

**PRACTICE OF MEDIATION AT LOCAL LEVEL:  
A Case Study of Sandakpur Rural Municipality, Ilam District, Nepal**

**A Thesis**

**Submitted to**

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**Tribhuvan University**

**Mahendra Ratna Multiple Campus, Ilam**

**Department of Rural Development**

**In Partial Fulfillment of the Requirement for the**

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**In**

**Rural Development**

**By**

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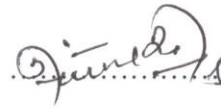
**Department of Rural Development**

**Mahendra Ratna Multiple Campus, Ilam**

**July, 2023**

## Declaration

I hereby heartily declare that this thesis entitled **Practice of Mediation at Local Level: A Case Study of Sandakpur Rural Municipality, Ilam District, Nepal** submitted to the department of Rural Development, Mahendra Ratna Multiple Campus Ilam, is my original and empirical work. I truly want to state that I have borrowed all idea and information from different sources for the preparation of them. I have made due acknowledgement to them and it is also declared that the results of thesis have not been presented or submitted anywhere else for the award of any degree as well as for any other proposes. I want to assure that any part of the content of this thesis has not been published in any form before.



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### Recommendation Letter

This thesis entitled **Practice of Mediation at Local Level: A Case Study of Sandakpur Rural Municipality, Ilam District, Nepal** has been prepared by **Man Kumar Baraily** under my guidance for his partial fulfillment of the requirements for the Degree of Master of Arts in Rural Development. This is his innovative work. I, therefore, recommend this thesis for its evaluation and approval.

Bed Nath Giri

Thesis Supervisor

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### Approval Letter

This thesis entitled **Practice of Mediation at Local Level : A Case Study at Sandakpur Rural Municipality, Ilam District, Nepal** submitted by **Man Kumar Baraily** in partial fulfillment of the requirements for Master's Degree (M.A.) in Rural Development has been approved by the evaluation committee.

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Man Kumar Baraily, September 2023

## ABSTRACT

*Practice of mediation for dispute resolution in Local Judicial System has formally adopted after the effectiveness of Local Government Operation Act, 2017 in Nepal. But the practice under judicial system was started in 2018. The practice of mediation in local judicial system is very new.*

*The main objectives of the study were to assess the status of the practice of mediation in local judicial system focusing the concept on mediation, benefit of mediation, legal provisions, and its implementation to analyze the context and explore gaps. The study was focused on exploring the practice of mediation in Sandakpur Rural Municipality in Ilam district.*

*The study collected philosophical principles on mediation, its concepts, benefit, experiences, recommendation and relevance in context of Nepalese society from team of experts and disputants. The expert's responses prioritized the need of mediation as a constructive, creative, simplest approach to assure justice at home in local context.*

*The study has also explored the legal provisions and experiences of implementation at local judicial system in study area. It was found that the judicial committee, mediators and disputants accepted mediation as the most effective approach to dispute resolution than other approaches as per their experiences, as well as it could be implemented in very short period of time.*

*The study has also explored the existing gaps and laps that hampered the effective implementation of mediation at local judicial service. Thus, the study recommends that the concern local governments, civil society and local stakeholders should focus to improve physical resources, human resources and educating citizen to manage linkage between service and citizen with quality justice service.*

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

ADR	Alternative Dispute Resolution
BS	Bikram Sambat
CSO	Civil Society Organization
CVICT	Centre for Victims of Torture
ENE	Early Neutral Evaluation
FGD	Focus Group Discussion
FY	Fiscal Year
GIZ	Gesellschaft für Internationale Zusammenarbeit
HURF	Human Rights Forum
JC	Judicial Committee
NGO	Non-governmental Organizations
NPR	Nepalese rupee
OSPC	Open Society Policy Center
SAARC	South Asian Association for Regional Cooperation
SDC	Swiss Agency for Cooperation and Development
U.S.	United State
UNDP	United Nations Development Programme
USA	United States of America
WTO	World Trade Organization

# CHAPTER - I

## INTRODUCTION

### 1.1 Background of the Study

Conflict is normal and natural and cannot be avoided. It is an integral element of human existence. As conflict cannot be eliminated in our lives, so also is our desire for peace. Every human being naturally desires to live in peace, and yet we find ourselves constantly in conflict (Ivorgba, 2005). Conflicts and disputes exist when people are engaged in competition to meet goals that are perceived as or actually are incompatible. Conflict is not necessarily bad, abnormal or dysfunctional; it is a fact of life. Conflict is not inherently uncivil. It is uncivil only when it is either hidden or is not resolved properly. People have always sought to find way of resolving their differences. Peaceful resolution of disputes between persons is our universally recognized norm, as it is an ingredient of civilization (Karki, 2002). Dispute seems to be present in all human relationships and in all societies. From the beginning of recorded history, we have the evidence of disputes among children, spouses, parents and children, neighbors, ethnic and racial groups, fellow workers, superiors and subordinates, organizations, communities, citizen and their government and nations (Moore, 1986).

Achieving justice is generally considered a fundamental objective or purpose of dispute resolution. Volumes have been written on the meaning of "Justice". Nevertheless, the term "Justice" resists easy definition. In simple words, "Justice" means fairness, giving to each his/her due (Paudel, 2006). Since the inception of human civilization, justice has been realized as an inevitable content of society. Human beings have been wandering in the quest of justice. The prime and ultimate goal of each and every society is to establish just and valid social order. Almost all of the constructive efforts of the society are directed towards acquiring justice (Khanal, 2000). So, justice, like John Rawls (year of publication?) said, is the first virtue of social institution as truth is system of thought for a thoughtful lawyer; the history of civilization is the history of millions of solved conflicts and the history of rule of law,

in dealing with conflicts in ways that can prevent recourse to violence (Shrestha, 1995).

The administration of justice is the primary function of state. The most important forum to resolve disputes is the judiciary. Except judiciary, other judicial bodies have been used for the resolution of disputes through adjudication. They dispense justice through formal rules of procedure and rigid application of formal law and principles. Such justice dispensation system is formal justice system, or 'Justice through law'. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law (Article 3, Basic Principles on the Independence of Judiciary, 1985).

However, in recent years, court systems have been the subject of increasing criticism. From all sides, the judiciaries have been excoriated for their perceived shortcomings in a number of areas. The processes themselves are described as incomprehensible, the products of lawyers who profit from obfuscation and complexity, so that the lay person is incompetent to seek redress in the courts without professional guidance. Society itself has become more litigious, so that we are faced with the now familiar over crowded docket and long delays until trial. Parties who do enter into the system are often dissatisfied with the justice meted out. This usually is not the fault of any judge, but is simply one consequence of the frustration caused by delay and of the relatively rigid methods of relief that can be granted by a court. And, of course, each judicial system remains virtually inaccessible to a large segment of the community because they simply cannot afford the expense of litigation (Cooke, 1983).

Andrews (1994) suggested that if a visitor from another planet spent months studying English civil procedure, the visitor would observe: -

- The remoteness of law and lawyers, who take litigation out of the hands of parties.
- The dominance of lawyers and the marginal importance of courts,
- The technicality of procedure, which also contributes to the high costs of proceedings measured in money, time and effort.

- The strange fact that while each side almost tries to bankrupt the other by employing costly procedures, each side is meant to aid each other by supplying documents in their procession and accounts of the evidence their witnesses intend to put forward at trial.
- The slow pace of progress in litigation.
- The high cost.
- The professionalism of the judge who although the employer of strange customs was also not corrupt or at the beck and call of the politically powerful.

Such defects are common almost in all legal systems. Dispute resolution through the courts is the most traditional method. This involves a highly formal process with the parties acting adversarial and their controversy being resolve with the aid of third party who officially represents the state. Litigation, today, frequently resembles the dance marathons of the 1930s where the partners or in this case, the adversaries move as slowly as possible to the music without actually stopping (Singhvi, 1995).

Such litigation practices increased dissatisfaction toward formal justice system. As a result, people searched and developed new just, accessible, efficient, effective, expeditious and less formal methods of dispute resolution as an alternative of litigation system. So, such system is called "Alternative Dispute Resolution System "(ADR)", which mainly includes negotiation, mediation and arbitration. Increasingly, widespread attempts are being made to offer individual's alternatives where by disputing parties can fix their differences themselves. One of the most popular of these processes is mediation. However, practice of mediation can be found since pre-legal history. But it was not institutionalized and was not recognized within legal system.

Mediation offers a radical departure from arbitration and the judicial process. Most notable feature of mediation is its dedication to the parties' self-resolution of their disagreements. The mediator differs from the judge and arbitrator in the sense that he/she does not hear evidence. Instead, the mediator encourages communication, assists in identification of areas of disagreement, as well as agreement and then works

to bring the parties to a resolution, but a resolution reached and defined by the parties themselves.

The practice of mediation and other ADR processes can be found in Nepal since ancient time. Mediation in different names as an informal method of settling small kinds of social, familial and other local disputes by a village/local headman or local committee (*Panchayat*) has been a very long practice in different communities in Nepal. Even now, community mediation and other indigenous dispute settlement practices similar to mediation can be found to some extent. However, it is not recognized by law and has not institutionalized. In recent days, some legislations have recognized mediation as the means of dispute resolution.

Easy availability of justice to all is the cherished goal of the Constitution of the Kingdom of Nepal, 1990. However, our judicial system is not satisfactory. It is facing many problems of delay, expensive, more procedure oriented, cumbersome and adversarial. The courts are overloaded with backlogged cases. As a result, access to justice is jeopardized. People's faith toward formal justice system is eroding. So, large segment of population do not seek formal justice (Nepal Law Society, 2002). Such condition invites danger to the stability of our society, government, rule of law and law and order.

So, it is necessary to solve these problems immediately and to satisfy people's thirst of justice. Similarly, the ever-expanding international business relation, impact of globalization and Nepal's accession to WTO are pushing legal system to cope with modern, developed, effective and accessible means of dispute resolution. Without speedy and effective dispute resolution system, we could not success to attract desired foreign investment. In this context, we inserted court-referred mediation on the District Court Rules, 1995 (Nepal Gazette, 2003).

The constitution of Nepal 2015, under its Policies of the State (Article 51) has provision (k) Policy relating to justice (2) to pursue alternative means such as mediation and arbitration for the settlement of disputes of general nature (Sapkota, 2020).



After adopting federal system in Nepal, the judicial role has been federalized. The constitution has provisioned the three tiers of judiciary, the Supreme court at federal level, the High Court at Province level and the District court and the Judicial Committee at local level. The Article 217 of the constitution of Nepal has provisioned as.

1) There shall be a three-member judicial committee to be coordinated by its Vice-Chairperson in the case of a Village body and by its Deputy Mayor in the case of municipality, in order to settle disputes under their respective jurisdictions in accordance with law (Sapkota, 2020).

The Local Government Operation Act 2017 has provided jurisdiction to the local judicial committee to settle the dispute through mediation and through arbitration. Clause 49 of the Act has provisioned justice execution process. It has adopted a formal judicial process in its sub-clause (1) The Judicial Committee shall send the evidence of the petition of dispute registered before it to the concerned party after having it registered. Likewise, the act prioritized mediation as the first priority in its sub-clause (2) While prosecuting and settling the dispute registered before it, the judicial committee shall as far as possible encourage mediation and mediate with the consensus of both parties. If mediation between parties could not be succeed, then the judicial committee should prosecute and settle the case as per the law in the dispute as mentioned in Sub-clause (1) of Clause 47. Furthermore, the act also prioritized the jurisdiction of mediation only for the judicial committee and decision making to the concern court and also provided the timeline to try out to settle the dispute through mediation. In sub-clause (4) In the dispute mentioned in Sub-clause (2) of Clause 47, the Judicial Committee should settle the case through mediation within three months from the date of arrival of the defendant. If mediation is not possible within the period, the concerned party should be communicated to go to the court by mentioning the same details and the documents and evidence related to it should also be sent to the concerned court.

Likewise, the judicial committee should manage its trained mediators and should be listed in its roster for the mediation of the registered cases. In its sub-clause (3) The Judicial Committee shall, while carrying out mediation as per Sub-clause (2), do so through the mediators enlisted by the Committee. (Sapkota, 2020)

It is new movement of dispute settlement within formal justice system at local level in the current context. It is in infant stage in the context of local judicial system. Based on the provision of constitution and prevailing laws what is the status of local judicial system? Are the local judicial committees providing justice service? Have local governments established mediation centers, and other necessary infrastructures to run mediation service at local level? Are they practicing the mediation? These questions and queries within me motivated me to have research to study the current status of mediation how it is being practiced in local judicial system.

## **1.2 Statement of the Problem**

On the basis of aforementioned background, the key problems of this study are as follows.

People's dissatisfaction towards our formal justice system is growing in Nepal due to the congestion of docket, delays, costs, expenditure of time and effort, adversary system, annoyances and procedure-oriented justice system. Mediation is prioritized in local justice system as one of the first means of dispute resolution tool by the constitution and law. In this context: -

- a) What is the benefit of mediation to incorporate in local judicial system?
- b) In current context, whether the mediation implementation mechanism at local level is proper or not? What arrangements are required for its better implementation?
- c) The local judicial committee has a role to settle the cases through mediation by its listed mediators. Whether the local judicial committee has the enough capacities itself, mediators and mediation centers or not? What are the efforts should be made to betterment of the situation?

### **1.3 Objectives of the Study**

The main objectives of the study were as follows: -

The general objective of this research is to study the practice of mediation in local judicial system in Nepal.

The specific objectives of this study are as follows: -

- To explore the need and benefit of mediation in access to justice to the communities.
- To examine legal provisions and practice of judicial system and mediation at local level in the study site.
- To identify existing status and key problems relating to implementation of mediation and draw recommendations at local judicial system.

### **1.4 Importance of the Study**

Practice of mediation at local judicial system is incorporated after the implementation of federalism in Nepal and hardly crosses its 5 years. So, the study on the practice of mediation in judicial committee is new in context of Nepal. Thus, the study and its findings seem to be useful for the local policy maker, judicial committees, mediators, local governments, court users as well as organizations and institutions related to local justice service: -

- This study can be useful to the students of rural development, sociology, law and other social issues to study the justice and its impact.
- Most of the lawyers, students of law, mediators, local governments and citizen are unknown about such efficient, quickest dispute resolution system. So, this study will be helpful to them and may useful to policy makers, judges, mediators, court administrators, court users, social workers and other concerned persons and authorities to identify the problems in this area.

## **1.5 Limitation of the Study**

This study tries to explore information based on its objectives. However, it has some inevitable limitation from the beginning. Occurrence of limitations persists up to data collection, data processing, and completion of thesis report. Such limitations will influence to the coverage, magnitude and the qualities of research: -

- The study was conducted with limited resources and limited time that automatically reduces the coverage of the study as well as the details of the information related to community practices and behavioral aspects.
- The study is purposed for the partial fulfillment of Master Degree in Rural Development, Tribhuvan University.
- This study is based on the practice of mediation in local judicial system in Nepal but the study site is focused in Sandakpur Rural Municipality, so majority of the information have been collected from the study site.
- The study is focused on the practice of the mediation at local judicial system so it is only focusing on the existing legal provision and its implementation at the study site.

## **1.6 Organization of the Study**

The study is organized in the following way.

Chapter one, provides the introduction of the study with a brief description of dispute, justice, justice delivery, dispute resolution institutions, tools and alternative dispute resolution. The problems of the research, research questions, the research objectives, importance and limitations of the research are focused. At the end of this chapter, the structure of the thesis is provided.

Chapter two presents literature review along with conceptual framework and analytical framework. It includes concept and meaning of dispute and conflict, dispute resolution principles, methods of dispute resolution, types of dispute resolution methods, concept, meaning, philosophy, advantages and disadvantages of mediation, types of mediation and role of mediators, mediation skill, process, ethics and stages of mediation. At the conclusion part of the chapter, it has included the research gap.

Chapter three comprises the methodology of the research. It describes about the research design, rationale of the study area selection, sources of data, tools and techniques of collecting data, sampling and its size, and data processing and analyzing.

Chapter four is about data presentation and analysis of the collected data. It deals with tabling and describing collected data.

