Improving access to justice through embracing a legal pluralistic approach: a case study of Nepal

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IMPROVING ACCESS TO JUSTICE THROUGH EMBRACING A
LEGAL PLURALISTIC APPROACH: A CASE STUDY OF NEPAL

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This thesis is submitted in fulfilment of the requirements for the conferral of the Degree of Doctor of Philosophy

SCHOOL OF LAW
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June 2018
ABSTRACT

Nepali people access justice either through the formal justice system (FJS) or traditional justice systems (TJS). TJS in Nepal exist alongside the FJS and serve the justice needs of people living in rural areas, Indigenous peoples, the poor, and marginalised groups of the population, such as women, Dalits and minority group members.

This PhD thesis analyses the structure and operation of selected TJS, explores the extent to which TJS in Nepal accord with international principles of human rights, describe the existing relationship between TJS and the FJS, and explores the potential for establishing a relationship between the two systems to improve access to justice in general and especially for TJS users.

The research used semi-structured interviews of TJS and the FJS stakeholders to assess the extent to which three Nepali TJS (Shir Uthaune, Badghar and Mukhiya) are able to meet the need for access to justice of the people who use them in three different districts of Nepal. Shir Uthaune, Badghar, and Mukhiya TJS are mainly utilised by members of three different Indigenous groups (the Rai, Tharu and Thakali respectively) in the three districts studied (namely, Dhankuta, Bardiya and Mustang). Field work was undertaken in Nepal between July and December 2015 to collect primary data. The data was analysed using the following theoretical frameworks: legal pluralism, a human rights-based theoretical approach, critical legal theories, and decolonisation methodologies.

The research found that although the three selected TJS operate in different locations and among different Indigenous groups, they exhibited many similarities. For
example, elderly males play a dominant role while women, Dalits and minority groups have either no role or a very limited role in the operation of that TJS. Some more minor differences were also documented, for example, regarding length of appointment of dispute settlers.

The research unveiled several reasons why people utilise the selected TJS, including: TJS are familiar, more accessible and readily available; the TJS service is either free of cost or cheaper and faster compared to those of the FJS; and TJS services are, in some areas, the only the viable option for rural people. Shortcomings were also noted, including: the dispute settlers’ lack of awareness of international principles of human rights and of the need to have knowledge of such principles, or of constitutional and legal provisions. In addition, in TJS dispute resolution processes, the rights of marginalised groups (such as women, Dalits, the poor and minority groups) either are not protected effectively or have been violated.

This research revealed that there is a lack of a systematic and coherent relationship between these two justice systems. A large majority of the interview participants thought that linking TJS and the FJS would contribute to improving the situation of access to justice in general and for marginalised groups in particular. The majority of the interviewees suggested linking TJS with the local level bodies and a few suggested linking TJS with the lower courts, such as the District Courts.

Finally, many suggestions for reform of the TJS arose. Overall, those desiring reform did not want to compromise the core values of the TJS dispute resolution process. The major recommendations for reform are: ensuring TJS protect the rights of women, Dalits and other minority groups; making TJS structure and operation inclusive of
marginalised groups; the state recognising and strengthening TJS processes so that legal pluralism is embraced and access to justice is improved; and changing policy based on the intersectionality approach so that the rights of women (especially those from Dalit, Indigenous groups), Dalits, minority groups and the poor so that that the experience of these groups can be addressed in policy making. Almost all the Indigenous groups in Nepal have their own dispute resolution process; therefore, it is recommended that serious effort be put into comprehensive research to identify, document and reform these systems so that access to justice in Nepal is improved.
STATEMENT OF ORIGINAL AUTHORSHIP

I, Rajendra Ghimire, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the School of Law, Faculty of Law, Humanities and the Arts, the University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Rajendra Ghimire
25 June 2018
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My time at University of Wollongong (UOW) has been a privileged period in my life and one that I have thoroughly enjoyed. I am indebted to many individuals for their support during my study, and without whom my PhD research would not have been completed.

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My sincere appreciation goes to Elaine Newby for her excellent copy-editing service that rendered this thesis more readable.
Although I am not in the position to list the names of interview participants as their anonymity must be maintained, I wish to formally acknowledge that it was their participation that immensely benefitted this thesis. Without their willingness to contribute there would indeed be no thesis. To them I will be forever indebted. I therefore sincerely acknowledge the contribution of the many unnamed actors from both TJS and the FJS in the Bardiya, Mustang, Kathmandu and Dhankuta Districts of Nepal. I am extremely grateful for their support which has so enriched my thesis.

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Finally, I would like to express my gratitude to my mother Malika Devi Ghimire, my wife Arjana Khanal and mother in law Basundhara Khanal for their constant support, cooperation and devotion during my study. At this time, I also remember my son, Aaditya, who always made me happy during my study period.

To each person above, named and unnamed alike, my sincere thanks.
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<td>AD</td>
<td>Anno Domini</td>
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<tr>
<td>BC</td>
<td>Before Christ</td>
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<tr>
<td>CA</td>
<td>Constituent Assembly</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CBS</td>
<td>Central Bureau of Statistics</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CLS</td>
<td>Critical Legal Studies</td>
</tr>
<tr>
<td>CLT</td>
<td>Critical Legal Theories</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
</tr>
<tr>
<td>CPN-M</td>
<td>Communist Party of Nepal, Maoist</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>CRT</td>
<td>Critical Race Theory</td>
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<td>CVICT Nepal</td>
<td>Centre for Victims of Torture Nepal</td>
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<tr>
<td>DFID</td>
<td>Department for International Development</td>
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<tr>
<td>FJS</td>
<td>Formal Justice System</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>HRBA</td>
<td>Human Rights-Based Approach</td>
</tr>
<tr>
<td>ICCPR</td>
<td><em>International Covenant on Civil and Political Rights</em></td>
</tr>
<tr>
<td>ILO Convention 169</td>
<td><em>Convention Concerning Indigenous and Tribal Peoples</em></td>
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<td>INGO</td>
<td>International Non-Governmental Organisation</td>
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<tr>
<td>IUCN</td>
<td>International Union for the Conservation of Nature</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NJA</td>
<td>National Judicial Academy</td>
</tr>
<tr>
<td>NLSS</td>
<td>Nepal Living Standard Survey</td>
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<td>PPR Nepal</td>
<td>Forum for Protection of People’s Rights, Nepal</td>
</tr>
<tr>
<td>TJS</td>
<td>Traditional Justice Systems</td>
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<tr>
<td>UDHR</td>
<td><em>Universal Declaration of Human Rights</em></td>
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<tr>
<td>UNCERD</td>
<td>United Nations Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNDRIP</td>
<td><em>United Nations Declaration on the Rights of Indigenous Peoples</em></td>
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<tr>
<td>UNHRC</td>
<td>United Nations Human Rights Committee</td>
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<tr>
<td>UNOHCHR</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
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DEFINITION OF TERMS

Badghar: A form of TJS practised by the Tharu community in various districts in Nepal. The term also indicates an individual dispute settler selected by the villagers in the Tharu community with responsibilities for resolving local disputes. Literal meaning of the term Badghar is ‘big-house’.

Brahmin or Bahun: A caste traditionally considered that of priests, or highest class according to the Hindu caste system.

Chaukidar: An individual selected by the Tharu community to help the Badghar (dispute settler) in community work, including dispute resolution.

Chhetri: A caste traditionally considered that of a warriors, administrators and member of the ruling class according to the Hindu caste system. The Chhetri is the largest caste group, comprising about 16 per cent of the population of Nepal.

Dalits: A group of people traditionally considered ‘untouchable’ in the Hindu caste system.

Dispute Resolution: A term that refers to the resolution of both civil and criminal matters in general, and in the context of traditional justice systems only to petty criminal matters.

Dispute Settler: A term used to indicate individuals who are in a decision-making role in TJS. Decision-making authorities, such as judges in the FJS, are not included in ‘dispute settlers’.

District: An administrative unit of Nepal. Nepal is divided into 77 districts.
<table>
<thead>
<tr>
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<td><strong>Formal Justice System</strong></td>
<td>The justice mechanisms established by the Nepalese Constitution and other laws, such as courts, tribunals, and quasi-judicial bodies.</td>
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<tr>
<td><strong>Gurung</strong></td>
<td>An Indigenous group living in the western Hill region of Nepal.</td>
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<tr>
<td><strong>Jimmuwal</strong></td>
<td>A position created for local tax collection in the <em>Rana</em> regime in Nepal.</td>
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<tr>
<td><strong>Licchavi</strong></td>
<td>Nepali ruling dynasty that ruled the country between the 5th and 8th centuries.</td>
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<tr>
<td><strong>Local Level Body</strong></td>
<td>The local level government body that exists at the local level in the federal structure of Nepal.</td>
</tr>
<tr>
<td><strong>Madhesi</strong></td>
<td>People who live in the Madhesh/Terai area of Nepal. Madhesh/Terai is the lowland area of Nepal bordering with India.</td>
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<tr>
<td><strong>Malla</strong></td>
<td>Nepali ruling dynasty who ruled the country between the 13th and 18th centuries.</td>
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<tr>
<td><strong>Mukhiya</strong></td>
<td>A form of TJS practised by the <em>Thakali</em> Community in the Mustang district. This term also means a person with the responsibility for settling disputes in the <em>Thakali</em> community.</td>
</tr>
<tr>
<td><strong>Pancha</strong></td>
<td>A person who is involved in social service, including resolving disputes at the local level.</td>
</tr>
<tr>
<td><strong>Pancha-bhaladami</strong></td>
<td>(lit) ‘five gentle persons’ who assist disputing parties to resolve their disputes at the local level.</td>
</tr>
<tr>
<td><strong>Pancha-kachahari</strong></td>
<td>A meeting of <em>Pancha-bhaladami</em> for the purpose of resolving disputes.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td><strong>Pancha-samuchchaya</strong></td>
<td>A formal local dispute resolution institution in the <em>Malla</em> period.</td>
</tr>
<tr>
<td><strong>Panchali</strong></td>
<td>A term used in the <em>Lichhavi</em> period for meetings of respected people of a community.</td>
</tr>
<tr>
<td><strong>Pancheti</strong></td>
<td>A Nepali term which refers to a traditional form of TJS practised at the local level. In <em>Pancheti</em>, all villagers gather in a common place to discuss and resolve a dispute locally. It is still widely used in villages in Nepal to settle disputes at the community level.</td>
</tr>
<tr>
<td><strong>Rana</strong></td>
<td>A Nepali ruling dynasty that ruled the country between 1846 and 1951. During this period, the <em>Rana</em> Prime Ministers seized the then King’s power and established a hereditary system.</td>
</tr>
<tr>
<td><strong>Satar</strong></td>
<td>An Indigenous group living in the eastern Terai region of Nepal.</td>
</tr>
<tr>
<td><strong>Shaha</strong></td>
<td>A Nepali ruling dynasty who ruled the country between 1768 and 2008.</td>
</tr>
<tr>
<td><strong>Sir Uthaune</strong></td>
<td>A form of TJS practised in the eastern part of Nepal by the <em>Rai</em> and <em>Limbu</em> communities. The term also indicates an individual who is a dispute settler in that system. It literally means ‘upholding morale’.</td>
</tr>
<tr>
<td><strong>Tamudhin</strong></td>
<td>A form of TJS practised by the <em>Gurung</em>, an Indigenous group in Nepal.</td>
</tr>
<tr>
<td><strong>Thakali</strong></td>
<td>An Indigenous group that originated in the Mustang district of Nepal. Due to internal migration, <em>Thakalis</em> now reside across the country.</td>
</tr>
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</table>
Thari: An assistant to the Jimmuwal in the collection of tax revenue at a local level in the Rana regime.

Tharu: An Indigenous group living in the Terai region of Nepal.

Traditional Justice Systems: Traditional Justice Systems (TJS) are defined in detail in Chapter 2 of this thesis, under the heading ‘Traditional Justice Systems’. The term refers to justice systems at the local or community levels that have not been set up by the state and usually function by following customs and traditional norms. For the purpose of my PhD research, TJS is primarily used in the plural; however, it also signifies the singular as and when required.

Untouchability: According to traditional Hindu Varna system Dalits (Shudras) were considered ‘untouchables’. In Nepal, untouchability is abolished, and it is an offence punishable in accordance with law.

Varna System: According to the Varna (Verna) system, traditionally, people were divided into four categories: Brahmim, Chhethri, Baishya and Shudra.
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CHAPTER 1: INTRODUCTION

I   BACKGROUND OF THE RESEARCH

In the context of Nepal, dispute resolution forums can be divided into two broad categories: (i) the formal justice system (FJS), such as courts and tribunals; and (ii) informal justice forums including traditional justice systems (TJS) that operate in rural areas across the country, and include Tamudhin (among the Gurung people), Mukhiya (among the Thakali people), and Badghar (among the Tharu people). The formal and informal justice mechanisms that operate in Nepal are presented in Appendix 1 of this thesis. This PhD thesis analyses the situation of access to justice in Nepal in three selected TJS and recommends potential options for establishing operational linkages between TJS and the FJS.

This chapter sets out the background of the research project, defines access to justice in the context of this research, identifies the research questions that this research project seeks to answer, specifies the contribution of the research and finally provides an outline of each chapter.

1 In this thesis, FJS refers to the judicial mechanisms that are established by law, such as courts, tribunals, and quasi-judicial bodies.

2 In this thesis, TJS are defined as justice systems that exist at the local or community levels that have not been set up by the state and usually function by following customs and traditional norms. A working definition of TJS for the purpose of my PhD research is given in Chapter 2 of this thesis, under the heading ‘Traditional Justice Systems’. The term TJS is primarily used in the plural: however, it also signifies the singular as and when required.

3 People living in rural areas, Indigenous people, the poor and marginalised groups within the population (such as women, Dalits, and minority groups) are users of TJS in Nepal due to their traditional practices or inability or unwillingness to use the FJS. About 83 per cent of the population of Nepal live in rural areas. While some 17 per cent of the population live in ‘municipalities’, not all municipal areas are urbanised. Therefore, the proportion of the population that is actually rural is greater than 83 per cent. See Central Bureau of Statistics, Government of Nepal, National Population and Housing Census 2011: National Report (2012) vol 1, 3.
The legal history of ancient Nepal\(^4\) is not well documented, resulting in many scholars pointing to the need for further research on the topic.\(^5\) However, there is a consensus that in ancient times Nepali law was based on customs, traditions, and religious scriptures, such as *Sruties* (comprising the most ancient authoritative and generally unchanging Hindu texts such as *Vedas*) and the more derivative, fluid and human authored/revised *Smrites* (such as *Manusmriti, Naradasmiriti, Yagyabalkyasmiriti* and *Bhrishpatismiriti*).\(^6\) Nepali legal history shows that in the ancient period (750 BC and 1380 AD), dispute resolution was mainly managed by local level TJS mechanisms and the final judicial authority was vested in the King, meaning that people in a dispute could appeal to the King, whose decision was then final.\(^7\) TJS in Nepal have a long history, and traditionally, TJS were used to maintain social order through resolving local disputes with the involvement of local leaders, elders, kin groups, lineage councils, village heads, religious meetings, and other local forums.\(^8\) Evidence of the practice of TJS in Nepal exists as far back as 750 BC, but there is little detail available about how the legal system operated as much law was unwritten and individual cases generally not formally recorded.\(^9\) As an anthropological historian in Nepal, Prayag Raj

\(^4\) Nepali history is divided into four phases — the ancient period between 750 BC and 1380 AD, the medieval period from 1381 to 1768 AD, the *Shah* period from 1769 to 1950 AD, and after 1950 AD the modern period. See Rewati Raman Khanal, *Nepalko Kanuni Itihasko Ruprekha [An Outline of Nepal’s Legal History]* (Saraswati Khanal, 2003) 23, 40, 71. The book covers Nepalese legal history from 750 BC to 1972 AD.


\(^7\) Khanal, above n 4, 13.


\(^9\) Khanal, above n 4, 22–4.
Sharma, noted: ‘in the disputes involving ethnic minorities, all cases were first referred to the local assembly of elders in the respective cultural, ethnic or linguistic communities.’

He argues that although Hindu law dominated state law in ancient Nepal, the state ‘always acknowledged the reality of cultural diversities and accepted these diversities as part of their social universe’. While the history of TJS in Nepal is not well documented, it is believed that several institutions and practices that originated in different periods continued to operate across different ruling dynasties. Such institutions included the Panchali from the Licchavi period (400–750 AD), the Pancha-samuchchaya from the Malla period (1201–1769 AD), and, in the Rana (1846–1951 AD) and Shaha period (1768–2008 AD), Thari, Jimmuwal and Pancha resolved disputes through a Pancha-kachahari and Dharmadhikari (‘owner of justice’).

Judicial historians have also found that four formal courts (adalats) — Kot, Linga, Itachapali and Dhansar — were operating in the Kathmandu valley in 1825 and they exercised both civil and criminal jurisdictions. Before the 1830s when 10 courts were established outside Kathmandu (the capital city), there had been courts only in the capital with judges deputed by the government for specific times and locations to deal with complaints in areas beyond the capital’s environs.

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11 Ibid.
13 Regmi, Judicial Customs of Nepal, above n 6, 273; See B H Hodgson, ‘On the Administration of Justice in Nepal: With Some Account of the Several Courts, Extent of their Jurisdiction, and Modes of Procedure’ (1836) 20 Asiatick Researches 94.
14 Regmi, ‘Administration of Law and Justice during the Time of Janga Bahadur Rana’, above n 5, 187. The ten courts established in the 1830s outside Kathmandu were located in Bhadgaun, Patan, Doti, Jumla, Dhankuta, Chainpur, Katarbana, Palpa, Pyuthan and Salyan.
With respect to the FJS, the current *Constitution of Nepal 2015* (hereinafter referred to as the ‘Constitution’) adopted a federal system of governance and that provides for federal, provincial and local level government.\(^{15}\) In accordance with the Constitution, the FJS in Nepal has a three-tier judicial structure comprising the Supreme Court, the High Courts and District Courts.\(^{16}\) The Constitution also provides a Judicial Committee in the local level bodies across the country.\(^{17}\) In addition to these courts, other specialised courts, judicial bodies or tribunals can be formed to hear and settle specific types of cases, as the federal law provides.\(^{18}\)

Due to the complex nature of the existing legal (including FJS and TJS) systems in operation in Nepal as well as the various forces/factors that see them act sometimes in concert and in a complementary manner and other times in a competing, even conflicting, manner, I think it is valuable for anyone contemplating the country's justice systems, and especially those considering further change, to be aware of the history of such arrangements — hence I provide a brief historical account below, particularly for the period from the mid-nineteenth century when change began to accelerate. In regards to the history of the FJS, after his visit to the European countries in 1851 when he was exposed to both the Napoleon Code and the Common Law system, Prime Minister Jang Bahadur Rana enacted the first National Code of Nepal,


\(^{16}\) Ibid art 127(1).

\(^{17}\) Ibid art 217(1).

\(^{18}\) Constitution art 152(1). Currently there are a Supreme Court, 7 High Courts, 77 District Courts, a Labour Court, a Special Court to hear corruption cases, 4 Revenue Tribunals, an Administrative Court, a Debt Recovery Tribunal and a Debt Recovery Appeal Tribunal functioning under the relevant legislation. For details, see the Supreme Court of Nepal website <http://www.supremecourt.gov.np>.
Muluki Ain (hereinafter referred to as ‘the Code’) of 1854.\(^{19}\) The Code covered criminal, civil, procedural and administrative matters that defined the powers and authority of executive and the judiciary.\(^{20}\) According to a Nepali historian Mahesh Chandra Regmi, the Code laid the foundation for the Constitution in Nepal because it brought ‘everybody, from (the King and other members of the royal family) to a ryot (peasant), and from Prime Minister to a clerk’ under the purview of this Code.\(^{21}\) The Code acknowledged the presence of various castes and ethnic groups in Nepal and formalised the social hierarchy according to this caste and racialised system.\(^{22}\) An anthropological historian in Nepal, Prayag Raj Sharma, argues that one of the motivations for promulgating the Code was ‘to provide people with a uniform and more accessible justice as part of continuing reforms in Nepal’s legal system’.\(^{23}\)

In a number of permutations, advances and retreats and shifts in the loci of power (to and from the Crown and other institutions) the modern formal court system was established; first through the Pradhan Nyayalaya Ain (Apex Court Act of Nepal) 1951 which established an essentially independent Apex (or Supreme) Court and guaranteed the independence of the judiciary and the rule of law and subsequently District Courts were established in 1956.\(^{24}\) After the promulgation of the Constitution of Nepal 1958, a three-tiered FJS in Nepal was announced — the Supreme Court, Regional Court and District Court.\(^{25}\) The Constitution of the Kingdom of Nepal 1990 also continued the

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\(^{21}\) Ibid 180–181.

\(^{22}\) Sharma, *The State and Society in Nepal*, above n 10, 128, 159. The caste system in Nepal is discussed in Chapter 5 of this thesis.

\(^{23}\) Ibid 157.

\(^{24}\) Osti, above n 19, 217.

\(^{25}\) Khanal, above n 4, 37.
three-tiered FJS — the Supreme Court, which is the highest court, the Appellate Courts and District Courts.26

Today, the Constitution of 2015 provides that the Supreme Court is the highest court in the Nepali justice system and has the final power to interpret the Constitution and the law.27 The Constitution is the supreme law of the land and the Supreme Court has the power to declare void any law ‘on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of any fundamental right conferred by this Constitution.’28 The Supreme Court has an extra-ordinary jurisdiction to carry out:

> [t]he enforcement of the fundamental rights conferred by this Constitution or of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.29

The Supreme Court has the extra-ordinary power to enforce the fundamental rights provided by the Constitution or any other right where there is no other remedy or only an inadequate remedy available, as well as to settle constitutional or legal questions where there is public interest or concern. For the enforcement of fundamental rights, the Supreme Court has the power to issue necessary and appropriate orders and writs, including writs of *habeas corpus, mandamus, certiorari, prohibition and quo warranto*.30

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26 *Constitution of the Kingdom of Nepal 1990* art 85.
27 Constitution art 128(2).
28 Ibid art 133(1).
29 Ibid art 133(2).
30 Ibid art 133(3).
The Constitution provides that in each of the seven provinces of the country there shall be a High Court.\textsuperscript{31} The Constitution empowers the High Court to issue necessary and appropriate orders and writs, including writs of \textit{habeas corpus}, \textit{mandamus}, \textit{certiorari}, prohibition and \textit{quo warranto}, for the enforcement of the fundamental rights conferred by the Constitution or for the enforcement of any other legal right in cases where the remedy provided is inadequate or ineffective or for the settlement of any legal question involved in any dispute of public interest or concern.\textsuperscript{32} Further to this, the High Court, as the Federal law provides, ‘has the power to originally try and settle cases, hear appeals and test judgments referred for confirmation.’\textsuperscript{33}

The Constitution provides that in all 77 districts in the country there shall be a District Court.\textsuperscript{34} The District Court has ‘the power to try and settle all cases under its jurisdiction, to try petitions under law, including petitions of \textit{habeas corpus} and prohibition’, and hear appeals against the decisions made by quasi-judicial bodies, and local level judicial bodies.\textsuperscript{35} At the local level, the Constitution provides a three-member judicial committee for the purpose of settling disputes under their respective jurisdictions in accordance with law.\textsuperscript{36} In addition to the formal court system, various forms of alternative dispute resolution practices exist, such as arbitration, community mediation, court-annexed mediation and TJS.\textsuperscript{37}

\textsuperscript{31} Ibid art 139.
\textsuperscript{32} Ibid art 144(1), (2).
\textsuperscript{33} Ibid art 144(3).
\textsuperscript{34} Ibid art 148.
\textsuperscript{35} Ibid art 151(1).
\textsuperscript{36} Ibid art 217(1).
\textsuperscript{37} See Appendix 1 for formal and informal justice actors in Nepal.
On the one hand, the Constitution provides for an independent, impartial and competent judiciary as a key part of ensuring access to justice for the people of Nepal.\(^{38}\) A law professor and expert on constitutional law in Nepal, Surya Dhungel, noted that the Constitution has made the Nepali judiciary a strong institution which has the important role of protecting the fundamental rights of people, interpreting law and constitutional provisions and in properly implementing the newly established federalism, especially in regard to resolving forthcoming disputes in relation to the use of power between central, provincial and local level governments.\(^{39}\)

As noted, the Constitution provides for judicial review and constitutional supremacy, which makes the judiciary the final arbiter of the law of the land. It has also been argued that the judiciary — under the Constitution — is very powerful because it has embraced the idea of ‘constitutional supremacy … by utilising the power of judicial review’.\(^{40}\) However, in many instances, these aspirations may be stifled due to a lack of gender and ethnic inclusivity in judicial appointments and appointments of court officials,\(^{41}\) the prevalence of corruption,\(^{42}\) delays in decision making and either delays or the non-execution of court decisions,\(^{43}\) insufficient human resources and/or poorly

\(^{38}\) Constitution preamble.


\(^{42}\) Transparency International, \textit{Global Corruption Report 2007: Corruption in Judicial Systems} (Transparency International, 2007) 236–9. This report considered judicial corruption in 37 countries including Nepal, which was covered in a chapter titled ‘Opportunity Knocks for Nepal’s Flawed Judiciary’. The report states: ‘In Nepal, many irregularities occur within the nexus of judges and lawyers … Nepal’s Judiciary is perceived to be one of the most corruption-afflicted sectors in the country.’ See 50, 236.

trained personnel,\(^\text{44}\) the over-use of formal language in court proceedings, and the geographic and financial inaccessibility of the formal justice mechanism for much of Nepal’s population.\(^\text{45}\) Further discussion in relation to the problems that the Nepali FJS faces is presented in Chapter 2 of this thesis.

The Constitution provides for formal courts of justice across the country. However, in the rural areas of Nepal, many local communities utilise TJS that operate according to their own culture and tradition for accessing justice at the community level.\(^\text{46}\) In these local dispute resolution systems, the person who settles the dispute (‘dispute settler’) is selected from within the particular community and he/she follows the customs and traditions of that particular community to settle disputes. In the Nepali context, approximately 85 per cent of community disputes do not utilise the FJS, instead the disputants choose to access the TJS.\(^\text{47}\) However, these systems have their weaknesses, such as a lack of recognition of the state; little or no role for women, Dalits\(^\text{48}\) and minority groups; and non-compliance with international human rights standards that guarantee access to justice. The strengths and weaknesses of TJS are discussed in more detail in Chapters 2 and 6 of this thesis.


\(^{48}\) Dalits are a group of people who were, traditionally, considered ‘untouchable’ in the Hindu caste system.
Currently, Nepal is in an historic phase of political, social and legal transition. The last seven decades in particular have seen many political transformations in Nepal. Such transition is relevant for this thesis because it has brought reform to the judicial systems of Nepal. The following brief socio-political account will contribute additional useful background knowledge about the origins of the current legal (and human) complexities of Nepal. As noted earlier, the changes in the field of law and justice can be traced back to 1856 when Jang Bahadur Rana became the Prime Minister and he seized all state power and rendered the king a figure-head only. He then established a rule that ‘the office of the Prime Minister would be passed through hereditary succession’, thus creating a prime-ministerial ‘dynastic dictatorship’; this lasted for one hundred and four years. In the period of Rana rule, most political and administration positions and state resources were occupied by Rana family members and the people generally were excluded. With the motive of supressing the movement for democracy and continuing the Rana state prerogative in the face of rising opposition, Rana Prime Minister Padma Shamsher promulgated the first ever constitution in Nepal, namely the *Nepal Government Act 1948*. 

Nevertheless, a revolution in 1951, led by an alliance of democracy activists and the then exiled King Tribhuvan Bir Bikram Shah, was successful, and the autocratic Rana

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50 Sushil Kumar Naidu, *Constitutional Building in Nepal* (Gaurav Book Center, 2016) 1–2.
51 Ibid.
52 Baral, above n 49, 3.
regime (1846–1951) came to an end. The King issued a royal proclamation and announced his commitment to democratic rules in the country and an election of a Constituent Assembly (CA) in order to promulgate a democratic constitution for Nepal. Upon the demise of his father in 1955, Tribhuvan Shah’s son Mahendra Bir Bikram Shah ascended the throne, and instead of conducting a CA election, he promulgated a new constitution created by an expert committee and then held a parliamentary election in 1959. In the election, the Nepali Congress Party won more than two-thirds of the seats and formed a government. However, due to some differences with the democratically elected government, King Mahendra dissolved the Nepali Congress government using his emergency powers in December 1960 and established direct rule in Nepal.

King Mahendra then promulgated a new constitution in 1961 that continued the king’s direct rule through a party-less ‘panchayat democracy’. Krishna Khanal, a political science professor in Nepal, noted that the panchayat democracy was considered a form of ‘guided democracy’ in which all parties were banned, and the one-party system was established while the king was declared to be the supreme power in the country and was the custodian of state sovereignty.

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55 Shneiderman et al, above n 54, 2049; Dahal, above n 53, 58.
57 Dahal, above n 53, 68–9; Prashant Jha, above n 56, 11.
The panchayat system came to an end through the emergence of the people’s movement; and in November 1990 the Constitution of Kingdom of Nepal 1990 was promulgated, which established a multi-party democracy and constitutional monarchy.\textsuperscript{59} However, the central features of Nepali national identity remained, namely it continued to be a ‘Hindu kingdom, though it recognized Nepal’s multi-ethnic character; the monarchy remained in place, though within a constitutional framework; and Nepali remained the official language’.\textsuperscript{60}

Not all were satisfied with the Constitution of 1990 in the now multi-party system (with some parties experiencing multiple internal divisions). Preeminent, however, was the Communist Party of Nepal-Maoist (CPN-M). In 1996, the CPN-M registered a 40-point list of demands with the Government of Nepal that included: the abrogation of royal privileges, the need for CA elections for new constitution making, and the overhaul of the semi-colonial relationship with India and the semi-feudal nature of the economy.\textsuperscript{61} If these were not met, the CPN-M threatened — in the name of a ‘people’s war’ — to launch an armed struggle against the Government of Nepal and, indeed, did so later in 1996.\textsuperscript{62} Subsequently, in the face of the growing CPN-M insurgency and the democratic government’s inability to address it, King Gyanendra, a constitutional monarch (1950–51 and 2001–2008) under the Constitution of the Kingdom of Nepal 1990, dissolved the democratically elected government and seized state power in

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\textsuperscript{60} Shneiderman et al, above n 54, 2050–1.

\textsuperscript{61} Prashant Jha, above n 56, 18.

\textsuperscript{62} Ibid 18; Kul Chandra Gautam, Lost in Transition: Rebuilding Nepal from the Maoist Mayhem and Mega Earthquake (Nepalaya, 2015) 128. However, people who are against the armed struggle argue that the armed insurgency was launched not for social change but for gaining ‘quick-and-easy power’. See Kanak Mani Dixit, Peace Politics of Nepal: An Opinion from Within (Himal Books, 2011) 10.
The democratic political parties (such as the Nepali Congress Party and Communist Party of Nepal – United Marxist Leninist) and the CPN-M launched a nationwide protest against the King’s rule and in April 2006, due to the national political uprising and international pressure, King Gyanendra reinstated the previous parliament and in May 2008 the monarchy was abolished. The civil war between the government security forces and CPN-M cadre lasted for ten years (1996–2006) and only came to an end after the Comprehensive Peace Agreement (CPA) in 2006 between the warring parties. The impacts of the civil war on Nepali people, including the impact on access to justice, are discussed further below in this Chapter of this thesis.

Since the successful 2006 political uprising, and in accordance with the Nepali people’s aspiration for change, Nepal has been undergoing a political transformation that could bring significant societal changes ‘including socio-political inclusion of diverse ethnic groups (ethnic/national, caste, religious, linguistic, and regional identity) and forms of democratic structures for the new Nepal.’ Nepali people hoped that CA would:

[p]rovide ethnic and other marginalized, excluded, subjugated groups with an opportunity to imagine and frame in the new constitution their vision of a truly

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64 Do and Iyer, above n 63, 737.

65 Dixit, above n 62, 10–14.

egalitarian, inclusive, multicultural society and thereby provide an alternative to the existing models of society against which they have struggled hard and long.\textsuperscript{67}

In order to embrace the achievements of the people’s movements, such as a federal form of governance, inclusive democracy, and secularity, Nepal promulgated the new Constitution through the CA on 20 September 2015.\textsuperscript{68} The Constitution aims to fulfil the aspirations of Nepali people by restructuring the nation as a new Nepal ‘for sustainable peace, good governance, development and prosperity through a federal, democratic, republican system of governance.’\textsuperscript{69} The Constitution, among other things, is committed to ‘establishing an independent, impartial and competent


\textsuperscript{68} For the first time in the history of Nepal, a Constituent Assembly (CA) was instituted in 2008. The CA is a body of people’s representatives instituted for the purpose of drafting a constitution. In Nepal, the first election for the CA was held on April 2008 and a 601 members CA was constituted but it failed to promulgate a new constitution due to its inability to resolve certain issues and dissolved in 2012. In the November 2013 election for the second CA, again a 601 member CA was constituted. On 20 of September 2015, the CA finally declared a new constitution for Nepal. However, many ethnic groups and Madhesi people remain unhappy with certain provisions (such as the federal model adopted by the Constitution and its provisions relating to citizenship). For further information in relation to the constitution making process in Nepal through the CA and post constitution unrest in the country, see Bipin Adhikari, Nepal Constituent Assembly Impasse: Comments on a Failed Process (Nepal Consulting Lawyers, 2012); Bipin Adhikari, The Status of Constitution Building in Nepal (Nepal Constitution Foundation, 2012); Mahendra Lawoti, ' Reform and Resistance in Nepal' (2014) 25(2) Journal of Democracy 131; Seira Tamang, 'Exclusionary Processes and Constitution Building in Nepal' (2011) 18(3) International Journal on Minority and Group Rights 293, Mm Bishwakarma, 'Contentious Identity Politics in Federalism: Impasse on Constitution Writing in Nepal' (2015) 9(2) International Journal of Interdisciplinary Civic & Political Studies 13; S D Muni, 'Nepal's New Constitution: Towards Progress or Chaos?' (2015) 50(40) Economic and Political Weekly 15; Mahendra Lawoti, 'Constitution and Conflict: Mono-Ethnic Federalism in a Poly-Ethnic Nepal' (Paper presented at the International Conference on Identity Assertions and Conflicts in South Asia, New Delhi, India, 2–4 November 2015); Prashant Jha, above n 56; Satish Kumar, 'New Constitution Triggers Violence in Nepal' (2015) 397 Alive 20; International Crisis Group, Nepal’s Divisive New Constitution and Existential Crisis (2016).