At last, chapter five deals with summary, findings, conclusion of the whole study and provides recommendation.

## **CHAPTER - II**

### **LITERATURE REVIEW**

This chapter explores the existing relevant literature and theories about the practice of mediation in communities. The aim of this chapter is to build of an analytical framework for the study by developing a conceptual and theoretical understanding of the practice of mediation at local judicial service.

This chapter is about the review of related literature. A literature is a scholarly paper, informative sources which includes the current knowledge including substantive findings, as well as theoretical and methodological contributions to a particular topic. A literature review is a type of review of such literature or scholarly paper. Literature reviews are secondary sources, and do not report new or original experimental work.

This chapter presents conceptual study that includes analytical framework, concept and meaning of disputes and conflict, principles of dispute resolution, methods of dispute resolution, court adjudication, alternative dispute resolution, rationale and pitfalls of ADR. It also includes concept and meaning of mediation, advantage and disadvantages of mediation, kinds of mediation, cases appropriate for mediation, role mediators, mediation process and stages, ethics along with their different points in its first section.

This chapter presents the review of previous researches conducted in different academic institutions, scholars. It also presents the review of different journals, paper articles.

#### **2.1 Conceptual Framework**

A conceptual framework helps in thinking about phenomena, to order data and to reveal patterns. The basic concept of the research study is that mediation has been recognized by the constitution of Nepal and adopted as one of the alternative dispute resolution tools. The constitution and Local Government Operation Act provisioned

that mediation is one of the tasks of local judicial committee for settling disputes at the community through the trained mediators. Mediation has not only helped regain the relationship but also help establish amity and harmony in the community. The service provided at the community level helps increase access to justice for those who have been always excluded and for those who cannot afford the huge amount to get justice through formal justice mechanism; mediation has been a best tool to get justice. Hence, Mediation has been popular among the community to get easy justice in short time, with Win-Win concept.

### **2.1.1 Analytical Framework**

The analytical framework consists of analysis of the Local Government Operation Act (2074) which did take on the matter of Judicial committee and mediation, by strengthening and defining the judicial role of the Local government, The Mediation Act-2068 and Constitution of Nepal are being reviewed and taken as a reference. Apart from these, a bird eye-viewed will also be carried out to the other countries' practices to understand and identify the loop holes of the practices in Nepal.

### **2.1.2 Concept and Meaning of Dispute and Conflict**

Mediation is a process of resolving disputes with the help of a neutral third party who helps parties identify issues and develop proposals to resolve their disputes. This study is related to the dispute resolution through mediation. However, dispute and conflict are widely used in mediation process. So, it is necessary to overview of these two terms.

Many words may be used to describe disputes: arguments, disagreements, challenges, contests, debates, conflicts, quarrels, law suits, fights, altercations, controversies, feuds, wrongs, combat and war. However, there is difference between 'conflict' and 'dispute'. Conflict is a state and disagreement, opposition, contention, competition or tension between individuals or groups of people. 'Conflict' is used to signify a general state of hostility between the parties and the term "dispute" is used to signify a specific disagreement relating to a question of rights or interests in which the parties

proceed by way of claims, counter-claims, denials and so on. Conflicts are often unfocused, and particular disputes arising from them are often perceived to be as much the result as the cause of the conflict. Dispute is a conflict or controversy especially one that has given rise to a particular lawsuit (Garner, 2004).

Thus, disputes are emerged from conflict. So, conflicts and disputes are interrelated and sometimes are used interchangeably. The reasons of conflict are very simple, ranging from differences in opinion, belief, ideology, culture and tradition to trivial financial matters. Of course, socio-cultural and economic differences are most common (Kattel, 2004). There are 5 major types of conflict from which issues in a dispute emerge: -

- **Values:** These are the deep beliefs that people use to judge good and bad or fair and unfair. They often emerge as "should" and "should not". When people try to impose their values on others or deny the values of others, conflict results.
- **Interests, Needs and Preferences:** When an activity or desire of one is perceived to be incompatible with another people they will engage in conflict to achieve their needs.
- **Relationships:** Problems in the relationship that produce conflict include powerful emotions such as anger and frustration, victimization, poor communication and negative patterns of interaction.
- **Control of Resources:** Time, space, money, power and properly inadequate to share satisfactorily, are resources that can generate conflict.
- **Information and Meaning:** When information is inadequate, or there are disagreements about the relevance or significance of information, conflict can result.

Conflict can be either intra-personal (within the individual) or interpersonal (between individuals or groups of individuals). While mediation is concerned primarily with interpersonal conflict, individuals may also experience intra-personal conflict about issues raised in mediation (Gold, 2000).



Conflict is an inescapable part of life and is not inherently uncivil. Indeed – it is the essence of civility to openly deal with conflict in our organizational lives through respectful discussion and clarification. Conflict is uncivil only when it is either hidden or when through the unnecessary use of the adversarial process, it is disrespectfully blown out of all proportion (Moore, 1986)

Thus, conflict is inevitable. All societies, communities, organizations and interpersonal relationships experience conflict at one time or another in the process of day-to-day interactions. Conflict and disputes exist when people are engaged in competition to meet goals that are perceived as or actually are incompatible.

All disputes or conflicts, however, do not have to follow the negative course as described above. Conflict is destructive when it: -

- takes people away from important priorities;
- builds barriers that inhibit the ability to understand each other and work together,
- decreases productivity,
- lowers morale,
- leads to harmful behavior (fighting, insults),
- injures people physically or psychologically,
- polarizes relationships, increasing an "us against them" feeling or
- increases distrust and suspicion.

However, conflict can be positive, it brings changes in societies. It can lead to growth and be productive for all parties. It means conflict is constructive when it: -

- leads to open dialogue,
- offers an opportunity to solve problems,
- increases understanding, communication and respect,
- increases productivity,
- results in healed or strengthened relationships,
- improves negotiation, communication, and problem-solving skills,

- relieves tension and anxiety by permitting a release of buried emotions or
- raises morale.

Thus, conflict and dispute may not be harmful all the time. It may lead to a closer examination of issues and assessment of situations. Conflict or dispute can result in creative and new resolutions. Relationships can be established or strengthened. And in fact, conflict is at the root of personal and social change. So, conflict or dispute can lead to growth and be productive for all parties if appropriate method of dispute settlement is selected. So, proponents of mediation have an underlying assumption that conflict need not be destructive. It is natural and can be healthy and useful if it is dealt with openly in a fair process that prevents escalation into violent or exploitive behavior. The mediation process is designed to develop the constructive dimensions of dispute and manage its destructive potential.

### **2.1.3 Dispute Resolution Principles**

No one approach is best for resolving all disputes. The nature of the dispute and the disputants will in large measure, determine which dispute resolution method is most appropriate. Among the characteristics that might suggest one approach over another are whether the relationship among disputants is of a continuing nature, the disputants' financial circumstances, their desire for privacy and control of the dispute resolution process and the urgency of resolving the dispute. Litigation is not always final, although that is a commonly perceived benefit, mediation may not enable parties to work together in future, as is often suggested, arbitration may not always be less expensive than pursuing a case in court. And all dispute resolution methods may have unanticipated consequences that make them more or less desirable in particular instances.

So, comparison of various methods of dispute resolution raises complex issues. There are a number of major criteria by which a dispute resolution mechanism can be judged (Gold, 2000): -

- It must be accessible to disputants. This means that the forum for resolution should be affordable to disputants as well as accessible in terms of physical

location and hours of operation. Parties should be comfortable in the forum and feel that it is responsive to their interests.

- It must protect the rights of disputants. In cases, where there is a parity of resources, influence and knowledge, this may not be a concern. But where one party is at a disadvantage, his or her rights may be jeopardized by choice of the forum, e.g., the poorer litigant may not be able to afford full discovery, expert witness etc. Similarly, a party may unnecessarily forfeit rights in mediation if without counsel.
- It should be efficient in terms of cost and time and, so, may have to be tailored to the nature of the dispute. Time is very important in many instances and the forum for settlement should respond to this imperative. e.g., it is obviously vital to the elderly that their disputes be settled quickly. Some disputes, especially those involving highly charged emotional issues may take some time to settle, factual disputes may be more amenable to expeditious handling.
- It must be fair and just to the parties to the dispute, to the nature of dispute and when measured against society's expectations of justice.
- It should assure finality and enforceability of decision. Although the mechanism itself can discourage appeals, it may be that disputants' belief that the process way fair that will be principal component of finality.
- It must be credible. The parties, their lawyers and other representatives must recognize the forum as part of a legitimate system of justice. People who practice the alternatives must be competent, well trained and responsible. Society, too, must have faith in the alternative and recognize its legality.
- It should give expression to the community's sense of justice through the creation and dissemination of norms and guidelines, so that other disputes are prevented; violators deterred and disputants encouraged to reach resolution on their own.

Thus, people have right to choose any forum of dispute resolution. A court has normally no power to prevent parties from settling their own disputes. However, litigation may serve the public interest better than other ADR processes in some types of cases. Where there is need for sanctioning or if the defendant's conduct constitutes a public danger, ADR process is inappropriate.

#### **2.1.4 Methods of Dispute Resolution**

Conflicts are universal phenomena. Because of pervasive presence of conflict and because of physical, emotional and resource costs that often result from disputes. People have always sought to find way of resolving their differences. People in conflict in society have a variety of means of resolving their disputes. Dispute resolution includes all methods, practices and techniques, formal and informal, within or outside the courts, that is used to resolve dispute. Means of dispute resolution can be divided into categories:

##### **(a) By the Use of Force**

It is traditional and unilateral means of dispute resolution. It includes fight, force or coercion. These responses have resulted in the win-lose perspective of conflict resolution. An often-used alternative to force is the flight or avoidance mechanism. But, to ignore the conflict in most instances is to not resolve it. Self-help is a unilateral action taken by one of the parties with the purpose of affecting a resolution. To cause such events, neither there is a need for communication between the two parties, nor involvement of the third party. Actions taken by adopting a self-help approach may even be illegal. Self-help may embody remover mongering, theft, striking, picketing, protesting and violence or threats of violence (Khadka, 2004). But for the purpose of this study, such means is not included.

##### **(b) The Settlement of Disputes by Peaceful Means**

It is bilateral means of dispute resolution. It is modern and an ingredient of civilization. It includes – negotiation, conciliation, mediation, arbitration and litigation. Such mechanism has been developed in order to maintain peace and order in society build harmonious relationships among neighbors/people and establish democratic norms and values in society.

The most common form of dispute resolution is negotiation. Compared with processes third party, negotiation has the advantage of allowing the third parties to control the process and the solution. If the parties cannot settle the dispute themselves and decide

to bring a third party, they cede some control over the process but not necessarily over the solution. There are 2 types of third-party processes, in one, the neutral has the power to adjudicate or impose a solution, in the other, and the neutral can only mandate or help the disputants achieve their own solution. Adjudication can be performed by a court or by a private adjudicator, also known as an arbitrator or private judge. All peaceful means of dispute resolution process broadly can be classified into two categories

- (1) Court adjudication
- (2) Alternative dispute resolution (ADR) processes

### **(1) Court Adjudication**

Court adjudication is a litigation process. Litigation is the process of carrying on a lawsuit. It is the process of bringing a case to court to enforce a right. Litigation is the government financed and administered court system based on formal rules and procedures. In litigation, a judge or jury makes decision, which is appeal able and binding on both the parties. Litigation is court adjudication and occurs in a public forum. So, court adjudication is the most formal and final of the dispute resolution processes. It is always a viable alternative to the other ADR processes. The courts apply law to the facts and arrive at conclusion.

In modern time, the administration of justice is the primary function of the state, which is fulfilled by courts and other institutions. So, courts are primary dispute resolvers. Court adjudication is formal mechanism of dispute resolution. In the court adjudication process, the procedures are highly structured and institutionalized, typified by detailed rules and numerous compliance mechanisms. Rules of evidence enhance the reliability of proof of claims and defenses.

### **(2) Alternative Dispute Resolution**

Alternative dispute resolution (ADR) is the term, which identifies a group of processes through which disputes, conflicts and cases are resolved outside of formal

litigation procedure. ADR procedures include negotiation, mediation, arbitration, case evaluation techniques and private judging. It is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation. ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation.

ADR is an umbrella term, which refers generally to alternatives to court adjudication of disputes, such as negotiation, mediation, arbitration, mini-trial and summary jury trial (Nolan-Haley, 1992). ADR describes processes used to resolve disputes, either within or outside of the formal legal system, without formal adjudication and decision by an officer of the state. The term "appropriate dispute resolution" is used to express the idea that different kinds of disputes may require different kinds of processes – there is no one legal or dispute resolution process that serves for all kinds of human disputing.

Many dispute resolution processes, including arbitration, mediation, negotiation, mini-trial, summary jury trial and mandatory settlement conferences are now commonly called "ADR" processes. All these processes are seen as "*alternative*" in the sense that they resolve disputes by means other than full-blown adjudication of the case in court. All are seen as having, in varying degree, at least some common elements distinguishing them from adjudication—most notably, privacy relaxation of procedural formality, non-application of substantive legal rules and emphasis on compromise to produce a resolution.

### **2.1.5 Rationale and Pitfalls of ADR**

Lengthy, delays in the processing of law suits, time consuming court procedures, the cost of attorney's services, a general lack of knowledge by judges and jurors about complex technology and complicated business arrangements, the growing volume of transnational business transactions and a widespread instance on quick resolution of controversies are among the reasons why an ever-larger number of disputes are being resolved by means other than a law suit (Tucker et al., 1992).

Courts are not the only devices for resolving civil disputes, nor are they always the best means of doing so. Settling private disputes through the courts can be a cumbersome, lengthy and expensive process for litigants. For these reasons, various forms of ADR have assumed increasing importance in recent years. Proponents of ADR cite many considerations in its favor for example (Mallor, 2001): -

- Quicker resolution of disputes,
- Lower costs in time, money and aggravation for the parties,
- Reduced strain on an overloaded court system,
- The ability to use decision makers with specialized expertise,
- Flexible compromise decisions that promote and reflect consensus between the parties,
- Both parties have autonomy to select the neutral third party except negotiation and court annexed arbitration,
- Hidden interests are explored and conflicts are settled permanently.

Similarly, Goldberg and others have enumerated following reasons for the justification of ADR process (Goldberg et al., 2007): -

- To lower court case loads and expenses,
- To reduce the parties' expenses and time,
- To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties' families,
- To improve public satisfaction with the justice system,
- To encourage resolutions that were suited to the parties' needs.
- To increase voluntary compliance with reductions,
- To restore the influence of neighborhood and community values and the cohesiveness of communities,
- To provide assessable forums to people with disputes,
- To teach the public to try more effective processes than violence or litigation for settling disputes.

Thus, ADR offers an impressive list of potential benefits including opportunities to develop creative solution, saves time, money, seeks to reduce litigation, increases

participant satisfaction, controls court congestion, maintain relationship and protect privacy. When the term 'e' come into general usage several decades ago, it mainly referred to mediation and arbitration, which were truly alternative to the court system. These processes were operated separately. But now, these processes have become an integral or supplementary part of legal system.

### **2.1.6 Concept and Meaning of Mediation**

'Mediation' is an extension of the negotiation process. Disputing parties, who have been unable to settle their dispute, use a neutral third party to assist them in reaching an agreement. Unlike the adjudication process where a third party applies law to the facts to reach a result, in mediation a third party assists the disputants in applying their values to the facts and reaching a result. These values may include the law, sense of fairness, religious preferences, morals and ethical concerns. The distinguishing feature of mediation is that the disputing parties rather than the third-party neutral choose the norms, which will influence the result of their disputes.

The term 'mediate' is derived from the Latin Word "Mediare" which means, "to be in the middle". Certainly, the mediator finds himself in the middle of a dispute. But mediation involves much more than placement of the mediator. A variety of definitions for the term "mediation" exist. While these definitions differ, and are subject to debate, most people agree on the purposes of the process: to assist people in reaching a voluntary resolution of a dispute or conflict.

Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to arbitration or judge, has no power to impose an outcome on disputing parties. However, it is an informal way, but one markedly different from negotiation. Like negotiation, mediation does not use rigid procedures or apply legal principles. Unlike mediation, it involves the active participation of a third party, a "*Mediator*", selected and paid by the parties themselves. The mediator cannot impose a binding settlement on the disputants, but can assist them in reaching a compromise. Successful mediation spares the parties the delays, costs, expenditure of time and effort and annoyances that are part and parcel of a lawsuit.



Mediation is first and foremost a non-binding procedure. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In these senses, the parties remain always in control of mediation. The continuation of the process depends on their continuing acceptance of it. The non-binding nature of mediation means also that a decision cannot be imposed on the parties. In order for any settlement to be concluded, the parties must voluntarily agree to accept it.

Mediation is a *confidential procedure*. Confidentiality serves to encourage frankness and openness in the process by assuring the parties that any admissions, proposals or offers for settlement will not have any consequences beyond the mediation process. They cannot, as a general rule, be used in subsequent litigation or arbitration. It brings people together in an informal, private setting (usually without attorney's present) and assists them in clarifying key issues and concerns. The goal is a written agreement, which addresses the needs of all parties.

On the basis of aforementioned discussion, we can sum up following characteristics of mediation: -

- Parties have right to choose neutral third party, mediator, to assists them. Parties may change the mediator. Such mediator may any person, persons or institution.
- Mediator does not decide the cases, he/she assists parties in information exchange and bargaining, generates options and encourages parties to compromise and if successes, assists parties to draft agreement.
- If mediation process does not get success, parties are free to enter court in regular process.
- It is cost effective, less formal and efficient method of dispute resolution.
- It is latest developed and fastest growing forms of dispute resolution process in the world. It avoids the backlog of the national court system. It is relatively quick and inexpensive.

### **2.1.7 Philosophy of Mediation**

Justice according to law does not actually settle the root cause of conflict, there is no participation of parties in dispute resolution, it is adversarial in nature. Mediation, on the other hand, is participatory, curative or therapeutic nature, which tries to resolve dispute permanently.

Mediation is an informal, consensual, participatory process in which neutral third party, without power to impose a settlement, assists disputing parties in reaching themselves a mutually satisfactory resolution. Its goal is to help the parties reach a negotiated settlement. The benevolent face of mediation shows it to be a helpful way for people to retain power and control over their lives while dealing with conflict productively and economically. Lon Fuller's classic formulation reminds us of mediation's "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another (Fuller, 2002). Mediation can be used as medicine to remove the disease, not to throw out the patient himself.

Mediation promotes the self-actualization or self-determination of the individual. The individual takes responsibility for his/her actions. The individual has the responsibility to understand the experience to the other in dispute and to act in ways, which acknowledge the previous understanding. Party autonomy is fundamental characteristics in mediation, which empowers parties to make a choice among real alternative, which they feel more comfortable. It assumes that parties are able to work within their counterparts and capable of understanding their solution better than third party. So, the parties may develop better solution. Its philosophy is to move away from legalities and identify the underlying issues and interests of the parties.

Mediation is designed and structured to foster personal harmony between the disputants, to preserve their relationship and to reduce personal contentiousness. Its objective is to identify the underlying interests of the parties in the hope of finding a solution that satisfies both sides. So, it is vehicle for citizen empowerment,

participatory, consensual dispute settlement. It is more satisfactory settlement of dispute in client's interest. So, mediation provides higher quality justice in individual cases. It is a tool to relieve court congestion, frees scarce judicial time and economized on public and private expenses.

### **2.1.8 Advantages and Disadvantages of Mediation**

Mediation offers a radical departure from arbitration and the judicial process. It is not coercive but a voluntary means by which the parties can reach an accord. It is informal, quick, economical, flexible and less traumatic than more formal procedures. Parties participate more directly in resolving the disputes. It generally yields practical and creative agreement and more satisfied client. It also helps to restore harmonious relationship between the parties. It enables the parties to define what is satisfactory to them by transcending the narrow issues in the disputes. Mediation helps the parties readjust their conflicting perspectives and view their concerns in a much broader framework than simply "legal" issues in a legal system. Moreover, disputing parties have considerably more autonomy than in an adjudication process where a judge or arbitrator would impose a decision. It avoids the backlogs of national court system.

Mediation has following four-fold goals (Cooley, 1996): -

- Increases access to justice
- Increases access to economically disadvantaged.
- Promotes harmonious relationship or atmosphere.
- Empowers people to pursue democratic norms and values.

As per Leo Kanowits, mediation is a valuable approach to many disputes that are better settled through negotiation than adjudication: -

- It may provide an opportunity to deal with underlying issues in a dispute,
- It may build among disputants a sense of accepting and owing their eventual settlement,
- It tends to mitigate tensions and build understanding and trust among disputants, thereby avoiding the bitterness which may follow adjudication,

- It may provide a basis by which the parties negotiate their own dispute settlement in future,
- It is usually less expensive than other processes.

According to Tibor Varady, mediation is an attractive alternative where any of the following are important priorities of either or both of the parties: -

- Minimizing the cost exposure entailed in settling the disputes,
- The maintenance of control over the dispute-settlement process,
- A speedy settlement,
- The maintenance of confidentiality concerning the dispute or the preservation or development of an underlying business relationship between the parties to the dispute.

Mediation has not advantaged only; it has some disadvantages too. Mediation as a process is independent of the judicial system and therefore lacks the procedural and constitutional protections of adversarial justice, such as the right to a jury trial and the right to counsel. Mediation, too, has potential shortcomings: -

- It can be time consuming.
- Lack of an enforcement mechanism when done outside the courts.
- Depends on voluntary participation of all parties to a dispute and their willingness to negotiate in good faith.
- It does not always result in agreement and, therefore, the resolution of a dispute.

Similarly, in mediation, the neutrals have little power or authority over the parties and certainly no power to impose unwanted outcomes on them. There is no application or development of public standards. There are no real due process safeguards exist.

Finally, successful mediation depends upon the parties' willingness to come to the bargaining table in good faith. Good faith is a difficult requirement to enforce in any dispute resolution process including litigation. Some parties may be using the process as a fishing expedition or simply to stall the litigation process. The mediator must

guard against these abuses and be prepared to suspend or terminate the process if necessary.

However, mediation is effective invention in the area of dispute settlement. It is a process that is designed and structured to foster personal harmony between the disputants, to preserve their relationship and to reduce personal contentiousness, might also fairly be described as non-adversarial, private, non-legal dispute resolution process. It means the promise of mediation is to render justice not through the operation of law but through autonomy and self-determination of parties. It is participatory, consensual and satisfactory settlement of dispute.

### **2.1.9 Kinds of Mediation**

Mediation is informal process of dispute resolution. It provides an unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns. So, there is diversity in its application. As a result, there is no actual or uniform mediation processes. Mediation can be classified in following ways.

#### **Voluntary and Mandatory Mediation**

Traditionally, mediation and arbitration have been applied as voluntary means of dispute resolution; that is, the parties agree before or after the dispute arise, to submit their dispute to one or both resolution methods in their choice. Parties are not compelled to use mediation. Even now, most of the disputes, mainly community disputes, are settled through mediation on a voluntary basis. However, in recent years, there has been an increasing trend towards the creation of statutes and court rules providing for mandatory, also called 'court annexed' mediation and arbitration as a means of easing the backlog of cases and as an attempt to reduce the amount of time and money the parties spend to resolve their disputes.

## **Facilitative and Evaluative Mediation**

Such division is based on the role of mediator in the mediation process. There are two main ways in which mediators assist parties in reaching their own decision, which correspond to two types or model of mediation practiced throughout the world.

Under facilitative mediation, the mediator endeavors to facilitate communication between the parties and to help each side to understand each other perspective, position and interests in relation to the dispute. It is the classical or non-directive model of mediation. In such form of mediation, the mediator should not desire, nor have the authority to impose a particular settlement. The mediator neither offers an option on the value of the case nor recommends how it should be settled. Rather the facilitative mediator assists the parties and their counsel through information interchange and creativity, to reach their own joint decision on the reasonable settlement or solution.

In facilitative model, parties of dispute can constructively dig into ways to resolve their dispute with the help of trained mediator. Mediator creates a conducive environment and the parties are encouraged to tell their stories and share one another's experiences, going into their interests and create stronger collaborative relationship. In this process, right and wrong or guilty or innocent is not determined. Mediator helps parties reach a mutually satisfactory resolution.

In evaluative mediation, the mediator provides a non-binding assessment or evaluation of the dispute, which the parties are than free to accept or reject as the settlement of the dispute. Mediator is hired by the parties to give an opinion or recommendation on settlement value or some other solution.

## **Rights-Based Mediation and Interest-Based Mediation**

Such division is similar to facilitative and evaluative mediation. Even though in practice; such distinction cannot always be clearly drawn because some programs and some mediators blend the two approaches. Where the mediator focuses on the legal

rights of the parties, her approach is closely resembling that in ENE (Early neutral evaluation), although the assessment or evaluation provided by the mediator may sometimes be less direct than is the case in ENE. In such mediation process, the parties' decision making is tempered by what they think would be available to them in court if the cases were litigated. In this type of process, there is more focus on the immediate dispute rather than the underlying conflict. An exclusive emphasis on rights, however, encourages positional bargaining and undercuts the value of the mediation process.

Interest-based mediation, on the other hand, is a somewhat more therapeutic process. It more closely resembles the traditional ideal of mediation, which attempts to help disputing parties understand the underlying conflict, which gave rise to the dispute. The mediator "facilitates" but does not offer an evaluation of the relative strength and weakness of each side's case but seeks to help the parties to work out a mutually acceptable integrative solution.

### **Pre-Litigation Mediation and Post-Litigation Mediation**

Such division is based on the recourse to mediation before litigation or after litigation. Post litigation may also call court mediation.

### **Pre-Litigation Mediation**

In pre-litigation mediation, concerned party uses mediation rather than litigation. It is a voluntary process of mediation. However, in some jurisdictions, certain types of cases should recourse to mediation by the laws, and if dispute cannot be solved through mediation, then only parties can file a lawsuit in court. Pre-litigation mediation, on the basis of involved institution, can be divided into two categories:

### **Community Mediation**

It is a method of dispute management in which mediators from the same community provide volunteer mediation services to help people to resolve their disputes within a community-by-community members (Kettel, 2004). However, in America and other

jurisdiction, community mediation centers have been established and such centers provide mediation service.

A central theme of community mediation is to empower disputants to build stronger community ties and resolve their disputes without having to rely on the power establishment of courts, police and governmental agencies and to frame the issues and devise solutions of their own making. It is classical mediation model, which encourages for people to resolve their own disputes. It is the value of voluntary resolution of conflict within a community framework. Community mediation services also shared a common methodological approach to dispute resolution. It empowers the community to resolve disputes in their own style. It is a right-based approach to resolving disputes that encourages full community participation. It relies on independent, competent and neutral mediators volunteering their services to act as facilitator with disputants.

### **Mediation Centers or Local Authorities**

Except community mediation, mediation centers and other institutions also provide mediation facilities in pre-litigation stage. Mediation centers have professional, skilled mediators. Parties voluntarily or as a contractual basis can use such mediation. In America, Philippines, Sri Lanka such mediation centers are playing vital role and certain cases are not eligible to file a lawsuit without prior recourse to such mediation centers.

### **Post-Litigation Mediation**

It is also called court litigation or pending cases mediation. It is labeled as court connected, court annexed, court ordered and court referred mediation. In such mediation, lawsuit pending in a court is referred for mediation under the request or choice of parties, or legal provision or judges' discretion. In previous time, ADR evolved as a purely alternative to court system. Mediation and other ADR processes were operated independently out of court system and courts responses were not



positive. But, now litigation and other ADR process including mediation are integral part of litigation. Post-litigation mediation can be divided into two categories:

### **Court-Annexed Mediation**

It is also called court connected mediation; where court rooms are used for mediation and any party can put the case on the mediation docket. Court-Annexed mediation means any mediation process conducted under the auspices of court, after such court has acquired jurisdiction of the dispute.

### **Court – Referred Mediation**

It means mediation 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.

### **2.1.10 Cases Appropriate for Mediation**

The development of mediation as a viable alternative to litigation was due, largely, to its over benefits, that is mediation saves time and money. However, it is not a panacea. It is not a suitable procedure for settling disputes in all cases. It is appropriate for the cases relating to civil matters commercial matters, damage, contract, ejection, injunction, labor, family construction, insurance etc. Mediation has an important part to play in family matter, where it is felt that the adversarial approach the traditional legal system has tended to compromise, if not increase, existing differences of view between individuals and has not been conducive to amicable settlements. In divorce cases, mediation have traditionally been used to enable the parties themselves to work out an agreed settlement rather than having one imposed on them from outside by the courts. The mediation program in Philippines covers following cases (Bhattraï, 2004): -

- All civil cases, settlement of estates and cases covered by the Rule on summary procedure, except those cases which by law may not be compromised (i.e., annulment of marriage),
- Cases covered by the Lupon Tagapamayapa under the Katarungang Pamabarangay Law i.e., settlement by local elders under the Barangay system,
- Civil aspect of bouncing of cheque,
- Civil aspect of quasi offences such as negligence and imprudence (under title 14 of the revised penal code).

### **2.1.11 Role of the Mediator**

Mediator is a neutral person who tries to help disputing parties reach an agreement. He is disinterested third person who becomes familiar with the issues of the dispute. He/she acts to overcome the parties' antagonisms and to make them recognize that they will benefit most by resolving their conflict among themselves without the active intrusion by a third party. The mediator, in contrast to the arbitrator or judge has no power to impose an outcome on disputing parties.

In mediation process, a neutral third party assists the disputing parties with the goal of helping them to arrive at a fair agreement. A mediator who agrees to assist the parties to a dispute should not relinquish his or her integrity. For instance, if the parties insist on an arrangement that conflicts with the mediator's ethical concerns or is against public policy or is a crime, the mediator should resign from any further participation in the mediation process.

Mediators are trained community volunteers from all backgrounds whose role is to facilitate communication and help to reach a resolution that satisfies every one's need. They will not take sides; tell parties what to do, give advice or judge. Mediator has no authoritative decision-making power. He/she does not represent any of the parties. Mediator is a diplomat not an advocate or judge but advocate and retired judge can work as mediator.

Depending on what seems to be impending agreement, the mediator may attempt to conduct following functions: -

- Provides new information,
- Helps the parties to understand each other's view,
- Let's them know that their concerns are understood,
- Deals with differences in perceptions and interests between negotiators and constituents (including lawyers and client)
- Helps negotiators realistically assess alternative to settlement,
- Encourages flexibility,
- Shift the focus from the past of future,
- Stimulates the parties to suggest creative settlements,
- Learns (often in separate sessions with each party) about those interests the parties are reluctant to disclose each other,
- Invents solutions that meet the fundamental interests of all parties.

#### **2.1.12 Mediator Skills**

The success of mediation depends on the role played by the mediator. Mediator is the key of mediation process. Mediation is an art and not a science, and then a variety of combined skill is required. There is no magic formula, which guarantees a successful mediation. Some individuals come to the mediation table with innate skills; while others must learn them. So, mediation skill can be developed through trainings. In most mediation training programs mediator's skill development is a major portion of the educational process. These skills include communication, analytical ability and patience. Certainly, a mediator must be tolerant, patient, resourceful and articulate. Other skills of a good mediator are quite similar to those of the lawyer in listening, questioning, observing, interviewing, counseling and negotiating.

#### **2.1.13 Mediation Process**

Court adjudication procedures are highly structured and institutionalized, typified by detailed rules and numerous compliance mechanisms. In comparison to litigation,

mediation is flexible process. It provides unlimited opportunities for the parties and mediator to exercise flexibility due to minimal procedural requirements. So, it is impossible to describe specific procedures for its conduct. In addition, there are many forms of mediation and some are more formal or follow more set patterns than others. The classical form of mediation that has been taught and used for decades in such areas as family law and community dispute resolution centers is still central to the approach taken by most mediators. Many of the steps and techniques are applicable to all forms of mediation.