\textsuperscript{69} Constitution preamble. The Constitution was promulgated by the Constituent Assembly on 20 September 2015. Making ‘a new Nepal’ and ‘state restructuring’ are popular terms in the context of post 2006 people’s movement in the country. This means adopting a federal structure in governance and an inclusive democracy where all the marginalised groups (such as women, Indigenous people, and Dalits) get an opportunity to utilise power and resources available in the country. In this regard, see Krishna P Adhikari, 'New Identity Politics and the 2012 Collapse of Nepal's Constituent Assembly: When the Dominant Becomes "Other"' 30(6) Modern Asian Studies 1; Ghai and Cottrel, Creating the New Constitution, above n 58; Sara Shneiderman and Louise Tillin, 'Restructuring States, Restructuring Ethnicity: Looking across Disciplinary Boundaries at Federal Futures in India and Nepal' 49 Modern Asian Studies 1, 29–39; Lawoti, 'Constitution and Conflict', above n 68; Pradhan, 'Negotiating Multiculturalism in Nepal', above n 67, 22; Naidu, above n 50; Baral, above n 49.
judiciary and the rule of law” and defines the nation as the ‘secular, federal republic of Nepal’. A political science professor and noted political analyst in Nepal, Krishna Hachhethu, argues that the political transition that has been taking place in Nepal since 2006 and the Constitution is transforming Nepal into a democracy that is both liberal and inclusive. According to him, there are many fundamental similarities between liberal and inclusive democracies, such as ‘popular sovereignty, guarantee of fundamental rights, respect of human rights, rule of law, independent judiciary, adult franchise, periodic multiparty elections, rule by elected representatives, etc.’ However, in his view, these two types of democracy also differ substantially from each other. For example, liberal democracy stands for common citizenship and equality before the law, whereas inclusive democracy embraces a differentiated citizenship, recognises the collective rights of social groups, embraces diversity, accepts legal plurality including customary law, and supports proportional representation. A professor of political science in Nepal, Lok Raj Baral, noted that liberal democratic values have been dominating factors in Nepali policies since 1950s. According to him, however, after the political change of 2006, aspirations are revealed as shifting to inclusive democracy, the essence of which is ‘active participation of people

70 Constitution preamble.
71 Ibid art 4. For more than two centuries Nepal remained as a kingdom and adopted a unitary form of governance. Only after the people’s uprising in 2006 did Nepal transition to the People’s Republic and a secular federal state. For further details see Sebastian von Einsiedel, David M Malone and Suman Pradhan (eds), Nepal in Transition: From People’s War to Fragile Peace (Cambridge University Press, 2012); Prashant Jha, above n 56; Kailash Nath Pyakuryal, Bishnu Raj Upreti and Sagar Raj Sharma (eds), Nepal: Transition to Transformation (Human and Natural Resources Studies Center, Kathmandu University, South Asia Regional Coordination Office of NCCR North–South, 2008); Pawan Kumar Sen, ‘Should Nepal be a Hindu State or a Secular State?’ (2015) 35(1) Himalaya: Journal of the Association for Nepal and Himalayan Studies 65.
73 Ibid 290–1.
74 Ibid 291.
75 Baral, above n 49, 3.
irrespective of class, caste, ethnic loyalties, region and gender’,\textsuperscript{76} and therefore it avoids mere ceremonial participation of marginalised groups in, and the capture by few elites of, the decision making process as has happened in the past.\textsuperscript{77}

For there to be adequate access to justice, the ongoing political transformation needs to be embedded within the justice system. This thesis considers this issue by researching how TJS may be reformed so as to meet international human rights standards, and how TJS and the FJS can coexist to more aptly improve access to justice for all, with a focus on the marginalised groups, such as women, \textit{Dalits}, Indigenous, and other minority groups in Nepal.

As discussed above, this research is particularly timely, given that the CA promulgated a new constitution for Nepal in 2015 with the promise of wider inclusive democracy and the provision of access to justice to all Nepali people, including marginalised communities and minority groups that existed in the country.\textsuperscript{78} However, there were some reservations and dissatisfaction surfaced on matters in relation to the inclusion of

\begin{itemize}
  \item \textsuperscript{76} Ibid 119.
  \item \textsuperscript{77} Ibid 120.
  \item \textsuperscript{78} Constitution preamble, arts 38, 39, 40, 42, 43, 46. Art 306(a) of the Constitution defines the term ‘minorities’ as: ‘ethnic, linguistic and religious groups whose population is less than the percentage specified by the Federal law, and includes groups that have their distinct ethnic, religious or linguistic characteristics, aspirations to protect such features and subjected to discrimination and oppression’. Likewise, art 306(m) defines the term ‘marginalized’ as: ‘communities that are made politically, economically and socially backward, are unable to enjoy services and facilities because of discrimination and oppression and of geographical remoteness or deprived thereof and are in lower status than the human development standards mentioned in Federal law, and includes highly marginalized groups and groups on the verge of extinction.’ The Federal laws indicated by these constitutional provisions are yet to be promulgated.
\end{itemize}
and proper representation in the state mechanism (the executive, legislature, judiciary and local bodies) of Madhesi, Dalits, and Indigenous groups in the Constitution.

II IMPACT OF INTERNAL ARMED CONFLICT ON ACCESS TO JUSTICE IN NEPAL

The decade long conflict between the Government security forces and CPN-M (1996–2006), discussed above, took the lives of more than 13,000 people, an additional 1300 are still missing and thousands more were injured or displaced. The conflict formally came to an end after the signing of the Comprehensive Peace Accord (CPA) on 21 November 2006 between the parties to the conflict (the Government of Nepal and the CPN-M). After signing the CPA, the CPN-M agreed (among other things) ‘not to operate parallel structures (including legal and governmental) or any form of structure in any areas of the State or Government’ (as indeed it had done during the conflict).

However, the impact on the Nepali society remained and has affected the situation of access to justice in the country. In 2012, in relation to the situation of post-conflict Nepal, it has been observed:

79 The people who live in the Madhesh/Terai area of Nepal. The Madhesh/Terai is the lowland area of Nepal bordering with India.

80 See Bhandari, above n 40, 34; Shanti Kumari Rai and Tahal Thami (eds), Analysis of Nepali Constitution: From the Perspectives of Indigenous Rights (LAHURNIP, 2016); Kalpana Jha, The Madhesi Uprising and the Contested Idea of Nepal (Springer, 2017); Muni, above n 68; Naidu, above n 50, 102; Kumar, above n 68.


Nepal is struggling with multiple interlocking transitions: from war to peace, from autocracy to democracy, and from exclusionary and centralised state to a more inclusive and federal one. … this post-conflict transition is embedded in broader state transformation, has not been linear, has suffered setbacks, is likely to see further reversals and is unlikely any time soon to be completed.84

This quote confirms the turmoil created by transition from civil war to peace and the hindrances that the country is facing in this process. During the armed conflict, parallel legal structures (including ‘People’s Courts’) set up by CPN-M had come into existence in large parts of the countryside; and the police, public prosecutors and courts were functioning, but only in urban areas or district headquarters.85 Very few cases were filed with the formal justice system and court officials were seriously impaired in the conduct of their regular business.86 CPN-M cadres compelled people in rural areas not to enter the FJS, but rather to use ‘People’s Courts’87 for resolving their disputes and in the areas where such courts had not been established, the cases were heard by local CPN-M leaders or People’s Liberation Army (PLA) or militia leaders.88 People’s Courts operated on three levels: at a geographic district level, Appellate Court and Court of Last Resort. The operation of People’s Courts in rural areas and the obstruction of people who wanted to make recourse to the FJS had caused decreased numbers of cases in the formal justice forums in the period of armed conflict.89

87 The People’s Courts were mobile courts meaning that they were not established in fixed location but rather judges would travel and hear cases ‘on the spot’.
88 International Commission of Jurists, above n 86, 8.
The conflict not only impacted the FJS but also TJS in rural areas. In some districts, it was found that the CPN-M had put pressure on TJS either to stop functioning or to function in the interest of the CPN-M. Not all impacts were necessarily negative. As the International Commission of Jurists, an international non-governmental organisation (INGO), in its 2008 report noted:

There is no doubt that the CPN-M ‘justice system’ did not uphold international standards. At the same time, however, it should be recognized that it had some positive impact, especially in remote rural areas and that it served to highlight many of the shortcomings of the state justice system.90

A 2005 United Nations Development Project (UNDP) Nepal study, *Access to Justice during Armed Conflict in Nepal*, found that the armed conflict adversely affected people’s ability to access to justice.91 The report stated:

Groups who were traditionally disadvantaged in their access to justice have also been the most affected by the conflict. Their security has further deteriorated; the conflict has created new groups of people who are disadvantaged in accessing justice, such as internally displaced people and relatives of alleged Maoists rebels. … As a result of the conflict, poor and disadvantaged people feel greater distrust towards both formal and informal mechanisms of justice, and they are less able to use them.92

The 2005 report identified displaced people and relatives of alleged Maoist rebels as vulnerable groups who have problems accessing justice due to the ongoing armed conflict in the country. The report also found that conflict related cases such as extra-judicial killings, disappearances, torture in military custody and rape in custody were not being resolved and victims still awaited justice.93

90 International Commission of Jurists, above n 86, 28.
92 Ibid.
93 Ibid 42.
After considering the necessity for transitional justice mechanisms in order to address the human rights violation committed by both sides during the armed conflict, the Government of Nepal established two separate commissions: (i) the Commission of Investigation of Enforced Disappearances; and (ii) the Truth and Reconciliation Commission in accordance with the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act 2014* (Nepal). These commissions are currently in operation to provide justice to the conflict victims in Nepal.

With regard to the impact of the armed conflict on the FJS, the then Chief Justice of the Supreme Court of Nepal, Honourable Ram Prasad Shrestha, states:

> Nepal’s judicial system being a sub-system of the overall political system remains very much affected by the developments taking place in the political sphere. In this sense, the Nepali judiciary is very much affected by the decade-long violent conflict that the country has had to face.

In saying this, he acknowledges the threats to judges and court officials and the obstructions parties faced in accessing the FJS to resolve their disputes during the armed conflict and the persistent impacts the period has had on the justice system.

### III JURISDICTION OF THE FORMAL JUSTICE SYSTEM AND TRADITIONAL JUSTICE SYSTEMS IN THE CONTEXT OF NEPAL

According to the Constitution, in each of the 77 districts of the country, there is a District Court ‘that shall have the power to try and settle all cases under its jurisdiction’. For the local level, the Constitution provides that a three-member

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96 Constitution art 151(1).
judicial body shall be in place in each local body in the country to settle disputes within the jurisdiction of the local body.\textsuperscript{97}

Regarding the jurisdiction of cases, the \textit{Administration of Justice Act 1991} of Nepal provides that ‘except as otherwise provided under the prevailing law, the District Court shall have power to try and settle, in original jurisdiction, all the cases within its jurisdiction.’\textsuperscript{98} If Article 151(1) of the Constitution and section 7 of the \textit{Administration of Justice Act 1991 (Nepal)} are read together, it is clear that all cases should be filed in the District Court or other institution established by the laws of the country and no other institutions have the power to try any case. Therefore, legally speaking, TJS do not have legal authority to resolve any case; but, in practice, TJS resolve a large number of cases at local level in the rural areas of the country.\textsuperscript{99}

In regard to the jurisdiction of criminal cases, according to the \textit{Nepal Government Cases Act 1992}, all serious criminal cases should be investigated by the police and charge sheets filed with the court concerned with the Government of Nepal as a plaintiff.\textsuperscript{100} In all serious criminal cases, the plaintiff is the Government of Nepal and the cases should be filed with the FJS. The victim and community people can play the role of witnesses if they so wish or are called to the court during proceedings. This is relevant to this thesis because in many instances TJS tend to handle (mainly minor) criminal cases and, in some instances matters that have been referred to TJS by police.

\textsuperscript{97} Ibid art 217(1).
\textsuperscript{98} \textit{Administration of Justice Act 1991 (Nepal)} s 7.
\textsuperscript{99} Nepal Law Society, above n 47, 15; Chhetri and Kattel, above n 8, 19; Interview with Kath-CS4 (8 August 2015).
\textsuperscript{100} \textit{Nepal Government Cases Act 1992} ss 7, 18, sch 1.
The next section, ‘Access to Justice’, analyses the situation of access to justice of marginalised groups such as women, Dalits and other minority groups in the Nepali context.

### IV ACCESS TO JUSTICE

#### A Defining Access to Justice

Access to justice is a broad concept that describes a wide range of issues that enable aggrieved parties to obtain legal remedies in a timely and affordable manner, while also protecting and promoting equality and the right to a fair trial.\(^\text{101}\) A reference to access to justice does not necessarily imply a particular outcome, but rather access to the means for obtaining justice, in an open and fair manner, under predetermined rules that include the right of access to formal judicial systems and legal representation during court proceedings.\(^\text{102}\) In a narrow sense, access to justice ‘focuses on the courts and on the other institutions of administration of justice, and the process of adjudication’ but in the broader sense it also addresses ‘the process of law making, the contents of law, the legitimacy of the alternative modes of legal representation and dispute settlement.’\(^\text{103}\) Furthermore, the ability of individuals to seek remedies within the international human rights context is also defined as access to justice.\(^\text{104}\)

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\(^\text{102}\) Ibid 5.

\(^\text{103}\) Yash Ghai and Jill Cottrel, ‘The Rule of Law and Access to Justice ’ in Yash Ghai and Jill Cottrel (eds), *Marginalized Communities and Access to Justice* (Routledge, 2010) 1, 3.

According to Rebecca L Sandefur, another common operational definition of access to justice indicates the availability and affordability of lawyers or legal aid in court cases.\textsuperscript{105} Defining a situation of equal access to justice, she states: ‘equal access to justice would mean that different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems.’\textsuperscript{106} Her narrow definition of access to justice is framed in the context of civil disputes rather than criminal matters and focusses only on the accessibility of legal aid to the disputing parties while a broader definition focuses on the presence of substantive equality amongst the disputing parties while resolving their disputes. Similarly, Gary Blasi suggests that access to justice can be defined in a narrow as well as a broad sense. According to him,: ‘[I]n most common usage access to justice means access to a lawyer, or what are generally regarded as next-best alternatives, such as assistance for self-represented litigants or demystifying court procedures.’\textsuperscript{107} In order to have a broader definition of access to justice, he suggests:

Access to justice must take account of legal needs other than those related to litigation or other dispute-resolving systems. … Access to justice implicates not only dispute resolution but also preventative law and transactional expertise, for those also determine outcomes over the longer term. … It would also encompass more than the means to obtain a fair outcome under current procedural rules or substantive law, or assistance in planning to avoid future problems under those rules.\textsuperscript{108}

The first definition by Gary Blasi focusses only on the legal assistance during the course of dispute resolution and criminal hearings while the second definition is broader since it includes not only a disputant’s ability to avail themselves of justice in

\textsuperscript{105} Rebecca L Sandefur, 'Access to Civil Justice and Race, Class, and Gender Inequality' (2008) 34 Annual Review of Sociology 339, 340.


\textsuperscript{108} Ibid 877–8.
regard to the present grievances but also to tackle possible injustices that may arise in the future. Further to this, he broadens the ambit of access to justice to include effective participation ‘in the political and legal processes that determine law and procedure relevant to future and potential interests.’ ¹⁰⁹

Deborah L Rhode broadly defines access to justice as encompassing (a) access to competent, government-subsidised legal assistance for those who need legal aid but cannot afford its cost; (b) access to affordable services and dispute resolution systems that would allow self-representation; and (c) for disputes that cannot be resolved informally, parties should have access to a dispute resolution body that offers timely, equitable and cost-effective remedies. ¹¹⁰ This definition is wide enough to embrace legal assistance, the possibility of informal resolution of disputes and criminal trials, and access to a system that is speedy, affordable and equitable.

For the purpose of the analysis in this thesis, the working definition of access to justice is that adopted by the UNDP which states that access to justice is ‘the ability of people to seek and obtain a remedy through formal or informal justice institutions in conformity with human rights standards.’ ¹¹¹ It further notes that ‘access to justice entails much more than improving an individual’s access to a court or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial

¹⁰⁹ Ibid 878. In this thesis the term ‘dispute resolution’ refers to the resolution of both civil and criminal matters in general and in the context of the modern or more recent operations of the traditional justice system only to petty (minor) criminal matters, the more serious criminal matters now lying within the jurisdiction of the FJS.


outcomes are just and equitable.\textsuperscript{112} The reason for selecting a working definition that includes reference to both formal and informal systems of justice and indicates is necessary due to the context of Nepal’s complex law which involves both formal and traditional axes that may operate separately or in combination in different areas of human activities and reflect various approaches to justice seeking and obtention in different areas and communities in Nepal. The UNDP definition includes both formal and traditional systems and also the human rights principles that also need to be respected while accessing justice. While many of the definitions mentioned above do not include informal systems as forums for accessing justice, the UNDP definition does embrace both formal and informal (including traditional) forums of justice and ‘conformity with human rights standards’; hence its selection as the thesis’s working definition. This is most apt as the main subject of this thesis is the use of traditional forums of justice in Nepal, especially by Indigenous communities whilst the necessity for conformity with human rights standards (usually of substantially western origin) can be a source of contention in societies of different cultural heritages whether monocultural or diverse (as is evidenced by the reservations by numerous countries to specific items in various human rights related treaties), yet some such societies also regard the adoption of these conventions and treaties as necessary for progress, preferring to reach some degree of accommodation of their provisions that limits their effectiveness ‘on the ground’. The inclusion of a Human Rights Based Approach (HRBA) relates directly to and reflects the complexities of law and the desire for ‘progress’ in such societies where advancement that is internationally acceptable is seen as highly desirable, though some adjustments to suit a particular society or culture may be required. This thesis focusses on within-country experiences of the creation,

maintenance and sometimes reconstruction of access to justice in Nepal, and including both formal justice and traditional justice systems. It begins with an examination of the nature and dimensions of ‘access to justice’.

The discussion above suggests that ‘access to justice’ describes a broad ‘bundle of issues’ that are related to the ability of individuals or communities to seek remedies through legitimate means for the perceived violation of rights.\footnote{Dias, above n 101, 5.} This means access to justice does not only relate to the establishment of institutions and procedural rules, but also the enactment of substantive legal provisions and the empowerment of justice seekers to seek justice.\footnote{Ibid 7.} As the UNDP observes, access to justice is a concept that needs to be adapted to a particular context so that justice institutions can be established both within formal or customary law spheres.\footnote{United Nations Development Program, Programming for Justice, above n 111, 5.} To ensure access to justice is achieved, it is not sufficient to simply make available a forum in which a litigant can bring an action. It also requires that ‘his or her case [be] heard or adjudicated in accordance with substantive standards of fairness and justice.’\footnote{Francioni, above n 104, 1.}

B Access to Justice for Marginalised Groups

The working definition of access to justice acknowledges that even within a country, access to justice (and legal and judicial outcomes) can vary from community to community. There are various factors, such as poverty, level of education and level of representation in the state mechanisms (the executive, the judiciary, and legislative bodies), local bodies or in other decision making bodies that can have a direct impact

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\footnote{Dias, above n 101, 5.}
\footnote{Ibid 7.}
\footnote{United Nations Development Program, Programming for Justice, above n 111, 5.}
\footnote{Francioni, above n 104, 1.}
on the capacity of individuals to access justice. A former justice of the Australian High Court, Michael Kirby, has pointed out that in most countries justice is only for ‘well to do’ people because these people know about their rights, they can hire competent lawyers, and they know where to go and how to seek justice, but for poorer people, refugees, ethnic minorities, homeless and other marginalised groups, seeking justice is not an easy task. Likewise, Rebecca L Sandefur argues that socio-economic status and social class, race and gender make a difference to a person’s capacity to access justice. She found that ‘factors reflective of social rank, such as a sense of entitlement or feelings of powerlessness, as well as differences in past experiences with justice problems, may play an important role in creating class-stratified patterns of action and inaction.’ According to her, people often do not consider that their problem is a legal problem and think that they can solve the problem themselves or do not believe that the problem can be resolved; therefore, they do not attempt to access justice, instead they remain with the grievances unresolved.

In the context of access to justice for Aboriginal and Torres Strait Islander people (Indigenous populations of Australia), Elena Marchetti argues that ‘different groups of people have different needs when it comes to the justice system — one size does not fit all.’ She further states:

119 Sandefur, 'Access to Civil Justice and Race, Class, and Gender Inequality', above n 105, 340.
120 Ibid 347.
Access to justice is not simply about redefining laws so that in theory they reflect the lived experiences of Aboriginal and Torres Strait Islander people. Access to justice also requires changes to practice so that Aboriginal and Torres Strait Islander people feel confident and comfortable with using the family law system to resolve family law disputes. Their underrepresentation as clients of family law services will only change if the system changes to accommodate their needs.\(^{123}\)

Her argument is that access to justice cannot be achieved by merely changing laws; it may require systemic changes reflected in processes and procedures that meet the needs of a particular group seeking justice.

The United Nations Commission on Legal Empowerment of the Poor in 2008 highlighted that access to justice means ensuring that:

\[
\text{all citizens should enjoy the effective protection of their basic rights, assets and livelihoods, upheld by law. They should be protected from injustice, whether caused by their fellow citizens or government officials, all of whom — high and low — must be bound by the law.} \tag{124}\]

However, the report also acknowledged that ‘the poor may be unable to access the justice system because they do not understand it, or lack knowledge about it. They may be illiterate, which severely hampers their ability to interact with the justice system.’\(^{125}\)

A review conducted by the World Bank in relation to access to justice and legal empowerment initiatives identified that ‘poor people were particularly reluctant to make use of the formal court of justice and that they perceived the courts to be biased, corrupt and inaccessible.’\(^{126}\) The problems with access to justice in Nepal through both TJS and the FJS are discussed in Chapter 2 of this thesis.

\(^{123}\) Ibid 13.


\(^{125}\) Ibid 32–3.

As outlined above, there are varied definitions of access to justice, but for my PhD I have chosen to view access to justice according to the principles enunciated in the United Nations Development Program report: *Programming for Justice: Access for All — A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice*. I am therefore researching the ability of Nepali people to seek and obtain a remedy (in civil matters and petty criminal cases) in conformity with both procedural and substantive principles of access to justice, consistent with human rights standards, either through the FJS or TJS.\(^{127}\) For the purpose of my analyses, the human rights standards relating to access to justice are derived from the international human rights instruments to which Nepal is a state party. For example, the standards reflect non-discrimination,\(^{128}\) the right to participate,\(^{129}\) an absence of torture, ill-treatment and physical and mental harm,\(^{130}\) and the recognition that minority groups, such as

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\(^{127}\) United Nations Development Program, *Programming for Justice*, above n 111, 5. As mentioned earlier, one of the reasons for selecting the UNDP definition is that it recognises TJS as a dispute resolution mechanism and another is the definition is based on the international principles of human rights that are relevant to access to justice. The use of an HRBA framework for the analysis of structure and operation of selected TJS in the Nepali context is important as it relates directly to the complexities of law and the desire for ‘progress’ in such societies.


\(^{130}\) UDHR art 5; ICCPR art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’) art 2, [Nepal acceded to the Convention on 14 May 1991].
Indigenous people, women, and other minority groups, have equal access to justice. Chapter 7 of this thesis explores these rights in the context of Nepali TJS in greater detail.

V RESEARCH OBJECTIVES

The objectives of this PhD project are to: (i) establish the status, structure and operation of selected TJS in the Nepali context; (ii) determine whether TJS in Nepal are resolving disputes and functioning consistently with the international principles of human rights; and (iii) identify and recommend possible options for establishing relationships between TJS and the FJS in the Nepali context so that access to justice in Nepal (especially in rural areas among Indigenous groups) is improved.

My interest in conducting this research comes from my childhood and professional experience of having witnessed the widespread use of TJS in my village in the Lamjung district of Nepal. After having completed my law degree, I reflected on the lack of reference to and acknowledgement of TJS in my degree, despite the fact that TJS settled the majority of the cases in rural Nepali settings. During my professional career, I co-founded the Forum for Protection of People’s Rights Nepal (PPR Nepal) in 2003, and have been involved in issues related to access to justice and human rights in Nepal for a number of years. That gave me an opportunity to have experience

131 ICCPR art 27; CRC arts 3, 40; CERD art 6; ILO Convention 169 art 8.

132 In my village, there has been no research in this regard but I estimate less than five per cent of cases go to the formal justice forums such as police and the courts.

133 PPR Nepal is a Non-Governmental Organisation based in Kathmandu, the capital city of Nepal, working in the field of human rights and access to justice in Nepal. For details, visit its website: Forum for Protection of People’s Rights, Nepal <www.pprnepal.org.np> (accessed 8 February 2018). I was founder General Secretary of the organisation. From August 2006 to September 2010 I served as a Program Director; from October 2010 to December 2013 as an Executive Director, and currently I am Chairperson of the Executive Board of the organisation.
working with Indigenous groups and in the field of traditional justice in the Nepali context, which in turn piqued my interest in researching the use of TJS in rural areas and how they comply with standard human rights principles.

Although I do not belong to an Indigenous group, while working on the issues related to access to justice in Nepal, I came to realise the importance of TJS for the access to justice by Indigenous groups and people living in poverty in rural areas. From my own experiences and from reading scholarly works related to access to justice, I became aware of the various barriers to accessing justice through the FJS faced by rural people and Indigenous groups in Nepal, including their lower representation in the judiciary, language barriers in the FJS, and a lack of accessibility to the FJS based on poverty, a lack of knowledge about their rights, and the people’s geographic remoteness.134

For my PhD project, I have selected three TJS — Badghar, Sir Uthaune and Mukhiya that are practised by three different Indigenous groups135 from different geographic locations — Dhankuta, Mustang and Bardiya districts of Nepal respectively. The three selected TJS — Badghar, Sir Uthaune and Mukhiya — are practised by three different Indigenous groups of Nepal namely, the Tharu, Rai and Thakali groups respectively,


135 Indigenous groups are sometimes referred as ‘indigenous nationalities’, ‘Indigenous peoples’, ‘Indigenous communities’ and ‘Aadibasi/Janajati’ in the Nepali language which means the communities who have their own mother tongue and traditional culture and do not fall under the conventional Hindu hierarchical caste structure. Section 2(a) of the National Foundation for Development of Indigenous Nationalities Act 2002 (Nepal) defines Indigenous peoples or nationalities of Nepal, as ‘those ethnic groups or communities that have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own’. The Government of Nepal officially recognises 59 groups as Indigenous communities that are distributed throughout the country.
in different parts of the country. The reasons for selecting these particular three TJS and geographic locations are discussed in detail in Chapter 4 of this thesis.

As I am not an Indigenous person and yet my thesis considers the justice practices of three different Indigenous groups of Nepal, I have to be mindful of my position as a non-Indigenous researcher and ensure that I adopt a ‘decolonising framework’ as suggested by Tuhiwai Smith.\textsuperscript{136} Adopting the decolonising framework for conducting research has helped me to minimise possible unwanted adverse consequences to the Indigenous communities in which I worked and encouraged me to adopt an indigenist standpoint in conducting the research. The tenet of the decolonising framework, the importance of using this framework for my PhD project, and how I used this framework are discussed in Chapter 4 of this thesis.

\section*{VI \hspace{1cm} Research Questions}

The political and judicial history of Nepal outlined above explain why it is that in Nepal TJS and the FJS are operating across the country and how it is that these systems are being utilised as dispute resolution forums by the Nepali people,\textsuperscript{137} with the vast majority of people using TJS to resolve disputes. However, there is a lack of research comprehensively analysing the efficacy of using TJS, including whether (or to what extent) TJS are providing Nepali people with an accessible and fair system of justice consistent with the principles of human rights. This research project attempts to fill the

\begin{flushleft}\footnotesize\textsuperscript{136} Linda Tuhiwai Smith, \textit{Decolonizing Methodologies: Research and Indigenous Peoples} (Zed Books, 2012) 89.
\footnotesize\textsuperscript{137} International Alert, Forum for Women, Law and Development, and Legal Aid and Consultancy Centre, \textit{Integrated or Isolated? How State and Non-State Justice Systems Work for Justice in Nepal: District Assessment Report} (International Alert, 2012) 7–8.\end{flushleft}
gap in this area. In this context, my PhD research answers the following research questions:

- To what extent do the TJS in Nepal deliver justice in accordance with international principles of human rights?
- What are the strengths and weaknesses of TJS in Nepal?
- What type of relationship exists between TJS and FJS in Nepal?
- What type of relationship should exist between TJS and the FJS so as to improve access to justice in Nepal?

VII CONTRIBUTIONS OF THE RESEARCH

This research project makes an original contribution in relation to the literature of TJS and access to justice in the Nepali context in at least three ways.

Firstly, there has not been in-depth research in relation to the structure and functioning of the selected TJS and their contribution to access to justice for the people who are using these systems in the Nepali context. This research contributes to filling this gap by analysing the structure and operation of three selected TJS from a number of theoretical perspectives such as legal pluralism, HRBA and critical legal theories. Use of legal pluralism as a theoretical framework enabled me to explore how the use of TJS in Nepal as a dispute resolution forum enhances access to justice in general and especially to the Indigenous community in the country. The use of HRBA as a theoretical framework allowed me to explore the situation of the respect of human rights in the TJS process in selected TJS in Nepal. Nepal is a country of diversity in
terms of caste, ethnicity, religion, language and social status. The use of critical legal theories that include critical legal studies, feminist legal scholarship, intersectionality, critical race theory, critical indigenous scholarship, postcolonial theory and orientalism enabled the researcher to analyse the different dynamics of access to justice of the diverse population in the country. Critical legal theories provided a framework in the thesis on which to build a basis to analyse and understand the subordination, exclusion and exploitation that marginalised communities face in the process of accessing justice in the TJS process in the Nepali context. In addition, the research has analysed in detail the reasons for using TJS and the limitations faced by the selected TJS in Nepal.

Furthermore, this research analyses the functioning of the selected TJS from the perspectives of international human rights principles that are related to access to justice and identifies gaps in the literature such as in relation to use of torture in the TJS process, and the estimation of degree of respect for the rights of women, Dalits, Indigenous peoples and other marginalised groups in the processes adopted by the selected community-based TJS. Based on the analysis, the research makes recommendations for TJS reform so that these systems operate consistently with the relevant international human rights principles. This thesis adds substantially to this area of research as very few Nepalese TJS have been studied, in terms not just of the type of TJS but their location and diversity, and the depth with which their operations — and interactions with other justice systems — are addressed.

Finally, one of the major areas of contribution of this research is that this research analyses the existing relationship between TJS and the FJS in the Nepali context and

138 See discussion in Chapter 2 and 3.
explores the possibility of linking them. The research explored the possibility of linking TJS with the FJS and linking TJS with the local level bodies, and examined merits and demerits of all the options. Based on the evidence, the research recommends linking TJS and the FJS so that access to justice in the country in general, and especially for the people using TJS, is improved.

VIII CHAPTER OUTLINE

This thesis is divided into nine chapters. Chapter 2 presents a review of the relevant literature in relation to access to justice in Nepal through TJS and the FJS as well as the relationship between these two systems of justice. The chapter also briefly describes the situation of access to justice in the post-conflict era in the country.

Chapter 3 analyses a number of theories relevant to this research. The analysis of the data in this project is informed by legal pluralism, human rights-based legal theories, and critical legal theories, including critical legal studies, feminist legal scholarship, intersectionality, critical race theory, critical Indigenous scholarship, postcolonial theory and orientalism.

Chapter 4 describes the methodology that was used to conduct this research. The chapter presents the reasons why qualitative methods were used and the reasons for selecting three TJS as case studies. Chapter 5 describes and analyses the structure and operation of selected TJS within the theoretical frameworks discussed in Chapter 3. The chapter outlines the structure and the process of each type of dispute resolution body, and the selection process, qualification, tenure and removal process of dispute settlers.
Chapter 6 analyses and presents the participants’ perspectives on the positive aspects of using TJS for the resolution of disputes. The chapter also sheds light on the shortcomings identified by participants using the selected TJS. Chapter 7 considers the extent to which the selected TJS in Nepal abide by the international principles of human rights, such as non-discrimination and equal participation, absence of torture and ill-treatment, and respect for Indigenous customs, traditions, institutional processes and languages.

Chapter 8 analyses how TJS and the FJS in the Nepali context currently co-exist and considers the options for linking TJS and the FJS so that disputants are better able to access appropriate forums to resolve their matters.

Finally, Chapter 9 summarises the major findings of the research and recommends possible options for linking TJS and the FJS as well as measures for improving access to justice for all Nepali people in general and especially for those people using TJS.
CHAPTER 2: LITERATURE REVIEW

INTRODUCTION

This chapter presents a review of the literature related to access to justice through the FJS and TJS in the Nepali context. It also reviews the literature that has analysed the existing relationships between TJS and the FJS. Finally, this chapter sets out the gaps in the literature in relation to access to justice in Nepal and the contribution this research makes in the knowledge of this field.

I  FORMAL AND TRADITIONAL JUSTICE SYSTEMS IN NEPAL

A  Formal Justice System

The structure of the FJS, the federal system and the jurisdiction of the courts was set out in Chapter 1. This section introduces the problems people have with access to justice in the FJS. The objectives of the FJS in Nepal as stipulated by the Second Five Year Plan of the Nepalese Judiciary, 2013-2014 are:

To establish a system of justice which is independent, competent, inexpensive, speedy, and easily accessible to the public and worthy of public trust and thereby to transform the concept of the rule of law and human rights into a living reality and thus ensure justice to all.¹

The statement shows that the FJS aims to provide access to justice to everyone in Nepal in a timely fashion, while observing the rule of law and respecting human rights. In considering the post-conflict situation of Nepal the then Chief Justice of the Supreme Court of Nepal, the Honourable Kalyan Shrestha stated in 2007:

In the post-conflict situation, minority rights or the rights of the Indigenous community have been one of the potent issues. In order that lasting peace can be built, these issues must be addressed holistically and equitably … the role of the judiciary

in protecting the rights of the minorities and the Indigenous communities is nonetheless [also] important.²

According to him, the judiciary needs to play an important role in maintaining the supremacy of the Constitution through the use of the power of judicial review and ensuring access to justice to all justice seekers.³ However, he states that the FJS in Nepal ‘has encountered problems of arrears, delay, eroding quality and above all mounting consumer dissatisfaction’ with regard to the work that is performed by the judiciary.⁴ Similarly, another Supreme Court Justice of Nepal, the Honourable Anand Mohan Bhattarai, states that ‘in post-conflict situations there is often a tendency to view justice and peace as opposing concepts’ where the concept of justice may be compromised in the interest of securing ongoing peaceful relation and reconciliation; therefore, the FJS may face challenges when attempting to provide easy access to justice to the justice seeking population.⁵

The 2015 Constitution (promulgated by the Constituent Assembly) proclaimed ‘the people’s sovereign right and the right to autonomy and self-rule, while maintaining freedom, sovereignty, territorial integrity, national unity, independence and dignity of Nepal’.⁶ The Constitution is committed to, among other things, a socialism based on democratic norms and values, including a ‘multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic

⁴ Kalyan Shrestha, above n 2, 15.
elections, full freedom of the press, and independent, impartial and competent judiciary and the concept of the rule of law’. An expert on constitutional law in Nepal notes that the judiciary has an important role to play to effectively implement the fundamental rights of the people (as well as resolving disputes between different levels of government in the federal state system), and cautions that it would need to be independent, strong and fair in accomplishing such significant tasks as fulfilling the rights of people while strengthening the country’s democratic system.