A variety of authors and trainers have enumerated the stages or segments of mediation. These may range from four-stage model to ten or more stages. Stephen B. Goldberg and others have divided mediation process into following 5 stages: -

- Pre-mediation or getting to the table,
- The opening of mediation,
- The parties' opening presentations,
- Mediated negotiations and
- Agreement.

Rau et al. (2002) have mentioned following stages in the classical non-directive style:

- Introductory remarks by the mediator(s)
- Statement of the problem by the parties
- Information gathering
- Problem identification
- Problem solving generating options and bargaining
- Writing of Agreement.

Moore (1986) has mentioned mediation process in following twelve stages: -

- Initial contact with the disputing parties,
- Selecting a strategy to guide mediation,
- Gathering and analyzing background information.
- Designing a detailed plan for mediation.
- Building trust and co-operation.

- Beginning the mediation session.
- Defining issues and setting an agenda.
- Uncovering hidden interests of the disputing parties.
- Gathering options for settlement.
- Assisting options for settlements.
- Final bargaining.
- Achieving formal settlement.

However, they do acknowledge that not all stages will be completed in every case. Some lawyers have simplified the process and divided it into 3 primary segments or stages of mediation: joint session, caucus, and conclusion. Mark D. Bennett and Michele S.G. Hermann have mentioned following stages of mediation process through chart, which are more appropriate, clear, and convincing.

## **Mediation Process in Stages**

### **1. Intake**

This is the first stage in which first contact is done between clients and the mediators or the mediation office. Parties may be court referred, attorney referred or through contract or under law. The initial contacts with the parties offer the mediators opportunity to build a foundation for success. By providing clear information about the decision to mediate, the mediators enable the disputants to take responsibility for their choice.

Main tasks of mediators at the intake stage are: -

- To develop procedures which will bring in potential clients.
- To use an intake procedure which does not risk mixing roles.
- To avoid hearing too much or improper information from one side.
- To give clear information about the mediation process used by them.
- To encourage the potential clients to come for an initial session.

Similarly, in this stage, mediator assesses appropriateness of the case for mediation. He provides information about mediation and other options as well as plans to take care of logistics for first meeting with parties.

## **2. Contracting**

In this stage mediators and parties review the goals and purposes of mediation, explore the role of mediators, agree to mediate, agree to cost, fees, terms and conditions of mediation and commit to work together to resolve differences. Parties usually sign a formal mediation agreement at this time. Thus, this stage is the foundation of mediation upon which the rest of the mediation process builds. Mediators and the disputants agree to proceed and establish their intent to work together to resolve differences. Contracting usually ends with the parties signing a written agreement to mediate, which covers the fees rules and procedures of the mediation process. Following 7 are the main tasks of the mediators at this state: -

- To explain the process, including time, location, and fees and ensure that all parties understand what will be taking place.
- To develop rapport with the parties and begin to build trust in the mediators and the process.
- To learn what brings the parties to mediation in order to develop a foundation for later problem solving.
- To determine the suitability of the mediation process for the parties in this dispute.
- To establish clarity with the parties about the rules of mediation.
- To set a positive tone and establish a workable structure for the mediation.
- To obtain a signed agreement to mediate.

## **3. Gathering Information**

In this stage, parties talk about the dispute between themselves or with the mediator. Parties exchange facts, the history of dispute and their opinions and emotions. It should also permit responding to accusations and clearing up to misunderstandings. Mediator can use open-ended questions and summarize in neutral language useful

points that have been made. A skillful mediator who allows the parties to reveal the information they feel important can enhance this stage; but who also assists them with appropriate questions and probing.

#### **4. Issue Identification**

After the exchange of information, the mediator attempts to identify exactly what issues are in dispute. Mediators review a list of potential issues to be addressed in the course of the mediation with the parties. The mediators frame the issues in neutral terms, which define the problems that the parties bring to mediation for resolution. The mediators should also seek to mutualize as many issues as possible. The mediators' list should include not only those issues specifically articulated by the parties, but also those, which the mediators have inferred from their interactions, such as future problem solving. It is important that the parties have the opportunity to review the issues list for clarity, accuracy and completeness during the stage of mediation.

#### **5. Setting the Agenda**

In this stage, mediators and the parties determine in what order to consider the issues. Mediators work with the parties to organize and, if necessary, prioritize the issues. There are several ways to approach organizing the issues: -

- Easy to hard
- Most urgent to least urgent
- Most important to least important
- Least important to most important
- Topical checklist

#### **6. Resolving each Issue**

This stage seeks to have the parties explore all possible options for resolving the dispute. It too may not take place as a separate stage but as part of a free-flowing exchange of information, positions, feelings and problem identification. Ideally concrete suggestions should come from the parties, although the mediator may have

to use various techniques for encouraging creative option generating. Option generating will often follow by negotiating and bargaining as the parties work out their demands and concessions.

## **7. Reviewing and Drafting Final Agreement**

If an agreement is reached, the mediator will assist in setting it down in writing ensuring that each party understands fully what the terms are and making the terms as concrete as possible. The mediator or more likely the centre or institution with which mediator is connected, may serve as the conduit for transfer of funds or other compliance with an agreement. Mediation centers also often maintain a copy of agreements for future reference if needed. Such agreement often serves as the basis for formal legal documents. In court-referred mediation, such final agreement is sent to the concern court.

### **2.1.14 Mediation Ethics**

The term "ethics" as applied to mediation is almost impossible to define and dissect. This is not because a wide range of definitions is not available, but rather is due to the inherent variability of the process and the participants. A generic definition of ethics is: "the discipline of dealing with what is good and bad and with moral duty and obligation. It is conforming to accepted professional standards of conduct". It is relating to moral action, conduct, motive or characteristics conforming to professional standards of conduct.

The first mediator codes of conduct began to appear in the early 1980's, with a code of ethics developed by the Federal Mediation and Conciliation Service of the U.S. Government, and then a Code for Colorado mediators. Since then more states and professional organizations have developed codes to govern mediator conduct. Similarly, at the same time, a number of codes have been written to apply to certain types of mediation practice, such as for family mediators. The various codes are similar in many ways, but also have significant differences. All of these codes cover essentially the same areas, which are (Gold, 2000): -



- Party self-determination.
- Mediator impartiality
- Conflicts of interest.
- Competence of the mediator.
- Confidentiality
- Quality of the process (professional advice, informed consent).
- Full disclosure.
- Advertising fees.
- Responsibilities to the profession.

Main foundation of mediation process is party self- determination. It means mediation is a process governed by party self-determination. Mediators cannot coerce parties into a settlement. It makes mediation distinct from other types of ADR. So, to respect party self-determination is the main duty of mediator. Considerations of party self-determination, mediator neutrality and professional advice are linked.

#### **2.1.15 Confidentiality in Mediation**

Confidentiality is the main benefit or characteristics of ADR procedures including mediation. In some instances, the words mediation and confidentiality are used almost synonymously. While initially confidentiality was seen as a protection afforded to the parties and their statements, confidentiality in the mediation process can also serve to protect and third party neutral, the mediator. In usual case, what was said in mediation will be of no further legal relevance after the mediation is over.

#### **2.2 Rreview of Empirical Literature**

Mediation as well as mediation at local justice service is new subject in Nepal. So, in the course of preparing this dissertation, researcher could not find any literature comprehensively dealt in the research topic. Very few literatures are available in the area of mediation in Nepal. Furthermore, research studies in mediation in Nepalese perspective are almost not at all available. For the conceptual or theoretical aspect of mediation, there can be found very few English books especially written by American

writers. Kovach (2004) has researched on Mediation: Principles and Practices, Goldberg (2007), had a research on Dispute Resolution: Negotiation, Mediation and other Practices, Rau (2007) had a lecture entitled Mediation and other Non-Binding ADR Processes, Bennet (2005) designed a workbook for mediation training entitled the Art of Mediation, Moore (1986) the Mediation Process: Practical Strategies for Resolving Conflicts were reviewed. Such books are taken as a source of information for the concept of mediation.

However, aforementioned books cannot be subject of review of literature for the purpose of guidance for the new research work in Nepalese perspective. Following literatures are little more relevant for this research work. So, these literatures were reviewed:

Aryal (1995) conducted a research entitled "Institutionalization of Mediation", to describe about the evolution of mediation since Vedic period to present time in Nepal. He has focused on existing legal provisions relating to ADR in Nepal as well as community mediation and indigenous informal dispute resolution practices. Author suggests for legal recognition of customary mediation practices as well as institutionalization of mediation for its great success.

Karki (2001) had a research on "Practices of Conciliation in the Settlement of Commercial Disputes in Nepal to visualize on concept of conciliation, its evolution in the field of international trade and commerce, international norms and practices and Nepalese laws and practices of conciliation in the settlement of commercial disputes. Author has highlighted that conciliation was developed in international law and was adopted in international trade disputes settlement. Conciliation is the alternative of litigation as well as arbitration due to flexibility of its nature. It has certain nature, which cannot be found in arbitration and litigation. Conciliation is differing from mediation in the role of conciliator. Practice of conciliation on commercial disputes is very new concept for Nepal. However, in different names as an informal method of settling small kinds of social, familial disputes by a village or local headman or Panchayat have been very long practice. Author also has described Nepalese legislations relating to conciliation and has suggested that practice of conciliation of

commercial disputes for speedy, less expensive dispute resolution should be developed in Nepal.

Timalsena (2010) had a research entitled "Mediation: Why and How" focuses on several means of dispute resolution, philosophical aspect of mediation, advantages of mediation and its limitations. Author highlights that disputes relating to constitution, public policy and heinous criminal cases cannot be settled through mediation. Author also has mentioned mediation practices in Singapore, India, USA, Philippines, Bangladesh and Sri Lanka and laws and practices of ADR in Nepal. He suggests necessity of extensive research and homework for the effective implementation of court-referred mediation.

Shrestha (2060) had a research on "Alternative Dispute Resolution and Court Initiation". The author has mentioned several forms of ADR, their characteristics, practice of ADR in Nepal, and necessity of court-referred mediation. He has suggested to enact unified mediation, conciliation Act, to conduct awareness programmes on ADR for public acknowledgement, development of infrastructure facilities for the effective implementation of ADR system, to encourage community-based dispute resolution system and to incorporate ADR curriculum in school and campus level.

Shrestha (2065) had a research on "New Legal Provision of Mediation: Rational, Prospect and Challenges" that has visualized that our court adjudication system has lost its faith due to expensive, delay and inaccessible to general people. So, it is necessary to encourage alternative dispute resolution processes for the satisfaction of the parties. For the promotion of trade and foreign investment, it is necessary in present globalize world to adopt expeditious dispute settlement processes. In his view, businessmen demand speedy resolution of disputes. He opines that it is not possible to settle all disputes within formal court system and judges may not expert in all subjects of disputes. So, he suggests for the institutionalization of mediation to extend easy access to justice.

Pandit (2063) "Local Body and Judicial Rights: An Analysis", focuses on history of judicial rights of Panchayat. Dispute settlement through local bodies enhances speedy and easy access to justice, permanent settlement of disputes and maintains social solidarity and harmony. He has also analyzed that some provisions of the Local Self-Governance Act, 1999 are not clear and sufficient. The Act has not dealt with extensive procedure of the collection of the names of arbitrators, mediators, their fees, training, qualification and professional conduct. So, such provisions should be made clear.

Sharma (2005) had a research intitled "Mediation Process: Some Experience" highlights his experience on court referred mediation. He has identified positive impacts of court-referred mediation that it helps permanent settlement of disputes, enhances public faith toward courts and reduces workload of courts. He has also analyzed some challenges, i.e. resist of lawyers, no active participation of parties in negotiation and lack of mediators' interest. So, he has emphasized on training to mediators for the success of the process.

UNDP (2005) published two research reports – "Local Mediation Practices in Kaski and Mustang District" and "Local Mediation Practices in Bardiya and Solukhumbu", have incorporated history of the indigenous dispute management practices in these districts. Reports also have deal with nature of cases and processes of informal dispute resolution as well as problems and suggestions in this area.

Acharya (2065) published a research entitled "Alternative Dispute Resolution Process", has focused on formal and informal dispute resolution process, necessity of ADR, kinds of ADR and cases appropriate to settle through ADR processes. He has analyzed that mediation is effective, simple and economic means of dispute resolution in comparison of arbitration and litigation. It is best for women rights related cases but arbitration is not appropriate in such cases. Mediation is best among ADR processes, so he suggests establishing Community Justice Centre for the proper implementation of mediation.

Khatiwada (2005) had a research on "Mediation and Existing Legal Framework" he has categorized three kinds of third-party intervention in dispute resolution processes- facilitative, advisory and determinative. Mediation is facilitative process. Author also has highlighted advantages, disadvantages and limitations of ADR processes. He has also visualized existing legal framework of mediation process in USA (United States of America), Philippines, Singapore, Sri Lanka, Bangladesh, India and Nepal.

Haley (2002) "Court Mediation and the Search for Justice through Law". The author has analyzed that mediation, an ancient, private, non-legal dispute resolution process, has recently found a welcome reception in the civil justice system. Author also has analyzed that how law affects the mediation process, the outcome and ultimately, the type of justice that parties achieve in court mediation. Author concludes that law neither automatically appears nor disappears in court mediation. The law's influence in the mediation process depends in large measure upon the individual mediator's approach to the mediation process. Court mediation offers litigants a forum for private, individualized and efficient justice.

Kattel (2005) had a research on "People, Peace and Community Mediation. A Glance through Legal Anthropology" on which he has analyzed that the impact of conflict is far reaching and long lasting. The conflict equally affects the disputing parties leaving behind bitter memories because both the parties lose money, time and other resources. Article also has analyzed approaches to conflict handling-conflict prevention, conflict management, and conflict resolution and conflict transformation. In community mediation, the trained people of the same community provide services for dispute settlement as volunteers. So, community mediation is a program that makes justice accessible to the poor, women and disadvantaged groups because such groups of people in our country have no easy access to formal justice system due to socio-cultural, economic and legal constraints.

Sapkota and Theis (2021) had research entitled "Dealing with Structural Change for Peace and & Justice : Strengthening Judicial Services and Mediation to provide access to justice" mention the lack of the judicial services, identified problems, implemented activities and develop context of judicial committee and mediation service in province

1 with its .context shows that the judicial service has been systematized with a new model and also showed the uniformity of judicial policies, practice and process through-out the province 1.

This study is distinct than aforementioned literatures in the sense that it is more extensive than previous literatures. Its objectives and scope are broad than aforementioned literatures. It has incorporated major focus on the implementation of legal provision on mediation in local judicial system in more focused way which is very new in Nepalese context. Thus, the issues related to the objectives of this research are not explored yet in context of Nepal. So, the need of the research is realized to be explored.

### **2.2.1 Conclusion**

To conclude the aforementioned literatures mediation is one of the popular alternative dispute resolution tools used in formal legal system throughout the world. Court mediation and community mediation were being practiced in Nepal after 2001 as campaign. Mediation in formal local judicial system has been ensured by Local Government Operation Act 2074. Mediation has been in practice in local judicial system since 2074 BS. Though, mediation has been accepted as easiest, cheapest, having concept of win-win deal, and informal and future oriented approach, it is very new in context of local judicial system in Nepal. There are very few resources based on the implementation of mediation at local judicial system. Thus, the topic has been new.

## **CHAPTER - III**

### **RESEARCH METHODOLOGY**

This chapter sum up the methodologies assumed in the study to tackle the research objectives and problems in systematic and designed idea. It contains the research design, nature and source of data, data collection methods and tools sampling size and sampling procedures, and data processing and analysis procedures. This chapters deals with the process of research work and is the description of materials, procedures and theory which were used in the research paper.

#### **3.1 Research Design**

The research was based on descriptive and exploratory types of research design. Legal provisions, principles of, methods and practice related issues were collected through literatures. Exploratory research was used to collect information about knowledge, practice, perceptions on mediation in Sandakpur rural municipality. Likewise, descriptive research design has been used to describe, analyze and interpret the collected data.