The Constitution provides the fundamental rights to the people of Nepal that include the right to live with dignity (Article 16), the right to equality (Article 18), the rights relating to justice (Article 20), and the right against torture (Article 22). In addition, the Constitution provides the right to constitutional remedies in order to enforce the rights conferred by the Constitution (Article 46). However, Dalits, Madhesi and Indigenous groups and others have voiced their dissatisfaction with certain aspects of the Constitution as well the process that was followed in the formulation and proclamation of the Constitution. For example, regarding the process adopted by the Constituent Assembly (CA), it is argued that ‘important decisions [of the CA] were left to informal discussions between senior party leaders outside the formal CA procedures. The CA was effectively circumvented and its debate aborted; the

7 Constitution preamble.
9 Ibid 5.
10 Madhesi are the people who live in Madhesh/Terai area of Nepal. Madhesh/Terai is the lowland of Nepal bordering with India.
prescribed public consultations and hearings never took place.'\textsuperscript{11} As one CA member who represented the transgender community explained:

While I feel I have made progress as a representative of the transgender community, the general view seems to be that an individual representing a particular group is incapable of contributing to other issues. So, I was not invited to the crucial decisions on federalism, state restructuring, governance … Other than 14–15 major party leaders, the rest of the CA members are considered minorities in terms of participation.\textsuperscript{12}

A Madhesi political party leader and former minister, Rajendra Mahato, expressed his dissatisfaction over the Constitution and stated ‘our concern was a federalism with rights, we [Madhesi people] did not get the state restructuring as we aspired.’ The Constitution has also defied the past agreements and is also not in line with the Interim Constitution 2007.\textsuperscript{13}

Indigenous people, Madhesi and Dalits are demanding ‘identity centric federal states for their autonomy and development’ while ‘Indigenous groups, including Madhesi people, have claimed that State imposed “one language and culture” policy has infringed their linguistic, cultural identity’.\textsuperscript{14} The right to use one’s mother tongue is

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\item Sushil Kumar Naidu, Constitutional Building in Nepal (Gaurav Book Center, 2016) 20.
\item Cited in ibid 20.
\item Cited in Surendra Bhandari, Constitutional Design and Implementation Dynamics: Federalism and Inclusive Nation Building in Nepal (HIDR, 2016) 35. There was a degree of dissatisfaction with federalism expressed (or polemics undertaken about the nature of its formation) in various sections of the community such as the Madhesi (as above), the janajati adivasi (Indigenous or ‘ethnic groups’) and even major political parties (see Astri Suhrke, Restructuring the State: Federalist Dynamics in Nepal (CMI, 2014) 2, 4, 16–17.
\item Mom Bishwakarma, 'Contentious Identity Politics in Federalism: Impasse on Constitution Writing in Nepal' (2015) 9(2) International Journal of Interdisciplinary Civic & Political Studies 13, 13. See Mahendra Lawoti, ‘Constitution and Conflict: Mono-Ethnic Federalism in a Poly-Ethnic Nepal’ (Paper presented at the International Conference on Identity Assertions and Conflicts in South Asia, New Delhi, India, 2–4 November 2015). Suggestions have included the adoption of a three language policy with Indigenous People able to use their mother tongue as well as be educated in it, another language of Nepal as a second language and an international language as a third. The right to use and be educated in ones’ ‘mother tongue’ has implications not only for the administration of justice but also access to it. See, eg, Pratyoush Ona and Devaraj Humagain, ‘Janajati Magazines and the Contents of the Subaltern Counterpublic Sphere during the 1990s’ in Michael Hutt and Pratyoush Ona (eds), Political Change and Public Culture in Post-1990 Nepal (Cambridge University Press, 2017) 99, 111.
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\end{footnotesize}
significant for those wanting to access justice who do not understand the Nepali language (see Chapter 7 for detailed discussion).

The Constitution provides for the establishment of a system of government that respects the rule of law, based on principles of human rights and justice and the creation of an independent and competent system of justice.\footnote{Constitution preamble and part 11 Judiciary [arts 126–156].} Article 42(1) guarantees the right to social justice for the ‘socially backward’ groups in Nepal, groups that include ‘women, \textit{Dalit}, Indigenous people, \textit{Madhesi}, \textit{Tharu}, minorities, persons with disabilities, marginalized communities, Muslims, backward classes, gender and sexual minorities, youths, farmers, labourers, oppressed or citizens of backward regions and indigent \textit{Khas Aryas}’\footnote{Ibid art 42(1).} and guarantees the right to participation in State bodies on the basis of the proportionate inclusive principle. According to the Constitution, one of the State’s directive principles is ‘to establish a just and inclusive society’.\footnote{Ibid art 50(1): The political objective of the State shall be to establish a public welfare system of governance, by establishing a just system in all aspects of the national life through the rule of law, values and norms of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice, while at the same time protecting the life, property, equality and liberties of the people, in keeping with the vitality of freedom, sovereignty, territorial integrity and independence of Nepal, and to consolidate a federal democratic republican system of governance in order to ensure an atmosphere conducive to the enjoyment of the fruits of democracy, while at the same time maintaining the relations between the Federal Units on the basis of cooperative federalism and incorporating the principle of proportional participation in the system of governance on the basis of local autonomy and decentralization.} However, creating a category of ‘indigent Khas Arya’ (which includes \textit{Brahmins} and \textit{Chhetri}) for the purpose of proportionate inclusion has been criticised by some because this group (unlike ‘women, \textit{Dalits}, \textit{Janajatis}, \textit{Madhesis} and minorities’) has been competent traditionally and well represented in state bodies, such as the judiciary,
parliament and the executive. A female Madhesi writer, in this regard, observes: ‘The affirmative action has therefore lost its legitimacy in terms of focusing in redressing historical marginalisation, by including Khas Arya or [H]ill upper caste community, who are already dominant in politics and all state organs.’ She argues that, in contrast to Pahadiya (people inhabiting the hills of Nepal), Madhesi people face discrimination in obtaining Nepali citizenship, which situates them as ‘less equal citizens’ in Nepal. The delays and difficulties they face in obtaining citizenship constitute a deprivation of the implementation of their fundamental rights regarding the citizenship.

Deprivation of citizenship directly limits the ability of the Madhesi people to access justice because they are deprived of certain facilities in the court. Legal aid, for example, is provided only to Nepali citizens. A citizenship certificate is also required to own land, operate a business and to enter the public service in Nepal.

Judicial powers are reflected in Article 126 of the Constitution:

**Courts to exercise powers relating to justice:** (1) Powers relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with this Constitution, other laws and the recognized principles of justice. (2) All shall abide by the orders or decisions made in the course of trial of lawsuits by the courts.

Thus, according to the Constitution, judicial power shall be under the formal judicial bodies that are established as per the Constitution, but in practice, Nepal’s justice

19 People living in hilly areas of Nepal and of high caste, such as Brahmin/Chhetri.
21 Ibid 50. The example supplied is of a Pahadiya obtaining citizenship in a single day while a Madhesi application can take months. Thus, there are complexities relating to the right of citizenship via descent despite the seeming implicit treatment of the issue of citizenship by descent in the Constitution (see Constitution art 4).
system is made up of ‘a complex matrix of formal and informal systems of justice’; these different systems of justice work primarily in isolation from one another23 and the TJS operating in Nepal are not recognised in the Constitution.

1 Problems of Access to Justice in the Formal Justice System

The Strategic Plan of the Nepali judiciary sets out the vision for the country’s FJS, seeking to create one that is ‘independent, competent, inexpensive, speedy and easily accessible to the people’, and aims to ‘transform the concept of the rule of law and human rights into a living reality and ensure justice to all.’24 The Strategic Plan identifies the problems with the FJS as: ‘justice [in Nepal] is not only slow and cumbersome, it is also expensive. The court has failed to earn public trust and easy access to justice by the general public has not been maintained.’25 In relation to the problems the FJS is facing, High Court Justice Hon T P Shrestha states:

Currently, the courts have become a centre point of people’s dissatisfaction. In particular, the formality being observed in the administration of justice and complicated procedures and delays in the administration of justice are the main problems. … Consequently, for the downtrodden, distressed, women, poor and voiceless classes of the society justice has become inaccessible and difficult.26

In order to improve access to justice, Justice Shrestha recommends measures, such as making all judicial services free, expanding judicial services at the local level, establishing an effective system of legal assistance to needy service seekers, promoting


24 Supreme Court of Nepal, Second Five Year Plan, above n 1, 11.

25 Ibid 64.

of the system of mediation and recognising of TJS to resolve dispute at the local level.27

The inadequate number of appropriately trained court officers and judges and the backlog of cases in the courts are two of the main problems disputants face with the FJS.28 The Annual Report of the Supreme Court of Nepal 2015–16 concluded that in the Supreme Court there were a total of 28 275 cases, of which 6448 (22.8 per cent) were decided within a one year period, whereas 21 870 cases remained undecided.29

The data shows that even if no further cases are filed in the Supreme Court, it would take more than four years to decide the remaining cases. One of the causes of such delays was the low number of appointed judges in the year 2015–16.30

Free legal aid is considered an important aspect of access to justice.31 In the context of Nepal, the Legal Aid Act of Nepal 1997 was enacted with the aim of providing ‘legal aid for those persons who are unable to protect their legal rights due to financial and social reasons to provide for equal justice to all’.32 A study conducted by the Forum for Protection of People’s Rights, a non-governmental organisation (NGO), found that the legal aid services in the country were neither sufficient nor effective due to a large resources gap.33 The assessment recommended policy reform, such as amendment of the Legal Aid Act of Nepal 1997 and the establishment of a body to coordinate legal

27 Ibid 115, 119.
28 Ibid 105, 115.
30 Ibid 3.
32 Legal Act of Nepal 1997 preamble. See also Constitution art 20(10).
aid services provided by the courts, Nepalese government and various non-governmental organisations across the country, so that the needs of people are met.\textsuperscript{34}

Another problem the Nepali FJS faces in providing access to justice to the disputing parties is in relation to the implementation of the decisions made by the courts.\textsuperscript{35} Research on the implementation of decisions made of various courts, conducted by National Judicial Academy of Nepal in 2008, stated:

The situation of implementation of the court decisions was not found satisfactory. Some of the reasons of this are — poorly resourced decision implementation sections in the courts, low priority for decision implementation among the judicial functions, weak coordination among stakeholders and obsolete legal provisions.\textsuperscript{36}

The research concluded that the weak implementation of decisions has an enormous impact on limiting access to justice to the people and that has significantly contributed to the loss of public trust in the overall judicial system in the country.\textsuperscript{37}

2 \textit{Access to Justice for Marginalised Groups} in the Formal Justice System

Nepal is a complex, multiethnic/caste society with 126 caste/ethnic groups of which 59 are classified as Indigenous.\textsuperscript{39} The Nepali population comprises: women (51 per

\textsuperscript{34} Ibid 74–5.


\textsuperscript{36} Bhattarai, Bhattarai and Koirala, above n 35, iv.

\textsuperscript{37} Ibid v.

\textsuperscript{38} Constitution art 306(1)(m) defines ‘marginalized’ as ‘communities that are made politically, economically and socially backward, are unable to enjoy services and facilities because of discrimination and oppression and of geographical remoteness or deprived thereof and are in lower status than the human development standards mentioned in Federal law, and includes highly marginalized groups and groups on the verge of extinction.’

cent), Brahmin/Chhetri (31 per cent), Terai/Madhesi people (32 per cent), Indigenous peoples (36 per cent), and Dalits (13 per cent).\[^{40}\] Despite making up over a third of the Nepalese population, Indigenous peoples face ‘pervasive linguistic, religious and sociocultural discrimination and unequal access to resources.’\[^{41}\]

Many Indigenous and non-Indigenous scholars have identified and analysed the multidimensional nature of the discrimination and disadvantages faced by Indigenous groups in Nepal in accessing state-based mechanisms, the economy and the media sector that have direct adverse impacts upon these individual group members’ capacity for accessing justice.\[^{42}\] In principle, the Nepali judiciary embraces ‘fair demographic representation, promotes inclusive institutional culture and carries out its duties without compromising the merit and quality of justice’ as core values.\[^{43}\] However, a 2013 report by the National Judicial Academy revealed that within the judiciary the dominant societal groups of males (86.1 per cent) and Brahmin/Chhetri (77.6 per cent) compose by far the greatest part of the judiciary, while women, Indigenous groups and Dalits are underrepresented.\[^{44}\] In terms of Indigenous and ethnic/caste representation,


\[^{43}\] Supreme Court of Nepal, Second Five Year Plan, above n 1, 12.

a total of 233 judges in the country, 87.1 per cent are Brahmin/Chhetri and only 9.4 per cent are from Indigenous groups; Brahmin/Chhetri constitute 87.6 per cent of gazetted officers and 82.1 per cent of non-gazetted officers while Indigenous groups constitute 9.3 per cent of gazetted officers and 11.2 per cent of non-gazetted officers in the Judiciary.45

Among lawyers, 76 per cent are Brahmin/Chhetri, 18.3 per cent are from Indigenous groups and 1.4 per cent from the Dalit community. The figures indicate that Dalits are on the bottom rung of the hierarchy in Nepali society and they are one of the most excluded groups in the Nepali judiciary.46 It has also been noted that ‘the study of Dalits of Nepal has also been secondary to other scholarly concerns’.47

In the context of Nepal, the capacity of marginalised communities, such as Indigenous peoples, women, Dalits, Madhesi and other minority peoples’, to access justice is limited, particularly when compared to the capacity of the society’s elites. The United Nations Human Rights Committee has noted with concern ‘the extremely low representation of women, particularly Dalits and Indigenous women, in high-level decision-making positions’ in Nepal.48 Similarly, research conducted by the United Nations Development Programme (UNDP) in Nepal in 2014 on gender-based violence


found that Nepali women, especially the victims of gender-based violence, face problems accessing justice through the FJS:

It is difficult for female victims to obtain justice because of various factors, including discriminatory laws, slow legal processes, persistence of patriarchal norms and expectations, as well as [the] predominance of men in law implementing institutions, which is perceived to impede access to justice and favorable decisions for female victims.\textsuperscript{49}

In relation to access to justice in the FJS, an assessment of the security and justice sectors by a group of donor agencies in 2011 found that:

Access to justice is a major issue for the poorest and marginalised groups. … Poverty, discriminatory legal provisions, under-representation of women and the marginalized caste and social groups in the judicial service, physical distance of court houses and poor legal education represent a few of the numerous other barriers.\textsuperscript{50}

A study jointly commissioned in 2016 by the National Judicial Academy of Nepal (NJA) and UN Women in relation to women’s access to justice in Nepal reported that only 27.6 per cent women who feel their rights have been violated take legal action and the remaining 72.4 per cent do not.\textsuperscript{51} The report identified the main reasons for not taking action as: lack of financial resources; lack of knowledge of legal remedies; a lack of trust in the justice institutions; geographic distance from relevant agencies and services; and fear of or unfamiliarity with the complex procedures in the judicial proceedings.\textsuperscript{52}


\textsuperscript{50} DFID, UN Resident and Humanitarian Coordination Office and Danida/HUGOU, above n 35, 5. The assessment aimed ‘to develop an assessment of the challenges and opportunities faced in citizens’ access to security and justice … and options for improving the impact of international support…; in particular for the poor and excluded groups.’ Sources of data included published and unpublished documents and individual and group interviews with key informants (total 299).


\textsuperscript{52} Ibid 69.
In the context of access to justice through the FJS in Nepal, research conducted by the Asia Foundation identified that the FJS for the poor and rural Nepali people was ‘of little value and largely inaccessible for addressing their day-to-day issues.’\textsuperscript{53} It also found that the time and resources needed to reach in the courts, lengthy processes, corruption and unfriendly behaviour in the FJS are the main hindrances to access justice.\textsuperscript{54}

An Indigenous rights activist and advocate Shankar Limbu, argues that as a result of deeply entrenched discrimination which is embedded in the Nepali legal system, \textit{Dalits} and Indigenous groups continue to face discrimination when attempting to access justice.\textsuperscript{55} Similarly, Professor Mahendra Lawoti argues that the exclusion of the Indigenous community and other marginalised groups from the judiciary and the bureaucracy silences their views, further hindering access to justice for these groups.\textsuperscript{56} According to Professor Lawoti, the lack of representation of Indigenous peoples and other marginalised groups in the judiciary limits access to justice in two ways. First, the elites and hegemonic groups are not aware of the problems faced by the Indigenous and minority people. Secondly, because of the lack of proper representation, these groups have minimal or no trust to the FJS mechanism.


\textsuperscript{54} Ibid.


\textsuperscript{56} Lawoti, ‘Ethnic Politics and the Building of an Inclusive State’, above n 41, 143–4. Professor Lawoti, a Nepali citizen who teaches in the Department of Political Science, Western Michigan University, belongs to an Indigenous community of Nepal and has written extensively on the issue of political inclusion and protection of the rights of Indigenous communities of Nepal.
Nepal is a multilingual country in which 123 languages are spoken as the ‘mother tongue’.57 The Constitution recognises all of these languages as ‘national languages’ (Article 6) but the Nepali language in the Devanagari script is the ‘official language’ (Article 7) and as such is the ‘language of official business’ for all official communication across the country including the judiciary.58 The Nepali language is spoken as a mother tongue by only 44.6 per cent of the population (notably by the Chhetri and Brahmin who dominate the FJS) while most of the Indigenous communities have their own mother tongue.59 Many Indigenous people cannot speak, read or write the Nepali language, but are compelled to use it in the court, police and other government offices. These rules establish the hegemony of one language in the country by excluding the languages of Indigenous communities.

In 2015, a nine-member Commission on Easy Access to Justice was formed, headed by the Chief Justice of the Supreme Court of Nepal, to consider access to justice issues generally and in particular for marginalised groups, such as women, Dalits and Indigenous people.60 The mandate of the Commission includes raising public awareness of the equal rights of marginalised groups such as women, the poor and other incapacitated groups of people; preparing and implementing programs that enhance the capacity of people to use law and justice mechanisms for asserting their legal rights; establishing an effective support system to ensure easy access to justice; and identifying the factors that deter access to justice and finding appropriate solution to overcome these problems; identifying legal needs of women, the poor and other

58 Constitution arts 6, 7.
60 Press note distributed by the Supreme Court of Nepal, dated 26 July 2015.
needy groups in the country and providing policy recommendations and taking a coordinating role among the institutions that are involved in the field of access to justice.\textsuperscript{61} This initiative by the Supreme Court indicates that the judiciary acknowledges the fact that the situation of access to justice in the country is not satisfactory and requires effort to improve.

\section*{B Traditional Justice Systems}

\subsection*{1 Problem of Access to Justice of Traditional Justice Systems}

The term ‘traditional justice systems’ (and its acronym ‘TJS’) describes justice systems that exist at the local or community levels that have not been set up by the state and usually function by following the customs and traditional norms and values of the community, and for this reason, they vary over time and place.\textsuperscript{62} By their very nature, TJS vary from place to place, time to time, culture to culture and therefore it is difficult to have a universal or cross-cutting definition of TJS. Concepts such as, ‘traditional’, ‘non-formal’, ‘informal’, ‘customary’, ‘Indigenous’, ‘local’, ‘folk law’, religious, and ‘non-state’ justice systems are used interchangeably in different contexts to refer TJS.\textsuperscript{63}

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\item \textsuperscript{61} Ibid.
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For the purposes of this study, TJS are those dispute settlement mechanisms which are based on local customs, culture and traditions, utilised by local people to resolve disputes and are not part of the state/government apparatus and/or formed state funded justice system.\textsuperscript{64} In many developing countries, TJS are utilised to resolve an estimated 80 per cent of total disputes.\textsuperscript{65} It is recognised that ‘where state and non-state systems have developed in relation to each other, they often serve to complement and reinforce socially accepted codes and rules.’\textsuperscript{66} However, there was not until comparatively recently in-depth and comprehensive research in relation to how a sovereign state should respond to the informal or customary dispute resolution mechanisms within the larger state structure context (Connolly was able to comment on its lack in 2005 but this current research and some others have been being conducted to fill that void). The difficulties are often described in detail in even recent research, but both in research and ‘on the ground’ solutions are less frequent and may include: (i) the continued toleration of TJS; (ii) their encouragement to the detriment of more secular FJS in resurgent faith-centric states when existing IJS or TJS are consonant with that faith or even part of the formally recognised system. Here the ‘balance of power’ may shift towards religious rather than secular courts and legislation be introduced that formalises that relationship, though rulers may also assert their desire to retain control. In quasi-states informal justice may more resemble the rule of a military regime and have been instituted by non-state or transnational-state actors who may both institute and execute summary justice. The


\textsuperscript{65} Department for International Development, Safety Security and Accessible Justice: Putting Policy into Practice (2002) 58; Wojkowska, above n 64, 5.

elimination of other TJS may also be considered a necessity in a resurgence of a religious court system.

Further options include the elimination of TJS with justice seeking limited to the FJS. Alternatively, governments may seek to completely replace TJS or partly substitute other informal but state controlled mediation for them, as has occurred in part in Nepal with the creation of justice or mediation centres which are still considered part of the Informal Justice System and not the FJS/courts system, nor part of the TJS. These are not studied in the research conducted for this thesis which concentrates specifically on the TJS.67

67 Brynna Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38(2) Connecticut Law Review 239, 239. Difficulties 'on the ground' can include a clash between justice goals and means and outcomes, in terms of existing state law, and particularly in terms of human rights; hence there can be broad recognition of ‘the imperative to recognise customary law’ in regards to Indigenous peoples of Australia and yet ‘significant disagreement as to what this term means in practice’: Tony Fitzgerald, The Cape York Justice Study Report (2002) 112 cited by Miranda Forsyth, A Bird that Flies with Two Wings: Kastom and State Justice Systems (ANU Press, 2009). In Australia, traditional justice can emphasise retribution, and punishments include spearing. If strict traditional law and justice were ever adopted, relatives would be able to be punished for the wrong doings of their kin, death could be inflicted, banishment, approved ‘skin’ (clan, totem) marriages be the only ones permitted, polygamy, arranged marriages, initiation into ‘The Law’ involving adult circumcision, divorce practices (see, eg. Australian Law Reform Commission, Recognition of Aboriginal Customary Laws (ALRC Report No 31, 12 June 1986) ch. 12 ‘Aboriginal Marriages and Family Structures’ and ch. 21 ‘Aboriginal Customary Laws and Sentencing’. It should be noted that the ALRC Report contains accounts of the rare implementation of customary law in sentencing for some crimes (including manslaughter) [491]–[492]. See also Law Reform Commission of Western Australia, Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal law and Culture. Final Report (September 2006) (eg, ch. 1 ‘Challenging Customary Law Myths and Misconceptions’) where, rather like the need to increase the knowledge of local level body committees in regard to traditional law if those bodies are to be used as courts of appeal, so the LRCWA report recommends that the FJS familiarise itself with Aboriginal customary law so that evidence is understood and evaluated correctly and sentencing appropriate. Many practices have largely fallen into disuse but some are open to resurgence or recognition. In a state where not all Indigenous parties would assent to its implementation, what most consider ‘extremes’ would not be implemented, as there is a clash between such traditions and modern human rights that the vast majority would desire to enjoy, but they do highlight the difficulties involved when wishing to reassert one part of traditional law (eg spearings) and not others (life for life; ‘right skin’ marriage only). See also, Miranda Forsyth, ‘A Typology of Relationships between State and Non-State Justice Systems’ 2007 39(56) Journal of Legal Pluralism and Unofficial Law 67; Danish Institute for Human Rights (commissioned by UNDP, UNICEF and UN Women), Informal Justice Systems, Charting a Course for Human Rights-Based Engagement (2009) Matthias Kötter, Non State Justice Institutions : A Matter of Fact and a Matter of Legislation (Governance in Areas of Limited Statehood, SGFB 700, SFB-Governance Working Paper Series, No. 43, [Deutsches Forschungszentrum] DFG Collaborative Research Centre [Sonderforschungsbereich] (SFB), Berlin, June 2012).
Nevertheless TJS survive across the globe. The reasons for the widespread use of TJS internationally include: (a) their locations are more physically accessible (especially for remote communities); (b) decision makers use local language and procedures that are readily understood by the community; (c) TJS are economically affordable; (d) decisions are made in a timely manner; (e) dispute settlers understand the local context surrounding the dispute, and typically aim to restore social harmony; (f) in most cases, decisions are made by consensus of all parties involved; and (g) in some remote areas TJS are the only choice for people due to the absence of the formal justice system.

TJS serve the justice needs of people in a post-conflict situation, as discussed in Chapter 1, where the formal justice system may be entirely dysfunctional, either due to the destruction of physical resources or lack of personnel, or both. TJS are popular because they are deeply rooted in social structures; they have a high degree of spontaneous compliance with outcomes by the disputing parties and are cheaper to use than the FJS.

In favour of recognising and utilising the TJS internationally, it is argued: (i) the failure to recognise different systems of dispute resolution may in itself be discriminatory and exclusionary, and hence inequitable; (ii) there are often very good

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68 Ubink, above n 63, 2–3.
70 Ibid.
71 Connolly, above n 67, 240.
reasons why people choose to utilise TJS for dispute resolution that should be considered and understood; (iii) ignoring or trying to ‘stamp out’ TJS do not work, and in some cases doing so may create serious negative implications (such as, no justice at all being obtained as the matter cannot go to the FJS or persons are unwilling to take them to a court that they can ill afford and do not trust: alternatively people may ‘take justice into their own hands’ with no mediation or support); and (iv) depending and focusing only on the formal justice mechanism has proven to be insufficient for easy access to justice not only in developing but also in developed countries.\textsuperscript{73}

By recognising the fact that in many developing countries TJS are widely used in rural and poor urban areas where there is often minimal access to formal state justice, the Department for International Development in 2004 highlighted reasons for the wide use of TJS. These reasons included low cost, speedy dispute resolution, easy accessibility, cultural relevance and responsiveness to poor people’s concerns.\textsuperscript{74} However, it also identified some common problems associated with TJS operations. These include corruption and abuse of power, non-compliance with international human rights standards (such as discrimination or inhuman and degrading punishments), and lack of accountability.\textsuperscript{75}

TJS have been utilised to resolve a significant number of cases especially in developing countries and many marginalised groups, such as Indigenous people,

\textsuperscript{73} Chirayath, Sage and Woolcock, above n 66, 5.

\textsuperscript{74} Department for International Development, \textit{Non-State Justice and Security Systems}, above n 63, 2–3.

\textsuperscript{75} Ibid 4.
women and poor people are accessing justice through TJS. However, TJS have also been criticised for their inherent weaknesses. For example, TJS follow flexible rules of procedure and lack accountability; therefore, on many occasions the decisions of TJS reinforce power hierarchies in the community that discriminate against marginalised groups, such as women, at the expense of justice and human rights.

Further, although TJS are said to be voluntary, there may be social pressure to use TJS, and the disputant may fear reprisal or social exclusion should they enter the FJS. In many instances, when using TJS, disputing parties may be under significant pressure to agree to what is broadly understood to be fair and equitable. However, what is considered ‘fair and equitable’ can be influenced by power, status and wealth differentials between disputants, discriminatory social norms, and perceptions of the desirability of group cohesion. The right to appeal is considered essential to an accountable and transparent legal system but, in general, there are no such mechanisms within TJS, and TJS lack the binding force necessary to implement their decisions, with the TJS decision implementation primarily depending on social pressure.

76 Wojkowska, above n 64, 12; Connolly, above n 67, 239–40.
78 See Ubink, above n 63, 3–5; Wojkowska, above n 64, 13.
80 Wojkowska, above n 64, 23.
Access to Justice in Traditional Justice Systems in Nepal

As discussed in Chapter 1 of this thesis, TJS are widely used in Nepal especially by Indigenous groups for resolving disputes. In 1998, the Nepal Human Development Report recognised the important role of TJS in Nepal:

Most local disputes are traditionally adjudicated locally with the help of kin, members of the community and local elders. Customary laws and local adjudicatory structures are important forms of social capital. The high level of comprehension of such laws among communities and sub-communities and the absence of bureaucratization of procedures means that most disputes are settled far more promptly than in formal courts of law.81

In Nepal, the government recognises 59 ethnic groups as ‘Indigenous nationalities’.82

In 2009, the Government of Nepal formed a committee led by Professor Om Gurung (a senior anthropologist in Nepal) to re-examine the official list of Indigenous groups in Nepal. 83 Following field investigations and interaction with stakeholders, the subcommittee recommended that the list be expanded to 81 groups. However, the recommendation has not been adopted by the government, and thus the official number of Indigenous groups in the country remains at 59.84

Most of the Indigenous nationalities in Nepal have their own TJS for settling disputes in their community. For example, Sir Uthaune is practised in the eastern hilly region of the country by the Rai and Limbu communities.85 Likewise, the Badghar system is well established in the Tharu communities and practised across the Terai (southern

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84 Ibid.
lowland of the country) from west to east.86 The *Pancheti* system is widespread in almost all Madhesi communities in eastern Terai districts.87 *Tamudhin* is utilised by the Gurung community in the western part of Nepal and the Mukhiya system is in use in the Thakali community in the Mustang district (in the western Himalayan region).88 Similarly, the *Pancha Bhaladami* is a widespread traditional process of dispute settlement in areas of eastern Terai.89 Some TJS that are practised in Nepal are based on religious faith.90 For example, in some part of the Seti (far west) and Karnali (far north west) regions of Nepal, disputing parties go to the nearby temple (one of the popular temples is the Talkot temple) and ask for the help of the priest to resolve their disputes. This justice process is known as ‘Talkoti justice’.91 Due to the absence of any systematic effort to identify, document and preserve TJS practices there are no accurate data which give the exact number and nature of TJS practised in Nepal.92 To identify and document all TJS in Nepal would be a research project in itself. There are, however, a few studies that have been conducted relating to TJS in Nepal that have identified strengths and weaknesses of such systems, and areas that require further research.

In the Nepali context, Chhetri and Kattel (2004) found that TJS have been beneficial for many poor and disadvantaged people (such as women, Dalits and the poor in rural

87 Chhetri and Kattel, above n 86, 17.
88 Massage, Kharel and Sharma, above n 85, 9.
89 Coyle and Dalrymple, above n 23, 1 vi.
91 Ibid 182–3.
92 Coyle and Dalrymple, above n 23, 2.
communities) as it facilitates access to justice by those who are otherwise unable to access justice via the FJS due to their lack of knowledge, resources and geographic remoteness.\(^{93}\) Pun and Malla (2005) identified that the beneficiaries of TJS in the selected districts were poor and disadvantaged people (such as Indigenous peoples, Dalits, women), mostly from rural areas.\(^{94}\) Similarly, Coyle and Dalrymple (2011) found that TJS have been seen to operate in remote areas that were more isolated from other fora of justice (such as formal courts) with TJS more accessible than all other form of dispute settlement.\(^{95}\) The study concluded that:

Traditional justice mechanisms continue to be key providers of justice in Nepal. This is particularly the case in more remote areas where other formal and informal justice mechanisms are not present, but also in the less remote areas because of the cultural value given to them.\(^{96}\)

This statement reveals, consistent with the research on TJS internationally (discussed above), that not only are TJS in Nepal major forums of justice in geographically remote areas due to the remoteness of the communities being served (far from urban areas where the formal justice mechanism is generally housed and operates) but also due to

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\(^{93}\) Chhetri and Kattel, above n 86, 19. This study was conducted in 2004 by the Centre for Victims of Torture (CVICT), an NGO, to ‘improve understanding about traditional and modern systems of community level dispute management in Nepal.’ Data for the study was gathered from published and unpublished reports, records of courts and community mediation groups, and interviews with local people who were involved in dispute resolution. The study identified major four different justice mechanisms in Nepal: (i) traditional community based systems; (ii) formal justice system; (iii) Village Development Committee forums; and (iv) community mediation, in six districts of Nepal — Ilam, Jhapa, Saptari, Dhankuta, Nawalparasi and Banke.

\(^{94}\) Pun and Malla, above n 86, 27–8. The study was conducted by the UNDP Access to Justice Project in 2005 and focused on local mediation practices in two districts of Nepal with the twin objectives of analysing the TJS in those districts from sociological perspectives and identifying the ‘strengths and weaknesses’ of those systems. The study was based on primary data collected through in-depth interviews of the participants and secondary data, including relevant magazines, and reports.

\(^{95}\) Coyle and Dalrymple, above n 23, 45–6. The study was conducted by the Saferworld (an International Non-Governmental Organisation (INGO)) on informal justice mechanisms (IJM) in the three selected districts of Nepal — Kaski, Panchathar and Dhanusha. The report defined the term IJM as: any non-state controlled processes through which people provide justice, resolve grievances and disputes and in some cases promote peace.

\(^{96}\) Ibid 54.
their cultural appropriateness for the disputing parties, especially those from Indigenous communities.

In regards to the nature of cases being resolved by TJS in Nepal, Upreti (2014) identified TJS as efficient in resolving social, family, and transaction-related disputes as they were found to be more effective, less expensive, administratively less complex and easily accessible when compared to the FJS.\(^7\) Chhetri and Kattel (2004) found that the *Kisan's court* also resolves all disputes in the village, such as the disputes related to physical assaults, domestic violence, irrigation and land use.\(^8\) Drone Prasad Rajaure, stated in regard to Tharu in the Dang district of Nepal, that ‘during quarrels between Tharus in the village, he [the Badghar] is the first person to be approached. Though usually minor cases are judged by him, he may try to settle major conflicts too.’\(^9\) He further observes that the *Badghars* were empowered to impose fines on wrongdoers, in cases such as where ‘cattle-owners … let their animal stray during the crop-season and in the case of other minor offences such as playing instruments during certain prohibited periods … causing bodily hurt to others, insulting a person, and cases concerned with abduction.’\(^10\)

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\(^7\) Bishnu Raj Upreti, *Settling Local Conflicts in Nepal: Different Mechanisms and Practices* (Nepal Centre for Contemporary Research, 2014) 1. The aim of the study was to discuss the strategies and practices that local people use in dealing with conflict situations. The study was based on case studies taken from nine districts of Nepal — Surkhet, Ramechhap, Dolakha, Saptari, Sankhuwasabha, Dhankuta, Sunsari, Kaski and Chitawan. The study uses both primary and secondary sources of information such as, published and unpublished reports, books, and journal articles and uses tools and techniques of qualitative research (such as observation, in-depth interviews and focus group discussions).

\(^8\) Chhetri and Kattel, above n 86, 13–14.


\(^10\) Ibid.
has occurred, such that traditional dispute settlers now generally do not resolve serious criminal cases such as abduction.

It was interesting to note that a 2008 study by Massage, Kharel and Sharma revealed that in most communities it wasn’t only the ‘poor and marginalised population’ that used TJS, but also those considered to be wealthy. The reasons supplied for the use of TJS by wealthy people in rural areas were: the ready availability of TJS at the local level and their ease of accessibility in terms of finance and time required (time involved in TJS dispute resolution is far less in compared to the FJS). In the Nepali context, it has been argued that a large number of people, especially in rural areas, are accessing justice through TJS; however, these systems were less suitable for the urban areas, areas with mixed societal structures and in disputes between communities.

The reason for this is because TJS are generally based on the customs and traditional of a particular group of people, and therefore the system may not be necessarily be recognised or preferred for use by people from other groups. In contrast to rural areas, people urban areas are from many castes and ethnicities; therefore, utilising TJS is not deemed practicable for urban dwellers. (This prior research finding was confirmed in interviews conducted during the current research.)

101 Massage, Kharel and Sharma, above n 85, 27. The study was conducted in five districts of Nepal — Dhankuta, Morang, Saptari, Sarlahi and Bardiya. This study uses the term IJS which includes both community-based mediation and TJS.

102 Ibid 37. This study was conducted by the Danish International Development Agency’s Human Rights and Good Governance Unit (Danida/HUGOU) in 2008 to: (a) analyse informal justice systems (IJS) in Nepal with a view to assessing the extent to which these systems are in line with human rights standards, values and principles (in particular with the International Covenant on Civil and Political Rights); (b) determine to what extent the IJS enhance access to justice in a legitimate and sustainable manner; and (c) make recommendations for enhancing access to justice. The study used different qualitative methods such as: interviewing key stakeholders, observations, and consultative meetings at both national and local levels. By definition, IJS include all forms of justice systems including TJS that are not set up by state legislation. The term IJS is broader than TJS; whereas the focus of my PhD research is specific to only the three selected TJS.
PhD research focussed on the TJS of the *Kisan* people\textsuperscript{103} found that people in need of a dispute resolution process hesitate to go to the formal state-based forums of justice; therefore, almost all cases were (and continue to be) settled through TJS. Elderly men were mostly involved in the dispute resolution process and not women, and almost all disputants in cases settled in the *Kisan* court were satisfied with the decisions of their court.\textsuperscript{104}

The above-mentioned studies did not touch upon possible options for establishing a relationship between TJS and the FJS. However, a study conducted in 2012 by International Alert (an international non-governmental organisation (INGO)) and its partners, Forum for Women Law and Development and Legal Aid and Consultancy Centre, sought to examine ‘the relationship between state and non-state justice mechanisms’ and identify ‘opportunities for strengthening coordination between state and non-state justice providers’ with the aim of improving access to justice in Nepal.\textsuperscript{105} The study revealed that TJS use is decreasing due to the availability of other institutions, such as village development committees and paralegal groups; an unwillingness on the part of youths to use TJS and abide by the decision of dispute settlers; but it notes that there is a lack of systematic and functional coordination among dispute resolution forums in the six districts selected.\textsuperscript{106} My PhD research differs from this study not only because the regions there examined differ from those studied here, as do their TJS in some instances, but also because I am using legal

\textsuperscript{103} *Kisan* is an Indigenous group of eastern Nepal that has a total population of 2876.


\textsuperscript{105} International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 23, 7.

\textsuperscript{106} Ibid 8. The assessment was based on the data gathered from six districts of Nepal — Banke, Jumla, Kailali, Mahottari, Panchthar and Sunsari.
pluralism, HRBA and critical legal theories for analyses and consider a wide range of
options for engaging TJS and the FJS in Nepal. Previous research in the area has
mostly been conducted by I/NGOS and they have not used a strong theoretical
framework nor used such a variety of theoretical frameworks such that this research
has used. For example, the International Alert report does not mention that it is based
on any particular theoretical framework. Similarly, the 2011 PhD thesis of Kattel used
a political and legal anthropological approach to analyse the judicial system of the
Kisan community in the eastern part of Nepal. The theoretical frameworks used in this
thesis (such as critical legal studies and intersectionality) provided a framework to
analyse the access to justice of diverse groups in Nepal such as women, Dalits,
indigenous groups and other marginalised groups and their subordination and
exploitation in the process of seeking justice through TJS in Nepalese context.

The increasing marginalisation of TJS is not seen as always conducive to positive
outcomes, and increased coordination between the informal dispute resolution sector
(including TJS) and the FJS, between the State and non-State institutions, is seen as
desirable. However, the emphasis appears to be on the continued expansion of the
informal sector (and to as far lesser extent the TJS as part of that sector) and increased
articulation with the FJS.

In regards to the reasons for using TJS in the Nepali context, research has identified
these as: user familiarity with TJS, easy accessibility to all, freedom from financial
costs (though sometimes the parties may offer tribute or gifts to the dispute settler, this
is not compulsory),107 and the swiftness in decision making and implementation of the

107 Upreti, Settling Local Conflicts in Nepal, above n 97, 9–10.
decision;\textsuperscript{108} and in some TJS, such as \textit{Majhi hadaam},\textsuperscript{109} \textit{Badghar} and \textit{Pancheti}, the tradition of imposing fines upon wrongdoers.\textsuperscript{110}

TJS in Nepal are often criticised for several reasons, some of which are similar to the criticism of TJS internationally, and some go beyond those. It has been found that TJS in Nepal are frequently dominated by elite groups; they lack of awareness of law and human rights among TJS stakeholders; they exhibit favouritism in decision; they practice torture;\textsuperscript{111} they are often being discriminatory against marginalised groups — particularly women, the poor, and lower caste persons;\textsuperscript{112} and there is a lack of documentation and recording of the outcome and process.\textsuperscript{113} In addition, in some communities, such as \textit{Satar}, it has been found that the disputing parties did not have the freedom to choose the forum within which to resolve their disputes, social pressure made it compulsory to use TJS.\textsuperscript{114} However, it was also found that there was a clear sense of the culture changing and an increased openness to the participation of women in the dispute settlement processes.\textsuperscript{115} Some TJS, such as \textit{Tamudhin}, have taken steps to include marginalised groups in the dispute settlement process.\textsuperscript{116} Some studies have identified that the reputation and impartiality of traditional dispute settlers are increasingly being questioned and the general tendency to interpret TJS as

\textsuperscript{108} Kattel, above n 104, 166–76.
\textsuperscript{109} \textit{Majhi hadaam} is a village head in the \textit{Satar} community.
\textsuperscript{110} Massage, Kharel and Sharma, above n 85, 27.
\textsuperscript{111} Chhetri and Kattel, above n 86, 19; Coyle and Dalrymple, above n 23, 48; Pun and Malla, above n 86, 27–33; International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 23, 9.
\textsuperscript{112} Massage, Kharel and Sharma, above n 85, 15; Coyle and Dalrymple, above n 23, 47.
\textsuperscript{113} Kattel, above n 104, 177–83; Coyle and Dalrymple, above n 23, 50.
\textsuperscript{114} Massage, Kharel and Sharma, above n 85, 21.
\textsuperscript{115} Ibid 15.
\textsuperscript{116} Coyle and Dalrymple, above n 23, 47.
‘unscientific, abusive, traditional, and lacking in legal authenticity’ has made TJS weaker than they used to be.\textsuperscript{117}

This analysis of the available research studies and literature in relation to TJS in Nepal identified a number of gaps; and for this reason, there have been calls for further research in order to develop a better theoretical and empirical understanding of disputes, dispute resolution institutions and the dispute resolution processes.\textsuperscript{118}

Likewise, further research is recommended for exploring TJS’ compliance with international human rights standards, diversity and social inclusion\textsuperscript{119} and for mapping of the different TJS that exist across the country to develop a comprehensive picture of the situation at the national level.\textsuperscript{120} The study by Chhetri and Kattel (2004) specifically recommended ‘in-depth studies to increase understanding about Nepal’s TJS’ be continued so that other forums of justice in the country could learn from them.\textsuperscript{121} My thesis attempts to fill some of the gaps identified in the above discussion, especially through analysing the different strengths and weaknesses of TJS and exploring the degree to which they comply with international human rights standards. My PhD research also investigates what relationship, if any, should exist between TJS and the FJS to improve access to justice for users of TJS within the Nepali context.

The studies referenced above were conducted primarily by I/NGOs, and anthropologists. My PhD project differs from these studies on the following aspects: (i) it is primarily focussed on the access to justice from the perspective of TJS in the

\textsuperscript{117} Upreti, Settling Local Conflicts in Nepal, above n 97, 14; Rajendra Pradhan, Legal Anthropology and Traditional Disputing Process in Nepal (Access to Justice Program, UNDP/Nepal, 2005) 67.

\textsuperscript{118} Pradhan, Legal Anthropology and Traditional Disputing Process in Nepal, above n 117, 79–80.

\textsuperscript{119} Massage, Kharel and Sharma, above n 85, 37.

\textsuperscript{120} Coyle and Dalrymple, above n 23, 52.

\textsuperscript{121} Chhetri and Kattel, above n 86, 58.
context of Nepal; (ii) it adopts a theoretical approach by drawing from legal pluralism, the human rights-based approach, and critical legal theories; (iii) it conducts an in-depth analysis of how the FJS and TJS can work together to provide better access to justice for marginalised groups; (iv) it uses decolonising methodologies as it acknowledges that this research is related to dispute resolution practices of Indigenous groups; (vii) and, finally, it is important to consider that the research is undertaken in the context of the enactment of a Constitution in 2015 that recognises that Nepal is a multicultural, multilingual, multi-religious and multiethnic country, and which transformed Nepal from a unitary nation to a federal nation where each local level elected body has power related to justice.122

II RELATIONSHIP BETWEEN TRADITIONAL JUSTICE SYSTEMS AND THE FORMAL JUSTICE SYSTEM

There are different views on whether or not it is necessary to have any relationship or engagement between TJS and the FJS. Even among the proponents who feel the need for greater engagement between the TJS and the FJS, there are differing ideas on the modalities for such engagement.

By considering the importance of traditional justice mechanisms, the United Nations Commission on Legal Empowerment of the Poor has highlighted the importance of TJS for accessing justice by the poor and the need for an appropriate relationship between TJS and the FJS.123 The Commission’s report stated:

The vast majority of the world’s poor rely on non-state, informal justice systems. Therefore, it is vitally important to consider non-state justice. Appropriately structuring the relationship between state and non-state systems is crucial. Reforms in

122 See further discussion in Chapter 1 of this thesis.
pluralistic legal systems might include combining formal or tacit recognition of the non-state justice systems.\textsuperscript{124} Some scholars have cautioned that utilising TJS could hamper the principles of the ‘rule of law’ and that a high usage of TJS is ‘symptomatic of poor access to the formal justice system.’\textsuperscript{125} It has also been argued that using TJS can create a ‘dual system of justice’: one for ‘poor people’ and another for the ‘wealthy’.\textsuperscript{126} Likewise, some argue that strengthening TJS can lead to ‘a competing and overlapping’ situation in the justice system within which more powerful, wealthy or more informed disputants can manipulate the system for their vested interest.\textsuperscript{127}

The question of an appropriate policy for the engagement of TJS with the state mechanism has no single answer that fits each and every situation. For this reason, there are diverse views for and against the recognition and engagement of TJS with the FJS and the modalities to be utilised to do so.\textsuperscript{128} Traditionally, the issue of legal and judicial reform including initiatives undertaken to make the justice system more accessible for weaker sections of the population (such as the poor, women and Indigenous people), was viewed only from the perspective of the FJS, but when such attempts failed in regards to bringing reform, then acceptance began to grow for the idea that justice mechanisms that work outside the framework of the state or the government should be considered as indispensable components for improving the

\textsuperscript{124} Ibid 63.
\textsuperscript{125} See Erica Harper, Traditional Justice: Practitioners’ Perspectives (International Development Law Organization, 2011) 2.
\textsuperscript{126} Wojkowska, above n 64, 14.
overall situation of access to justice in many countries.\textsuperscript{129} When international development agencies’ attempts to reform access to justice failed because of an over reliance on the FJS, it was acknowledged that TJS have an important role in ensuring better access to justice.\textsuperscript{130} By analysing the situation of some of the Latin American and African countries, Julio Faundez came to the conclusion that any successful engagement with TJS requires a deep understanding of local state structures, political processes and the communities within which they operate.\textsuperscript{131}

Similarly, Deborah Isser argues that traditional forms of dispute resolution forums cannot be considered ‘a side issue, a sort of sub specialty on the margins of the “real justice system”, nor is it necessarily a problem to be overcome. Rather, it is an undeniable and critical part of the justice landscape’.\textsuperscript{132} She further argues that the justice reform project is not merely a technical exercise but ‘one that is bound up in the complexities of culture, socio-economic realities and politics’.\textsuperscript{133} Therefore legal systems should not be viewed through western lenses; the justice landscape needs to be seen as it really is, which may include traditional justice institutions; ‘or, better yet’,

\begin{itemize}
\item \textsuperscript{129} Julio Faundez, ‘Legal Pluralism and International Development Agencies: State Building or Legal Reform? ’ (2011) 3(1) Hague Journal on the Rule of Law 18, 18–19. In the Nepali context, the introduction of legal aid and paralegal committees and less formal court annexed, and community mediation mechanism could be viewed as attempts at reform as are all women committees. Their success varies: see examples contained in International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 23.
\item \textsuperscript{130} Ibid 19; Chirayath, Sage and Woolcock, above n 66, 1.
\item \textsuperscript{131} Faundez, ‘Legal Pluralism and International Development Agencies, above n 129, 21.
\item \textsuperscript{133} Ibid
\end{itemize}
she writes, ‘we should avoid compartmentalizing “traditional” and “formal”, and instead examine the actual options in all of their hybrid and blurry forms’.\textsuperscript{134}

In the African context, Chidi Odinkalu argues that in spite of a number of weaknesses TJS are widely used; therefore, reforms in TJS might serve the justice needs of people in a manner compatible with human rights standards.\textsuperscript{135} He recommends that the role of TJS be recognised by the state system in many ways, such as registering or notifying customary marriages, decisions related to land management arrangements and traditional dispute management.\textsuperscript{136}

By analysing the literature about non-state justice systems from more than twenty jurisdictions, Miranda Forsyth identified the following seven types of models that can be used to describe legal systems that contain both a FJS and TJS:\textsuperscript{137} (i) repression of non-state justice system by the state system, (ii) no formal recognition but tacit acceptance by the state of the non-justice system, (iii) no formal recognition but active encouragement of the non-state justice system by the state, (iv) limited formal recognition by the state of the exercise of jurisdictions by a non-state justice system, (v) formal recognition of exclusive jurisdiction in a defined area, (vi) state recognition of the right of a non-state justice system to exercise jurisdiction and the state lends its coercive powers to the non-state system, and (vii) complete incorporation of the non-state justice system by the state. She also found that there is possibility of two or more

\textsuperscript{134} Ibid.
\textsuperscript{136} Ibid 160.
different models of relationships that can exist in one country and the relationship may not be simultaneously uniform throughout the jurisdiction.\textsuperscript{138}

A 2004 UK Department for International Development document suggested several possible ways for TJS and the FJS engagement, such as the incorporation of TJS within the FJS; codification of customary laws and a form of recognition by the state; the state ensuring sure that TJS comply with international principles of human rights or constitutional provisions; and the state may recognise certain Indigenous groups as able to utilise their respective TJS.\textsuperscript{139}

The UNDP, United Nations Children’s Fund (UNICEF) and UN Women commissioned a study in 2012 to identify how engagement with informal justice can build greater respect and protection for human rights.\textsuperscript{140} The study (undertaken by the Danish Institute for Human Rights) analysed the data collected from six countries and suggested possible entry points for engagement of the FJS with informal justice so that such systems can be strengthened to better deliver justice.\textsuperscript{141} The study concluded that the method by which informal justice can be linked with the formal system, or the extent to which it should be done, mainly depends upon the historical circumstances of each country.\textsuperscript{142} The study found that in most of the countries studied, there were functional linkages between the formal and informal justice systems. In some cases,

\textsuperscript{138} Ibid 71–2.

\textsuperscript{139} Department for International Development, \textit{Non-State Justice and Security Systems}, above n 63, 5, 10.

\textsuperscript{140} Danish Institute for Human Rights, above n 63, 8. For this study qualitative and quantitative data collected in six countries: Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda.

\textsuperscript{141} Ibid. For this study ‘informal justice’ encompasses ‘the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not the part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law’. Informal justice has a wider scope than TJS though it includes TJS. My PhD project is focussed only on TJS not all forms of informal justice systems.

\textsuperscript{142} Ibid 9.
state law may define such linkages as appeal procedures, referrals and assistance; and even if no official engagement methodology exists, various forms of unofficial collaborations, such as referral of cases.¹⁴³

In relation to models for managing or engaging TJS, Brynna Connolly has proposed four possible situations that can be created: (i) total abolition of TJS or formal prohibition of the operation of TJS; (ii) full incorporation of TJS or where they play a formal role within the FJS; (iii) limited incorporation where TJS and the FJS co-exists to create a justice system; and (iv) legal permission of the existence and functioning of both TJS and the FJS with no interrelation between the two institutions.¹⁴⁴

TJS do not operate as a substitute or replacement for the FJS, but rather they are viewed as a complementary system of courts or tribunals that reinforce the provision of justice to the majority of the population. For example, Bangladesh has a widespread practice of Salish justice which indicates that the ‘community-based, largely informal process’ are able to ‘help resolve disputes and/or impose of sanctions’ using ‘small panels of influential local figures’.¹⁴⁵ The appropriateness of some sanctions and processes, however, has been a matter for dispute.

The preceding discussion shows that despite many inherent challenges and criticisms, a variety of practices of engagement between TJS and the FJS are in practice. Chapter 8 of this thesis analyses the existing TJS and FJS relationship and provides options for

¹⁴³ Ibid 10.
¹⁴⁴ Connolly, above n 67, 247–8.
how the two systems might continue to co-exist for the purpose of improving access to justice in the context of Nepal.
CHAPTER 3: THEORETICAL FRAMEWORK

INTRODUCTION

This chapter introduces the theoretical and conceptual frameworks — legal pluralism, human rights-based approach (HRBA), and critical legal theories — that are being used to inform the analyses in this thesis. The chapter provides an explanation of why the selected theoretical frameworks are suitable for the analyses of access to justice in the context of Nepal and the contribution these frameworks make to the analysis contained in this thesis. In summary, the reasons for selecting these theoretical frameworks include: (i) legal pluralism provides a framework from which an assessment of how the formal and traditional justice systems can or cannot co-exist; (ii) HRBA provides a framework to analyse access to justice from the perspective of international principles of human rights with a particular focus on marginalised groups, such as women, Dalits, Indigenous peoples, and other minorities in the context of Nepal; and (iii) critical legal theories (Critical Legal Studies, feminist legal scholarship, critical race theory, critical Indigenous scholarship, intersectionality and post-colonial theory and Orientalism) provide a framework from which to analyse and understand the subordination, exclusion and exploitation that marginalised communities experience when accessing justice, especially those utilising the selected TJS in the Nepali context.

Theoretical frameworks, namely legal pluralism, HRBA and critical legal theories, are used to provide frameworks from which to analyse TJS practices in Nepal from different viewpoints so that the understanding of operation of TJS in Nepal is enhanced. Using different sets of theories to analyse selected TJS that are practised in different locations allows the researcher to utilise different perspectives. This provides
an opportunity to better understand the structure and operation of TJS in Nepal in a broader international and theoretical context. These theoretical frameworks also enable the researcher to inquire into how legal plurality operates in practice in the Nepali context and the ways in which it promotes access to justice for TJS users, especially the Indigenous communities. HRBA provides the framework for the analysis of the protection of certain rights within the structure and operation of TJS and of the people using TJS in three selected locations in Nepal. On the other hand, critical legal theories provide a variety of frameworks to analyse the structure and operation of TJS from the perspectives of marginalised communities such as women, Dalits, Indigenous peoples. In sum, utilising all theoretical framework mentioned above provides an integrated framework that allowed a tool for analysing TJS structure and operation of TJS in Nepal. That allows a holistic approach to see and analyse the access to justice of the people using TJS in the Nepali context.

I LEGAL PLURALISM

The basic concept of legal pluralism is that multiple forms of law may be in operation in the same jurisdiction at the same time. However, within this basic conception, the term legal pluralism covers ‘diverse and often contested perspectives’ on law that range from ‘the recognition of differing legal orders within a nation-state to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity.’\(^1\) The term ‘weak’, ‘juristic’ or ‘classic’ legal pluralism is

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\(^1\) Anne Griffiths, 'Legal Pluralism' in Reza Banakar and Max Travers (eds), An Introduction to Law and Social Theory (Hart, 2002) 289.
used to indicate the first scenario and the latter is sometimes referred to as ‘strong’, ‘deep’, or ‘new’ legal pluralism.²

John Griffiths defines legal pluralism as ‘the presence in a social field [of] more than one source of “law”, than one “legal order”’.³ He broadly categorises legal pluralism as strong and weak. According to him, strong legal pluralism is a situation where different legal norms exist without any uniform sources.⁴ He suggests that in a situation of weak pluralism, ‘the sovereign (implicitly) commands (or the ground norm validates, and so on) different bodies of law for different groups in the population’.⁵ The different groups can be defined in terms of features, such as ethnicity, religion, nationality or geography. In such a situation, parallel legal regimes exist due to the recognition of the pre-existing customary law of the concerned groups by the overarching and controlling legal system. According to Griffiths, legal pluralism in a weak sense is ‘merely a particular arrangement in a system whose basic ideology is centralist’ and therefore, in his view ‘strong legal pluralism’ is the only legal pluralism in a real sense.⁶ Griffiths argues that, in such a situation of recognition of customary law, the state asserts its sovereignty to pronounce law; therefore, in essence customary law comes under the state law, which ultimately is legal centralism. Likewise, Franz von Benda-Beckmann suggests that legal pluralism means ‘the theoretical possibility of more than one legal order, based on different sources of the

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² See ibid 290.
⁴ Ibid 5.
⁵ Ibid.
⁶ Ibid 7–8. John Griffiths used the term ‘legal centralism’ to indicate the ideology in which ‘law is and should be the law of the State, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’. According to him, the objectives of legal pluralism are ‘destructive’ to break the idea that the law is a single, unified and exclusive hierarchical normative ordering based on the power of the state.
ultimate validity other than the state, within one political organisation. His definition accepts the possibility of different legal systems functioning separately in one jurisdiction as legal pluralism.

A leading Canadian political philosopher, James Tully, coined the term ‘the politics of cultural recognition’ which he uses to mean ‘to gather together the broad and various political activities which jointly call cultural diversity into question’ and he argues that cultural recognition is a characteristic constitutional problem of our time. TJS, and demands for their recognition (in whatever manner of legal pluralism), represents a specifically juridical dimension of cultural recognition.

Sally Engle Merry notes that ‘legal pluralism is not a theory of law or an explanation of how it functions, but a description of what law is like. It alerts observers to the fact that law takes many forms and can exists in parallel regimes.’ According to her, legal pluralism provides ‘a framework for thinking about law, about where to find it and how it works’ and is an important ‘guide to thinking about law in its multiple instantiations and intersections and to paying attention to alternative understandings and practices of law, particularly among the less powerful members of a society.’ According to Shaun Larcom, legal pluralism means: ‘a situation where at least two legal orders assert jurisdiction over the same geographical space and persons within

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9 Sally Engle Merry, 'McGill Convocation Address: Legal Pluralism in Practice' (2013) 59(1) McGill Law Journal 1, 2.
10 Ibid.
that space.\textsuperscript{11} The definition is broad enough to cover interactions between state law and religious law, Indigenous customary law, and the law of various other non-state institutions. Having said that, Larcom notes that ‘any legislator, or state authority, must consider what harm or injuries can occur systematically if one community within a large community adopts its own governing rules.’\textsuperscript{12} Legal pluralism is an important and complex notion in colonised countries since it can be used to empower Indigenous communities by recognising customary rules and dispute resolution processes.\textsuperscript{13} As my PhD research is aimed at improving access to justice for the marginalised groups in Nepal such as women, Indigenous and minority groups, legal pluralism provides an important analytical framework.

As Paul Schiff Berman finds, studies of legal pluralism in different scholarly traditions — such as law, philosophy, anthropology, history, and theology — define and analyse the concept differently: lawyers, philosophers and theologians discuss legal pluralism within the context of ecclesiastical and the state authority; historians have an interest in non-state entities (such as jockey clubs and stock exchanges) and consider the power of such entities over formal law; and anthropologists use a plural legal framework to analyse the relationship between colonial and Indigenous local legal systems.\textsuperscript{14} He argues that after the end of the bipolar Cold War order in 1989, a new application of

\begin{itemize}
  \item\textsuperscript{12} Ibid 195.
  \item\textsuperscript{13} Kaius Tuori, 'The Disputed Roots of Legal Pluralism' (2013) 9(2) Law, Culture and the Humanities 330, 336.
  \item\textsuperscript{14} Paul Schiff Berman, 'The New Legal Pluralism' (2009) 5(1) Annual Review of Law and Social Science 225, 226.
\end{itemize}
pluralist insights has arisen in the international and transnational space that can be designated as a ‘new legal pluralism’.15

Renowned legal anthropologist Leopold Pospisil argues that society is not an undifferentiated amalgam of people but it is ‘a patterned mosaic of subgroups (e.g., families, clans, bands, communities, etc.) that belong to certain, usually well-defined (or definable) types with different memberships, composition, and degree of inclusiveness.’16 He further argues that no society has ‘a single consistent legal system, but as many such systems as there are functioning subgroups’, and for this reason any proper analysis of law can be done only with a full recognition of the plurality of legal systems within a society.17 Legal pluralism or plural legal order is a worldwide phenomenon, and it exists ‘in all types of political systems and contexts and varies enormously in jurisdiction, procedure, structure and degree of autonomy.’18 The situation of legal pluralism arises due to numerous factors including colonialism, migration, conquest and the presence of Indigenous groups.19 Legal pluralism is an appropriate framework for my PhD research because the research considers the situation of access to justice of the Indigenous people of Nepal, nation where the formal justice system (FJS) exists as do a number of TJS, the latter operating even when not officially recognised by the State. In the case of Nepal, although never

15 Ibid.
17 Ibid 24–5. Leopold Pospisil developed the concept of ‘legal levels’ to indicate a situation of a separate legal system for each subgroup, and the legal systems form a hierarchy reflecting the degrees of inclusiveness of the corresponding subgroups, the total number of legal systems of subgroups, of the same type of inclusiveness.
19 See ibid 19, Larcom, above n 11, 208.
officially a country subjugated by any major colonial power, it has been argued that a type of internal colonialism or colonisation has existed over centuries and swept various areas in waves (see further below) and has contributed to the emergence of the situation of legal pluralism.²⁰

In the Nepali context, as discussed under the heading ‘II Human Rights-Based Approach’ (further below), the provisions of the International Labour Organisation Convention no 169 (ILO Convention 169) and United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) acknowledge the human right of Indigenous peoples to practise their own customs and traditional institutions including their dispute resolution practices. These provisions explicitly oblige the Government of Nepal, as state party to these conventions and because the conventions are entrenched in domestic law, to recognise the dispute resolution mechanisms that are being practised by Nepal’s Indigenous groups. However, as discussed in Chapter 2 of this thesis, TJS practised by Nepali people living in rural areas and by Indigenous people are not recognised by the state and the formal legal system. Non-recognition necessarily limits the extent to which the Nepalese legal system can operate in a pluralistic manner.

The preceding discussion shows that legal pluralism is not a definite set of rules but encompasses diverse perspectives (such as strong legal pluralism, weak legal pluralism, deep legal pluralism; and how different scholarly disciplines — such as law, philosophy, anthropology and history — define legal pluralism). For the purpose of

analysis in this thesis, the concept of strong and weak pluralism as defined by John Griffiths\textsuperscript{21} is utilised. In relation to the analysis of options for linking TJS and the FJS in the context of Nepal, ‘strong legal pluralism’ means recognising traditional justice forums and their practices as independent legal system with ultimate validity while ‘weak pluralism’ means recognising these forums and practices as dispute resolution forums under the present legal system established by the Constitution, Acts and regulations. In the situation of weak legal pluralism, traditional practices of Indigenous groups and TJS operation will come under the purview of the formal state law.

Legal pluralism provides a framework in which to think about law and its functions in particular social contexts. Legal pluralism allows us to create a holistic picture of diverse systems that manage conflict in a society and ‘the ways in which these systems interact with one another’.\textsuperscript{22} In relation to the protection of the rights of minority communities, the role of plural legal order is important;\textsuperscript{23} therefore, Nepal, as a country of minorities,\textsuperscript{24} needs to be able to formally embrace a pluralistic legal order so that the rights of the women, Indigenous groups and people who are using TJS are protected. Accepting such a pluralism would also recognise the contribution the use of

\begin{flushleft}
\textsuperscript{21} John Griffiths, above n 3, 5.
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\textsuperscript{22} Miranda Forsyth, \textit{A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu} (ANU E Press, 2009) 262.
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TJS makes to improving the situation of access to justice in the country.\textsuperscript{25} In the Nepali context, the pluralistic legal framework provides a guide ‘to thinking about law in its multiple instantiations and intersections and to paying attention to alternative understandings and practices of law, particularly among the less powerful members.’\textsuperscript{26} Embracing legal pluralism in a multi-ethnic and multi-cultural country like Nepal creates an opportunity to empower Indigenous communities and to give recognition to TJS that are being practised in the country, and that will ultimately contribute to improving the situation of access to justice.\textsuperscript{27} For my PhD research, I use legal pluralism as a framework to analyse the operation of particular TJS within the Nepali (Chhetri/Brahmin) hegemonic context.\textsuperscript{28} Legal pluralism is relevant for this thesis, because it provides a framework to analyse the extent to which processes and outcomes of selected TJS function as independent or inter-dependent systems. Furthermore, the framework also provides a basis with which to analyse the relationship between TJS and the FJS.

\section*{II \hspace{1em} HUMAN RIGHTS-BASED APPROACH}

Human rights are the rights that belong to all human beings because they are human beings, and these rights are essential for a dignified human life irrespective of the nationality, place of residence, sex, national or ethnic origin, colour, religion,


\textsuperscript{26} Merry, ‘McGill Convocation Address’, above n 9, 2.

\textsuperscript{27} Tuori, above n 13, 336.

\textsuperscript{28} Further discussion in regard to the hegemony created by Brahmin and Chhetri caste (and shared Nepali language) groups in Nepal is presented in Chapters 2, 5 and 6 of this thesis.
language, or any other status.\textsuperscript{29} Although the idea that individuals have some form of basic rights is an old one, the international system of human rights was developed after World War II and the establishment of the United Nations in 1945.\textsuperscript{30} Article 1 of the \textit{Charter of the United Nations} states that one of the purposes of the organisation is that of co-operation ‘in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’\textsuperscript{31} Likewise, Article 55 of the Charter provides that the organisation shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.\textsuperscript{32} The World Conference on Human Rights in 1993 recognised and reaffirmed that ‘all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms.’\textsuperscript{33} However, Costas Douzinas argues that the concept of the universality [of human rights] ‘is necessarily a white mythology: the enthronement of free will as the principle of universal legislation is achieved only through the exclusion, disenfranchisement and subjection, without free subjectivity, of the other.’\textsuperscript{34} He also comments, however, that ‘[c]ommunitarianism and cultural relativism … can often become “mythologies of colour”, local — and usually much more aggressive — reflections of the exclusions of

\textsuperscript{29} See \textit{Universal Declaration of Human Rights}, GA Res 217A (III), UN GAOR, 3\textsuperscript{rd} sess, 183\textsuperscript{rd} plen mtg, UN Doc A/810 (10 December 1948); Jack Donnelly, \textit{Universal Human Rights in Theory and Practice} (Cornell University Press, 2013) 10–11.


\textsuperscript{31} \textit{Charter of the United Nations} art 1.

\textsuperscript{32} Ibid art 55.

\textsuperscript{33} \textit{Vienna Declaration and Programme of Action}, UN GAOR, World Conf. on Hum Rts, 48\textsuperscript{th} sess, 22\textsuperscript{nd} plen mtg, UN Doc A/CONF 157/24 (1993) preamble.

universalism’, according to him, ‘despite difference in content, colonialism and the human rights movement form a continuum, episodes in the same drama.’\textsuperscript{35} In contrast to Douzinas, the New Zealand Law Commission 2006 Report states: ‘Although human rights are sometimes seen as a construct of the West alone, they reflect values found in many cultures, …Nor is the international human rights framework confined to individual rights, as is sometimes claimed.’\textsuperscript{36} The Report further states ‘the rights of groups and the obligation of individuals to their communities are also provided for in the core human rights instruments.’\textsuperscript{37} Douzinas refers to the ‘fragile liaison’ of tradition and universality, the latter including ‘imported’ human rights. The nature of this liaison is explored in this thesis, as it examines not only the structure and operation of selected TJS in Nepal and their relationship (current and possible future) with the FJS, but also the extent to which TJS accord with international principles of human rights.

Initially, human rights were seen as ‘negative rights’, meaning preventing states from unjustified interference in the exercise of rights of individuals, but it is now recognised that states have positive duties to ‘respect, protect and fulfil’ the rights of individuals for the full realisation of people’s human rights.\textsuperscript{38} According to this positive approach, the ‘obligation to respect’ suggests the state should refrain from any action that may deprive individuals of the enjoyment of their rights; the ‘obligation to protect’ refers to the state’s need to prevent violation of human rights by third parties; and the


\textsuperscript{36} New Zealand Law Commission, Converging Currents: Custom and Human Rights in the Pacific (Report 2006) 12.

\textsuperscript{37} Ibid.

'obligation to fulfil' requires the state to take appropriate measures (for example legislative, administrative, judicial, budgetary etc) towards the full realisation of the rights.39 Therefore, the concept is relevant to the context of my thesis because it is a duty of a state to respect, protect and fulfil the rights of people, including the right to access to justice. International human rights principles oblige state parties to take positive measures, such as making sure that laws are non-discriminatory and removing obstacles for the marginalised peoples (such as the poor) to ensure not only de jure access to justice but also de facto access to justice of the individuals that seek justice.40

Provisions of the international human rights instruments, to which Nepal is a state party, are important for Nepal because the Nepal Treaty Act 1990 provides that any law inconsistent with the international treaties or conventions ratified by Nepal will be void to the extent of the inconsistency.41 On many occasions, the Supreme Court of Nepal has declared void provisions of domestic law on the basis that they are inconsistent with the provisions of international human rights instruments.42 For example, in the case, Devendra Ale v Government of Nepal, the Supreme Court declared void a proviso of section 7 of the Children’s Act of Nepal 1991 that reads ‘an act [minor beating and scolding to a child] by mother, father, family members, guardian or teacher to scold the child or give him/her minor beating for the sake of his

39 Ibid 2.

In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.

42 More examples and discussion in this regard appears in Chapter 7 of this thesis.

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or her interest’ because it contravened provisions of the Constitution of the Kingdom of Nepal 1990 and the Convention on the Rights of the Child 1989.\textsuperscript{43}

The term ‘access to justice’ is not directly used by any international human rights instruments but a number of international human rights instruments provide principles and minimum rules for the administration of justice and offer guidance on human rights and justice.\textsuperscript{44} The human rights framework provides an opportunity to implement rights in relation to access to justice (such as non-discrimination, equal participation, a right to due process) enshrined in the domestic, regional and international human rights commitments of a state.\textsuperscript{45} Nepal, as a member of the United Nations and a state party to the major international human rights instruments, is under an obligation to adopt such principles in domestic law and policy. For example, Article 8 of the Universal Declaration of Human Rights 1948 (UDHR)\textsuperscript{46} provides a right to ‘an effective remedy by the competent nation based tribunals for acts violating the fundamental rights granted by the Constitution or by law.’ Likewise, Article 2(3) of the International Covenant on Civil and Political Rights 1966 (ICCPR)\textsuperscript{47} obliges state parties to ensure effective remedy through competent authorities in cases of violation of rights of individuals. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) enshrines the principle that women


\textsuperscript{45} Sepúlveda Carmona and Donald, above n 40, 244.

\textsuperscript{46} Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3\textsuperscript{rd} sess, 183\textsuperscript{rd} plen mtg, UN Doc A/810 (10 December 1948) (‘UDHR’).

\textsuperscript{47} International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) (‘ICCPR’) [Nepal acceded to the Covenant on 14 May 1991].
are entitled to have their human rights protected on an equal basis with men. Article 2(c) of the CEDAW obliges state parties to ensure the effective judicial protection of women’s entitlement to enjoy rights on an equal basis with men. Likewise, Article 15 provides the principle of equality before the law, which means equal access to courts and tribunals, non-discrimination within the justice system, as well as equal protection of the law.

The International Labour Organisation Convention no 169 (ILO Convention 169) and United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) provide an important framework for the implementation of access to justice for Indigenous communities. For example, the ILO Convention 169 obliges state parties to give due recognition to the customs and traditions of Indigenous peoples. Article 8(1) of the ILO Convention 169 provides that ‘in applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws’. Similarly, Articles 8(2) and 9(2) of the ILO Convention 169 provide that Indigenous groups shall have the right to their customs and institutional practices that are compatible with the international human rights principles and national legal system. UNDRIP provides important guidelines for states to protect and promote the rights of Indigenous peoples and their access to justice by recognising their traditional justice practices and institutions. Article 34 of UNDRIP recognises

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51 Provisions of UNDRIP related to access to justice for the Indigenous peoples are: art 5 which provides the right ‘to maintain and strengthen their distinct political, legal, economic, social and cultural
Indigenous peoples’ right to use and continue ‘their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices’ provided they are consistent with international human rights standards.