#### **3.2 Rationale of Selecting the Study Area**

The proposed study was carried out at Sandakpur Rural Municipality with analytical status of in overall of province 1 in policy and practice-based issues and it is mostly focused in Sandakpur Rural Municipality of Ilam. The study covers all 5 wards, their mediation centers, mediators and disputant including citizen. The total population of Sandakpur Rural Municipality is 16065. The local governments have the diverse population with the minority groups especially 18 different ethnic groups with their ethnic languages are there. Beside this Brahmins, Chhetries and Dalits live in Sandakpur. Rai (38.97%), Gurung (19.68%), Brahmin (13.53%) and Limbu (11.87%) are the major dominant castes in the population. Others are in minorities groups such as Magar, Sunuwar, Dalit, Sherpa, Tamang. Thus, the study site is selected to study the access to justice of the minority groups in local justice service. Thus, the study

prioritized inclusive participation of caste, gender, and ethnicity and focused on vulnerable groups. They are being exploited by the so-called upper castes, dominant population and elite people. So, the present study is tried to trace out this socio-economic status of women and minorities groups of the study site. No previous research has been carried out on this issue in the project site as well is also a reason to select this study site.

### **3.3 Universe and Sampling Process**

The population sample covers judicial committee and all 5 ward mediation centers of Sandakpur. 25 mediators are listed by judicial committee in Sanduakpur. Among the listed mediators 40 % of listed mediator i.e., 2 persons from each ward has been selected for the study with purposive sampling method to cover all mediation centers including inclusive participation at ward level as they are registered and involved in same time and same place as the concept of same universe. 14 cases were registered and settled through mediation in FY (Fiscal Year) 2078/079 in judicial committee in Sandakpur. 5 cases out of 14 (35.72%) of the registered cases referred to mediation were sampled to study with disputants. Sampling was carried out in proportional way based on wards. Beside this, information was collected on the concept and benefit of the mediation from the facilitators, experts and judicial committee.

### **3.4 Nature and Sources of Data**

Both primary and secondary sources of information have been used in this study. Secondary sources mainly Constitution, Acts, Rules, Reports, Directives, cases are used as primary source of information. Similarly, secondary sources of information were also collected from different related books, journals, and articles etc. of different libraries. Some statistical data were collected from Mediation Council; some statistical data were collected from Judicial committees and local governments of Province 1, as well as mediation centers of local governments and Human Rights Forum Nepal Ilam. Some information was included obtained from training as mediator trainee conducted by HURF (Human Rights Forum) Nepal, GIZ, SDC (The Swiss Agency for Cooperation and Development) & OSPC (Open Society Policy



Center) along with policy formulation of local judicial committee by HURF Nepal and province government.

Questionnaire survey, field observation, FGD were used for primary data collection. This study is based on comparative as well as analytical method. Existing laws and practice of the judicial committees has been analyzed.

### **3.5 Data Presentation and Analysis**

In this study, exploratory as well as descriptive methods have been used to analyze the data and information. The data was thoroughly checked, edited and tabulated to make the data set suitable for analysis. Data processing has been performed with the help of a calculator, a personal computer and other electronic and manual devices. Certain other relevant local conditions were recorded in photographs. Produced data has been presented in table. After analyzing and interpreting the data and information, conclusions and recommendations has been drawn.

## **CHAPTER - IV**

### **PRESENTATION AND ANALYSIS OF DATA**

This chapter deals with the analysis of the collected data and its interpretation based on the objective of the study as to find out the information of practice of mediation at local judicial system. The citizens in Sandakpur rural municipality especially the mediators, disputants and judicial committees and trainers/experts in mediation based on Human Rights Forum Nepal are the primary source of data. 25 mediators who were listed in judicial committees was the total universe for the mediators. All of them were involved in focal group discussion where 10 out of 25 were sampled with questionnaire survey too. It covered 2 mediators from each ward. The mediators should meet the provided qualification to be registered and listed as a valid mediator in local judicial committee. The mediators were listed by judicial committees covering all communities. Thus, only ethnic diversity and sex status of respondents were analyzed. 14 cases were registered at judicial committee in FY 078/079. 5 cases out of 14 were sampled for the study. The data presentation and analysis based on all 3 objectives were carried out with this study comparing with the existing legal provision. The study was determined with three major parts based on its three objectives. The first part of the study was on the need and benefit of mediation, the second part was based on the legal provision and its practice and the last part was based on the existing status and key problems relating to implementation of mediation at local justice service.

#### **4.1 Diversity of the Respondents**

Diversity plays a vital role in mediation. Since the mediation is an informal tool it can be settle in local language as well as disputants only have rights to choose their mediators. In this context, ethnic diversity plays role. Likewise, culturally female disputants do not want to share all of their problem to the male mediators. So, sex also plays vital on dispute resolution especially in mediation.

#### 4.2 Knowledge on Mediation Among the Respondents

<b>Respondents</b>	<b>Male</b>	<b>Female</b>	<b>Total</b>	<b>Percentage</b>
Judicial Committee members	2	1	3	6.98
Trainers	8	12	20	46.52
Mediators	5	5	10	23.25
Disputants	8	2	10	23.25
<b>Total</b>	<b>23</b>	<b>20</b>	<b>43</b>	<b>100</b>

Source: Field survey 2022

Out of the 58 respondents 6.98% were the members of judicial committee, 46.52% trainers, 23.25% mediators and 23.25% disputants were participated in the study. Altogether, 23 (53.49%) female and 32 (46.51%) male respondents were involved in the study.

#### 4.2 Knowledge on Mediation among the Respondents

Knowledge on mediation plays vital role for its practice. Thus, the knowledge on mediation among respondents was also assessed. All the mediators, trainers and a member of judicial committee found trained. 12 respondents (10 disputants and 2 judicial committee members) had some information about mediation.

**Table 4.2 Knowledge on Mediation Among the Respondents**

<b>Respondents</b>	<b>Experts</b>	<b>Trained</b>	<b>Aware</b>
Judicial committee	1	0	2
Mediators	0	10	0
Disputants	0	0	10
Trainers	6	14	0
<b>Total</b>	<b>7</b>	<b>24</b>	<b>12</b>

Source: FGD 2022

The experts had more than 100 hour's trainings with knowledge of different types of mediation skills. Likewise, Trained mediators have more than 50 hours of training skills and had enough skill to work as mediator as per law. Aware respondents had knowledge with need, importance and concept of mediation but they do not have the skills of mediation.

### **4.3 Concept, Need, Benefit and Role of Mediation**

Trainers on mediation were participated to access the concept, principles, difference, benefit, need and importance, and the role of mediation in Nepalese context. Likewise, they were asked how mediation can be institutionalized in Nepal to explore gaps.

#### **4.3.1 Concept of Mediation**

FGD (Focus Group Discussion) with mediators brought the following output to define and relate the concept of mediation: -

- Mediation is a process of dispute resolution bringing collaboration between two parties.
- It's a process to trace a friendly way between disputants and solve their problem ensuring win-win stage
- The process that respects prevailing laws and human rights
- Justice based on social justice and social norms
- A future oriented approach that seeks collaboration for future and comes up with future plan
- A voluntary work
- Process based on trust and agreement based on trust
- Simple, accessible and efficient justice service
- Ensures win - win of both parties
- Respect protect and promote local culture
- The process to explore creativity to resolve conflict
- The easiest approach to provide access to justice to poor, marginalized and vulnerable communities.

- It discourages opportunists to take benefit from someone conflict. Reduces third party intervention
- An alternative dispute resolution tool that supports the justice system of the state.
- A justice delivery approach that promotes social harmony with promoting sustainable peace
- A non-violent conflict resolution approach.

The response of the trainers showed that mediation is a non-violent dispute resolution tool and a part of justice system that is informal, easiest, efficient, it protects human rights, respects existing laws, creates win - win approach between disputants, develops relation and creates collaboration. It does not only settle the dispute but also develops relation of dispute parties with mutual relation and seeks solution from the parties. It promotes the future collaboration between parties that brings good relation and harmony. It also promotes local culture. As per mediators, mediation is useful tool to provide access to justice of poor and marginalized communities.

FGD with trained mediators in Sandakpur rural municipality brought the following idea on how they perceive mediation as: -

- A non-violent conflict resolution tool that promotes negotiation
- It promotes relation and brings collaboration between parties
- It revives or restore the past good relation and supports to make it more strong collaboration
- It promotes human rights of both parties and respect their dignity
- A trustful, confidential, and un-bias approach
- Mediator works as facilitator and has no influence on decision where parties solve their problem on their own.
- It develops social harmony addressing the route of conflict. Thus, it promotes sustainable peace
- It works on relation building between parties. If the parties have good relation, they can sit together and seek solution on their own is the core concept of mediation.

- The most useful tool in context of local community as it is informal, can be done in any place, cheapest, accessible in community, and develops harmony and brotherhood between parties.

A case study is presented here on disputes that have been successfully resolved through Mediation.

#### **Box No 4.1 Case Study of Cultural and Mass Conflict Mediation**

##### ***Case Study-I***

##### ***Case Study of Cultural and Mass Conflict Mediation of Sandakpur***

*(The name of the parties are confidential as per mediation law, the provided names are symbolic only)*

*Harka Bahadur (Changed name) had moved to Malaysia for foreign employment 3 years ago. He died in Malaysia 3 month ago. His father Bal Bahadur, his wife Lal Maya, a son and a daughter lived at home. After his death, after a long process his death body was brought to Nepal. When the corpse was heading towards the village from Kathmandu, a discussion was held to carry out his death ritual as per the Magar rituals by Magar communities. But, his family refused the decision of the Magar community and took position that the family would follow the traditional Hindu ritual which had been followed by their forefathers. There were 29 households of Magar community, out of them 7 would like to follow Hindu rituals where 22 decided for Magar ritual.*

*When the corpse brought home, the family took the corpse to the river and preformed death ritual based on Hindu ritual. During the mourn rituals the people from 22 household started to satire the bereaved family "there is no alcohol, now they become Brahmin etc." Though, the responsible members of the Magar Community did not say anything but the rumor escalated the conflict. On the tenth day of the ritual, the secretary of Magar Association Ram Kumar Magar said that the death rituals based on Magar culture has been over by the tenth day,*

so, they would not join from the next day. On the 11<sup>th</sup> & 12<sup>th</sup> day the families from 7 houses and people from other castes came to Lal Maya's home to support the ceremony but nobody came from the 22 households.

After the boycott of the Magar Association & community, Lal Maya went to seek justice with different stakeholders in Ilam. Then, the stakeholders referred the case to HURF Nepal. Then, 2 mediators were sent to study the case from HURF including mediators from Sandakpur.

There was a large crowd at ward office in Sulubung. 1 person from each family, and the individuals who were participated in Hark's funeral procession were invited by both groups. At least each group contained 50 people. The mediators adopted group conflict solving method and selected 8 representatives from each group and conducted mediation session. The session found some major core issues especially religious freedom, dignity and social harmony. The parties planned to address the issues and the session was over with agreement. Since then, a new plan to keep social harmony, respect of individual and religious as well as cultural freedom has been ensured. Mediation found very useful in mass conflict resolution, cultural conflict resolution and bringing harmony.

Source: Field Survey, 2022.

#### **Box No 4.2 Generation Long Conflict Settled through Mediation**

##### ***Case Study-II***

##### ***Generation Long Conflict Settled through Mediation***

##### ***A case study of land conflict in Sandakpur***

In 2001 BS, 2 Rai families (Deusali and Bangdel) lived there after invading land of 36 ropani of each. Both families are relatives as one family is brother's and another is sister's family. But the land was later in 2029 BS, registered in the name of another person from Subedi family. Later, in 2060, Subedi told them to buy the land. Deusali family bought the land but the land of Bangdel was passed to Deusali. Again, Deusali family bought the land of their own too. As a result, the whole land was legally owned by Deusali family and the Bangdel family became

*landless. The families in both sides increased and reached 8, (5 Bangdel families and 3 Deusali families). When, Deusali family had to buy the land in 2060, Deusali families started to force the Bangdel families to leave the land and the dispute raised. Then they went to the district court Ilam.*

*The court decided as per the record and the whole land became to Deusali family. The decision of court was not suitable for both families because Bangdel families became landless and Deusali families did not want to capture the Bangdel families land. After decision of court, both families went to seek justice in different places but got nothing. Finally, they went to the mediators in Sandakpur. The mediation took place. They sat in mediation for 2 session and came up with agreement. As a result, Bangdel family returned the money to Deusali family which was paid by Deusali family while purchasing the land from Subedi family. Then, the Bangdel family got 31 ropani of land from Deusali family. Now, all 8 families have good relation and cooperation after mediation.*

Source: Field Survey, 2022.

On the same question, the members of judicial committee responded that mediation is the most effective and necessary tool in context of judicial work. The judicial committee members responded that: -

- Judicial decision results win-lose stage as one-party wins and another loses. It creates barriers between two neighbors, friends or family members. They are imposed to accept the decision of judicial committee. But, in the same time if there is the mediation, their relation is restored, they decide on their own, and express commitment to implement their decision. Judicial committee should only provide platform for them. It also creates good relation among parties, judicial committees, mediators and society.
- Mediation has informal process, it can be conducted on mother tongue. In context of Sandakpur, we have different mother tongues due to diverse ethnic groups. Thus, it respects our local culture, our mother tongue and easiest access to explore problem even the parties are illiterate. It does not need to follow the formal language as in court process. So, it supports to provide access to justice to those citizens who are not aware on legal process.



Furthermore, mediation focuses on better relation rather than collecting evidence to ensure guilt. Thus, it respects the dignity of the disputants.

#### **4.3.2 Principles of Mediation**

The focused group discussion with trainers responded that HURF Nepal follows facilitative mediation which is need based and rights based. It's a human rights-based mediation approach. HURF model is facilitative and mediator works as facilitator while settling dispute. The model is similar to Steven Moore. The trainers responded following as principles of mediation: -

- **Voluntary:** Mediation is a voluntary approach and the disputant has only right to sit on mediation and to take any decision. Nobody can impose the disputants by any means to sit in mediation and have agreement. It's not forceful.
- **Trustful and Confidential:** The issues discussed and evidence presented in mediation session have to be confidential. The Mediation Act 2068 also ensured that the issues and evidences placed in mediation sessions cannot be placed as evidence in formal court or court does not take it as an evidence. Nothing can be shared from mediation session without agreement of the disputants by mediator too.
- **Neutral Mediator:** Mediator works as facilitator and is unbiased. Mediator should not work as a lawyer.
- **Self-decision of disputant:** Only disputants can make decision and agreement in mediation. Mediator can facilitate them to reach the decision but cannot influence on their decision.

**Rigorous Process:** Mediation can be possible if mediators is concentrated, listen both side with active listening, address immediate situation, aware on neutrality, aware on own prejudice, aware on third party intervention and aware on the stage of conflict. Thus, it's not the easy process, it needs rigorous effort.

### **4.3.3 Difference Between Mediation, Arbitration and Traditional Dispute Resolution Methods**

The trainers group provided the following differences between mediation, arbitration and traditional dispute resolution methods that are existing in local communities. As per the trainers, the mediation is the latest concept started to practice in Nepal since 2057 BS (Bikram Sambat). Arbitration had been in practice in formal court system in Nepal. The government brought Arbitration Act 2055 declared arbitration as a specific process. In 2068, Mediation Act was passed and was effective from 2071 BS. Thus, the concept of mediation is new in Nepalese context. Traditional dispute resolution methods are existing in communities. Still citizen perceive mediation is the same as traditional dispute resolution. Thus, the study focused to access the core difference between those dispute resolution methods and tools. Following is the findings:

**Table 4.3 Difference Between Mediation, Arbitration and Traditional Dispute Resolution Methods**

<b>Process</b>	<b>Mediation</b>	<b>Arbitration</b>	<b>Traditional dispute resolution tools/approaches</b>
Decision Making	Voluntary	Compulsory	Compulsory
Decision Maker	The parties themselves	Arbitrator/lawyer	Leaders of society
Control	Disputant parties	Arbitrator/lawyer	Leaders of society
Procedure	Informal	Formal	Informal
Time period	3 months	More than 3 months	uncertain
Money expenses	Less	More	Less
Concern	Issue based and personal	Objective and impersonal	Objective and impersonal
Emphasis of solution	Future oriented/relation and plan based	Past oriented/evidence based	Past oriented/evidence based
Publicity	Confidential and trustful	Public	Public
Relation of the parties	Friendly and collaborative	Rival	Rival
Presentation of evidence	Voluntary	Compulsory	Compulsory
Result	Win-Win + Gain-Gain	Win-lose/Lose-win	Win-lose/Lose-win
Contract compliance	Generally respected	Often resisted	Often resisted
Case settlement approach	Creative and protection of social values	Legal	Traditional

Source: FGD, 2022.