By emphasising the rights of minority communities, the Vienna Declaration on Human Rights 1993 states that it is ‘the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law.’ It further highlights the minority peoples’ rights ‘to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.’ The right to justice can be impeded by legal provisions that effectively deny the use of a mother tongue in court proceedings or similar matters. It could be argued that a failure to accommodate the various languages of the people of Nepal and their TJS are contravention of the Vienna Declaration, UNDRIP and the ILO Convention 169.

While declarations are not legally binding, treaties and covenants and conventions are for their signatories.

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52 Vienna Declaration and Programme of Action, UN GAOR, World Conf on Hum Rts, 48th sess, 22nd plen mtg, UN Doc A/CONF 157/24 (25 June 1993) art 19. Like other UN declarations the Vienna Declaration is also a non-binding document. While this means that Nepal is not formally obliged to abide by the, it should be noted that as a signatory to a number of conventions and treaties, it is legally bound by the provisions of those treaties.

53 Ibid.
The United Nations Office of the High Commissioner for Human Rights (UNOHCHR) defines a HRBA as a conceptual framework ‘that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.’ According to the UNOHCHR, a HRBA tends to recognise and analyse inequalities, discriminatory practices and unjust distribution of power among populations and seeks to take necessary measures to redress such shortcomings.

A HRBA eschews the classification of development initiatives as ‘charity’; instead, the plans, policies and processes of development are anchored in a system of rights of people and corresponding obligations of state authorities established under national and international law. Adopting a HRBA in analysing a society’s access to justice is important for two reasons: (a) to promote empowering development processes, and (b) to enhance the accountability and effectiveness (in terms of meeting the needs of target groups) of the justice initiatives taken. A HRBA to access to justice programming is a methodology to develop programmes and projects based on international human rights standards that enshrine principles such as non-discrimination, participation and accountability.

In Nepal, it has been acknowledged that people of certain groups, such as Madhesi, Dalit, Indigenous people and women, have been marginalised and excluded from

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55 Ibid.
56 Ibid.
58 Ibid.
mainstream society and state structures (judiciary, government and parliament).\textsuperscript{59}

Mahendra Lawoti, a renowned Indigenous scholar in Nepal, observes:

The country’s elite of top media figures, intellectuals, and politicians comprises mainly upper-caste hill Hindu males. Their privileged social positions, advanced education, high-powered careers, mobility, and networking skills make them formidable political players.\textsuperscript{60}

Lawoti argues that upper-caste Hindu males are dominant in most sectors, such as media, politics, and academia, as well as in the sector of dispute resolution in Nepal. Similarly, in relation to discrimination of Madhesi people in Nepal, Prashant Jha (a Madhesi journalist and writer) argues that Madhesi people face systematic discrimination and ‘they have remained deprived of services, and have lived every day with the burden of having to prove that they are, indeed, Nepali.\textsuperscript{61} Therefore, it is appropriate to use a HRBA to analyse the situation of discrimination and redress it in regards to the sphere of access to justice in Nepal. Both the above quotes indicate that minority groups in Nepal (such as Indigenous peoples and Madhesi people) face discrimination and have been excluded from state power and continue to live at the margins. Due to the Madhesi people’s close connection to India and being of similar origin to some of the Indian population, most of the Hill population of Nepal ‘view the Madhesi as less Nepali than them’.\textsuperscript{62} Similarly, Dalits face exclusion and discrimination in the country, but not on the basis of perceived race or nationality but


\textsuperscript{60} Lawoti, above n 59, 139.

\textsuperscript{61} Prashant Jha, Battles of the New Republic: A Contemporary History of Nepal (Aleph, 2014) 163.

on the basis of caste.63 Research in relation to the social exclusion of Dalits in the context of Nepal concluded that:

_Brahmin/Chhetri_ have created hegemony in the Nepal Army, educational institutions, civil service and judicial service, Nepal police force, foreign service, political parties, civil service organisations. Dalits are not only at the bottom the Nepali social hierarchy but also out of the State mechanisms. Dalits’ representation in general State governance is very low, in policy making levels it is almost ZERO and in non-state sectors, especially in the leadership in political parties and civil society, it is just symbolic.64

The statement reveals that only a few powerful groups control the main political and social institutions of the country, with the Dalits having very little opportunity (if any) to influence changes in laws, policies and institutions. The marginalisation and discrimination that are faced by the people of the Dalit community in the Nepali context are further discussed in Chapter 5 of this thesis.

As Amartya Sen, a leading economist and philosopher of Indian origin, argues, democratic rule needs to be sensitive to both majority rule and the rights of minorities, though, in the organisational context, democracy is frequently seen entirely in terms of the ballot box and majority rule; therefore, the issue of respecting minority rights ‘is undoubtedly one of the most difficult issues that democracy has to tackle’.65 In this context, he suggests that ‘the formation of tolerant values is thus quite central to the smooth functioning of a democratic system.’66 What is necessary is an accommodation of diverse values, including those of minority groups whose rights cannot necessarily


64 Kisan, above n 63, 60.


66 Ibid.
be guaranteed by a ‘blanket democracy’ where, it can be postulated, the majority can sway legislation to serve its interests alone unless guided by a higher aim that embraces the rights of minorities and guarantees the human rights of all persons within the country. James Tully, a leading political philosopher, argues that ‘recognition and accommodation of cultural diversity in a modern constitution is one of the most difficult tasks’. Although tolerant values do not equal cultural diversity, such values are required to permit the accommodation of cultural diversity within a country while emphasising the shared human rights of all people. In the context of the post-conflict scenario of Nepal, many complexities have been pointed out in regard to attempts to accommodate the aspirations of the diverse Indigenous groups, women and marginalised groups and regions’ demands. As discussed in Chapter 1 of this thesis, the Constituent Assembly enacted the 2015 Constitution that recognises the aspirations of all people including women, Dalits, minority groups in the country, embraces the provisions that are directed towards the respect of minority groups and provides the right of inclusion in the state structures of certain excluded groups of people including women, Dalits and Indigenous groups. For example, Article 42(1) of the Constitution provides the right to participate in state bodies (such as parliament, executive and judicial bodies) based on the principles of proportionate representation (according to their population) to the marginalised groups that include women, Dalits, Indigenous people, Madhesi, Tharu, and other minority groups in the country. Likewise,

67 Tully, above n 8, 1.
69 Constitution preamble, art 42. Article 42(1):

Right to social justice: (1) The socially backward women, Dalit, Indigenous people, Indigenous nationalities, Madhesi, Tharu, minorities, persons with disabilities, marginalized communities, Muslims, backward classes, gender and sexual minorities, youths, farmers, labourers, oppressed or citizens of backward regions and indigent Khas Arya shall have the right to participate in the State bodies on the basis of the proportionate inclusive principle.
restructuring of the state from a unitary form of governance to a federal system is aimed to ensure the inclusion of previously excluded groups in the state structures, including the executive, judiciary and parliament.\textsuperscript{70} For instance, in order to ensure representation of the excluded groups in the national parliament. Article 84(2) of the Constitution provides that political parties should ensure the representation of marginalised groups, such as women, Dalits and Indigenous peoples, based on their proportion of the population within their electorate. The Constitution provides the following fundamental rights: the right to equality\textsuperscript{71} for all citizens and affirmative action for the weaker groups,\textsuperscript{72} rights relating to justice,\textsuperscript{73} the right against torture,\textsuperscript{74} the right against untouchability and discrimination,\textsuperscript{75} the right against exploitation,\textsuperscript{76}

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\textsuperscript{70} Constitution preamble, art 50. Article 50:

Directive Principles [of the State] provides: (1)The political objective of the State shall be to establish a public welfare system of governance, by establishing a just system in all aspects of the national life through the rule of law, values and norms of fundamental rights and human rights, gender equality, proportional inclusion, participation and social justice, while at the same time protecting the life, property, equality and liberties of the people, in keeping with the vitality of freedom, sovereignty, territorial integrity and independence of Nepal, and to consolidate a federal democratic republican system of governance in order to ensure an atmosphere conducive to the enjoyment of the fruits of democracy, while at the same time maintaining the relations between the Federal Units on the basis of cooperative federalism and incorporating the principle of proportional participation in the system of governance on the basis of local autonomy and decentralization.

\textsuperscript{71} Constitution art 18.

\textsuperscript{72} Constitution, the proviso of art 18(3) reads:

Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including socially or culturally backward women, Dalit, Indigenous people, Indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya.

\textsuperscript{73} Ibid art 20.

\textsuperscript{74} Ibid art 22.

\textsuperscript{75} Ibid art 24.

\textsuperscript{76} Ibid art 29.
the right to language and culture,77 rights of women,78 rights of the child,79 rights of Dalits,80 the right to social justice,81 the right to social security82 and the right to Constitutional remedies to enforce the fundamental rights provided by the Constitution.83 In order to protect the human rights of people in Nepal, the Constitution has provisions for the establishment of various commissions including the National Human Rights Commission,84 National Women Commission,85 National Dalit Commission,86 National Inclusion Commission,87 Indigenous Nationalities Commission,88 Madhesi Commission,89 Tharu Commission,90 and the Muslim Commission.91 In spite of the above mentioned provisions in the Constitution, Indigenous groups and Madhesi people are not satisfied with some of the constitutional provisions of the Constitution in relation to the demarcation of provincial boundaries, citizenship and language issues; therefore, the country is facing post constitution protest.92 For example, Madhesh-based political parties demand for two autonomous

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77 Ibid art 32.
78 Ibid art 38.
79 Ibid art 39.
80 Ibid art 40. Article 40(1): ‘The Dalit shall have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. Special provision shall be made by law for the empowerment, representation and participation of the Dalit community in public services as well as other sectors of employment.’
81 Constitution art 42.
82 Ibid art 43.
83 Ibid art 47.
84 Ibid art 248.
85 Ibid art 252.
86 Ibid art 255.
87 Ibid art 258.
88 Ibid art 261.
89 Ibid art 262.
90 Ibid art 263.
91 Ibid art 264.
92 See Mahendra Lawoti, 'Constitution and Conflict: Mono-Ethnic Federalism in a Poly-Ethnic Nepal' (Paper presented at the International Conference on Identity Assertions and Conflicts in South Asia,
provinces in the Terai/Madhesh region, parliamentary seat allocation in proportion with the population of Terai region, and proportionate reservation of seats for the Madheshi and Tharu group members in state bodies (administration, security, judiciary, and diplomatic services).93

James Anaya, a prominent Indigenous rights scholar, observes that Indigenous peoples have a right to participate in the legal, political and social system with their cultural identity intact, in that they are not to be forced or presumed ‘to assimilate and thus lose their distinctive cultural attributes to dominant cultural patterns.’94 The minority groups have a right to continue their distinctive cultural patterns, including Indigenous customary law and institutions regulating Indigenous communities.95 However, in the context of minorities in Nepal, the 2016 *South Asia State of Minorities Report* found that in spite of some constitutional and legal provisions upholding the rights of minorities in the country, ‘the State has failed to recognise and address the interests of minority and marginalised groups. The weakness of the state in ensuring fair distribution of resources, development flows and power-sharing among all sections of

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95 See ICCPR art 27; *ILO Convention 169* arts 2, 5; Anaya, ‘International Human Rights and Indigenous Peoples, above n 94, 15.
the population is clear.96 This creates a base for Nepal’s Indigenous peoples to continue their dispute resolution systems and institutions in the Nepali context and access justice through their traditional justice resolution forums. The situation of minority groups in the FJS and TJS in the context of Nepal is discussed in Chapters 2, 5 and 7 of this thesis.

The idea of legal rights has been criticised ‘as an abstract diversion from true political needs: they are alienating because they are mere ideals which do not reflect people’s real needs’.97 Further to this, it has been argued that legal rights are ‘ideals which protect the interests of the privileged in society: in a capitalist legal world where the ability to defend one’s rights is reliant on the ability to pay’.98 Likewise, the notion of the universality of human rights, in the context of the multicultural world, is seen as being of limited use:

We live in a multicultural world, where the light in which a person sees cultural values depends on the social environments to which he [or she] is accustomed. ... If we are aware that a world of distinct cultures exists and eventually accept it, we will recognise and ultimately tolerate different cultural values and therefore essentially different concepts of human rights.99

Sompong Sucharitkul further argues that, after all, the international instruments proclaiming the rights of people or the international covenants on human rights merely incorporate the views and concepts advocated by the authors and drafters of those instruments, who have invariably been trained in Western or European legal

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96 Kharel, Thapa and Sijapati, above n 24, 260. This study was conducted as part of a study that mapped the situation of minority groups in South Asia.


traditions. Makau Mutua, a law professor of African origin, argues that there is a need for the human rights movement ‘to rethink and reorient its hierarchised, binary view of the world in which the European West leads the way and the rest of the globe follows in a structure that resembles a child-parent relationship’. Criticising the Eurocentric human rights discourses that propagate the universality of normative framework of human rights, Mutua suggests a need for a cross-cultural perspective to define the human rights norms suitable for developing countries. Indeed, Hilary Charlesworth, a well-respected Australian expert on international human rights, lists the following limitations as existing in international human rights standards: (a) international human rights standards rely on national implementation mechanisms for their operation because international implementation procedures are weak and cumbersome, and (b) human rights standards are formulated in broad and general language and do not offer easy solutions to controversial issues. In spite of these challenges, she suggests that international human rights standards ‘can provide a set of principles that enable people to live lives of full human value and worth’ and ‘human rights law offers a vocabulary and structure in which claims by marginalised groups can be formulated; it also allows dialogue on difficult issues of human existence’. In many instances, operation of TJS may be used to validate the positions of elites in the community. In such situations a human rights perspective can provide minimum standards that need to be followed during the process of dispute resolution. The use of

100 Ibid.
102 Ibid 4–5.
103 Charlesworth, above n 30, 54.
104 Ibid.
a human rights framework assists in establishing TJS that incorporate certain minimum human rights standards.105

A human rights-based perspective provides an outline for establishing a justice system that is accessible, in the sense of being able to be utilised by and be relevant for all citizens, but which at the same time adheres to the international human rights principles. Further to this, in most instances, the beneficiaries of TJS in Nepal are Indigenous people.106 Therefore, my thesis is informed by the notion of rights from the perspectives of Indigenous peoples. As a result, a HRBA has been used to analyse the strengths and weaknesses of TJS practised in the sites considered for this research. A human rights perspective has also provided the reference point from which recommendations are made in relation to reforming TJS and establishing operational linkage between TJS and the FJS to ensure adequate and appropriate access to justice for minority groups.

III CRITICAL LEGAL THEORIES

Critical Legal Theories (CLT) are the responses to the traditional or positivist legal theories, such as liberal legal ideology,107 and ‘provide alternative explanations of the functions and positions of law.’108 CLT include a diverse critical scholarship in law,

106 The human rights principles that are relevant to access to justice in general as well as for the Indigenous peoples in the context of Nepal are discussed in detail in Chapter 7 of this thesis.
107 ‘Liberal legal ideology’ means the ideology which dominates the contemporary Western system of law and is also known as ‘liberalism’. The principal ideas of liberal doctrine are liberty, individualism and equality. See David Wood, Rosemary Hunter and Richard Ingleby, ‘Themes in Liberal Legal and Constitutional Theory’ in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law (Allen & Unwin, 1995) 41.
such as feminism and critical race theory. Critical legal scholarship challenges the traditional notions of legal objectivity and legal neutrality and the idea that law can be studied in isolation of the social, cultural, historical, political, and economic contexts of a particular society. Critical legal scholarship considers the interactions and behaviours of human beings, and the law, as part of a complex web of social, political and historical relationships, and it is the aim of CLT to analyse and understand those relationships. The underlying idea of CLT is the notion that law and legal systems are not ‘benign, neutral and autonomous institutions’ as they are regarded by liberal legal ideology. In the words of Margaret Davies, ‘critical theory sees theory and the theorist as socially and culturally situated, rather than objective and universal.’

My PhD thesis considers the situation of access to justice of the people of Nepal, especially those accessing justice through TJS. As has already been discussed in Chapter 2 of this thesis, Nepal is a country of social and ethnic diversity and multiple nationalities, in that it has 126 caste/ethnic groups, 123 languages and 10 religious groups. The Nepali population, on the basis of caste, ethnic, regional, cultural, religious and linguistic cleavages, can be broadly classified in four ways: (i) by Region: Hill (68 per cent) and Terai/Madhesh (32 per cent); (ii) by Caste/Ethnicity: Hindu caste of both Hill and Terai (59 per cent), Indigenous groups (37 per cent), and Muslims (four per cent); (iii) by Language: People speaking Nepali as mother tongue

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109 Reza Banakar and Max Travers, 'Critical Approaches' in Reza Banakar and Max Travers (eds), An Introduction to Law and Social Theory (Hart, 2002) 97.

110 Davies, above n 97, 183.

111 Ibid 184.

112 Simpson and Charlesworth, above n 108, 86.

113 Davies, above n 97, 184.

(45 per cent) and minority linguistic groups such as Indigenous groups (that comprises 59 government recognised Indigenous groups) (55 per cent); and (iv) by Religion: Hindus (81 per cent), minority religious groups (Buddhists (9 per cent), Muslims (4 per cent), Kirats (3 per cent), Christians and others (3 per cent).\textsuperscript{115} There are ‘numerous and overlapping identity categories’\textsuperscript{116} in the country because each ethnic and caste categories encompasses multiple smaller ethnic and caste groups and several of these categories overlap, such as the Dalits, and the Madhesis; gender and class also cut across categories.\textsuperscript{117} In 1964, the 1854 National Code was replaced by the New National Code that formally abolished untouchability and other forms of caste-based discrimination in Nepal but the practice of untouchability, as a part of tradition and customs, continues in many areas of the country. The Parliament of Nepal passed a comprehensive piece of legislation, the \textit{Caste-Based Discrimination and Untouchability (Offence and Punishment) Act 2011} (hereinafter referred to as the Caste-Based Act), with the aim of creating a society where untouchability and discrimination on the ground of caste, race, descent, community or occupation in the name of custom, tradition, religion, culture or ritual is abolished; and to make punishable untouchability, exclusion, restriction, expulsion, contempt or any other discriminatory act that is against humanity.\textsuperscript{118} The Caste-Based Act also provided for restitution (compensation) to the victims of such acts, with the stated aim of enhancing national unity and strengthening relationships among the general public, as well as


\textsuperscript{116} Hangen and Lawoti, above n 62, 9. This overlap is because Brahmin/Chhetri may be in Terai/Madhesh region or in a Hill area, Brahmin/Chhetri may dwell among people of Hindu or Christian faiths, and Indigenous groups live in both Terai/Madhesh and Hill regions.

\textsuperscript{117} Ibid 10.

\textsuperscript{118} \textit{Caste Based Discrimination and Untouchability (Offence and Punishment) Act 2011} preamble.
creating an egalitarian society.\textsuperscript{119} However, these mechanisms to eliminate discrimination based on caste have been critiqued as ineffective, and few cases relating to untouchability have been filed in the courts compared to the extent of the problem in Nepal.\textsuperscript{120} The reason for this is that most law enforcement officers, especially police officers, are either unaware that caste-based discrimination is a crime or, in the name of maintaining social harmony, are reluctant to file cases; rather, they tend to pressure victims to withdraw their complaints.\textsuperscript{121} By considering the situation of prolonged injustice caused by the practice of untouchability against Dalits, the Nepali Constitution provides the right against untouchability and discrimination and the rights of Dalits as fundamental rights.\textsuperscript{122}

In the face of such diversity, only high caste Hindus from the Hill region gained the upper hand, and they now are in a dominant position in society and government in the state power.\textsuperscript{123} To ensure the analysis in this thesis can accommodate the access to justice experience of various minority groups, it is informed by a number of CLT, such as Critical Legal Studies, feminist legal scholarship, critical race theory, intersectionality, critical Indigenous scholarship, and postcolonial theory and Orientalism.

A \textit{Critical Legal Studies}

In critical legal scholarship, the term Critical Legal Studies (CLS) emerged in the United States in the 1970s as an umbrella term to indicate a body of critical scholarship.

\begin{itemize}
\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} Kharel, Thapa and Sijapati, above n 24, 240.
\item \textsuperscript{121} Ibid 240–1.
\item \textsuperscript{122} Constitution arts 24, 40.
\item \textsuperscript{123} Hangen and Lawoti, above n 62, 12.
\end{itemize}
that challenges ‘liberal legal and political philosophies.’

Shedding light on the nature of the CLS movement, its proponents Duncan Kennedy and Karl Klare note:

CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches. CLS has sought to encourage the widest possible range of approaches and debates within a broad framework of a commitment to democratic and egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society.

Kennedy and Klare suggest that the CLS movement is not a particular theory, but rather an approach that recognises and embraces a diversity of theories. The CLS movement rejects value neutrality in legal scholarship, and instead, seeks to provide an environment in which ‘radical and committed’ scholarship can thrive with no aspiration to lay down a ‘correct’ theory or method.

According to CLS, law and politics are not separate but rather ‘law is political, and legal reasoning is a technique used to rationalise in legal jargon the political decisions that are actually made.’ In addition, the CLS movement also emphasises the indeterminacy of law, that is, that ‘the legal doctrines do not and, in fact, cannot be determinate’, meaning that legal doctrine does not determine completely the outcome of a case.

The CLS movement is sceptical about the liberal doctrine of legal rights and principles of the rule of law. CLS scholars acknowledge the existence of hierarchies in society and are ‘concerned with the relationship of legal scholarship and practice to the

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124 Simpson and Charlesworth, above n 108, 100.


127 Davies, above n 97, 190.

128 Ibid.
struggle to create a more humane, egalitarian, and democratic society.’129 As discussed in more detail in Chapter 2 of this thesis, Nepal is a country of diversity in terms of caste, ethnicity, language and geography, and many of these groups face exploitation and discrimination in accessing justice through both TJS and FJS forums. CLS scholarship provides a framework for understanding and analysing the situation of access to justice of marginalised groups, such as Dalits in the Nepali context, for identifying reasons for such discrimination and exploitation, and measures to address the situation and create a situation in which Dalits also will be able to access justice on an equal basis to other groups in society. Such analysis is presented in Chapters 5 and 6 of this thesis.

B Feminist Legal Scholarship

Feminist legal scholarship aims to address the issue of subordination of women and the failure of liberal legal philosophy ‘to accord substantive justice to women as a class or gender.’130 Feminist approaches to law challenge the gender-blind approach, which promotes the principle that regardless of gender, all human beings are equal, and proposes the need to recognise and embrace the experiences of women in legal knowledge and policy.131 As Catherine MacKinnon observes:

Feminism is an approach to society from the standpoint of women, a standpoint defined by concrete reality in which all women participate to one degree or another. This is not to say that all women are the same or that all women in all cultures and across history have been in an identical position. Rather, it is to say that the experience of women is concrete, not abstract, and socially defines women as such and distinguishes them from men across time, space and culture.132

129 Kennedy and Klare, above n 125, 461.
130 Simpson and Charlesworth, above n 108, 87.
131 Davies, above n 97, 213.
The central notion of feminism is that women’s experiences and thinking are different to those of men’s experiences, and laws and legal institutions silence women and fail to acknowledge and accommodate their experiences. According to Catharine A MacKinnon, ‘feminism starts with the simple observation that women are people. It moves into the more complex observation that they have been denied that simple recognition to their disadvantage.’ She argues that feminism sheds light on ‘the reality that men as well as women have a sex and are variously gendered, and that the male sex and masculine gender have largely been unrecognized as such, having been merged with humanity and merit and superiority, to men’s social advantage.’

Feminist legal scholarship is not a single set of principles but perspectives on feminist legal scholarship that are ‘matched by a diversity of approaches to law’. For this reason, feminism has a number of diverse approaches such as liberal feminism, radical feminism, postmodern feminism and critical legal feminism. Feminist legal scholarship critiqued ‘law by claiming that laws were made, interpreted or applied by men and that legal discourse therefore treated women as subordinate and as not existing in the public domain.’ Further to this, scholars noted that ‘not only do men make, interpret and apply laws, but that as an institution, law is imbued with a masculine perspective, and that even the notion of “women” is simply a social construct created by men.’ In regards to the domination of men in the legal field,


134 Ibid.

135 Ruth Fletcher, 'Feminist Legal Theory' in Reza Banakar and Max Travers (eds), An Introduction to Law and Social Theory (Hart, 2002) 135, 135.


138 Ibid.
Margaret Davies notes: ‘it is empirically true that law and legal theory have (and still are) the province of men… it is mainly men who have written the law and theories about the law.’

She further observes:

[Law and jurisprudence reflect values conventionally associated with the liberal male. Men have made the legal world in their own image, … for women, and other marginalised groups, it is not only the overrepresentation of one group in legal decision-making and theorising which is the problem. A much deeper difficulty lies in the value systems of law and culture, which reinforce in various ways oppressions of gender, race, class, sexuality, and so on.]

According to her, law and legal theories are set by males of elite groups that do not embrace the aspirations of women and marginalised groups. In the Nepali context, in relation to the situation of women’s access to justice, Chapter 2 of this thesis reveals that women are experiencing discrimination and exclusion in accessing justice both in TJS and the FJS in the Nepali context. According to the feminists’ approach, adequate representation of women in prominent positions, such as lawyers, judges, politicians, and as dispute settlers in the TJS are not only about increasing women’s public profile, they are also about increasing women’s influence on policy making. One example of the perpetuation of male hegemony is the low level of participation by women in the decision-making level in both the FJS and TJS. In the FJS, all eight judges who are interview participants in this research are male and only one court official who was interviewed is female; and in the TJS, of a total of 17 dispute settlers from three TJS who were interviewed for this research, only one is female. In the Nepali context, ‘across all ethnic groups and castes, … the traditional gender-based division of labour severely restricts women’s access to education, skill development, and employment

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139 Davies, above n 97, 214–15.
140 Ibid 215.
141 Fletcher, above n 135, 135.
opportunities outside the home, and in decision-making processes.'\textsuperscript{142} In such a discriminatory and exclusionary context of Nepal, feminist legal scholarship will inform my analyses of the role of women in justice practices and of their level of participation in the formation and overall functioning of TJS in the selected districts of Nepal. Such analyses appear in Chapters 5, 6 and 7 of this thesis.

C Intersectionality

The term ‘intersectionality’ was coined and first used by Kimberle Crenshaw to analyse how race and gender intersect to influence the legal employment experience in the context of African American women.\textsuperscript{143} The intersectionality framework suggests taking into account the multiple axes, such as race, gender and ethnicity, as opposed to a single axis framework. In the context of African American women’s experience, Kimberle Crenshaw observes:

\begin{quote}
[s]ingle-axis framework erases black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. … In race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.\textsuperscript{144}
\end{quote}

According to Crenshaw, to understand and analyse Black women’s experiences utilising only one axis — ‘woman’ or ‘race’ — is not sufficient; both the axes of ‘womanhood’ and ‘Black’ need to be taken into consideration. Richard Delgado and Jean Stefancic define intersectionality to mean ‘the examination of race, sex, class, national origin, and sexual orientation, and how their combination plays out in various

\begin{itemize}
\item \textsuperscript{142} Rajendra Pradhan and Ava Shrestha, \textit{Ethnic and Caste Diversity: Implications for Development} (Asian Development Bank, 2005) 11.
\item \textsuperscript{143} Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) \textit{University of Chicago Legal Forum} 139.
\item \textsuperscript{144} Ibid 140.
\end{itemize}
settings. In the context of Black Women’s experience in the US, Crenshaw argues that ‘single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group’. According to Crenshaw, ‘[b]ecause the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which the Black women are subordinated.’ The term intersectionality was first coined in the late 1980s as:

a heuristic term to focus attention on the vexed dynamics of difference and the solidarities of sameness in the context of antidiscrimination and social movement politics. It exposed how single-axis thinking undermines legal thinking, disciplinary knowledge production, and struggles for social justice. …intersectionality has proved to be a productive concept that has been deployed in disciplines such as history, sociology, literature, philosophy, and anthropology as well as in feminist studies, ethnic studies, queer studies, and legal studies.

The intersectionality approach has contributed in facilitating consideration of gender, race, and other axes of power in a wide range of political discussions and academic disciplines, including new developments in fields such as geography and organisational studies. As Catharine A MacKinnon argues, ‘categories and stereotypes and classifications are authentic instruments of inequality. And they are static and hard to move.’ She further observes that the identities and stereotypes ‘are the ossified outcomes of the dynamic intersection of multiple hierarchies, not the

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146 Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, above n 143, 140.
147 Ibid.
149 Ibid.
dynamic that creates them. They are there, but they are not the reason they are there.’

Therefore, as Elena Marchetti notes, ‘[f]or some time now, scholars have argued that when talking about race, the effects of gender also need to be considered and that when talking about gender, the effects of race are also important.’ Therefore, while considering the status of Dalit women in the structure and operation of TJS in Nepal, both gender and race should be taken into consideration so that the exclusion, marginalisation, discrimination, and injustices they face can be properly analysed. Indeed, axes of gender, race/ethnicity, caste, religion, education (or its lack), income, place of residence may all be seen to intersect to disadvantage minority women in Nepal in terms of access to justice. This study seeks to measure the different variables and gain a greater understanding of their impacts. Such knowledge is crucial for any work towards mitigating such impacts and improving access to justice for women, and Dalits and other minority group members in Nepal.

The intersectionality framework does not talk about simply adding variables but ‘it adopts a distinctive stance, emanates from a specific angle of vision, and, most crucially, embodies a particular dynamic approach … in the experiences of classes of people within hierarchical relations.’ To analyse violence against women in the US context, Crenshaw observes that ‘many women’s experience is often shaped by other dimensions of their identities, such as race and class. … the experiences of women of colour are frequently the product of intersecting patterns of racism and sexism.’

151 Ibid.
152 Elena Marchetti, 'Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It' (2008) 17(2) Social & Legal Studies 155, 156.
153 MacKinnon, 'Intersectionality as Method', above n 150, 1020.
intersectionality approach focusses on the essentiality of taking into account of multiple dimensions, such as gender, race, economic status and so on to analyse and understand the discrimination and marginalisation of the groups at the margins. When considering the approach undertaken by the Royal Commission into Aboriginal Deaths in Custody, Marchetti found that ‘when looking at race, law and legal processes rarely consider how other characteristics, such as gender might complicate matters and create distinct and varied experiences of marginalization.’155 In this thesis, I use the term ‘intersectionality’ the same way as Crenshaw; that allows Indigenous, Dalit, women and other minority groups, in the context of access to justice in Nepal, to be seen as Indigenous, Dalits and minority group members and as women. For example, Dalit women experience exclusion and discrimination in TJS settings in Nepal because they are women as well as Dalits and, in most instances, most poor. To understand and analyse Dalit women’s experience in the TJS operations in Nepal, the axes of Dalithood, womanhood and poverty should be taken into consideration.156 Therefore, for my analyses in this thesis in regards to the situation of access to justice of women, Dalits, Indigenous peoples and minority groups in the context of Nepal, the intersectional approach propounded by Kimberle Crenshaw would be appropriate because the approach allows consideration of complex dynamics, such as gender, race, ethnicity, economic status, and other relevant factors in that is related to access to justice through TJS and the FJS.157 Chapters 5, 6 and 7 of this thesis present intersectional analysis in the context of the access to justice in Nepal.

155 Marchetti, ‘Intersectional Race and Gender Analyses’, above n 152, 156.
157 Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, above n 143, 140.
The term Critical Race Theory (CRT) emerged in the United States in the 1980s, and initially referred to scholarship that focused on the issues of discrimination against and injustices borne by African Americans, but more recently it has been expanded to include scholarship on issues of other minority identities, such as Latinos and Asians.\(^{158}\) Challenging colour-blindness, which relies on the principle that regardless of the colour or origin of an individual all human beings are equal, a concept promoted by liberal ideology, CRT argues that discrimination and injustices exist as a result of a person’s ‘race’ or ethnicity.\(^{159}\)

Richard Delgado and Jean Stefancic argue that ‘color-blind, or “formal”, conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination.’\(^{160}\) It is argued that ‘CRT uncovers the ongoing dynamics of racialized power, and its embeddedness in practices and values which have been shorn of any explicit, formal manifestation of racism.’\(^{161}\) CRT scholars believe that the liberal idea of looking at all people equally conceals the fact that people are different and they experience different realities. Critical race scholars argue that CRT’s major aim is to unearth and critique racially unjust social structure, meaning, and ideas for the purpose of rooting out inequality and injustices.\(^{162}\) One of the founding members of CRT, Derrick A Bell, observes:

\(^{159}\) Davies, above n 97, 316–17.
\(^{160}\) Delgado and Stefancic, above n 145, 8.
\(^{162}\) Trevino, Harris and Wallace, above n 156, 8.
‘critical race theorists strive for a specific, more egalitarian, state of affairs. We seek to empower and include traditionally excluded views and see all-inclusiveness as the ideal because of our belief in collective wisdom.’\textsuperscript{163} He further observes that ‘we emphasize our marginality and try to turn it in toward advantageous perspective building and concrete advocacy on behalf of those oppressed by race and other interlocking factors of gender, economic class, and sexual orientation.’\textsuperscript{164}

CRT provides a framework for critical analysis of race and racism from a legal point of view. In the context of the United States, Barbara Flagg observes that ‘blacks continue to inhabit a very different America than do whites. They experience higher rates of poverty and unemployment and are more likely to live in environmentally undesirable locations than whites.’\textsuperscript{165} The statement might be equally true in the case of Dalits and Indigenous communities in Nepal, who are facing social, cultural and political discrimination in general and in the process of accessing justice.\textsuperscript{166} For example, the United Nations Committee on the Elimination of All Forms of Discrimination against Women, in their response to the state report submitted by the Government of Nepal, raised their concern in relation to the discrimination experienced by women in Nepal. The committee stated that it was: ‘deeply concerned


\textsuperscript{164} Ibid 902.


about the multiple forms of discrimination against disadvantaged groups of women such as *Dalit* and Indigenous women, widows and women with disabilities.ُ167

Thus, CRT provides an important framework for analysis within my thesis because it will assist with analysing the contribution of racialisation to the lack of protection of the rights of Indigenous communities and *Dalits* in the overall process of dispute settlement through TJS in the selected districts of Nepal.

In order to analyse the discrimination and the marginalisation of the *Dalit* community in the structure and functioning of the selected TJS in Nepal, the lens of critical race theory (CRT) that allows analysis of issues, such as immigration, right to language, sexism, internal colonialism, sexual oppression, transnationality, and citizenship status would be appropriate.168 As Javier Trevino, Michael Harris and Dorren Wallace argue:

> Critical race theory is committed to advocating for justice for people who find themselves occupying positions on the margins — for those who hold minority status. It directs attention to the ways in which structural arrangements inhibit and disadvantage some more than others in our society. It spotlights the form and function of dispossession, disenfranchisement, and discrimination across a range of social institutions, and then seeks to give voice to those who are victimised and displaced.169

CRT scholars, according to Richard Delgado and Jean Stefancic, ‘are interested in studying and transforming the relationship among race, racism, and power.’170 The marginalisation of and discrimination against people of the *Dalit* community in every aspect of social life in the Nepali context is discussed in Chapter 5 of this thesis.171

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168 Trevino, Harris and Wallace, above n 156, 7.