Above table no. 4.3 showed that the traditional methods of case settlement at community level found more likely to arbitration in the sense of taking decision, control and emphasis on solution. Though these methods are informal in nature likely to mediation. The traditional conflict resolution methods found as hybrid method of both mediation and arbitration. Arbitration found as a specific legal process defined by Arbitration Act 2055. Mediation found different than other two category as it focuses on relation, future collaboration, respect human rights, creates win-win and ensures gain-gain. Mediation can be done in local language even in the mother tongue, parties' decision, confidentiality, issue based and personal focuses also differentiated with other.

#### **4.3.4 Benefits of Mediation**

The question was placed with trainers and mediators in focus group discussions to access how they define the benefit of mediation where same question was asked to the disputants why they felt the benefit of mediation.

The result of the focal group discussion with trainers pointed out the following benefit: -

- Justice delivery can be possible at community level.
- It respects human rights and laws and mediation is legally valid.
- Efficient due to its informal nature, in sense of money/expense, process and time.
- Restores and better's relation between parties which trace a way to have negotiation for other number of problems between them in the future. But other tools come up with blaming one party as a perpetrator.
- Respect and protect dignity of citizen.
- Decision is made by disputant and they have full ownership on justice. In other processes, justice is given by moderator and found imposed decision.
- Ensure win-win with creating gain-gain situation that promotes collaboration. It means it fulfills local need. For example, if our relation is disturbed, our need is to restore the relation instead of becoming winner or loser one.
- Mediation brings sustainable resolution of conflict.

- It promotes and ensures non-violent conflict transformation process.

The FGD with mediator's groups provided the following responses: -

- Neutral and impartial role of mediator supports to explore the real problem of disputants
- Disputants trust mediators and share everything due to its confidentiality
- Mediation can be only possible when both parties agreed to sit on mediation. It depends upon their will.
- Mediator works as facilitators which promotes trust among disputants as impartial mediator.
- Same case is not repeated or appealed. It proves that it brings sustainable resolution.
- It focuses on real situation and daily life.
- It's informal, easy to access and cheapest means available at community level
- Establishment of mediation center at ward level and availability of mediators at community level supported to enhance access to justice for poor, women, Dalits and marginalized communities.

The disputants who registered and solved their cases through mediation were asked why they preferred mediation. They were also asked why they preferred judicial committee and mediation centers instead of going to court. All 10 respondents responded as;

**Table 4.4 Benefits of Mediation**

Response	Number of Respondents	Percentage
<ul style="list-style-type: none"> <li><input type="checkbox"/> It was efficient due to time in sense of settlement within 3 months, and it took less time to go to mediation center than to the court.</li> <li><input type="checkbox"/> The process was informal, they did not have to hire lawyers for making their documents</li> <li><input type="checkbox"/> Mediation could be available in their community but court is far. It reduced distance to seek justice.</li> <li><input type="checkbox"/> They did not have to pay money. They paid for registration of case, but there was no court fee.</li> <li><input type="checkbox"/> The process was easy to them, mediator supported to facilitate, and they could share everything.</li> <li><input type="checkbox"/> The decision was made in common consensus between parties on their own.</li> <li><input type="checkbox"/> No third-party influence in decision. It supported them on self-decision and they were willing to implement their decision.</li> <li><input type="checkbox"/> They also implemented their decision.</li> <li><input type="checkbox"/> Their relation has been restored and strengthen.</li> <li><input type="checkbox"/> They felt respected. Nobody was accused and blamed.</li> </ul>	10	100
<ul style="list-style-type: none"> <li><input type="checkbox"/> Female mediators are the opportunity to the female disputants to share their personal matters, which they cannot share with male mediators. Thus, most of the female's cases are safely addressed in mediation securing their confidentiality.</li> </ul>	6	60

Source: FGD, 2022.

All the 10 respondents expressed that they choose mediation: -

- It was efficient due to time in sense of settlement within 3 months, and it took less time to go to mediation center than to the court.
- The process was informal, they did not have to hire lawyers for making their documents
- Mediation could be available in their community but court is far. It reduced distance to seek justice.
- They did not have to pay money. They paid for registration of case, but there was no court fee, fee for mediator.
- The process was easy to them, mediator supported to facilitate and they could share everything.
- The decision was made in common consensus between parties on their own.
- No third-party influence in decision. It supported them on self-decision and they were willing to implement their decision.
- They also implemented their decision.
- Their relation has been restored and strengthen.
- They felt respected. Nobody was accused and blamed.

Furthermore, 6 out of 10 respondents also expressed that.

- Female mediators are the opportunity to the female disputants to share their personal matters, which they cannot share with male mediators. Thus, most of the female's cases are safely addressed in mediation securing their confidentiality.

The responses of the trainers, mediators, and disputants found similar responses in most of the issues. The common issues as the benefits of mediation in comparison seeking justice from court and judicial committee responded by respondents are: -

- It is efficient in sense of time
- Informal process that supports to share individuals' feelings as it is
- Distance to mediation is more accessible than the court
- Cost effectiveness. Justice in low even no cost.
- Supportive and participatory process, no third-party influence
- Trustful and confidential

- Nearest and easiest in sense of access.
- Feeling of respect,
- Restores relation and promotes social harmony

#### **4.3.5 Need and Importance of Mediation in Context of Nepal**

The respondents were asked to explore the need and importance in local and overall context of Nepal.

The focused group discussion with trainers pointed the following idea to highlight the needs and importance: -

- Nepal is a country of diversity based on its ethnicity, cultures and social norms. The culture is one of the major causes to create conflict that it creates discrimination between two cultures, caste, value, norms and develops exclusion. In this context, conflict based on belief, feelings and values cannot be settled through formal legal practice. Such conflict can be solved only by restoring relation, assuring dignity and promoting respect and harmony. Mediation promotes social cohesion through dialogue and negotiation. Therefore, mediation is the most suitable means of conflict transformation and dispute settlements in context of Nepal.
- The informal nature of dispute settlement in mediation respects and promotes local practices and cultures which directly links with faith of citizen.
- It brings win-win instead of win-lose. The stage of win-win ensures and respects the dignity of both disputants instead of making victim of blame. As a result, it bridges the broken relation between two parties.
- Since mediation is informal, it can be possible in community and respective household of the disputants. Thus, it can ensure access to justice at home too.
- Access to justice of poor and marginalized communities is the need of Nepal. This need can be addressed/fulfilled by only one mean that is mediation.
- It develops relation and resolves conflict between two parties, but other family members or society also get benefit from the result.
- The easy access, low cost, short period, informal nature, win-win stage and long-lasting solution are its benefit. So mediation is the cheapest and most



effective justice delivery system. Thus, mediation is the most necessary tool and effective in context of Nepal.

- There are many cases in our society which are not libel to get legal remedy due to lack of awareness of the deadline of registering cases, lack of evidence and other issues. But the cases are there. In this context, mediation can be one possible platform where the disputants can try to solve their cases. Concept of community mediation has been brought to address such cases too, where there no option to get justice from formal justice service mediation can be a mean.

The group of mediators responded need of mediation in local context and in context of Nepal based on their practice and learning as follow: -

- Majority of citizen in local community are not aware on law, its process of getting justice from court. Court is very far and they need to hire lawyers which cost a lot. Even they are not aware on the deadline of the case registration, necessary evidence and so on. Often their cases cannot be registered in court due to lack of necessary time and evidence. But, mediation can provide opportunity to those citizens to get their cases addressed.
- Mediation focuses in building relation and the parties will collaborate in their future. It also supports to develop family relation, neighborhood and social harmony. The intention of community people to get justice is to repair their relation and promote harmony. Mediation is only one dispute resolution tool that can work on relation building. No formal laws are there to develop relation.
- Diverse culture, poor economic condition of citizen, far from community, rigid procedure in court is some constrains to get justice from court. But, mediation can address these issues and it is most importance and effective.
- To compare the cases settled through court decision and mediation the mediated cases found long lasting solution, improved relationship and dispute parties expressed that they got real justice. The decisions of court were not accepted by disputants they appealed to high court and even the cases were solved the relation between two parties is still as rival which leads generation/decent based conflict.

- Mediation ensures confidentiality and impartial role of mediator. Thus, citizen also started to choose mediation to settle their dispute securing their confidentiality, and getting involved in making own decision.

#### **4.3.6 Role of Mediation in Context of Nepal**

The group of trainers were asked what could be the role of mediation in context of Nepal. Both groups provided similar responses as the need and importance. Beside the need and importance in local context the result of the FGD with trainers was as follow to explain the role of mediation: -

- Due to diverse geographic location, less access of court less cost efficient, distance and rigid process many cases remained unsolved in community. In the other word, many citizens are away from access to justice. To address those citizens, to ensure their access to justice mediation can play a vital role.
- If the cases are settled through mediation in community level, it reduces the work load of the court. Mainly civil cases are solved through mediation. Thus, court can have more time to deal with criminal cases and the justice delivery of court will be effective and in time.
- There is unity in diversity in Nepal especially on the issues of culture, caste, ethnic groups, geography and social settings. In this context, the need of cooperation, collaboration, respect, support are the key issues to sustain the unity and brotherhood that ensures social harmony. Thus, mediation can play a vital role to repair relation, promote dignity, collaboration and protect local culture.
- Mediation can be possible in informal approach. So, it can be done even at the house of the disputant. So, justice delivery at home can be made possible if mediation is promoted in context of Nepal.

Mediation assures human rights, law and social justice thus justice delivery through mediation does not harm the parties as well as it does not violet the law but respects. So, to promote rule of law, protect human rights and promote social justice mediation has an important role.

#### **4.4 Legal Provisions and Practice of Judicial System and Mediation**

The practice of judicial committee system and mediation process at Sandakpur rural municipality was assessed with an objective to compare legal provision and practice.

##### **4.4.1 Legal Provisions**

Summary of legal provision has been presented to take the basis of legal provision in this section so that it can be compared with practice as well as to access the gap. Sapkota (2020) said that the Local Government Operation Act 2017 has provided jurisdiction to the local judicial committee to settle the dispute through mediation and through arbitration. Clause 49 of the Act has provisioned justice execution process. It has adopted a formal judicial process in its sub-clause (1) The Judicial Committee shall send the evidence of the petition of dispute registered before it to the concerned party after having it registered. Likewise, the act prioritized mediation as the first priority in its sub-clause (2) While prosecuting and settling the dispute registered before it, the judicial committee shall as far as possible encourage mediation and mediate with the consensus of both parties. If mediation between parties could not be succeed, then the judicial committee should prosecute and settle the case as per the law in the dispute as mentioned in Sub-clause (1) of Clause 47. Furthermore, the act also prioritized the jurisdiction of mediation only for the judicial committee and decision making to the concern court and also provided the timeline to try out to settle the dispute through mediation. In sub-clause (4) In the dispute mentioned in Sub-clause (2) of Clause 47, the Judicial Committee should settle the case through mediation within three months from the date of arrival of the defendant. If mediation is not possible within the period, the concerned party should be communicated to go to the court by mentioning the same details and the documents and evidence related to it should also be sent to the concerned court.

Likewise, the judicial committee should manage its trained mediators and should be listed in its rooster for the mediation of the registered cases. In its sub-clause (3)The Judicial Committee shall, while carrying out mediation as per Sub-clause (2), do so through the mediators enlisted by the Committee.

As per the above discussion, the law has following provision: -

- Judicial committee has specific jurisdiction
- Judicial committee can settle all cases under its jurisdiction through mediation.
- Judicial committee can settle certain cases (related to clause 47.1) through judicial decision in case of unsuccessful of mediation and cases related to Clause 47.2 should be referred to district court if mediation is not successful.
- Local government should make local law for the procedural management of judicial work.
- Judicial committee should settle cases through mediation by its registered and enlisted mediators.
- Judicial committee can establish mediation centers in ward level and community level too.

#### **4.4.2 Status of Practice of Legal Provision in Sandakpur Rural Municipality**

Field observation, review of document and informal interview with judicial committee and mediators were done to access the practice of legal provision for judicial system. The practice was assessed with how judicial committee started to implement legal provision and what was the status at the time of observation. The table below provided the existing status and practice.

**Table 4.5 Status of Practice of Legal Provision in Sandakpur Rural Municipality**

<b>S. N.</b>	<b>Particular</b>	<b>Status</b>
1	Formation of Judicial committee	Formed
2	Developing Local Law	Judicial Procedural Act 2078 Passed and effective
3	Mediation Procedure Guideline 2078	Passed and Effective
4	Nomination of Compliant Officer	Nominated
5	Office set up	established and functional
6	Service delivery (case registration – settlement)	Functional
7	Rooster of Mediator	Prepared and updated 25 mediators as per mediation guideline and judicial procedure.
8	Mediation Centers	6 (5 ward level & 1 at Judicial Committee)
9	Case registration and settlement process	necessary formats are available, procedure is adopted based on local law
10	Total case registered	14 cases (FY-2078/079
11	Cases settled through mediation	14 cases (FY-2078/079
12	Plan & budget for Judicial function	clear plan, budget allocated (700,000 NPR (Nepalese rupee) for FY 2077/078
13	Information dissemination on Judicial service in community	Awareness program were organized in ward level
14	Monitoring of Judicial committee	District Court regularly monitored and provided feedback. Feedback are implemented.

Source: Field Survey, 2022.

As per the law the judicial committee was formed and found functional during observation. Judicial committee had a separate office, its staff, and necessary infrastructures for example furniture, computer, and necessary format for legal process. The municipality had passed its judicial procedure act and mediation guideline. Mediation centers have been established at judicial committee and ward level as per the local law. The judicial committee found functional on its service delivery as well as informing citizen about the service of judicial committee and mediation center.

#### **4.4.3 Legal Process Adopted for Case Settlement by Judicial Committee**

Members of judicial committee were asked about the step that has to be completed from registration to settlement of a case at judicial service. The respondents explained with legal provision of their judicial procedure act. It was discussion with observation. Finding of the discussion and observation is given below

**Table 4.6 Steps That Have to be Completed from Case Registration to Settlement**

<b>Step</b>	<b>Description of Task</b>
<b>1 Case Registration</b>	Case is prepared in provided format and evaluated based on jurisdiction. If the case is under jurisdiction the case will be registered. The applicants get date of appointment for further process.
<b>2 Inform to Second Party</b>	After registration, information describing about the case registered against him/her and to file reply within 15 days will be sent to the second party.
<b>3 Reply Registration</b>	The second party comes and his/her reply application is prepared in provided format and registered.
<b>4 Refer to Mediation</b>	Both parties will be invited in a same date and oriented them about mediation. Then Judicial committee decides to send the case for mediation. Then parties choose mediator from the list of mediators in judicial committee, they also provided the mediation center, date. Selected mediators will be informed as they were selected on the case, and provided time up to 3 months to try to settle case through mediation.
<b>5 Mediation</b>	Mediation process is done in provided time. If the case is mediated, an agreement between both parties is prepared by mediators and both party and mediators sign it and send to judicial committee If the case is not settled through mediation, both parts will be sent to judicial committee, and mediators send report quoting that mediation remained unsuccessful and request for further process.
<b>6 Approval of Mediation, Further Process</b>	The judicial committee approves the mediation /agreement made in mediation center in case of successful mediation. And the case is settled. The judicial committee takes further 3 different steps in case of unsuccessful mediation 1. To send again in mediation 2. To start judicial process for judicial decision in case of clause 47.1 3. Refer to District Court in case of clause 47.2

Source: Field Survey, 2022.

The explanation with documents and observation found based on local law. Furthermore, recommendation of monitoring of judicial committee by district court showed that the process adopted by judicial committee in Sandakpur found effective in sense of legal implementation.

#### **4.5 Existing Status and Key Problems in Implementation of Mediation Service at Local Judicial System**

Discussion with judicial committee was carried out to assess the status of judicial committee and need to enhance judicial system and mediation service at local judicial system. The issues were discussed with scoring.



**Table 4.7 Existing Status of Capacities and Key Problems in Implementation of Mediation Service at Local Judicial System**

Category	Status	Need
<b>1. Capacity</b>		Newly elected judicial committee was there. 1 member of judicial committee has experience on judicial function. Remaining are not trained. They need skill training. Regular training plan was a lack of Judicial committee.
<b>1.1 Judicial Committee</b>		
Trained and enough skilled(76-100 %)		
Trained and some skilled (51-75 %)		
Well (26-50 %)		
Somehow (1-25 %)	✓	
<b>1.2 Staff</b>		The local government nominated compliant officer and case registration assistant at mediation centers. They are trained and active. But still there is a need to have specific and enough staff, such as documentation officer.
Trained and enough. (76-100 %)		
All Trained but not enough (51-75 %)	✓	
Some Trained but enough (26-50 %)		
Not trained but enough (1-25 %)		
Not trained not enough, (0)		
<b>1.3 Mediator</b>		The number of mediators found less based on local context. 5 mediators from each ward were registered. Judicial committee has plan to increase number of mediators at least by double in this fiscal year.
Trained and enough. (76-100 %)		
All Trained but not enough (51-75 %)	✓	
Some Trained but enough (26-50 %)		
Not trained but enough (1-25 %)		
Not trained not enough, (0)		
<b>1.4 Mediation Centers</b>		The existing mediation centers covers each ward. But the judicial committee realized the need of 3 more mediation centers focusing the geography and larger population in 3 wards.
How many?	<b>6</b>	
Sufficient Number? Or not?	<b>Not</b>	
If not How many?	<b>3</b>	

Source: Field Survey, 2022.

**Table 4.8 Existing Status of Necessary Infrastructure, Law and Policy as well as Key Problems in Implementation of Mediation Service at Local Judicial System**

Category	Status	Need
<b>1. Infrastructure</b>		All the mediation centers have their room, some furniture's and office supplies. Judicial committee has its separate office too. Still there is a need to improvise these centers to upgrade them safer and well-equipped space.
Well-equipped and sufficient (76-100 %)		
Equipped but not enough (51-75 %)	✓	
Some (26-50 %)		
None (1-25 %)		
<b>2. Law &amp; Policy</b>		Judicial committee perceived that prevailing civil law, local government operation act, judicial procedural act and mediation guideline are the major law for judicial committee. Thus, they will be sufficient in current context. They prioritized on implementation of law as a need.
Sufficient what are they?	1) Judicial procedural Act 2) Mediation guideline 3) prevailing laws	
Some, what are they?		
What lacks?		

Source: Field Survey, 2022.

The status provided by judicial committee showed that the judicial committee members were newly elected and had less skills. But, the previously trained staff and mediators were actively working. Necessary laws were passed and functional. Capacity enhancement of judicial committee, increment of mediators, increment of mediation center and specific plan of judicial committees were identified as the need to make the judicial system effective and functional.

## **CHAPTER - V**

### **SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATIONS**

This chapter deals with the summary of the study on practice of mediation at local judicial system which was carried out focusing Sandakpur Rural Municipality in Ilam district. It includes the summary, major findings, conclusion and recommendation drawn based on the findings.

#### **5.1 Summary and Findings**

The practice of mediation at local justice service was started after the election of the first judicial committee in 2074. The local governments then brought laws, established, mediation centers, managed staff, developed mediators and initiate mediation services as a necessary part of judicial system. Judicial committee was trained and functional. 15 cases were registered in FY 077/078. All the cases were settled through mediation. 25 mediators were registered, 6 mediation centers were established and functional. Staff were trained and active for the service. Judicial committee also implemented awareness programs to inform citizen about the judicial service and its benefits. After the second periodic election in 2079 BS, newly elected judicial committee is there. The judicial committee has not enough skilled team due to they are new. The perception upon mediation and motivation of disputants showed that mediation is the most useful to settle disputes which restore better relation between two parties. Mediation has been accepted as the most effective tools to settle dispute at community level and ensure access to justice to poor and marginalized groups. It is prioritized as most effective tools to deal with cross-cultural issues in diverse cultural society like Sandakpur. It is realized as effective tools in context of the community having ethnic, cultural and religious diversity like Nepal.

## **Major Findings of the study**

- (1) Mediation is a nonviolent conflict resolution tool which focuses relation building of the disputants, brings collaboration and creates win-win situation.
- (2) Mediation ensures prevailing laws, human rights and social justice.
- (3) Mediation is a future oriented approach and respects party's dignity ensuring confidentiality, respect and with concept of no-blame.
- (4) Mediation is the only one dispute resolution process where parties take decision on their own. Mediator works as neutral and impartial facilitator.
- (5) Mediation is informal, can be done in community, can be done in local language and the cheapest, easiest, and safest means of dispute resolution.
- (6) Voluntary approach, trust, confidentiality, neutral mediator, self-decision of disputants and a systematic and rigorous process are the key principles of mediation.
- (7) Mediation is different than arbitration and traditional dispute resolution process due to its difference nature. Decision is made by arbitrator and imposed in arbitration, as well as in traditional approach but in mediation decision is taken by disputants.
- (8) Human rights respected; rule of law based informal justice delivery at home can be possible through mediation is one of the major benefits.
- (9) Cheapest, easy access, efficient in term of time, process and sustainable solution are some examples of the benefits of mediation perceived by the disputants while settling their disputes.
- (10) Female mediators have separate role to provide access to female disputants to settle their confidential matters.
- (11) Mediation creates social harmony developing relation which is the major need of community.

- (12) Due to diverse culture context is one major aspect to create violent conflict. It needs reparation or relation, respect and social dignity to promote harmony. Thus, mediation is the most effective and urgent tool to address disputes in context of Nepal. Mediation also promotes local practices and culture which links with faith of citizens. Therefore, mediation is important in context of Nepal.
- (13) The easy access, low cost, short period, informal nature, win win stage and long-lasting solution are its benefit. So, mediation is the cheapest and most effective justice delivery system. Thus, mediation is the most necessary tool and effective in context of Nepal.
- (14) There are many cases in our society which are not libel to get legal remedy due to lack of awareness of the deadline of registering cases, lack of evidence and other issues. But the cases are there. In this context, mediation can be one possible platform where the disputants can try to solve their cases. Concept of community mediation has been brought to address such cases too, where there no option to get justice from formal justice service mediation can be a mean.
- (15) comparison between the cases settled through court decision and mediation the mediated cases found long lasting solution, improved relationship, and dispute parties expressed that they got real justice. The decisions of court were not accepted by disputants they appealed to high court and even the cases were solved the relation between two parties is still as rival which leads generation/decent based conflict.
- (16) Mediation ensures confidentiality and impartial role of mediator. Thus, citizen also started to choose mediation to settle their dispute securing their confidentiality, and getting involved in making own decision.
- (17) Prevailing laws of Nepal provisioned the practice and priority to mediation in local justice system.
- (18) Local justice procedure can be prepared based on local law.

- (19) All cases under the jurisdiction of judicial committee can be settle through mediation. Furthermore, judicial committee should provide first priority for mediation.
- (20) Judicial committee can establish mediation centers in ward level and community level too.
- (21) Judicial committee in Sandakpur rural municipality has been practicing mediation based on prevailing laws. The local government has passed Judicial procedural act 2078, Mediation procedure guideline 2078.
- (22) The judicial committee has its staff, office, mediation centers, registered mediators.
- (23) Judicial committee has been operating its justice delivery procedure based on law. Necessary steps, necessary formats are adopted as per law.
- (24) All registered 14 cases in FY 2078/079 were settled through mediation.
- (25) Monitoring of judicial committee by District court remarked that the judicial committee has been following legal track as per law.
- (26) Legal process has been adopted by judicial committee for case settlement. Mainly 6 major steps have been taken to settle a dispute in judicial process.
- (27) Capacity building of judicial committee, staff & mediators are one of the needs to enhance the judicial service.
- (28) Increment of the numbers of mediators, number of mediation centers and infrastructures are the needs for the judicial committees.
- (29) Judicial committee has prepared plan to address the need too.

## 5.2 Conclusion

This study clearly shows that the practice of mediation at local justice system has been implemented at local level. Promotion of mediation at local justice service, community motivation to settle dispute through mediation is in increasing trend.

The campaigners, experts of mediation are promoting concept, importance, and benefit of mediation and supporting to develop trained mediators to promote mediation. Government of Nepal has also prioritized mediation ensuring mediation as one of the essential alternative dispute resolution tools. The law also intensifies the need of mediation having provision of the first priority of judicial committee. The law also promoted local need to manage local justice service providing rights to prepare local law for judicial services.

Mediation is accepted as the most useful tool in context of Nepal with its distinct nature such as voluntary, relation focused, future oriented, informal in sense of process and place, confidential in nature, legally valid, and respect of human rights and rule of law.

The practice of mediation in a very short period of judicial committee found effective. All cases were settled through mediation despite the lack of enough capacities, infrastructures, resources and expertise. The perception of the disputants who got their cases settled through mediation speaks that the impact of mediation is positive and sustainable. Mediation does not only solve a case between two parties, it brings collaboration, repairs relation with other parties and stakeholders in society.

NGO (Non-governmental organizations) such as Human Rights Forum Nepal are playing a vital role to capacitate, motivate and implement mediation at community level focusing sustainable peace through non-violent conflict transformation and ensuring social justice. The collaboration between such expert organization and local governments found fruitful to foster mediation in short period of time.

The study came up with conclusion that the practice of mediation at local justice system found supportive and have positive impact among citizen. It can be a mean to provide access to justice to the poor and marginalized citizen. Mediation can play a vital role to build social harmony, justice and sustainable peace. Mediation can play vital role to address relation-based conflict created due to cross-cultural phenomena which is most relevant to Nepalese context as Nepalese community has ethnic, cultural, religious diversity.

### **5.3 Recommendations**

The study has explored need, benefit and importance of mediation in context of Nepal. Several approaches have been made to promote mediation in Nepal. Practice of mediation at local justice service has been started and is in increasing trend. But the study has also focused on the gaps and lacks while practicing mediation at local justice system. These gaps and lacks can be fulfilled with collective effort of government, CSOs (Civil Society Organization), local stakeholders and citizen. Based on this context, analyzing the different opinion and findings the study has drawn some major recommendations that are presented categorically below.

#### **5.3.1 Role of Government to Promote Practice of Mediation**

The existing role of government found supportive to promote mediation as governments have provisioned in law, local laws are passed, judicial structures are set up and judicial committee is functioning. Still there is a need of clear regular plan of local government, enough budget has to be allocated, and local executive and elected representatives should be aware and play a supportive role to foster the judicial service at community level even to reach every door. Local government should create community awareness on the benefit of mediation so that citizen can get justice in time. Necessary infrastructures, staff, trained human resources have to be managed by local governments. Local governments should increase collaboration with NGOs who have strong trained expertise and utilize those capacities to develop local capacities.



### **5.3.2 Role of Civil Society**

CSOs should have a vital role to increase community awareness to promote mediation at community level. Beside this, civil society organizations should have role to support local governments to identify issues, making plan, developing capacities and implementation. Technical and expertise support of civil society organizations have to be utilized for community building.

### **5.3.3 Role of Local Stakeholders**

Local stakeholders such as political parties, ethnic leaders, activists, community-based organizations and social leaders should be engaged to aware community to utilize the local justice service. They also have the role to raise advocacy to ensure sustainable and quality service delivery at community level.

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# APPENDIX-I

## QUESTIONNAIRE

This questionnaire has been designed to explore information for purely academic purposes. This is to enable the researcher **Mankumar Baraily** complete his thesis on the topic; **Practice of Mediation at Local Level: A Case Study of Sandakpur Rural Municipality Ilam District, Nepal**, in pursuance of Master of Art in Rural Development (MA.R.D.) degree.

### Questionnaire for the Respondents

#### FGD (Focused Group discussion) with Trainers

1. Name: .....
2. Name of participants (Optional): .....
3. Age: .....
4. Address: Tole: ..... Ward No.: ..... Municipality: .....
5. Checklist
  - a. Concept of Mediation at local level
  - b. principles of mediation
  - c. Different between Mediation, Arbitration and traditional dispute resolution system at community level.
  - d. Benefit of mediation
  - e. need and Importance of mediation in context of Nepal
  - f. Role of mediation in Nepalese context
  - g. How mediation can be institutionalized (gaps and recommendation)

{Thanks for cooperation}

## QUESTIONNAIRE

### FGD (Focus Group Discussion) trained mediator (listed) at local level

1. Name: .....
2. Age: .....
3. Address: Tole: ..... . Ward No.: ..... Municipality: .....
4. Perception on mediation
5. Importance of mediation
6. Experiences while carrying out mediation
7. Effectiveness of mediation
8. Mediation is necessary? of not? at local level, why?
9. Problem faced.

{Thanks for cooperation}

# QUESTIONNAIRE

## Questionnaire Survey with Dispute parties

1. Name: .....
2. Name of participants (Optional): .....
3. Age: .....
4. Sex: .....
5. Address: Tole: ..... Ward No.: ..... Municipality: .....
6. Party: a) first                      b) second
7. Case .....
8. status of case:
  - a. Registered
  - b. process of mediation
  - c. settled
  - d. referred to court
9. Why did you prefer mediation to settle your dispute?
  - a.
  - b.
  - c.
  - d.
10. why did you not go to court instead of judicial committee and mediation center?
  - a.
  - b.
  - c.
  - d.
11. Have you seen or known or felt the decision of court on any case in your locality?
  - a. if yes, how was the decision? .....
12. Have you seen or known or felt about the mediation of any case in your locality?
  - a. if yes, how was the result? .....

{ Thanks for cooperation }



# QUESTIONNAIRE

## Questionnaire with JC (Judicial Committee)

1. Name: .....
2. Position in JC: .....
3. Age: .....
4. Sex: .....
5. Municipality:
6. What steps has to be completed form registration to settlement of cases at judicial services?
7. What are the needs for a JC to function Mediation Service In effective way ?  
Status.
  - a. Capacity
    - i. Trained JC
    - ii. Well
    - iii. Somehow
    - iv. None
  - b. Staff
    - i. Trained and enough.
    - ii. Trained but not enough
    - iii. Not trained but enough
    - iv. Not trained not enough,
    - v. None
  - c. Mediator
    - i. Trained and enough.
    - ii. Trained but not enough
    - iii. Not trained but enough
    - iv. Not trained not enough,
    - v. None
  - d. Mediation Centers
    - i. How many?
    - ii. Sufficient Number? Or not?
    - iii. If not How many?
  - e. Infrastructure

- i. Well
  - ii. Some
  - iii. None
- f. Law & Policy is.
  - i. Sufficient what are they ? 1.....2.....3.....
  - ii. Some, what are they? 1.....2.....3.....
  - iii. What lacks?
- g. feeling upon mediation.
  - i. Its necessary & useful.
  - ii. does not helpful.
  - iii. works sometimes.