169 Ibid 8.

170 Delgado and Stefancic, above n 145, 3.

171 For detail see Sob, above n 63; Kisan, above n 63; Amar Bahadur BK, *The Stigma of the Name Making and Remaking of Dalit Identity in Nepal* (Social Science Baha, 2013); Krishna Khanal, Frits
One of the reasons for the exclusion and discrimination *Dalits* face in Nepal in general and especially in the operation of TJS is the prevalent caste hierarchy in Nepal. In 2004, United Nations Committee on the Convention on the Elimination of Racial Discrimination (UNCERD) noted: ‘The Committee remains deeply concerned at the persistence of the de facto caste-based discrimination and the culture of impunity that apparently permeates the higher strata of a hierarchical social system’. Discrimination remains (whether overt or muted) in all areas of life for Dalits (including access to justice) despite the promulgation of Caste-Based Act. This research opens a window on it in relation to access to justice.

E  Critical Indigenous Scholarship

A critical Indigenous scholarship has evolved with the recognition of the fact that Indigenous people in every country have lived with different experiences from those of non-Indigenous peoples and that therefore to analyse and understand their situation a specifically critical Indigenous discourse is needed. The subjugation of Indigenous people is described as:

Indigenous peoples remain on the frontier as visible minorities and often as inhabitants of remote, forbidding environments. Yet, their ongoing struggle for justice raises doubt about the moral legitimacy of the nation-states that were founded on denial of their prior ownership… The thirst for land and natural resources to power the colonial economies quickly brought conflict with indigenous inhabitants, who were expected to be assimilated into the white settler societies.  


In saying this, Richardson, Imai and McNeil describe how Indigenous groups live largely unseen in society and their relation to traditional land, customs and traditions are being encroached upon and their prior ownership of their ancestral land is not recognised. In the context of the subordination of Indigenous peoples of Australia by the white colonisers, Irene Watson observes:

The ‘domestication’ and ‘assimilation’ of Indigenous peoples are on the main agenda of the Australian state and within that process of assimilation the richness of indigenous law, philosophy is largely ignored, or treated as if those indigenous ways of being are of minor interest…The richness of Aboriginal law and philosophy was in many places dispossessed as were First Nations peoples dispossessed of our land.174

Watson observes how in Australia, Indigenous peoples were displaced from their ancestral land and their rich culture, law, traditional and philosophy ignored by the white settlers but also sets out the need to ‘recentre’ Indigenous law, philosophy knowledge that have sustained Indigenous people at the periphery but which now offer a way forward for the nation in its understanding of itself, its history, the need for care of country and its future as peoples in the land together. The phenomena of subordination and exploitation of Indigenous peoples of Nepal may not be the same as the situation of Aboriginal peoples in Australia and Indigenous peoples in countries that were colonised by ‘outsiders’ (such as the Dutch, Spanish, German, French and, in the context of the Indian subcontinent, the British (and to a lesser extent the Portuguese)) but Indigenous groups in Nepal also have very different life experiences from non-Indigenous Nepali people, particularly the so-called ‘high’ caste hegemonic group. In the context of Nepal, in regards to the situation of ethnic discrimination, it is argued that:

Ethnic inequality has been a constant and pervasive feature of the modern state. The ‘high’ caste Hindus from the hill region gained the upper hand in the political arena

During the last half of the eighteen century, when Prithvi Narayan Shah, then king of a principality called Gorkha, conquered and annexed numerous small kingdoms throughout [what is now] Nepal.\textsuperscript{175}

After conquering the small states in Gorkha state,\textsuperscript{176} ‘Nepali rulers sought to frame their diverse subjects within a broadly Hindu framework’\textsuperscript{177} and the population of the country was divided into five macro caste categories in a unitary hierarchy that reflected the ancient Hindu divisions based on occupation and religion: (1) wearers of the sacred thread (tagadhari) such as Brahmin, Chhetri, Thakuri; (2) non-enslavable alcohol-drinkers (namasinya matwali); Magar, Gurung, Sunuwar, and some Newar caste (merchants and the like); (3) enslavable alcohol-drinkers (masinya-matwali), such as Cepang, Hayu, Tharu, Sherpa, Tamang (farmers, agriculturists, labourers etc); (4) impure but touchable who are deemed ‘water-unacceptable’ (that is, denied access to common drinking water) (pani nachalne chhoichhito halnu naparne): butchers, washermen, Muslims; and (5) untouchables (pani nachalne choi chhito halmuparne); blacksmiths, tailors, tanners.\textsuperscript{178} According to this hierarchical division of the population, wearers of the sacred thread (such as Brahmin, Chhetri, Thakuri) were considered to be at top and they remained as priests, teachers and ruling class; alcohol drinkers, such as Magar, Gurung and Newar (most of whom are Indigenous peoples) remained in the middle, and untouchables (Dalits) remained at the bottom of the hierarchy. Such division among the population by the then rulers created a society based on hierarchy and the people who fall to the bottom (including Indigenous

\textsuperscript{175} Hangen and Lawoti, above n 62, 12.

\textsuperscript{176} King Prithvi Narayan Shah ascended the throne of Gorkha state in 1743 and began the unification of the Kingdom of Nepal by annexing neighbouring states. The process came to end under the Treaty of Sugauli between British India and the King of Nepal on 4 March 1816 after two years of Anglo-Nepalese war (1814–16).

\textsuperscript{177} Adhikari, above n 20, 7. The writer refers to the provision of the Interim Constitution of Nepal 2007 that defined Brahmin and Chhetri, the hegemonic groups, of Nepal as ‘Other’.

\textsuperscript{178} See ibid 8; Pradhan, ‘Negotiating Multiculturalism in Nepal’, above n 25, 11–12.
peoples and Dalits) experienced exclusion and discrimination in the state structure and society for centuries. The Tharu people live on the plains of Nepal. On the way the Tharu experience subjugation in Nepal, anthropologist Arjun Guneratne, notes: ‘Throughout the Terai and especially in the West, Tharus have lost control of land either through outright fraud or through indebtedness. In the western Terai many of them have been reduced to the status of bonded labor’.

At present, the diverse groups are considered equal by the Constitution and state law but, in practice and to some extent by customary laws, ‘the different groups and the gender relations between men and women have remained hierarchically structured, very similar to the old legally sanctioned inequalities and social exclusion’. For example, in 2014 the United Nations Economic and Social Council’s Committee on Economic, Social and Cultural Rights in their concluding observations on the third periodic report submitted by the Government of Nepal raised concerns that:

[D]eep-rooted stereotypes and patriarchal attitudes that discriminate against women and girls continue to be prevalent in society, despite measures taken to curb them. It [the Committee] is particularly concerned that women and girls, in particular of Dalit origin, continue to suffer from harmful traditional practices such as forced and early marriages, accusations of boxi (witchcraft), deuki tradition (offering girls to deities to fulfil religious obligations), jhumas (offering young girls to Buddhist monasteries to perform religious functions, kamlari (offering girls for domestic work to the families of landlords), chaupadi (isolating menstruating girls) and badi (widespread practice of prostitution).


181 Pradhan and Shrestha, above n 142, 7.

For this reason, critical Indigenous scholarship is important for my research because it provides a framework within which to analyse the extent to which indigeneity and caste are excluded or ignored by selected TJS in Nepal.

F Postcolonial Theory and Orientalism

The term ‘post-colonial’ was coined in the 1950s (and popularised in the 1980s) to describe situations where colonial rule had formally come to an end, such as in India and some countries within Africa.\(^{183}\) The term now has expanded beyond its literal meaning, that is ‘after colonialism’, to embrace the imprints of colonialism, that is ‘where the effects of colonialism have become an inextricable part of the culture and of its legal, educational, and political institutions, and where the colonial state still serves as a reference point in local discourse.’\(^{184}\) In a broader sense, the term is used to describe the situation of all groups affected in one way or another by a past or present colonialism that ‘includes peoples from former colonies who have migrated to Western colonising powers, as well as white Western people whose identities have been formed, in part by the discourses of colonialism.’\(^{185}\) Postcolonial theory is useful for ‘rethinking how colonialism operated in different times in ways that permeate all aspects of social life, in the colonised and colonising nations.’\(^{186}\) Furthermore, my analyses will also be informed by the concept of Orientalism. In his seminal work on

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\(^{183}\) Robert Westwood et al (eds), Core-Periphery Relations and Organisation Studies (Palgrave Macmillan, 2017) 7 (citing Robert J C Young, Post Colonialism: An Historical Introduction (Blackwell, 2001); Davies, above n 97, 306.

\(^{184}\) Ibid 306–7.

\(^{185}\) Ibid.

Orientalism, Edward Said defines Orientalism ‘as a Western style for dominating, restructuring, and having authority over the Orient.' According to Said:

[T]he Orient is not an inert fact of nature. It is not merely there, just as the Occident itself is not just there either. … the Orient is an idea that has a history and a tradition of thought, imagery, and vocabulary that have given it reality and presence in and for the West. He further observes that Orientalism is a specialised field of Western scholarship having the Orient as its object of its inquiry and a Western ‘style of thought’ that adopts clearly different view of ‘the Orient’ and ‘the Occident’ and makes essentialist statements about the Orient. As Margaret Davies maintains, Orientalism is ‘a massive European discourse (academic, literary, journalistic, political, religious) created a theoretical object out of an enormously disparate reality, labelled it the Orient, and opposed it to another idea, the Occident. For my PhD research, Orientalism provides a framework to understand and analyse the relations and body of knowledge so far created by hegemonic groups about Indigenous groups within the Nepali context.

Although Nepal was never colonised by external forces, it has a history of ‘internal colonisation’ by hegemonic groups; thus some might consider the situation of Indigenous groups, Madhesi, and Muslims in Nepal to differ from that of Indigenous inhabitants of many other countries which were colonised by external ‘foreign’

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188 Ibid 4–5.
189 Ibid 2–3.
190 Davies, above n 97, 308.
Western powers. However, there appears to be many commonalities of lived experience, both historically and contemporaneously.

Before the territorial unification process by king Prithvinarayan Shah in the mid eighteenth century, Indigenous groups had their ‘own rule in their respective traditional homelands. King Prithvinarayan Shah annexed small but independent kingdoms, [between] “22 and 24 principalities” of different Indigenous nationalities either through defeat in the war or through mutual agreement.” According to Sushil Kumar Naidu, ‘the main consequence of “territorial unification” was that all Indigenous groups lost their rights to land, water, forests, mines, rivers and pastures. Thus they began to lose their language, religion, culture and Indigenous knowledge systems’. High-caste Brahmin/Chhetri males have dominated the Indigenous groups, Dalits, Madhesis and women in every sector of life, such as politics, the economy, education and media; and the groups they dominate face linguistic, religious, sociocultural discrimination and unequal access to the resources within the hegemonic Nepali context. The subordination of and discrimination against Indigenous groups and Dalits is sometimes termed ‘internal colonisation’ in the Nepali context. According to the proponents of this view, the process of internal colonisation started from the so-called unification of Nepal as a kingdom and opting for a unitary form of

191 Bhattachan, 'Ethnopolitics and Ethnodevelopment, above n 20, 48. Prithvi Narayan Shah, then king of a small state called Gorkha, started to unite small states within the ‘Kingdom of Nepal’ in 1744. This came to an end in 1815. The process of unification and building a unified Nepal was considered as a ‘nation building’ or ‘unification’ process by the ruling class but indigenous scholars have considered the situation as colonisation by the Shah King. See Hem Raj Kafle, ‘Prithvi Narayan Shah and Postcolonial Resistance’ (2008) 2(1) Bodhi: An Interdisciplinary Journal 135.
192 Sushil Kumar Naidu, Constitutional Building in Nepal (Gaurav Book Center, 2016) 45.
193 Ibid.
governance in the country more than two centuries ago. Since my thesis is analysing the three selected TJS of three selected districts (Bardiya, Mustang and Dhankuta) that are practised by Indigenous groups, postcolonial theory and orientalism are important for my PhD project because the theory provides ‘lenses for analyses of the “raced” and gendered dynamics of colonial imperialism.’ By using these lenses, I analysed the role of Indigenous groups, women, Dalits in the functioning of selected TJS in Nepal.

In the context of Nepal, where certain groups of people control powerful position in society, and women, Dalits, Madhesi, Indigenous and other minority groups experience discrimination and exclusion, critical legal scholarship (CLS, CRT, feminist legal scholarship, intersectionality, critical Indigenous scholarship, and postcolonial theory and orientalism) provides a framework within which to analyse the extent to which diverse views and experiences are represented by TJS. In addition to this, the scholarship informs a consideration of the level of participation of Indigenous groups, Dalits, the people living in rural areas and those living in poverty, during the dispute settlement practices of selected Nepali TJS. Such analysis is crucial because this thesis aims to explore the extent to which large sections of the population (such as women, Dalits, Madhesi, Indigenous groups, people who experience poverty) who experience social, economic, and political discrimination, exclusion and exploitation can access justice for the resolution of their disputes.


CHAPTER 4: METHODOLOGY

INTRODUCTION

This chapter explains the qualitative research methods used to conduct this research and reasons for using these methods. This chapter also provides a description of the three selected TJS: the Badghar, Thakali, and Shir Uthaune and the reasons for selecting these three TJS and the three districts (Dhankuta, Mustang and Bardiya) of Nepal. The manner in which participants were selected and interviews were conducted, how the data was analysed, and the limitations and ethical considerations that were taken into account, is also explained in this chapter.

I QUALITATIVE RESEARCH METHODS

My PhD research analyses the operation of selected TJS from the perspectives of legal pluralism, human rights perspectives and critical legal theories with the aim of analysing the structure and operation of the three TJS selected, as well as unveiling options for linking TJS and the FJS so that access to justice is improved in general and for the people who are utilising TJS in Nepal. In doing so, qualitative research methods are used because to understand human behaviours properly such methods are appropriate as ‘the meaning that we give to events and things come from their qualities’ and such methods ‘tend to assess the quality of things using words, images, and descriptions’.\(^1\) Qualitative research methods are appropriate for my research because these methods are adaptable, which allows a researcher to understand the meaning, interpretation and subjective experiences of marginalised groups, and it provides an opportunity for a researcher to be able ‘to hear the voices of those who are

silenced, othered and marginalised by the dominant social order.'

Bruce L Berg distinguishes qualitative and quantitative research thus:

Qualitative approaches indicate that the notion of quality is essential to the nature of things. On the other hand quantity is elementally an amount of something. Quality refers to the what, how, when, and where of a thing — its essence and ambiance. Qualitative research thus refers to the meanings, concepts, definitions, characteristics, metaphors, symbols, and description of things. … In contrast, quantitative research refers to counts and measures of things.

According to Berg, qualitative research focusses on the qualitative attributes of some context or situation and quantitative methods focus on counting or quantifying things.

My PhD research is informed by intersectionality, which requires an approach that

adopts a distinctive stance, emanates from a specific angle of vision, and most crucially, embodies a particular dynamic approach to the underlying … reality it traces and traps while remaining grounded in the experiences of … people within hierarchical relations and also focuses awareness on people and experiences.

My research is also informed by feminist legal scholarship. As Virginia Olsen argues, ‘qualitative research is most useful for inquiries into subjective issues and interpersonal relations… feminists range from assessment of women’s lives and experiences that foreground the subjective and production of subjectivities to analyse of relationships through investigation of social movements.’ The use of qualitative research methods allow a researcher to form a relationship with participants, which

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leads to the establishment of trust and good rapport making it possible for a researcher to gather more in-depth information.⁶

My PhD project analyses the dispute settlement practices of three Indigenous groups — the Tharu, Rai and Thakali — that are in the operation in the three selected districts of Nepal, the Bardiya, Dhankuta and Mustang districts respectively. When conducting research on the topic related to Indigenous groups I need to be mindful and respectful of the culture and traditions of these three Indigenous groups, and accommodate the fact that interview participants may speak a language that is neither English nor Nepali. To guide my research practice, I have adopted a ‘decolonising methodology’ approach as espoused by Linda Tuhiwai Smith.⁷ Adopting a decolonising methodology does not mean ‘a total rejection of all theory or research or western knowledge; rather, it is about centring our concerns and world views and then coming to know and understand theory and research from our own perspectives and for our own purposes.’⁸ According to her, adopting a decolonising methodology does not mean entirely discarding western knowledge or methodology but rather it suggests acknowledging the experiences, world views and perspectives of Indigenous communities. She further observes: ‘Indigenous people across the world have other stories to tell which not only question the assumed nature of those ideals and the practices that they generate, but also serve to tell an alternative story: the history of Western research through the eyes of the colonized world.’⁹ In order to acknowledge and respect the customs and traditions of Indigenous communities, decolonising methodologies are essential.

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⁶ Liamputtong, above n 2, 8.
⁸ Ibid.
⁹ Ibid 2.
because ‘research is not an innocent or distant academic exercise but an activity that has something at stake and that occurs in a set of political conditions.’

Similarly, in the context of research ‘on’ Aboriginal peoples in Australia, Aboriginal researcher Karen Martin sees ‘research as an instrument of colonialism in the dispossession of Aboriginal peoples. … [where] institutions have silently colluded in the devaluing of Aboriginal knowledge and the misrepresentation of Aboriginal peoples.’ Although the situation of Indigenous peoples in Nepal is different from that of Aboriginal peoples in Australia and the Maori people of New Zealand, these observations may bear on a research topic (and approaches adopted) related to Indigenous groups and Dalits in Nepal who are experiencing exclusion by caste, as well as ‘language and religion based discrimination, low literacy, unemployment, poor representation and subjugation in government.’ In regards to the situation of women, Dalits, Indigenous peoples, Madhesis, and other minority groups in Nepal, it is argued that these groups have been ‘experiencing domination and discrimination by the Brahmin/Chhetri, Khas Nepali language speakers and Hindus of Nepal’. As Mahendra Lawoti, argues Indigenous groups make up more than 36 per cent of the country’s population and they experience various forms of discrimination, such as ‘linguistic, religious and sociocultural discrimination as well as unequal access to

10 Ibid 5.
11 Linda Briskman, 'Please Knock before You Enter' (2011) 64(1) Australian Social Work 144,144. Note: this article is a Book Review of Karen Lillian Martin, Please Knock before You Enter: Aboriginal Regulation of Outsiders and the Implementation for Researchers (Post Pressed, 2008).
resources’.

He also noted that Dalits group comprises around 15 per cent of the total population of the country and traditionally they are considered the “lowest’ Hindu caste and ‘are affected by the widespread practice of untouchability that considers them impure, denies then entry into “higher” caste homes, and generally segregates them from the social mainstream’.

In consideration of the fact that my PhD research analyses three selected TJS that are utilised by Indigenous groups (the Rai, Thakali and Tharu) and other marginalised groups (such as women and Dalits) in the rural areas of Nepal, in my research I ensured throughout that (as suggested by Elena Marchetti) there was a distinct emphasis on ‘maintaining a critical perspective, using culturally sensitive approaches, and being mindful of the need to encourage and advance Indigenous voices and experiences.’

As a researcher, I always kept in mind core ethical values, such as respecting the cultural and traditional values of the community, obtaining informed consent before collecting any information, using the data only for the expressed purpose of the research, and maintaining the confidentiality of the interview participants. I became aware of local customs, traditions and etiquette from research assistants and tried to adhere to them so that no conflict would arise. For example, to respect the language spoken in each three field sites I used a research assistant who could speak the local language (in Dhankuta the Rai language, in Mustang the Thakali language and in Bardiya the Tharu language) so that the interviewees’ language was able to be respected. This is particularly important where a culture gives precedence to a different language to that of the speakers/interviewees

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15 Ibid 132

16 Elena Marchetti, Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody (PhD Thesis, Griffith University, 2005) 47.
(in Nepal, it is worth recalling that while all languages spoken are recognised as national languages, the official language for law and business is the Nepali language, which is spoken by the Chhetri and Brahmin who dominate the FJS). The adoption of the relevant local language in the interview situation serves to respect and validate culture and invite more accurate and detailed responses than would the use of the dominant official language. Similarly, in all three selected venues, the culture of the Indigenous peoples demands that elderly people need to be shown respect. In order to follow this rule I always greeted older people appropriately (saying ‘Namaste’ when giving a namaskar [greeting involving verbal component and a salute or bow]), first on my part as deferring to them, and only then starting to interview them. Again, following such traditions of gesture and greeting acknowledges and demonstrates respect for culture and invites a freer response than might otherwise be the case.

While adopting such courtesies, I remained mindful of the need to interview widely and not be swayed by any local prejudice/preference; I ensured that women, Dalits, and Indigenous parties to disputes were involved, not merely members of the locally dominant group or those in positions of power in any area. Triangulation plays an important role in this research. As Norman Denzin and Yvonna Lincoln observe, qualitative methodologies can include the collection and analysis of a variety of empirical materials, such as case studies, personal experience and interviews. According to Bruce L Berg, ‘triangulation actually represents varieties of data, investigators, theories, and methods’.

17 Norman K Denzin and Yvonna S Lincoln, ‘Introduction: Entering the Field of Qualitative Research’ in Norman K Denzin and Yvonna S Lincoln (eds), Handbook of Qualitative Research (Sage, 1994) 3.
18 Berg, above n 3, 7.
This research relies on primary data, such as data collected through scheduled semi-structured interviews which has then been triangulated through interviewing different actors. This comprises users of TJS and the FJS at each of the three locations, and justice administrators (namely, judges, court officials, TJS dispute settlers and experts).

The analysis based on the primary data is enriched by the use of relevant documents from justice related institutions (such as the Supreme Court of Nepal, National Judicial Academy and Nepal Bar Association), government institutions (such as the Central Bureau of Statistics), United Nations’ agencies and other non-governmental organisations and academic scholars.


For my PhD research, I have selected three TJS namely, Badghar, Sir Uthaune and Mukhiya that are being practised in Bardiya, Dhankuta and Mustang districts respectively. The reasons for selecting these three TJS for the analyses are:

- they are among the most well-known and widely practised TJS in the country;
- the selection provided an opportunity to collect data from three different geographic regions of the country, and that enables an in-depth comparative analysis;
- the selected TJS are practised by three different Indigenous groups of the country (Badghar, Mukhiya and Shir Uthaune are practised by three different Indigenous groups the Tharu, Thakali and Rai respectively); and
- I had already established contacts and working relations with the people associated with the selected TJS and locations.

II DESCRIPTION OF THE SELECTED TRADITIONAL JUSTICE SYSTEMS

The following section provides a detailed description of the practices and locations of the three selected TJS from the Bardiya, Dhankuta and Mustang districts of Nepal.

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23 Nepal was administratively divided into five Development Regions, 14 Zones and 75 Districts. However, the Constitution of Nepal 2015 (hereinafter ‘Constitution’) adopted a federal form of government and divides the country into seven provinces and 77 districts.

24 See Suku Pun and Gehendra Lal Malla, Local Mediation Practices in Bardiya and Solukhumbu Districts (UNDP, Access to Justice Programme, 2005); Chhetri and Kattel, above n 22; Pradhan, above n 21; Massage, Kharel and Sharma, above n 22.

25 Geographically, Nepal is divided into three regions: Mountain, Hilly and Terai (lowland). Bardiya, Dhankuta and Mustang districts are located in Terai, Hill and Mountain regions respectively. See the map of Nepal in this chapter for the three locations of this research.

26 A more detailed description and analysis in relation to the structure and operation of these selected TJS is presented in Chapter 5 of this thesis.
A  Badghar

The literal meaning of the term Badghar in Tharu language is Bada (big) and Ghar (house): ‘big house’. In some regions, Badghar is also known as Mahato or Mahaton or Bhalmansa. In order to maintain uniformity, the term Badghar is used throughout this thesis. A Badghar is a person selected by a gathering of local villagers in the Tharu community who is trustworthy, knowledgeable and of high moral integrity so as to be able to lead the village and settle disputes. The selection of a Badghar is done through a gathering of all the villagers and by consensus or election once a year. The Badghar is considered the head of the village and leads all social activities performed in the village and settles disputes. Complaints are given orally by the petitioner to the Badghar, then the Badghar informs both the disputing parties and the villagers regarding the date, place and time of the hearing. Disputants are at liberty to bring any witnesses and evidence if they deem it necessary. Primarily, the party instituting the case is allowed to express his or her views, which is then followed by a similar presentation by the second party. All the villagers present at the meeting have an equal right to express their views in relation to the dispute. Parties are free to present their witnesses and any documentary evidence at the meeting. After hearing the disputants and villagers who are present in the meeting, and upon evaluating the evidence produced (if any), the Badghar decides the case in consultation with the villagers.


28 Chhetri and Kattel, above n 22, 17–18.

29 Pun and Malla, above n 24, 15–17.


31 Ibid.
Shir Uthaune is practised in the eastern part of the country, especially in the Dhankuta, Bhojpur, Khotang, Tehrathum, Sankhuwasabha and Solukhumbu districts within the Rai and Limbu communities. Sir Uthaune is known as ‘Saaya Chockma’ in the Rai language, which means ‘to resolve the dispute and harmonise the conflicting parties.’ Generally, Shir Uthaune is used to resolve disputes within the Rai community but in some instances, it is used beyond the Rai community.\textsuperscript{32} Persons who are well-known in the village, are believed and respected by many, who engage in social work without being aligned with any political party, and who are neutral and trusted by the disputants can be involved in Shir Uthaune. Under Shir Uthaune, a person who is a victim of any wrongdoing approaches the villagers to conduct a Shir Uthaune process to resolve the dispute. In Rai and Limbu culture, a victim and perpetrator’s morale is believed to be low (Shir Jhukeko). It is believed that the victims feel weak due to the injustice they face and the wrongdoing perpetrated against them, and in order to boost their morale they approach the Shir Uthaune. For example, if someone is a victim of a minor assault, they feel weak or have low morale but when they obtain justice then their morale is revived. It is believed that the decision of the Shir Uthaune imparts justice so that the morale of the victim is boosted. The Shir Uthaune process is conducted in a public place and all the villagers who are interested in the matter can participate. Both parties to the conflict attend the process, and they can bring others to assist them during the process.\textsuperscript{33}

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\textsuperscript{32} Chhetri and Kattel, above n 22, 11–12.
\textsuperscript{33} Ibid.
C Mukhiya

The traditional homeland of the Thakali community is Thak Saatse,\textsuperscript{34} which consists of 15 villages of the Mustang district. The territory of Thak Saatse was recognised during the Malla dynasty.\textsuperscript{35} The village of Kobang is the centre/capital of the Thakali community. It is believed that the Mukhiya system was established and was being practised in the Thakali community from around 1750–1760 AD.\textsuperscript{36} Traditionally, Mukhiya was used to collect revenue from the people and to regulate economic, social and justice systems within the community. Currently, there are 13 Mukhiyas operating in the Thak Saatse region. Selection of Mukhiya is done by consensus amongst the villagers.\textsuperscript{37} Disputes are, in the first instance, resolved at a household level (if the dispute is among family members); however, if this is unsuccessful, then the disputing parties approach the village Mukhiya. At this point, the Mukhiya tries to resolve their dispute but if that is not possible or the parties are not satisfied with the Mukhiya decision, then the parties can file an appeal to the Mir Mukhiya (main Mukhiya) or go to the formal justice system (FJS).\textsuperscript{38}

B Introduction to the Tharu, Rai and Thakali Communities in Nepal

The 2011 National Census Report of Nepal shows that the Tharu community lives in the Terai (low land) across the country but is more densely concentrated in the western

\textsuperscript{34} Thak Saatse is a group of villages in Mustang district of Nepal that are the traditional homeland of the Thakali community.


\textsuperscript{37} Ibid 2.

\textsuperscript{38} Ibid. Mir Mukhiya means ‘main Mukhiya’ who has the power to hear an appeal against the decision of Mukhiya in the Thakali community.
Terai, including the Bardiya district; *Rais* are in the eastern hilly region which includes Dhankuta district; while the *Thakali* mainly populate the mountainous area of the Mustang district.\(^3^9\)

*Map of Nepal showing the field districts*\(^4^0\)

Similarities among the chosen three groups are: all three groups are Indigenous groups; the majority of the population of all groups reside in rural areas; and in all three groups the female population is larger than the male population.\(^4^1\) The data shows that the

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\(^4^0\) The map shows in red four districts: Dhankuta, Kathmandu, Mustang and Bardiya. The reason for selecting Dhankuta, Mustang and Bardiya is because the three selected TJS, *Shir Uthaune, Mukhiya* and *Badghar* are practised in these districts respectively. The reason for including Kathmandu as a field district is that it is the capital of Nepal where a number of government and non-governmental organisations, such as the Supreme Court of Nepal, Central Law Library, National Judicial Academy and Nepal Bar Association are located and where a number of academicians and experts, and FJS actors who participated in this research live.

female population is 884 501, 326 097, and 7058; and the male population is 852 969, 293 907 and 6115 of the Tharu, Rai and Thakali communities respectively.\textsuperscript{42} Despite these similarities, their language, tradition, cultures and geographic location are different. For example, the Tharu, Rai and Thakali people speak the Tharu, Rai and Thakali languages respectively. Of the three selected groups, the Tharu group is one of the Indigenous groups in Nepal that are scattered all along the southern foothills of the Himalayas and the greater part of their population resides in Nepal, although some Tharus also inhabit the adjacent Indian districts.\textsuperscript{43} Nepal’s population census of 2011 shows that the Tharu is the largest group of the three selected groups with a population of 1 737 470 which constitutes 6.6 per cent of the total population of the country, and it is the fourth largest ethnic group in Nepal.\textsuperscript{44}

The Rai is an ethnic group that resides in eastern hill districts of Nepal (such as the Dhankuta, Bhojpur, Ilam, Udayapur and Khotang).\textsuperscript{45} The Rai communities are characterised by ‘close-knit social relations as most people are related either through descent or matrimonial ties’.\textsuperscript{46} According to the 2011 population census, the Rais in Nepal number 620 004 which amounts to 2.3 per cent of the population.\textsuperscript{47}

\textsuperscript{42} Ibid 1–2.

\textsuperscript{43} Rajaure, above n 27, 155. For detailed information about Tharu groups see Harald O Skar (ed), Nepal: Tharu and Tarai Neighbours (EMR Kathmandu, 1999) vol 6.


\textsuperscript{45} Chhetri and Kattel, above n 22, 11.

\textsuperscript{46} Ibid.

Traditionally, the *Thakali* ethnic group inhabited the Thak Khola region of the Mustang district in the northern Himalayan region, but now only 20 per cent of the *Thakali* population live there; the majority have migrated to live in towns and rural areas in the south of Nepal. Historically, the *Thakalis* were considered a marginalised group in the country; however, their entrepreneurship and rise in their wealth have contributed to their human development and the group now has a higher human development rank among ethnic groups in the country than was previously the case.

For example, the *Nepal Human Development Report 2014* reveals that the average human development index value for all Indigenous groups in Nepal is 0.509 but the value is 27 points higher (0.536) for the *Thakali* people. The total population of the *Thakali* is 13,215 which forms 0.05 per cent of the total population of the country. According to the traditional Hindu *Verna* system that is discussed in Chapter 3 and 5 of this thesis, the three selected Indigenous groups fall below the hegemonic *Brahmin/Chhetri* group and above the *Dalit* groups.

### III SEMI-STRUCTURED INTERVIEWS

#### A Interview Participants for the Semi-Structured Interviews

In order to answer the research questions, a total of 58 semi-structured interviews were conducted with the stakeholders of TJS and the FJS from the three selected districts...

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48 Vinding, above n 39, 17.


and the capital city of Nepal, Kathmandu. The reason that a semi-structured interview approach was selected for this research is because it is reasonably flexible in both content and execution in a field situation. Semi-structured interviews are appropriate for this research project because ‘in a semi-structured interview it is expected that interview participants’ viewpoints are more likely to be expressed in a relatively openly designed interview situation.’\footnote{Uwe Flick, 	extit{An Introduction to Qualitative Research} (Sage, 2002) 74.} The use of the semi-structured interview schedule allowed me to interview participants from the varied backgrounds from TJS (such as dispute settlers and TJS users) and the FJS (such as judges, court officials and FJS users). Three locations in Nepal were selected for the research. They are not districts located close to each other (see map on page 129) but offered the opportunity to study the three most well-known and widely practised TJS (namely Badghar, Mukhiya and Shir Uthaune that are practised by the Tharu, Thakali and Rai respectively) and the FJS. Both the geographic spread and diversity of TJS allows greater in-depth comparative analysis to be conducted. Their distance from each other, however, contributed to cost and time pressures. Endeavouring to interview widely within the various communities (including TJS and FJS users, administrators, justices, witnesses etc (see below)) in each of the three locations took much time despite my already having contacts and working relationships with some parties. It must be recalled that while in some populations one can find interviewees ready and willing to be interviewed on various subjects, here the researcher was looking to interview people who had accessed TJS to resolve disputes. Securing such interviews took great effort and some time. Given the degree of relatively recent conflict in Nepal and the fraught history of access to justice in recent decades (outlined earlier in this thesis), it can be difficult to obtain interviews with those who have been justice seekers. Any person in
such a position (and particularly women, Dalits and other disadvantaged community members) could feel vulnerable within their local community; more so in Nepal, despite the possibility of contributing to better future processes and outcomes. By adopting a culturally sensitive approach (and especially facilitating the use of local languages), I was able to interview broadly in each community, with interviewee numbers totalling 58 (comprising 25 TJS participants who were almost equally distributed between the 3 TJS study sites, 23 FJS participants that included persons at all three sites and the capital, and 10 expert participants, of whom four were in the capital and a further two in each of the three study sites (see further below)). Despite my best endeavours, a disparity in regards to female participation may be noticed. This can be largely attributed to both the lower number of women seeking to access justice in both the TJS and FJS and perhaps a certain degree of reluctance to participate and perhaps attract greater (possibly negative) attention. In regards to female participation, 4 (one of them a dispute settler) of the 25 TJS participants were women as were 5 of the 23 FJS participants, but 4 of the 10 experts were also women. Women identifying as Indigenous, Dalit and Brahmin/Chettri were interviewed over the period.

Although the low number of female TJS participants is to be regretted, more could not be accessed during the time allocated to interviews (difficulties encountered are detailed further below). I triangulated participants’ responses and found that the experiences mentioned by the women were supported by what other participants said. Commonalities of women’s experience is discussed further below.

Ultimately, however, due to the scarcity of financial resources (as a full-time student enrolled in PhD study at the University of Wollongong, Australia) and time constraints (six months on location in Nepal was afforded), and locational difficulties (the three
TJS venues that were scattered across Nepal), I was unable to interview more than 58 participants. Fortunately, I found that was sufficient to reach saturation in several fields in terms of results analysis but despite this, the small total number of interviewees does limit the generalisability of the findings. Nevertheless, the thesis remains a valuable contribution to knowledge in the area and recommendations were able to be made in relation to possible change and topics for further research.

Following is a short description of the interview participants from among TJS and the FJS stakeholders and reasons for their selection as participants.

1 Interview Participants from Traditional Justice Systems

My PhD thesis aims to explore the strengths and weaknesses of TJS and analyse the formation, functioning and outcomes of TJS; therefore, it is important to interview stakeholders from TJS to answer the research questions. For the purpose of interviewing, TJS stakeholders were divided into two categories: dispute settlers and users of TJS. This division enabled me to uncover the perspectives of different actors who play distinct roles in the dispute settlement process in a particular traditional justice system.

Interviews with dispute settlers (a total of 17) helped to answer questions in relation to (i) the structure of the particular TJS, (ii) selection of dispute settlers, (iii) the extent of their knowledge about international human rights standards, (iv) the process of dispute settlement, (v) strategies used to make their decisions, and (vi) views about the relationship between TJS and the FJS.

Users of TJS are the real beneficiaries of the system; therefore, their perspectives are important for determining whether or not they feel it is easy to access justice from TJS.
The interviews (a total of eight) uncovered information about why they use TJS instead of the FJS, their level of satisfaction with the overall functioning of TJS, including the formation of dispute settling bodies, the process and outcomes of TJS, and the areas of possible reforms of TJS so that users’ ability to access justice is improved.

2 Interview Participants from the Formal Justice System

When conducting research on access to justice, it is not sufficient just to consider individual experiences; it also requires taking into account ‘institutions, such as courts, administrative bodies and other potential structural constraints on access to justice.’ To answer the research questions, it was necessary to interview participants from the FJS, including judges (a total of eight; one from the Supreme Court, two from the Appellate Court and remaining from the district courts), court officials (a total of eight) and users of the FJS (a total of seven). FJS interview participants were asked questions about the extent to which marginalised groups such as women, Indigenous people, people living in rural areas and people living in poverty are able to access justice in the FJS, the overall functioning of the FJS, and the necessity for a relationship between TJS and the FJS, including possible ways to create such a relationship.

3 Expert Interview Participants

For the purpose of this research, experts are the people who due to their training, education or experience have knowledge about access to justice through TJS and the FJS in the Nepali context and are working as academics or in national or international non-governmental organisations. Judges and court officials also can be experts but in

For example, to interview judges and court

54 ‘Experts’ are the interview participants from academia, and international and national non-governmental organisations who have knowledge and experience in relation to access to justice in Nepal.
officials, I read the questions but for the interview participants who are less educated (mostly representing TJS (dispute settlers and TJS users)), I explained the meaning of the questions that were asked and briefed them regarding the purpose of the PhD research in greater detail to ensure they understood the context of the research. A full list of semi-structured interview questions that were used to interview both FJS and TJS interview participants appears in Appendix 2 of this thesis.

5 Sampling Strategy

Sampling is used ‘to study a representative subsection of a precisely defined population in order to make inferences about the whole population.’\textsuperscript{55} The main purpose of sampling in qualitative research is ‘to collect specific cases, events, or actions that clarify and deepen understanding’; therefore, in a qualitative research project a researcher ‘focuses less on a sample’s representativeness than on how the sample or small collection of cases, units, or activities illuminates social life.’\textsuperscript{56}

A purposive and snowball sampling technique was used in selecting the participants to be interviewed. In a purposive sampling approach, a researcher uses a wide range of methods to locate possible members of the specific population, and the method is useful in exploratory field research where a researcher wants to identify particular types of respondents for in-depth investigation.\textsuperscript{57} ‘Snowball sampling’ is also called ‘network sampling’, whereby a researcher asks interview participants who have


\textsuperscript{57} Ibid 222.
already been selected for the study to identify other interviewees. Each person I interviewed was asked whether there were other people whom, in their opinion, I should interview. Selection of the interview participants for an interview was based on their knowledge about and experience of the subject matter. Interviews were conducted until a point of saturation was reached, meaning that interviews were conducted until no new significant ideas emerged from the information gathered and the responses became repetitive. Ensuring that women, Dalits and Indigenous peoples were represented as interview participants was also considered when selecting interview participants from TJS and the FJS. Their lower participation rate, however, reflects the lower number of women willing and able to access justice either under the TJS or the FJS. Given the small number of female TJS participants in particular, triangulation was undertaken and support found for the experiences they related. For the roles and gender division of interview participants from all three categories of participants (TJS, FJS and the expert interview participants), see Table 4.2.

Table 4.2: Gender of Interview Participants According to Roles

<table>
<thead>
<tr>
<th>Interview Participants</th>
<th>Female</th>
<th>Male</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>TJS Participants</td>
<td>4</td>
<td>21</td>
<td>25</td>
</tr>
<tr>
<td>FJS Participants</td>
<td>5</td>
<td>18</td>
<td>23</td>
</tr>
<tr>
<td>Expert Participants</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>13</td>
<td>45</td>
<td>58</td>
</tr>
</tbody>
</table>


59 In the FJS, the representation of women, Dalits and other minority group is extremely low. Likewise, dispute settlers in TJS are also rare from these groups.
Table 4.3 depicts the caste/ethnicity of the interview participants.

**Table 4.3: Number of Interview Participants According to Caste/Ethnicity**

<table>
<thead>
<tr>
<th>Interview Participants</th>
<th>Dalits</th>
<th>Indigenous Peoples</th>
<th>Madhesis</th>
<th>Brahmin/Chhetris</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>TJS Participants</td>
<td>3</td>
<td>22</td>
<td>-</td>
<td>-</td>
<td>25</td>
</tr>
<tr>
<td>FJS Participants</td>
<td>4</td>
<td>6</td>
<td>2</td>
<td>11</td>
<td>23</td>
</tr>
<tr>
<td>Experts</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>9</td>
<td>32</td>
<td>3</td>
<td>14</td>
<td>58</td>
</tr>
</tbody>
</table>

Table 4.4 depicts the roles (dispute settlers and TJS users) and gender division of the TJS interview participants.

**Table 4.4: Roles of TJS Interview Participants According to Gender**

<table>
<thead>
<tr>
<th>TJS Participants</th>
<th>Female</th>
<th>Male</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dispute Settlers</td>
<td>1</td>
<td>16</td>
<td>17</td>
</tr>
<tr>
<td>TJS Users</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Total</td>
<td>4</td>
<td>21</td>
<td>25</td>
</tr>
</tbody>
</table>

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60 See discussion relating to the caste/ethnicity division in Chapters 2 and 4 of this thesis.
Table 4.5 depicts the roles (judges, court officials and FJS users) and gender of the FJS interview participants.

Table 4.5:  Roles of the FJS Interview Participants According to Gender

<table>
<thead>
<tr>
<th>FJS Participants</th>
<th>Female</th>
<th>Male</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td>-</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Court Officials</td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>FJS Users</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>18</td>
<td>23</td>
</tr>
</tbody>
</table>

Following are some of the characteristics of interview participants who were interviewed during the field work:

- Out of a total of 58 interview participants, 25 were TJS participants, 23 FJS participants, and 10 experts;
- Out of a total of 58 interview participants, 45 were male and 13 female; (The number of female participants is much lower than of the male participants in the research. This is mainly due to the very low participation of women in the dispute resolution process and marginalisation of women in Nepal. For detailed discussion in relation to the subordination of women in Nepal, see Chapters 5, 6 and 7 of this thesis).
- Out of a total of 58 interview participants, 32 were Indigenous; three were Madhesi, nine were Dalits and 14 were Brahmin/Chhetris.
TJS Interview Participants (total 25, TJS Dispute Settlers and TJS Users)

- Of the total of 25 TJS interview participants, 17 were dispute settlers and 8 were TJS users;
- Of the 25 TJS interview participants, 21 were male and 4 were female;
- All 17 dispute settlers were from Indigenous groups and only one was female;
- The average age of the dispute settlers was 57 years (range: 35 to 88);
- Of the eight TJS users, five were male and three were female;
- Of the eight TJS users, five were Indigenous (one female) and three were Dalits (two female).

FJS Participants (total 23, Judges, Court Officials and FJS Users)

- Of the 23 FJS interview participants, 18 were male and five were female;
- Of the 23 FJS interview participants, eight were judges, eight were court officials and seven were TJS users;
- Of the five female interview participants, one was a court official and the remaining four were FJS users;
- Of the 23 FJS interview participants, there was a total of eight judges (Supreme Court of Nepal – one, Appellate Court – three, and District Courts – four). All of the judges were male;
- Of the 23 FJS interview participants, 11 were Brahmin/Chhetri (including five male judges) and two were male Madhesi judges;
- Six of the FJS interview participants were Indigenous (four court officials – one of whom was a female; and two male lawyers);
- Four of the FJS interview participants were from the Dalit community (three were female FJS users and one male judge).
- Of the FJS users (total seven), four were female;
- Of the FJS users (total seven), four were from the Dalit community (three were female).
Experts (total 10)

- Of the 10 experts, six were male and four female;
- Of the 10 experts, one was a Madhesi man, four were Indigenous (two male, two female), two were Dalit males and three were from the Brahmin/Chhetri caste group (two of whom were female).

6 Interview Process

The University of Wollongong Human Research Ethics Committee granted ethics approval on 10 July 2015. I conducted all of the interviews in Nepal between 25 July and 20 December 2015. PPR Nepal staff and volunteers supported me in the conduct of the research activities in the field work including identifying appropriate locations in the selected districts and participants for the interviews. I used the PPR Nepal central office in Kathmandu as my contact office during my stay at Kathmandu. During the field work, I accessed relevant materials in the libraries in Nepal, including the Nepal Bar Association Library, Supreme Court of Nepal Library, National Judicial Academy Library, Central Law Library and Central Library of Tribhuvan University in Kathmandu.

Bruce L Berg and Howard Lune state that researchers in social science have a greater ethical obligation to their ‘colleagues, their study populations and the society at large.’ According to Berg and Lune, social science researchers ‘must ensure the rights, privacy, and welfare of the people and communities that form the focus of their studies.’ Moreover, conducting research on a topic related to ‘indigenous people’ is

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61 Berg and Lune, above n 1, 61.
62 Ibid.
highly sensitive and challenging. Describing Indigenous peoples’ perspectives towards research activities, Tuhiwai Smith observes that ‘indigenous people and research intersected only to the extent that indigenous communities were most often the objects or subjects of study by non-indigenous researchers and they were not considered agents themselves and their conditions.’ She further observes that ‘the term “research” is probably one of the dirtiest words in the indigenous world’s vocabulary’ and Indigenous people think that they are the people who are the ‘most researched people in the world.’ I acknowledged the perspectives of Tuhiwai Smith and became mindful of the traditions, cultures and experiences of Indigenous populations during the course of data collection and interpretation of the data. Judy Putt suggests that in doing research with Indigenous people, a researcher should be mindful of cultural sensitivity, and have a willingness to partner and to involve communities in the processes and outcomes.

(a) Interviews with TJS Interview Participants and Experts

At the beginning of the field work, I identified some possible interview participants who fell into the group of TJS interview participants (TJS dispute settlers and TJS users) and experts through my local contacts (contacts from previous employment). After identifying possible interview participants, I contacted them by telephone to arrange face-to-face interviews at a date, time and place of their convenience. Participants who were interviewed helped me to identify further interview participants.

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63 See Tuhiwai Smith, above n 7; Liamputtong, above n 2.
64 Tuhiwai Smith, above n 7.
65 Ibid 1–3.
66 Judy Putt, Conducting Research with Indigenous People and Communities (Standing Council on Law and Justice, 2013) 2–3.
To facilitate the fieldwork in each of the three districts (Dhankuta, Bardiya and Mustang), an Indigenous research assistant was selected and appointed in each district. Each research assistant helped me to understand the customs and traditions of the local Indigenous group, assisted me to contact interview participants, translated local language into the Nepali language and assisted me in conducting interviews during my field work in Nepal. The selection of a research assistant for each district was based on the following criteria:

- the person should have knowledge of the local dialect and Nepali language;
- the person should belong to the same ethnic group as the TJS that is being studied in this research; and
- the person should have attained a formal education standard of at least senior high school graduate level.

To select an appropriate research assistant, I made contact with people whom I knew could assist me in hiring such a person and briefed them about the criteria a research assistant needed to satisfy. They then helped me to locate a research assistant in each of the three districts. One of the research assistant (from the Dhankuta district) was female and the other two were male.

To interview the TJS participants (TJS dispute settlers and TJS users) and experts, I contacted the possible interview participants by telephone and introduced myself and the PhD project and asked whether they were interested in the topic and willing to participate in the research. If the response was positive, I arranged for a Nepali language version of the Participant Information Sheet and the Consent Form to be given to them when meeting them personally. Where the person was unable to read, I read out the content of both documents for them over the telephone or in person at the
point of the first contact. Two days later I again contacted these people by telephone or met them personally and asked if they were still interested in participating in the research. If they indicated that they were still interested in participating in an interview, an appropriate date, time and venue was arranged. At the beginning of the interview, I handed the participant the Nepali language version of the Consent Form and read it out loud for the interview participants who were unable to read the document. After this process, the participant signed the Consent Form.

A total of 35 face-to-face interviews with TJS interview participants and experts were conducted. Twenty-three of the interviews were recorded using a digital recorder. The remaining 12 interview participants were hesitant to speak into a digital recording device and I therefore turned off the recorder and took notes of the interview. The interviews took place either at a participant’s home or in public places, such as a school. The interviews with the TJS interview participants and experts took between 30 minutes and one hour 45 minutes, with the average length of time being one hour.

(b) Interviews with FJS Interview Participants

For the interview participants from the FJS, I first contacted interview participants via telephone. I found their contact details through a publicly accessible telephone directory published by the Supreme Court of Nepal and Nepal Bar Association. At this first point of contact I introduced myself and the PhD research and asked whether they were interested in participating in the research. If they agreed, I then emailed the participant a copy of the Information Sheet and the Consent Form at least two days prior to the interview. In that email correspondence, a date, time and venue for the

67 A copy of the Information Sheet and the Consent Form given to each person who was interviewed appear in Appendix 1 of this Thesis.
interview was arranged. Interviews with the FJS actors were conducted in their offices in the Kathmandu, Bardiya, Mustang and Dhankuta districts.

At the start of each interview, I had the participant sign a Consent Form. All 23 interviews of the participants from the FJS actors were conducted face-to-face and the interviews were recorded using a digital recorder. The interviews lasted between 30 minutes and an hour 15 minutes, with the average time being 55 minutes.

(c) Response Rate

In total, I approached 69 possible interview participants (from TJS, the FJS and experts) and handed them the Information Sheet but I was able to interview only 58 of them. In the Bardiya district, a judge was on leave and a dispute settler was unwell. In the Kathmandu district, three experts, a female judge and a high-ranking court official at first agreed to participate in the interview but, when I called them back to conduct the interview, they did not pick up the telephone nor respond to my emails. Two dispute settlers from the Dhankuta district and one from the Mustang district did not participate due to their busy schedules during my field work. After I returned to the Kathmandu, I tried to call them and tried to interview them over the telephone but at that stage they declined to be interviewed. In the Kathmandu district, a female court official in the first meeting agreed to participate in the interview but afterwards, when I went to conduct the interview, she told me that she did not have knowledge of the issues I was going to discuss and therefore declined to be interviewed. A total of 11 people declined or did not respond to repeated requests for an interview. It seems that of the 11 people, five were absent from their abode/place of work or their time available did not match with mine; one declined because of a lack of knowledge about the topic and the remaining five did not mention any reasons and simply did not
respond to my request for an interview. Though due to above mentioned reasons some of the proposed interview participants did not participate in the interviews, sufficient number of participants (total 58) were accessed to make interview results valid and reliable. Where small numbers did exist in relation to gender, triangulation was undertaken which found that there were no differences in experiences of women between the sites, and their experiences were supported by what other participants said. Commonalities of women’s experience revealed by that examination included: their greater vulnerability and lower participation rate in justice seeking due to lower status and a tendency towards exclusion from processes. Women as less able litigants in the FJS is also a commonality due factors such as physical vulnerability, and lower wealth and status. As TJS operate according to the customs and tradition of the Indigenous peoples in the majority in specific they are also less able to serve those of other backgrounds and language groups, and women who are Dalits or other Indigenous groups are thereby doubly disadvantaged.

7 Storage and De-Identification of Data

After the interviews, the recordings of the interviews were stored on a password-protected computer and the transcripts and notes were kept in a locked filing cabinet in room 239B, Building 67, University of Wollongong. In order to maintain the anonymity of the people who were interviewed, each person was allocated a code. In the code, the first three/four letters indicate the district from which the person interviewed (Dhan, Kath, Bard and Mus indicate the Dhankuta, Kathmandu, Bardiya and Mustang districts respectively). The second part of the code indicates the role of the person interviewed (TJS dispute settler (DS), court official (CO), expert (EX), TJS user (TJSU), and FJS user (FJSU)). The number in the last part of the code indicates
the number of the participant from the particular district. For example, Dhan-DS2 indicates that the interview participant was from the Dhankuta district, was a dispute settler and was the second participant from that district. Similarly, Kath-EX1 indicates that the person was from the Kathmandu district, was an expert and was the first person interviewed from that district.

I transcribed the recordings. All the interviews were conducted in the Nepali language and I translated them into the English language.

**IV METHODS OF ANALYSIS**

The interview data were coded and analysed thematically. According to Bruce L Berg and Howard Lune, data analysis is ‘the most creative’ and ‘the most difficult aspect of any qualitative research’.

While it is therefore not practical to prescribe ‘a complete step-by-step operational procedure that will consistently result in qualitative analysis’, a brief summary appears in the paragraph below of the approach taken. Uwe Flick and Katie Metzler observe, qualitative data analysis is ‘the interpretation and classification of linguistic (or visual) material’ with the aim of revealing implicit and explicit dimensions meaning of the data.

For the purpose of analysis, I pre-coded all the primary data that had been collected through in-depth semi-structured interviews with the interview participants of FJS and TJS from the selected locations. For qualitative research, ‘coding is a process of labelling and categorising data as the first step of analysis’ with the aim of ‘developing

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68 Berg and Lune, above n 1, 153.
69 Ibid.
70 Uwe Flick and Katie Metzler, *An Introduction to Qualitative Research* (Sage, 5th ed, 2014) 370.
concepts which can be used for labelling, sorting, and comparing excerpts of the data.\textsuperscript{71} During this initial stage, a number of themes were identified through the pre-coding within the data sets. These included:

- selection of dispute settlers;
- structure of dispute settlement body;
- qualification of a dispute settler;
- tenure and removal process of a dispute settler;
- dispute resolution process;
- types of cases for TJS to resolve;
- role of women, Dalits and minority groups as TJS dispute settlers;
- TJS dispute resolution as a voluntary service;
- TJS as traditional practices of the Indigenous groups;
- reasons for using TJS – geographic proximity, economic affordability, procedural flexibility and simplicity, speedy service, respect of local customs and traditions including use of local languages;
- respect for international human rights principles in TJS;
- recognition of TJS by the state;
- uncertainty of the process and outcomes in the TJS processes;
- appropriateness of use of TJS in a heterogeneous society; and
- the different options in relation to the relation between TJS and the FJS, such as complete abolition of TJS, recognition of TJS by the FJS, independent functioning of TJS with state recognition.

\textsuperscript{71} Ibid 373.
After pre-coding the data, I further coded the data according to sub-themes that reflected the topics in the research questions. According to Berg, thematic coding is a most powerful unit to count while doing data analysis. He defines themes as ‘a simple sentence, a string of words within a subject and a predicate.’ The thematic codes that emerged from the second round of coding include:

- Inclusivity of women, Dalit, and other minority groups in the TJS structure and processes;
- Extent to which the human rights principles that are related to access to justice were respected in the TJS operation; and finally
- Options for the establishing linkage between TJS and the FJS and the issue of recognition of TJS by the state.

The coding of the data enabled me to conduct a thematic analysis that compares the operation of TJS in three districts as well as comparing and contrasting the use of TJS and the FJS; and to draw out how these findings illustrate whether or not access to justice is achieved in accordance with international human rights standards.

After the identification of the themes for the analysis, the actual process of data interpretation was conducted. As Flick suggests, data interpretation is the ‘core activity of qualitative data analysis for the understanding or explaining what is in the data — whether explicitly mentioned or implicitly there to be elaborated.’ According to him, the interpretation of data means ‘to understand the logic of an excerpt of the data or to

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73 Flick and Metzler, above n 70, 375.
put it into the context."\textsuperscript{74} The analyses in this thesis were informed by the contexts enunciated in the theoretical frameworks described in Chapter 3 and by being mindful of the fact that many interview participants were engaged in the justice system process as people who sit at the intersection of more than one disadvantaged or marginalised group. The findings of my analyses are presented in Chapters 5, 6, 7 and 8.

V Limitations of the Research

The main limitation of this research is that there are a number of TJS in the 77 districts of Nepal,\textsuperscript{75} which deal with a large number of disputes across the country but, as discussed, this research only considered three TJS (the Shir Uthaune, Badghar and Mukhiya) being practised by the Rai, Tharu and Thakali communities respectively.

The timeframe for PhD research and the six months’ time frame for field research in three locations in Nepal and the limited financial resources should also be considered as a limitation for the research. This resulted in me being able to in interview only four female TJS participants and five female FJS participants (though I did manage to interview four female experts). The greater difficulty in interviewing female TJS and FJS participants reflects the lower participation rate by women in accessing justice in Nepal. I also did not get opportunity to participate in and observe TJS hearings. As these are generally sporadic, being held in response to disputes that arise, rather than routinely timetabled like the FJS, this was unfortunate but not altogether unexpected as the researcher could not suddenly return (from another part of Nepal or from

\textsuperscript{74} Ibid.

\textsuperscript{75} The Nepal Law Society 2002 study indicates that around 85 per cent community disputes are being settled through TJS. However, there is no documentation on how many TJS are operating in the country and exactly how many people use TJS for accessing justice. See Nepal Law Society, \textit{The Judiciary in Nepal: A National Survey of Public Opinion} (2002) 15. Of the recognised 59 Indigenous communities in the country, most have their own TJS.
Australia) to a research site as a dispute had arisen there. The lower than optimal interview rate for women TJS participants means that the findings and conclusions of this study may not be generalisable to all TJS. However, the analyses and findings in relation to the role of women, Dalits and other minority groups in the TJS and broader areas of reform in the TJS for improving access to justice to the people using TJS can be used as a reference for policy making, as well as for further research. In addition, the analyses and findings of this research can provide important insights for formulating policies and programs in relation to reform in TJS and linking TJS to the formal justice mechanism in the Nepali context.
CHAPTER 5: STRUCTURE AND OPERATION OF SELECTED TRADITIONAL JUSTICE SYSTEMS IN NEPAL

INTRODUCTION

This chapter describes and analyses the structure and overall operation of the three selected traditional justice systems (TJS) — Badghar, Mukhiya, and Shir Uthaune — that are being practiced respectively in the Bardiya, Mustang and Dhankuta districts of Nepal. In order to analyse the current structure and operational status of the three selected TJS, this chapter is organised on the basis of the themes arising from the analysis of primary data collected for the project, such as selection of the dispute settlers, structure of the dispute settlement body, qualifications of a dispute settler, tenure and removal process of a dispute settler, dispute resolution process, types of cases that the selected TJS resolve, inclusivity of women, Dalits and minority groups as TJS dispute settlers, and the nature of functioning of TJS as a voluntary service to the community. For the purpose of analysis, the dispute resolution process of the selected TJS is divided into three phases — pre-meeting, dispute resolution meeting, and post-meeting or decision implementation. To enrich the analysis of interview data, relevant secondary sources that deal with the structure and operation of TJS are utilised.\(^1\) Comparisons and contrasts are made between the structure and functioning of the three selected TJS.

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This chapter makes an important contribution in establishing the current status of the structure and operation of the selected TJS in the context of Nepal by using theoretical perspectives, based on HRBA, legal pluralism, and critical legal theories.

I Structure of Dispute Settlement Body and Selection of Dispute Settlers

Among the three selected TJS some similarities and differences were noticed regarding the structure of the bodies. In most villages in the Bardiya district where the Badghar system operates, it was found that a Badghar and a Chaukidar were being selected to form a dispute resolution body. In the Mustang district, under the Mukhiya system generally a Mukhiya was being selected in a village but in some areas such as Thak Saatse there was a provision of a Mir-Mukhiya and an Upamir-Mukhiya. In contrast to both the Badghar and Mukhiya systems, in the Shir Uthaune system in the Dhankuta district there was no selected or elected body or an individual functioning as a permanent dispute settlement body but rather a dispute settler works as and when necessary.

In the Badghar system in the Bardiya district, a Badghar is a not a committee but an individual. A Badghar explained: ‘In our ward there are 18 hamlets. In each hamlet there is a Badghar and from among 18 Badghars a Chief Badghar is selected who coordinates the activities of all the Badghars in our village.’


2 The term ‘dispute settler’ is used for the person who resolves disputes in TJS. Judges in the formal court of justice are not included in the term ‘dispute settler’.

3 Mir-Mukhiya is the chief of all Mukhiyas and Upamir-Mukhiya is deputy of the Mir-Mukhiya.

4 A ‘ward’ is the smallest unit of the local level body.

5 Interview with Bard-DS1 (29 November 2015).
a tradition of selecting a *Chief-Badghar* to coordinate the activities of all *Badghars* of that particular region, but each individual *Badghar* has full authority to resolve the disputes of their village. Generally, among the *Badghars* the most experienced one or the eldest one is selected as a *Chief-Badghar* by the consensus of the *Badghars*.

Under the *Mukhiya* system in the Mustang district, a *Mukhiya* is an individual selected by the village people and entrusted with various social responsibilities, including dispute settlement, for a particular period of time. In the *Mukhiya* system, a *Mukhiya* performs the role as an individual, not a body or a committee. Under this system, in the course of dispute resolution ex-*Mukhiyas* and villagers are also present, take part in the discussion relating to the dispute resolution and provide assistance to resolve disputes. In many villages of the Mustang district (such as Chhairo, Jomsom, Marpha and Thini) a *Mukhiya* functions independently and there is no formal coordination among *Mukhiyas* of different villages. However, in the Thak Saatse area of the Mustang district (where there are 13 villages, namely Tukche, Khanti, Kobang, Larjung, Nakung, Murjungcot, Naurikot, Dhampu, Titi, Taglung, Kunjo, Lete and Ghasa) each village selects a *Mukhiya* and from among the 13 *Mukhiyas* a *Mir-Mukhiya* (Chief of *Mukhiya*) and *Upamir-Mukhiya* (Deputy Chief of *Mukhiya*) is selected. Generally, each year there are two meetings of these 13 *Mukhiyas*. All the *Mukhiyas* of the Thak Saatse region work independently in their villages but where one or both parties to a dispute are not satisfied with the decision of a *Mukhiya*, they

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6 Interview with Bard-DS6 (3 November 2015).
7 Interview with Bard-DS1 (29 November 2015).
8 Interview with Mus-DS3 (16 September 2015).
can appeal to the Mir-Mukhiya. However, in such a case parties are free to approach the FJS instead of going to the Mir-Mukhiya.9

Unlike the Badghar and Mukhiya systems, the Shir Uthaune system in the Dhankuta district has no permanent structure or an elected or selected person to serve as an enduring dispute settler. Under the Shir Uthaune system, a dispute settler is an individual who is trusted by the village people and disputing parties and ready to provide dispute resolution services as and when needed.10 For this reason, in the Shir Uthaune system, one or many dispute settlers can exist at the same time in a single village.

In relation to the selection of dispute settlers, in all of the three selected TJS the dispute settlers are selected from among individuals in the community. As a result, village people and disputing parties are well acquainted with the dispute settlers. Such a familiarity between dispute settlers and disputing parties has contributed to building a strong sense of trust. This trust has contributed to disputing parties and villagers feeling ownership of the dispute settlement practices in their community.11

Each year on the 1st of Magh (mid-January), the Tharu community celebrates the Maghi festival. The day is celebrated with festivities and one of the important events is the selection of a Badghar. In a Tharu community, a Badghar is considered as a community leader who leads social, cultural and local level development related activities and resolves the disputes of their community.12 In relation to the Badghar

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9 Interview with Mus-DS3 (16 September 2015); Interview with Mus-DS5 (6 September 2015).
10 Interview with Dhan-DS4 (9 November 2015).
11 Interview with Mus-TJSU1 (28 August 2015).
12 Interview with Bard-DS1 (29 November 2015).
selection process in the Bardiya district, a current Badghar said: ‘Tharu community celebrates Maghi festival each year. On that day people in the village gather in a public place for the festival celebration and to select a Badghar. Generally, a Badghar is selected by the consensus of the villagers.’ On some occasions, the current Badghar or other elders propose an individual’s name as the next Badghar in front of the village meeting. In some cases, they may have previously discussed and informally selected the person at earlier gatherings such as a feast or ceremony. On election day, there is some light discussion on the proposed name but usually there is no opposition and all the village people elect by consensus the proposed person as their new Badghar. In some villages of the Bardiya district that have in place the Badghar system, the practice exists of selecting a Chaukidar to assist the Badghar to perform his or her work. A Badghar explained the process of selection of the Badghar and the Chaukidar as:

Generally, a Badghar is selected by the consensus of the village people; … if a consensus cannot be reached a Badghar is selected by a majority vote. To date in my village we are able to reach consensus while selecting a Badghar. In my village we select a Badghar and a Chaukidar to assist the Badghar to perform his role as a Badghar.

The primary function of the Chaukidar is to assist the Badghar to perform their work smoothly and the role includes informing people about dispute settlement meetings, requesting that disputing parties be present at dispute resolution meetings and helping implement the decision as per the instruction of the Badghar.

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13 Interview with Bard-DS3 (30 November 2015).
14 Chaukidar is a position selected from among village people to assist a Badghar to perform his/her work.
15 Interview with Bard-DS2 (29 November 2015).
16 Interview with Bard-DS2 (29 November 2015); Interview with Bard-DS5 (2 December 2015).
In practice, an elderly male member of each household attends the village meeting under the Badghar system. In the absence of a male household member, women can participate in the meeting. In principle, all the household representatives gathered at the village meeting have equal rights to participate in the discussion and decision-making processes.\(^\text{17}\) However, in practice, elderly males dominate the process because they are considered the ‘guardians of the community’ and it is understood that they are well aware of Tharu customs, cultures and traditions. For this reason, the village meetings are dominated by the voices of elderly men, and the voices of women and young people are not heard equally to those of elderly men.\(^\text{18}\)

Under the Mukhiya system in the Mustang district, a Mukhiya is selected from among the villagers through a village gathering, and the Mukhiya is considered a village leader. The Mukhiya system is practised in almost all villages of the Mustang district and the selection process of a Mukhiya is very similar to that of a Badghar. In all villages, Mukhiyas are selected by the consensus of village people. A Mukhiya from the village of Thini explained the selection process of a Mukhiya in his village as follows:

> Each year on 3\(^\text{rd}\) of Jestha [second week of May] a village meeting is organised. A representative — generally a male elder — from each household attends the meeting. It is a traditional practice that women and Dalits do not attend the meeting. Generally, the Mukhiyas are selected by the consensus of the villagers — and it is a voluntary job, therefore nowadays people are not much interested in becoming a Mukhiya.\(^\text{19}\)

In contrast to the Badghar and Mukhiya systems, the Shir Uthaune system in the Dhankuta district has no specific procedure for selecting a dispute settler. Under the Shir Uthaune system a dispute settler is not a particular individual who is elected or

\(^\text{17}\) Interview with Bard-DS4 (30 November 2015).
\(^\text{18}\) Interview with Bard-DS6 (3 December 2015).
\(^\text{19}\) Interview with Mus-DS1 (5 September 2015); Interview with Mus-DS4 (26 August 2015).
selected for a particular time period. Instead, a dispute settler is a person who is trusted by the disputing parties and village people to resolve a particular dispute. A dispute settler under the Shir Uthaune system is a trustworthy, elderly person (or persons) from among the community. A Rai male who is well recognised and respected by the community people can work as a dispute settler. There is no formal process for selecting or electing a dispute settler. For these reasons, many individuals can be working as dispute settlers in a village, each handling a different dispute. Becoming a dispute settler entirely depends on the choice of the disputing parties and the person’s willingness to serve as a dispute settler. Under the Shir Uthaune system in the Dhankuta district a dispute settler is not an elected person or a body, but a person (or persons) trusted by the disputing parties and the community to resolve disputes.

From the above discussion, it can be concluded that: (i) in all three selected TJS the dispute settlers are respected individuals from among the particular community; (ii) the selection process of dispute settlement under the Badghar and Mukhiya systems is almost identical in that the selection is by a consensus of the people present at a village meeting; (iii) in all the three selected TJS the role of elderly men is dominant and in the selection of a dispute settler, the voices and concerns of women, Dalits and minority groups are not present; and (iv) in the Mukhiya and Badghar systems there is a tradition of selecting dispute settlers for certain periods of time. However, under the Shir Uthaune system a dispute settler is not a selected or elected person but an individual who is approached by the villagers to resolve particular disputes.

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20 Interview with Dhan-DS1 (6 November 2015).
21 Interview with Dhan-DS3 (8 November 2015).
II Qualifications of a Dispute Settler

In all the three selected TJS, no formal educational qualifications are required for becoming a dispute settler. The important qualifications for dispute settlers were that they be trusted by the village people and that the candidate’s be motivated about social service. Operations of the selected TJS were found to be guided by the traditions, customs and rules of the particular Indigenous groups therefore educational qualifications for dispute settlers are considered to be not of much importance. For example, a dispute settler from the Bardiya district stated:

In the Badghar system, there is no need of any academic qualifications to become a Badghar because the system functions as per the customs and traditions of the Tharu community. To perform the work of a Badghar, academic qualifications are not needed and the educated people mostly go for jobs and live in urban centres.\(^\text{22}\)

However, some young individuals who have become a Badghar have attained a formal education. For example, of the six Badghars from the Bardiya district who participated in this research, two Badghars (aged 38 and 35) had both attained formal education to grade 12.\(^\text{23}\)

Likewise, under the Mukhiya system in the Mustang district there is no need for academic qualifications to become a Mukhiya. According to dispute settlers, what is important is that the person be an individual who is dedicated to social service, is honest and speaks the truth, and can provide leadership to the village people.\(^\text{24}\) An individual who can devote time to social service becomes a Mukhiya and there is no need for any educational qualifications because the Mukhiya system is a traditional

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\(^{22}\) Interview with Bard-DS6 (3 December 2015).

\(^{23}\) The remaining four Badghars who participated in this research had not participated in formal education but were found to be literate.

\(^{24}\) Interview with Mus-DS1 (5 September 2015); Interview with Mus-DS4 (26 August 2015).
system of the Thakali group, therefore knowledge of Thakali customs, traditions and cultures is considered sufficient to be a dispute settler.\textsuperscript{25} However, some Mukhiyas who were interviewed for this PhD research were literate and educated.\textsuperscript{26}

Similar to the situation in the Badghar and Mukhiya systems, specific academic qualifications are not required to become a dispute settler in the Shir Uthaune system. All the dispute settlers who participated agreed that the Shir Uthaune system functions as per the customs, traditions and values of the Rai community so the dispute settler is not bound to have certain formal academic qualifications to become and serve as a dispute settler.\textsuperscript{27} The most important qualifications for a dispute settler in the Shir Uthaune system are considered honesty, trustworthiness, fairness and a willingness to render voluntary service to the community.\textsuperscript{28} Although there is a consensus among interview participants that there is no need for academic qualifications to become a dispute settler in the Shir Uthaune system, this research found that a number of dispute settlers had a formal education. For example, among the six dispute settler interview participants from the Shir Uthaune system, one has a Bachelor of Humanities, two have completed grade 10 and the remaining three are literate.