{Thanks for cooperation}

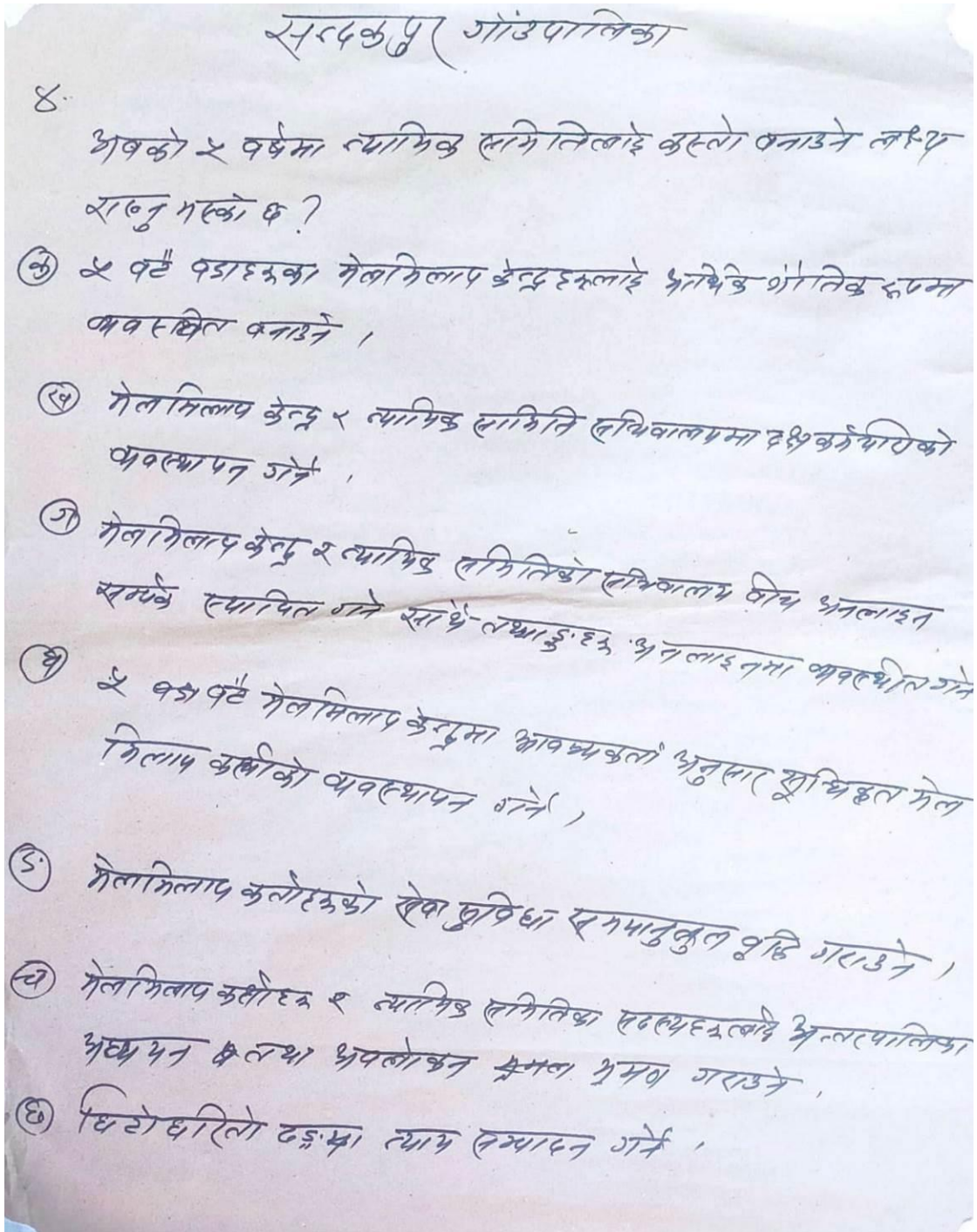
# QUESTIONNAIRE

## Checklist for Discussion

1. What are the prerequisites to set up and initiate judicial service?
2. What is the status of infrastructures, human resources, capacities to run judicial service and mediation in context of Sandakpur?
3. Observation
  - a. Policy and procedure of local government
  - b. Judicial committee
  - c. Mediation centers
  - d. Substantive and procedural documents

{Thanks for cooperation}

Filled FGD by respondents



Source: Field Survey 2022

# APPENDIX-II

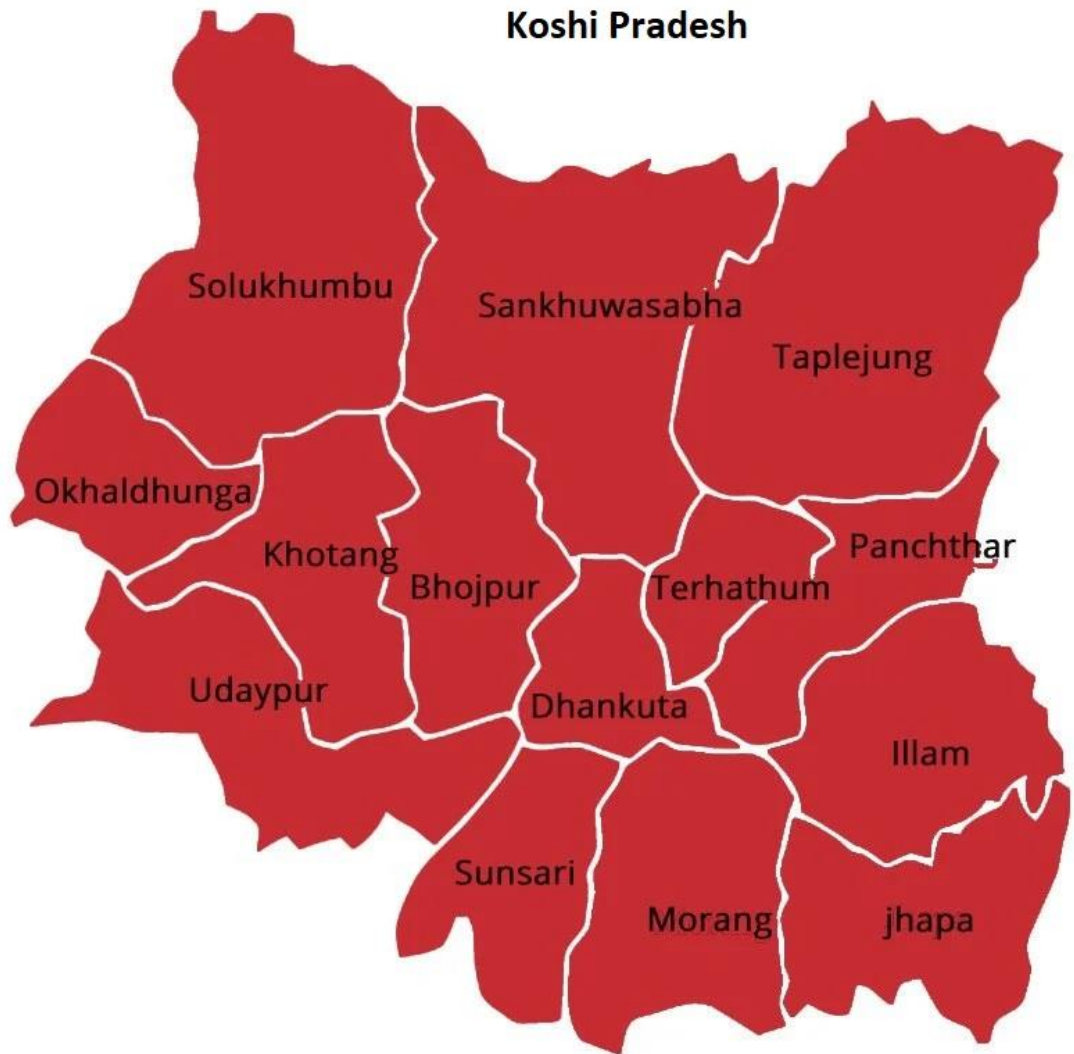
## MAPS

Map of Nepal



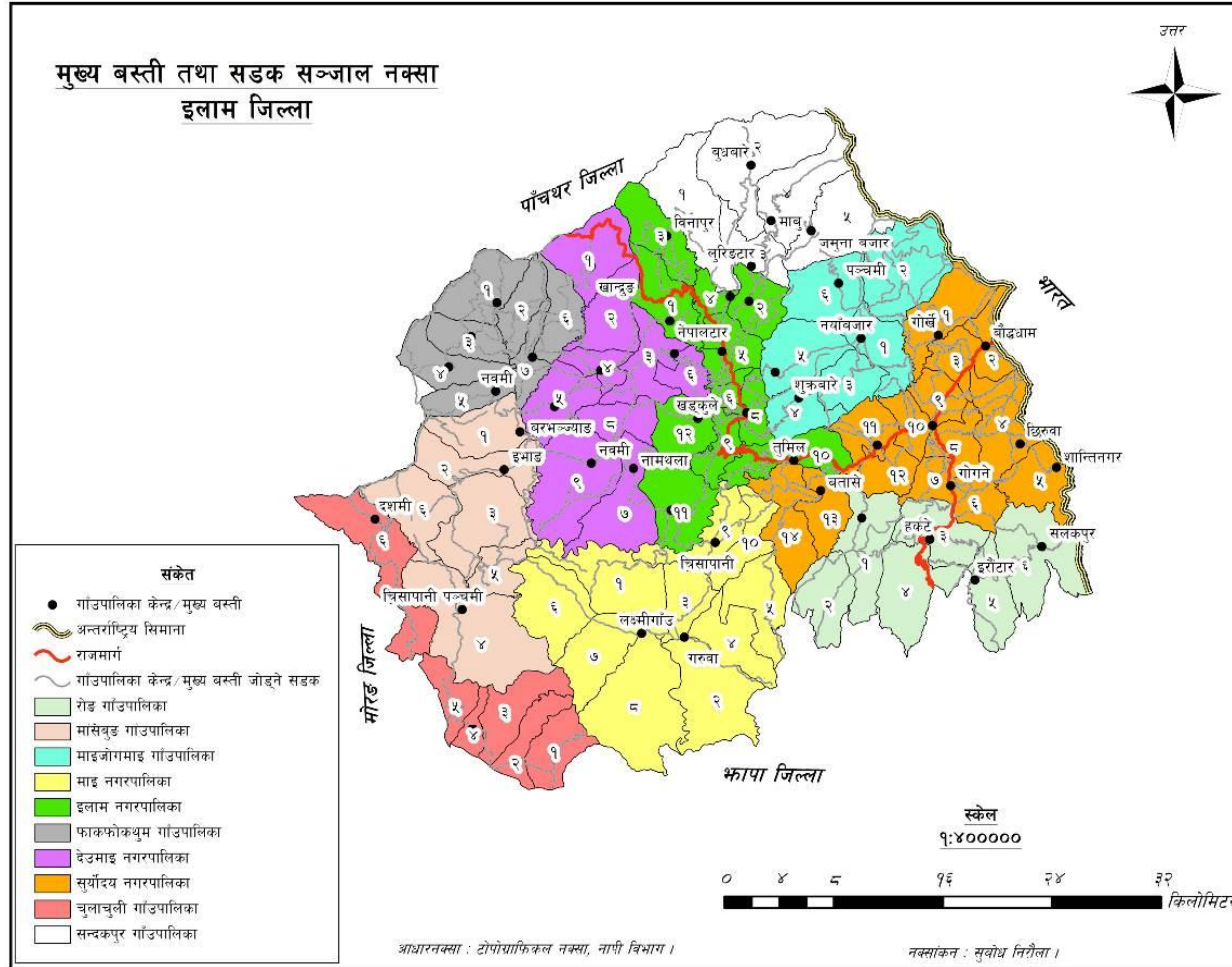
Source: Sandakpur Rural Municipality

## Map of Koshi Pradesh



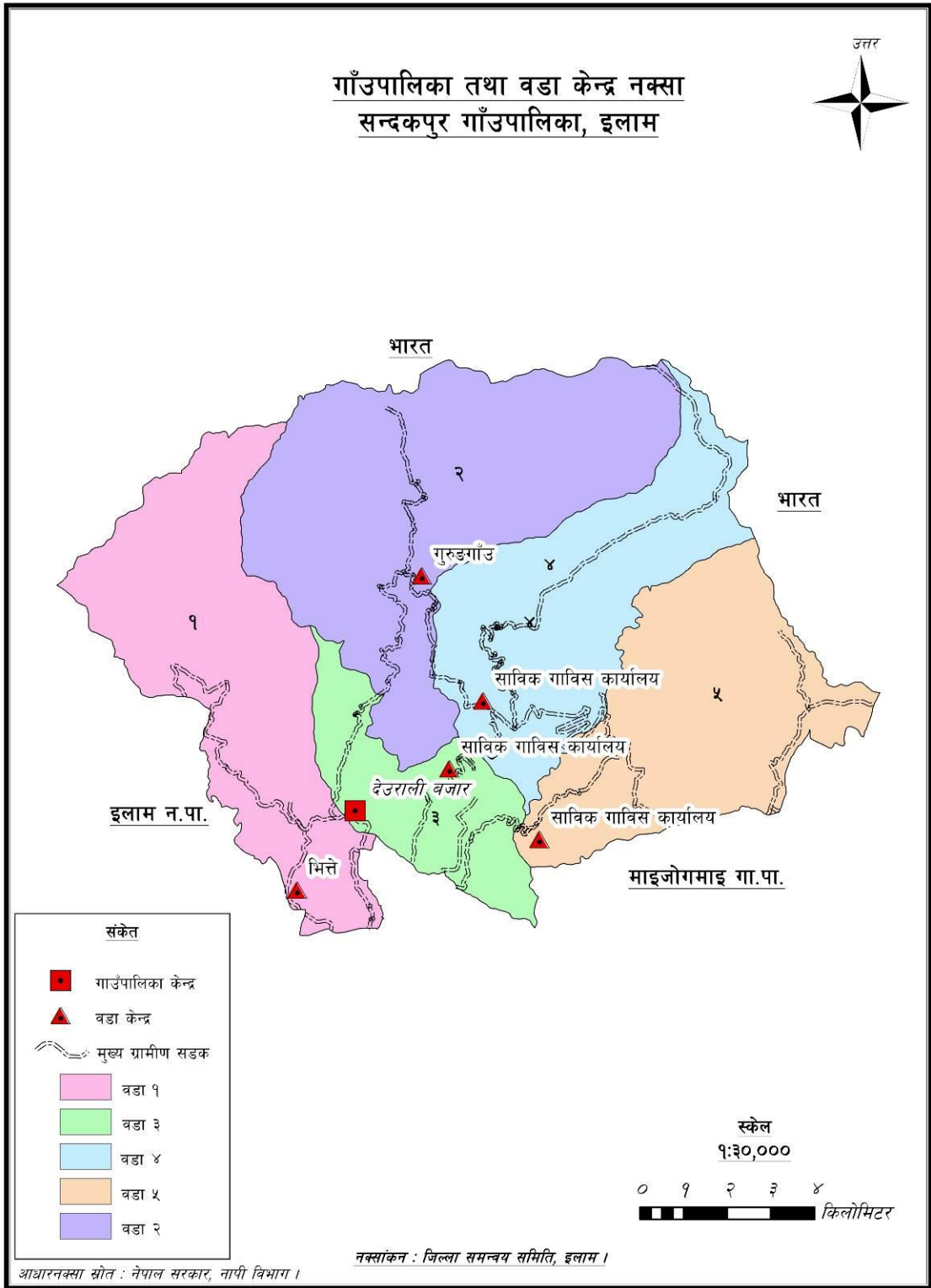
Source: Sandakpur Rural Municipality

## Map of Ilam District



Source: Sandakpur Rural Municipality

Map of Sandakpur Rural Municipality (Research Area)



Source: Sandakpur Rural Municipality



## APPENDIX-III PHOTOGRAPH

Photographs with researcher and respondents in study area









# सन्दकपुर गाउँपालिका न्यायिक समिति

माबुमोड देउराली, इलाम

प.स.:२०८०/०८९

च.नं.: ११

कोशी प्रदेश, नेपाल

मिति :२०८०/०४/०४

विषय : यो जो सँग सम्बन्धित छ ।

प्रस्तुत विषयमा इलाम नगरपालिका वडा नं. ८ का श्री मन कुमार बराईलीले, त्रिभुवन विश्व विद्यालय, महेन्द्र रत्न बहुमुखी क्याम्पस, इलाममा मानविकी संकायको ग्रामीण विकास विषयमा स्नातकोत्तर तहको उपाधि प्राप्तिका लागि यस सन्दकपुर गाउँपालिकामा आधारित भई "नेपालमा स्थानीय न्याय प्रणालीमा मेलमिलापको अभ्यास"विषयमा शोधपत्र तयार गरी यहाँको न्याय सेवाको प्रभावकारीता अभिवृद्धिमा समेत पुऱ्याउनु भएको योगदानका निम्ति धन्यवाद व्यक्त गर्दछु ।

हरी बहादुर लुङ्गोली  
न्यायिक समिति संयोजक

हरी बहादुर लुङ्गोली  
उपाध्यक्ष  
सन्दकपुर गाउँपालिका