Of the eight TJS users who participated in this research, none of them were found to be interested in the academic qualifications of the dispute settlers. For example, a TJS user from the Mustang district stated:

\textsuperscript{25} Interview with Mus-DS3 (16 September 2015).
\textsuperscript{26} For example, of the five Mukhiyas interviewed for this research project in the Mustang district, one dispute settler was a retired teacher from a local school and he had a Bachelor of Arts degree, two have completed grade 12, one attended grade eight in the local school, and the remaining one was literate.
\textsuperscript{27} Interview with Dhan-DS5 (8 November 2015); Interview with Dhan-DS6 (11 November 2015).
\textsuperscript{28} Interview with Dhan-DS2 (6 November 2015); Interview with Dhan-DS3 (8 November 2015).
In our dispute resolution system [Mukhiya system], dispute settlers work as per the traditions, customs and values of the Thakali community. The Thakali community is very rich in customs and tradition; therefore, almost all the disputes can be resolved using them. The dispute settlers should be honest and impartial so that they can make us feel justice. I do not care if the dispute settler has academic qualifications or not.29

The TJS user expects honesty and fairness from the dispute settlers in applying the tradition and customs of the Thakali community. For him, the academic qualification of the dispute settler is not of paramount importance. However, more than two-thirds (77 per cent) of expert interview participants thought the attainment of academic qualifications to become a dispute settler is an important factor to ensure quality dispute resolution services in the TJS. For instance, an expert interview participant from the Kathmandu district who is a lawyer and from a Dalit community stated:

I am aware of the fact that in the current situation a majority of the TJS dispute settlers do not have formal academic qualifications. For me, a lack of education is also one of the reasons that TJS, in most instances, are unable to protect the rights of Dalits, women and other marginalised groups in the community. A certain level of academic qualifications equips dispute settlers with the knowledge of state laws and the principles of human rights so that the TJS process becomes fair and human rights friendly.30

It is clear that the expert thought that currently the TJS dispute resolution processes face limitations in regards to the respect for and protection of the human rights of women, Dalits and other marginalised communities because the dispute settlers in most cases possess no academic qualifications. According to the above expert interviewee, a requirement that dispute settlers attain a certain level of formal educational qualifications may have a positive impact by making the TJS dispute resolution process fair and human rights friendly. When the person was asked what level of academic qualification could bring about the changes that he mentioned, he

29 Interview with Mus-TJSU1 (28 August 2015).
30 Interview with Kath-EX1 (30 July 2015).
answered that it would be nice if all TJS disputes settlers had a bachelor degree in any discipline.

III TENURE AND REMOVAL PROCESS OF DISPUTE SETTLELS

Some similarities and differences were noticed within and among the selected TJS regarding the tenure and removal process of dispute settlers. Generally, in the Badghar system in the Bardiya district, the tenure of a Badghar is for one year. If a Badghar wants to continue after a year and the villagers also agree, the Badghar can be re-elected for as many terms as the villagers agree. During the field visit, it was noticed that some individuals had been serving as a Badghar for more than ten consecutive years.31 However, the work of a Badghar is purely voluntary and there are no financial benefits; therefore, few are interested becoming a Badghar and nor are those who are Badghars often interested in renewing their appointment for another term. A Badghar who was serving as a Badghar for the third time (having previously worked as a Badghar 11 years earlier, and again five years ago) stated that in principle, the re-election of a Badghar is possible but many people do not want to be re-elected because it is a voluntary position.32

Another reason that people are not interested in becoming a Badghar is because the position is not recognised by government offices, such as the District Administration Office, District Court, and the District Development Office.33 The need to remove a Badghar before their tenure ends hardly ever arises.34 The only situation in which it

31 Interview with Bard-DS2 (29 November 2015).
32 Interview with Bard-DS2 (29 November 2015).
33 Interview with Bard-DS6 (3 December 2015).
34 Interview with Bard-EX2 (11 December 2015).
normally occurs is if a Badghar does something wrong and a majority of people in the community no longer want the Badghar to continue in their role. In such situations, a meeting of the village people can be convened to decide whether the Badghar should be removed from their position.

The only female Badghar who participated in this research noted that the tenure of a Badghar is for one year in her village and, if the villagers want it, it can be extended. She mentioned that it was her second term as a Badghar, and that if she were ever to find that people were not happy with her service, she would immediately quit her position as a Badghar by resigning from the post.\textsuperscript{35}

In the Mukhiya system in the Mustang district, there is no uniform rule regarding the tenure and removal process of a Mukhiya. In different villages of the Mustang district the tenure of a dispute settler varies. It can be one year, two years or even longer. One Mukhiya stated that in his village a Mukhiya is selected for a year and there is no provision for re-selection.\textsuperscript{36} There is no provision for removing a Mukhiya before their term is completed. In the case of serious illness or the death of a Mukhiya, a gathering of village people can select another Mukhiya. There is no provision for a Mukhiya to resign from their position. If a Mukhiya is involved in unlawful activities and/or misconduct, their punishment would be doubled, and the person can be removed from their position.\textsuperscript{37} The increase in the penalty for unlawful activities or misconduct demonstrated the importance ascribed to the need for ethical behaviour on the part of

\textsuperscript{35} Interview with Bard-EX2 (11 December 2015).
\textsuperscript{36} Interview with Mus-DS1 (5 September 2015).
\textsuperscript{37} Interview with Mus-DS1 (5 September 2015).
the Mukhiya, rather than a belief in an equal penalty for the same misdeed whether it is done by an ordinary villager or by the Mukhiya.

A Mukhiya from another village of the Mustang district stated that the tenure of Mukhiya in his village is for two years and there is no tradition of immediately reappointing or re-electing a Mukhiya for another term; but after a gap of some years, villagers can request the same person to again serve as a Mukhiya. In another village, it was found that the tenure of Mukhiya was not fixed. A Mukhiya can work as per the will of the village people and the Mukhiya. One of the Mukhiya was found to have been serving for eight years. In that village, if people are not satisfied with the work of Mukhiya, in principle the appointee can be removed at any time but that does not happen often. In some cases, Mukhiya themselves want to resign from the post because of chronic illness, old age or in the event of migration. If such a situation arises, a villagers’ meeting selects another Mukhiya. One Mukhiya said that he was 75 years old and wanted to hand over the position soon to another interested in serving the community.

In the Shir Uthaune system in the Dhankuta district, as already discussed, there are no fixed people and structures related to the appointment of dispute settlers; thus a tenure and removal process in the Shir Uthaune system does not exist. There is no fixed term for the length of time a dispute settler is appointed. A person can work as a dispute settler until the disputing parties and villagers lose trust in them. It is not a permanent

38 Interview with Mus-DS2 (3 September 2015).
39 Interview with Mus-DS3 (16 September 2015). The rule is in practice in Thak Saatse region (13 villages) in the Mustang district.
40 Interview with Mus-DS3 (16 September 2015).
41 Interview with Mus-DS3 (16 September 2015).
position but rather an occasional service to the community.\textsuperscript{42} Where a dispute settler does not want to continue his work, he is free to leave the dispute resolution related work. If a dispute settler makes serious mistakes or loses the trust of the disputing parties and villagers, then the dispute settler will not be approached by disputing parties for dispute resolution.\textsuperscript{43} In such a scenario the dispute settler automatically loses their role as a dispute settler.

\section*{IV DISPUTE RESOLUTION PROCESSES OF TRADITIONAL JUSTICE SYSTEMS}

Dispute resolution processes in all the selected TJS are broadly divided into three stages for the purpose of analysis — pre-meeting, dispute resolution meeting, and post-meeting or decision implementation phase.

\subsection*{A Pre-Meeting}

In all three selected TJS, no uniform and formal procedure was found to be followed at the pre-meeting stage. The pre-meeting stage is a preparation phase for the actual dispute resolution meeting. Generally, in a pre-meeting stage, dispute settlers and their associates, if any, perform various tasks, such as receiving a dispute; determining an appropriate date, time and venue for the dispute resolution meeting; and informing both the disputing parties and concerned people from the village that they should attend the dispute resolution meeting. A uniform practice was observed whereby a person or a group of people who feel an injustice has been done to them due to the wrongful deeds of another person or group, informs the dispute settler about the grievances and requests justice. A case can be initiated by writing to, by meeting with, \vspace{1cm}

\textsuperscript{42} Interview with Dhan-DS4 (9 November 2015).
\textsuperscript{43} Interview with Dhan-DS6 (11 November 2015).
or telephoning the dispute setter. All the Badghars from the Bardiya district who were interviewed agreed that written complaints are, however, rare. For example, a Badghar explained how a case is referred to him:

There is no particular procedure for case referral to a Badghar. A case can be brought in writing, verbally or by telephone. Most of the disputes are brought to me verbally; very few people bring cases in writing. As soon as a case is brought to me, I ask the Chaukidar to inform the other party of the dispute and for the villagers to gather in the village community hall to discuss and resolve the dispute. Then the Chaukidar notifies people to come to the community hall on the agreed date and time.\(^4^4\)

The statement makes clear that the pre-meeting preparation is informal and flexible in the TJS dispute resolution process. In the pre-meeting phase, one contrast among the three selected TJS was that in the Badghar system the Chaukidar provides assistance to a Badghar but in the other two selected TJS, namely Shir Uthaune (from the Dhankuta district) and Mukhiya (from the Mustang district), dispute settlers themselves arrange the meeting with the help of the disputing parties and the village people. For instance, an expert interviewee stated: ‘In Shir Uthaune and Mukhiya systems the dispute settler himself informs the people concerned to attend the meeting or asks for help from the village people.’\(^4^5\) A Mukhiya from the Mustang district said that under the Mukhiya system on some occasions the Mukhiya can ask both the disputing parties to inform people in the village to attend the dispute resolution meeting on the fixed date, at a given time and venue.\(^4^6\)

In all the selected TJS, it was noted that the date, time and venue for dispute resolution is set by the dispute settlers. It was found that mostly the dispute resolution meetings

\(^{4^4}\) Interview with Bard-DS1 (29 November 2015).
\(^{4^5}\) Interview with Kath-EX4 (8 August 2015).
\(^{4^6}\) Interview with Mus-DS3 (16 September 2015).
are conducted in public places such as a community hall, ward buildings, Village Development Committee buildings, schools or open public places within the village.

B  

Dispute Resolution Meeting

All the interested people in the village are free to attend the meeting and take part in the dispute resolution process.\(^{47}\) Despite the fact that the meeting is open to all members of the community, it is mostly elderly males who attend. In all three selected TJS, the public meeting for dispute resolution is conducted on the date, time and venue set by the dispute settler. It is a uniform practice of all the selected TJS that the dispute resolution meetings are conducted in public places and the meetings are considered public events. The number of people attending the meeting also varies according to the interest of the village people. For instance, a Badghar said that in his village the number of people that gather for dispute resolution meetings varies from 20 to 50.\(^{48}\)

In all the selected TJS no set procedure was found for a dispute resolution meeting. Generally, in the meeting the complainant states his or her grievances and the other party responds. After hearing the stories from both the sides, dispute settlers and other participants in the meeting ask disputing parties to find a point of an agreement so that the dispute can be resolved. In some cases, the disputing parties themselves find a solution by admitting their mistakes and offering options to end their grievances. These include the giving of a public apology, the payment of compensation, or an undertaking not to repeat the mistake. If the parties are unable to find a solution, the dispute settler and other elders assist the parties in resolving their dispute. Having said

\(^{47}\) Interview with Bard-DS2 (29 November 2015).
\(^{48}\) Interview with Bard DS2 (29 November 2015).
that, some dispute settlers\textsuperscript{49} from each of the three districts stated that the determination of a case rests with them, and therefore, there is no need for input from other elders or community members. Nevertheless, in the TJS settings generally, disputes are not seen as simply personal issues but as a community problem, and therefore it is possible that the whole community may participate and cooperate to resolve the problem.\textsuperscript{50} Unlike the adversarial criminal justice system of the FJS, the objectives of the TJS are not just to penalise the wrongdoer but rather to compensate the aggrieved party and restore relations and maintain peace and harmony in the community.\textsuperscript{51} For example, in a case of a beating in the Bardiya district the dispute settler and village people resolved a case by asking the wrongdoer to deliver a public apology and pay the cost of treatment and compensation to the victim.\textsuperscript{52}

Generally, in the TJS dispute resolution process both the disputing parties and other interested members of the community are given enough time to express themselves. In principle, everyone who is present at the meeting is equal and they have an equal right to express their view in the dispute resolution meeting. However, a law professor, interviewed for this research project stated that many factors (such as gender, ethnicity, age, social class and caste) limit the power of participants in the meeting.\textsuperscript{53} In the Nepali TJS context, women, Dalits, poor people, and people from minority groups generally do not in practice have the opportunity to participate in dispute resolution meetings as part of the public and if they do participate, they are not able to assert any

\textsuperscript{49} At least seven of a total of 17 disputes settlers who were interviewed for the project expressed this view.

\textsuperscript{50} Interview with Mus-DS3 (16 September 2015); Interview with Bard-EX2 (11 December 2015); Interview with Kath-EX4 (8 August 2015).

\textsuperscript{51} Interview with Bard-DS4 (30 November 2015); Interview with Kath-EX2 (3 August 2015).

\textsuperscript{52} Interview with Bard-DS4 (30 November 2015).

\textsuperscript{53} Interview with Kath-EX3 (11 August 2015).
power and speak. When they do speak, their opinions are not given the same weight as of that of elderly males from the dominant groups such as so-called high caste people.\textsuperscript{54}

In general, if the dispute is related to women’s issues, such as gender based violence or partition of property, then only women attend the dispute resolution meeting and again dispute settlers are often males. In such a situation, women may yet find it difficult to speak freely ‘as equals’ as deference to male and caste hegemony may impede them or even make them loathe to bring a grievance for dispute resolution. The most frequently cited reason for non-participation or lower participation of women in other dispute resolution meetings that do not address women’s issue, is the traditional division of labour that confines women in household work. Likewise, the Dalits are also not found to be represented properly in the dispute resolution process. The role of women and Dalits in the TJS process, including meetings only attended by women, is discussed below in more detail.\textsuperscript{55}

On some occasions, a single meeting is not sufficient to resolve a dispute. In such a situation, a dispute settler will arrange another meeting. Out of a total of 17 dispute settlers, 12 of them reported organising one to five meetings to resolve a single case. For example, an elderly (72 year old) dispute settler of the Shir Uthaune system in the Dhankuta district stated:

> In my nearly 40 years of experience as a dispute settler in Shir Uthaune system the number of meetings to resolve a dispute varies from one to five. The number of

\textsuperscript{54} Interview with Kath-EX3 (11 August 2015).

\textsuperscript{55} For further detail in relation to the participation of women in the functioning of the TJS, see text following the heading ‘Inclusiveness of Women, Dalits and Minority Groups in the TJS Process’ later in this chapter.
meetings is determined by the attitude of disputing parties, nature of a case, and the number of persons involved in the disputes. In all the selected TJS, the dispute settlers denied the use of any kind of coercion or torture during the process, as part of the punishment or to enforce a penalty imposed by dispute resolution. However, some different opinions on the matter were expressed by experts, TJS users, and FJS interview participants, which will be explored further in Chapter 7 of this thesis. ‘Torture’ in the context of this thesis is defined as a situation where an individual or individuals are made to suffer any violent pain at a physical or mental level or coercion is used to compel them to do or to desist from doing something.

In all the three selected TJS, the first meeting was used as an attempt to reach an agreement between the parties themselves. If the parties and the community fail to find a point of an agreement — and then only in consultation with the elders and former dispute settlers — does the dispute settler decide the case. Some dispute settlers, however (as noted earlier), expressed a view that deciding a case is their exclusive right; therefore, there was no need to consult anybody. In the TJS dispute resolution process, disputing parties normally represent themselves. However, the parties are free to bring eyewitnesses, or people who may help them prove their case, and any other evidence; nevertheless, this rarely happens. For example, a TJS user from the Mustang district stated:

I didn’t feel the necessity of submitting any evidence or bring an eyewitness during the dispute resolution meeting because the dispute settler [Mukhiya] and people in the

56 Interview with Dhan-DS2 (6 November 2015).
58 Interview with Dhan-DS3 (8 November 2015); Interview with Mus-DS3 (16 September 2015).
village who participated in the meeting were aware of every detail of our dispute. I am happy with the decision made by the Mukhiya with the help of village people. As the interview participant said, in the TJS dispute resolution setting, generally there is no need to present any witness, evidence, or documents because the dispute settlers, village people and the disputing parties are all from the same community and they know the context and details of the dispute. Given this, the dispute resolution process at the community cannot be an impartial and absolutely objective as argued by the dispute settlers, as discussed in Chapter 3 of this thesis.

In the context of the three selected TJS in Nepal, if the parties to a dispute are able to find an agreed solution with the facilitation of dispute settlers or the parties agree with the decision made by the dispute settler then the dispute ends there, and the decision implementation phase starts. If the parties are not happy with the decision, then they are free to go to the FJS. However, in most cases the parties are pressured by social norms, family, friends and relatives to accept the decision made by the TJS and to not take the matter to the FJS.

C After the Dispute Resolution Meeting: Decision Implementation Phase

Like other procedural aspects of the TJS dispute resolution process, no set rules or procedures were found for the implementation of the decision in the selected TJS. After the dispute is resolved, the process of decision implementation starts and the parties are asked to find a mutually agreeable decision implementation modality. For example, if a case is about a minor physical injury (simple battery) and the decision

59 Interview with Mus-TJSU1 (28 August 2015).
60 See Margaret Davies, Asking the Law Questions (Thomson Lawbook, 2008) 183–4.
61 Interview with Kath-EX4 (8 August 2015); Interview with Dhan-EX2 (5 November 2015).
made is for the wrongdoer to provide medical expenses and compensation to the victim and a fine be imposed on the wrongdoer, then the medical expenses and the compensation are provided to the victim whereas the fines are deposited in the community fund, and will later be used for a social purpose. In such a scenario, the party can pay compensation on the same day or within a period of days in accordance with the agreement. If the party does not pay the medical expenses and compensation or the fine within the agreed time, the dispute settler or his assistant continue to follow up with the party so that the decision is implemented in a timely manner. For example, in a case decided by a dispute settler in the Mustang district where the decision was implemented promptly, one of the disputing parties stated:

My case was decided by the Mukhiya with the help of village people that the wrongdoers should pay a fine and compensation. Both the parties agreed on the decision and the boys paid me the compensation amount on the same day of the decision and deposited the fine the next day in the village fund. …I got justice within three days of the incident.

The statement indicates the simplicity of the procedure and the speediness of implementation of the decision within the TJS settings. One of the similarities among the three TJS was found to be that in most of the cases the implementation of the final agreement or decision was easy and swift. The reason cited for this was that in many instances the disputing parties themselves make an agreement or a decision is made in their presence that makes them feel that it is their moral duty to implement the outcome. In some cases, a party or parties may not be happy with the decision but due to social pressure and a lack of knowledge about the further processes available,

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62 Interview with Bard-DS6 (3 December 2015).
63 Interview with Bard-DS6 (3 December 2015).
64 Interview with Mus-TJSU1 (28 August 2015).
65 Interview with Ktm-EX2 (3 August 2015); Interview with Dhan-EX1 (1 November 2015).
the parties were found to feel compelled to implement the decision.\textsuperscript{66} But, generally, it was found that the rate of decision implementation is very high and timely in the TJS. As discussed in Chapter 2 of this thesis, the FJS in Nepal faces a problem of either non-implementation or partial implementation of the court decisions;\textsuperscript{67} in contrast, this research revealed that in the selected TJS implementation of the decision is prompt and compliance with restitution and other remedies is very high.

V \textbf{Types of cases that traditional justice systems resolve}

TJS were found to be effectively resolving almost all civil and petty criminal matters, such as minor beating and theft, at the local level in all three selected districts. It was noticed that only the serious criminal cases, such as homicide, rape and serious injury are filed in the FJS. In the rural Nepali context, civil cases can be divided into three broad categories: (i) disputes related to the appropriation, use, and control of locally available natural resources, such as land, forest, and water, (ii) disputes related to family matters, such as polygamy, alimony, partition of parental property etc., and (iii) disputes related to social differences, such as lending and borrowing, and in religious and caste/ethnic discrimination.\textsuperscript{68} As detailed in discussion below, in the three selected districts the major disputes dealt with by the TJS were found to be quarrelling/fighting (person to person or on a group level), illegal cattle grazing, unauthorised use of irrigation, defamation, family disputes, gender based violence, partition of ancestral property, assault/minor beating, unauthorised use of forest products, unauthorised use

\begin{footnotesize}
\textsuperscript{66} Interview with Mus-TJSU3 (2 September 2015); Interview with Mus-EX2 (3 September 2015).


\end{footnotesize}
of access trail or road to a house or land, damage to crops, illegally grazing crops, or stealing crops or fodder.

As discussed in Chapter 2 of this thesis, the Constitution and statutory laws of the country do not empower TJS to resolve disputes in Nepal; rather, all the powers to resolve disputes are vested in the FJS.\(^6\) This is the reason more major criminal matters tend to end up in the FJS and are no longer dealt with, as formerly, in TJS.

The constitutional and legal provisions in regards to jurisdiction in Nepal limit the possibilities for the legal system to formally embrace legal pluralism in the ethnically diverse and multicultural Nepali context, despite the fact that a number of Indigenous groups and people living in rural areas are using TJS for dispute resolution at the community level. As Franz von Benda-Beckmann suggests, legal pluralism means ‘the possibility of more than one legal order, based on different sources of ultimate validity other than the state, within one political organisation’.\(^7\) A legal system can be a pluralistic one ‘when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality or geography…’.\(^8\) In practice, legal pluralism is functional in Nepal because many Indigenous groups residing in rural areas use TJS to resolve their disputes. The Constitution’s acceptance that Nepal as a nation is ‘multiethnic, multilingual, multi-religious, multicultural and with geographical diversities’ does not extend to recognition of TJS.\(^9\) The Constitution does not make any provision for recognising legal customs, traditions and

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\(^6\) See Constitution art 126(1); Administration of Justice Act of Nepal 1991 s 7.


\(^9\) Constitution art 3.
dispute resolution processes that are being practised by diverse groups, including Indigenous communities in Nepal. Therefore, my argument is that the constitutional provisions and statutory arrangements are silent on this matter, limiting any possibility for formal recognition of the informal legal pluralism that is clearly operating in Nepal.

In regards to the types of cases that are being dealt by the TJS, dispute settlers from the Bardiya district observed that the Badghar deals with almost all cases at the community level. This includes cases regarding quarrelling, illegal cattle grazing, unauthorised use of irrigation, defamation, family disputes and minor physical abuse.

In the Mustang district, it was found that in the past Mukhiya used to resolve all types of cases in the community, including petty criminal cases. But nowadays the police deal with serious criminal cases, such as murder and rape and a Mukhiya deals with the cases related to family disputes, defamation, partition of ancestral property, assault/minor beating, unauthorised grazing, and disputes related to unauthorised irrigation etc.\(^\text{73}\) However, a Mukhiya from an urban area in the Mustang district said, people prefer to go to the FJS to resolve their disputes:\(^\text{74}\)

The only airport of the Mustang district is situated in my village Puthang. There are government offices, such as the District Police Office, District Court and District Administration Office etc. in the village. Compared to others, this village is different, much developed [urbanised]. This year, as a Mukhiya I have not resolved any dispute. The village is urbanised; therefore, people do not come to Mukhiya for dispute resolution, they would rather approach police or other government offices concerned.\(^\text{75}\)

A similar situation was noticed in the Shir Uthaune system in the Dhankuta district. Traditionally, almost all cases were resolved by the TJS, but now they are not used to

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\(^{73}\) Interview with Mus-DS1 (5 September 2015).

\(^{74}\) Interview with Mus-DS2 (3 September 2015).

\(^{75}\) Interview with Mus-DS2 (3 September 2015).
resolve serious criminal cases, such as murder and rape; but other than that, all cases are resolved under the Shir Uthaune system. The Shir Uthaune system handles cases related to assault, defamation, property partition, cattle grazing, and unauthorised use of irrigation.\textsuperscript{76}

The majority of the FJS interview participants (70 per cent) from all three selected districts, the Dhankuta, Mustang and Bardiya, accepted that TJS are effective in their respective districts and that they are providing dispute resolution services to the Indigenous communities that use TJS. For example, TJS interview participants in the Bardiya District Court expressed the view that the Badghar system is well established in the Bardiya district among the people of Tharu community and it has significantly contributed to resolving disputes at the local level. They were of the view that almost all civil disputes at the community level could be resolved through the use of the Badghar system. However, at the community level, an investigative mechanism is lacking and there are also no prisons, rendering the TJS unsuited to more serious criminal matters.\textsuperscript{77} These are now left to the FJS which has the investigative arm of police and public prosecutors and is also able to detain those accused of convicted of serious criminal actions.

A court officer from the Mustang District Court stated that one of the primary reasons for a low number of cases in the court in the Mustang district is the popularity of the Mukhiya system in the Thakali community. He stated that ‘[T]he practice of the Mukhiya system in the Thakali community is very popular in settling disputes within their community — due to which there are very few cases in the District Court of

\textsuperscript{76} Interview with Dhan-DS1 (6 November 2015); Interview with Dhan-DS2 (6 November 2015).

\textsuperscript{77} Interview with Bard-CO1 (5 December 2015); Interview with Bard-CO2 (6 December 2015).
Mustang. The Thakali people in the Mustang district are used to with the Mukhiya system and almost all civil cases and petty criminal cases are resolved by the Mukhiya. At the time of the interview (August 2015), there were only four cases in the Mustang District Court. Of these, three were criminal cases and one concerned money lending.

Likewise, an Appellate Court Judge from the Dhankuta district accepted that TJS are widely used in the rural areas, especially by Indigenous groups, to resolve disputes at the community level and called for a considered delineation of jurisdictional responsibilities. In regard to his appeal for greater formal recognition of TJS, he stated:

Though formal laws do not empower TJS to resolve disputes, people in rural areas — especially the indigenous groups, and in the case of the Dhankuta district the Rai group — are using TJS widely and the majority of the cases are dealt with by Shir Uthaune. In my view, comprehensive research is needed to find out what type of cases should be resolved through TJS and what should go to the FJS, so that a national policy can be framed regarding the jurisdiction of the FJS and TJS.

In all the selected TJS, it was observed that the dispute settlers and village people are aware that the state law does not provide them with the authority to resolve criminal cases and these cases should be tried by the FJS. Traditionally, all the selected TJS were formerly used to resolve almost all kinds of cases at the community level but nowadays serious criminal cases are being investigated and tried in the FJS. It was also found that in urban areas people (even minority community members) tend to approach the FJS to resolve their disputes. This indicates that urbanisation and the availability of alternative forums for dispute resolution have significant impact on the acceptance and use of the TJS process. This finding of this research corroborates a previous study

78 Interview with Mus-CO1 (25 August 2015).
79 Interview with Dhan-CO3 (30 October 2015).
80 Interview with Dhan-CO3 (30 October 2015).
that also noted in certain urban locations in Nepal and in the heterogeneous communities, the use of TJS is problematic. Therefore, an inverse relationship exists between TJS use and urbanisation of the population.  

VI INCLUSIVENESS OF WOMEN, DALITS AND MINORITY GROUPS IN THE DISPUTE SETTLEMENT BODY

As discussed above, one of the widely expressed concerns is that TJS are often dominated by powerful, elite, elderly male in the society and are likely to exclude women, minority, youths and disadvantaged groups in the dispute resolution process and outcomes. In all three selected TJS, almost all the dispute settlers are male members from the dominant Indigenous group in their respective locations. Women are mostly excluded from the role of dispute settler on the pretext of tradition and historical practices (that is, women have never been dispute settlers). Likewise, another deep-rooted reason for negligible participation of women is the traditional division of labour that restricts women from performing outside work and confines them to domestic duties. Of a total of 17 dispute settlers interviewed for this research, only one was female and she was from the Badghar system in the Bardiya district.

Similar to the situation in the other two districts, the Badghars in Bardiya district are male members of the Tharu community. However, there are a few Dalits, Brahmin, Chhetri, and women also working as Badghar. For example, in Ward Five of the Gulariya Municipality a Dalit male is a Badghar. Likewise, the only female dispute settler interviewed for this research was working as a Badghar in a village of the

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81 Massage, Kharel and Sharma, above n 1, 37.
Bardiya district. But the general perception in the Tharu community in the Bardiya district was that a Badghar is an elderly man from the Tharu community as illustrated by the following statement from a male Badghar:

Traditionally, Badghars were selected from among the Tharu men but nowadays women can also be selected. In my opinion, the reason for not choosing women as Badghar, in practice, is that they are busy with child rearing and household work.\(^{83}\)

Likewise, a Badghar stated that ‘[T]here is no particular reason for not selecting women as a Badghar. I think they are mostly busy with household work and traditionally also only men worked as Badghar and were involved in dispute resolution processes.’\(^{84}\) This view was supported by the female Badghar who was interviewed. She added that women, however, have now started challenging the traditional gendered work division and had begun getting involved in social activities outside the domestic sphere. She further said: ‘It is my second term serving as a Badghar. I became a Badghar due to the trust of community people and the support I got from my family members. My husband and children help with the household work so I could work as a Badghar.’\(^{85}\)

During the fieldwork, it was noticed that individuals from the Dalit group rarely get the opportunity to become dispute settlement in the Badghar system in the Bardiya district. A dispute settler from Bardiya district supplied what he saw as the reasons for not selecting an individual from among the Dalits as a Badghar. He stated that the Badghar is a system of the Tharu community not of the Dalits and so that Dalits prefer not to serve as Badghars and also because they are either occupied with their

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\(^{83}\) Interview with Bard-DS1 (29 November 2015).
\(^{84}\) Interview with Bard-DS2 (29 November 2015).
\(^{85}\) Interview with Bard-DS4 (30 November 2015).
household chores or busy earning their livelihood.\textsuperscript{86} It was found that in most of the villages Dalits are either a minority or completely absent; therefore, the likelihood of Dalits being Badghars is extremely low. For example, in one village there are only three households of Dalits out of 60\textsuperscript{87} and in another village there is not a single Dalit family.\textsuperscript{88} However, in regard to possible Dalit participation in the Badghar TJS, a Tharu male Badghar said: ‘[T]hough the Badghar system is of Tharu community, if people in the village select a Dalit as a Badghar and he is ready to follow Tharu customs and traditions, a Dalit can be a Badghar.’\textsuperscript{89} The low level of participation of Dalits is not solely attributable to their small number in any location, however; rather, the reason for not selecting a Dalit as a Badghar (or other dispute settler) is rooted in the caste system that is practised in Nepal which is discussed in detail below in this thesis.

Similarly, women, Dalits, and people from minority groups often do not get an opportunity to serve as a Mukhiya in the Mustang district. The reasons given for not selecting women and Dalits as a Mukhiya echo those supplied by those involved in the Badghar system. Again, in some villages there are very few Dalit families and they are not selected by the majority Thakalis. In addition, the Mukhiya system itself is of the Thakali community not of the Dalits and other groups,\textsuperscript{90} just as a Badghar system is of the Tharu community.

\textsuperscript{86} Interview with Bard-DS2 (29 November 2015).
\textsuperscript{87} Interview with Bard-DS3 (30 November 2015).
\textsuperscript{88} Interview with Bard-DS4 (2 December 2015).
\textsuperscript{89} Interview with Bard-DS5 (2 December 2015).
\textsuperscript{90} Interview with Mus-DS2 (3 September 2015); Interview with Mus-DS3 (16 September 2015).
In the *Shir Uthaune* system, traditionally it is elderly *Rai* males who work as dispute settlers. *Dalits*, women, and individuals from other communities can attend the dispute resolution meetings and express their opinions but dispute settlers are mostly elderly men from the *Rai* community.\(^91\) No specific reason was provided for not selecting women as dispute settlers, other than it followed *Rai* community tradition. However, an interviewee did mention that in modern times if women want to become dispute settlers, they can.\(^92\) Traditionally, the practice of selecting dispute settlers from among the *Dalits* and other groups did not exist but it has been said that if they are ready to follow the customs and traditions of the *Rai* community they can be entrusted with the role of dispute settler.\(^93\)

The issue of male domination and the exclusion of women in the social, economic and political spheres in Nepal needs to be seen and analysed within a national context. Women comprise more than half of the country’s total population.\(^94\) However, only 19.71 per cent of households reported the ownership of land or house or both in the name of a female member of the family.\(^95\) In urban areas, a total 26.77 per cent of the households show female ownership of fixed assets while the percentage stands at 18.02 in rural areas.\(^96\) In terms of human development indicators, adult male literacy is 78.87 per cent while for women it is only 56.39 per cent and in terms of administrative and managerial positions in Nepal, women hold only 27.56 per cent and the remaining

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\(^{91}\) Interview with Dhan-DS1 (6 November 2015).

\(^{92}\) Interview with Dhan-DS2 (6 November 2015).

\(^{93}\) Interview with Dhan-DS4 (9 November 2015); Interview with DS5 (9 November 2015).


\(^{95}\) Ibid 2.

\(^{96}\) Ibid.
72.44 per cent are held by men.\textsuperscript{97} However, the life expectancy of women is better than that of men; for men it is 66.83 years while for women it is 71.44 years.\textsuperscript{98} In regards to the reasons for exclusion of women in decision making positions, a political science professor in Nepal, Meena Vaidya Malla, argues that ‘in Nepal, the principle of inequality exerts its influence in the society and socialization process. In a patriarchal and male dominated society, the tradition, perception, and culture are against the active role of women’.\textsuperscript{99} Her argument applies to the three selected groups of this research and therefore there are very few women are taking the role of dispute settler.

Research conducted by the United Nations Development Programme (UNDP Nepal), titled \textit{Nepali Masculinities and Gender Based Violence}, revealed that men are mostly not involved in domestic work, and, compared to women, are involved very little in child-caring activities.\textsuperscript{100} It was also found that men living in the Terai region (plains bordering India) do even less household work compared to the men living in the urban areas such as the capital city Kathmandu, located in the Kathmandu Valley, thus perpetuating the inability of women across Nepal to access and participate in the social sphere outside the home, but particularly in rural areas, and so particularly I regard to TJS that are a dominant form of justice in rural areas. Traditional gendered division of labour persists, with most men involved in paid employment outside the home whereas women are involved in unpaid household work.\textsuperscript{101} Again, while the TJS services are

\begin{flushleft}
\textsuperscript{98} Ibid 86.
\textsuperscript{99} Meena Vaidya Malla, \textit{Political Socialization of Women in Nepal} (Adroit, 2011) 42.
\textsuperscript{101} Ibid. The Bardiya district located it the Terai region.
\end{flushleft}
free of cost to users (allowing women greater access, at least theoretically), serving as a dispute settler is at the dispute settlers expense. This may impede participation by some women and lowly paid workers. However, women are not equally disadvantaged in this regard.

In Nepal, women are not a homogenous group; rather, they are characterised by diversity in terms of race, caste, ethnicity, language, religion, culture, and geographic region. It was found that the ethnic groups from the mid and high hills, including Thakali, have relatively more egalitarian roles and autonomous positions for women in terms of household decision making, mobility outside the home and in the community, and roles in the family business and marketing in comparison to the women of other groups in Nepal.

All Nepali women experience discrimination but its nature, forms, and intensity differs among different ethnic, cultural, regional (Hill, Mountain or Terai) and religious groups. For example, in regards to literacy, 92.8 per cent of Brahman men and 68.6 per cent of Brahman women are literate, but only 48.5 per cent of Madhesi Dalit men and only 17.2 per cent of Madhesi Dalit women are literate. A study, conducted by the Central Department of Sociology/Anthropology of the Tribhuvan University, revealed that:

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104 Bhattachan, above n 102, 62.

105 National Judicial Academy, above n 1, 4.
Gender discrimination is a striking feature of Nepali society, with men continuing to dominate the socio-economic sphere. This entrenched and persistent male domination has created a huge social barrier for women wishing to exercise their fundamental human rights. The patriarchal value system is the root cause of female subordination and social exclusion in Nepal.\textsuperscript{106}

Discrimination and exclusion affects Dalits as well as women. In all three selected TJS, the role of the Dalits was found to be very minimal, with individuals from this community rarely given opportunities to become dispute settlers. To understand the situation of exclusion of Dalits in the selected TJS we need to be informed about the exploitation and exclusion of Dalits from the social, political and economic mainstream of the country. Traditionally, Dalits have been placed at the bottom of the social hierarchy. The Dalits are the people who were formerly treated as ‘untouchables’ (a now unlawful and unconstitutional practice) and thus discriminated against and excluded from the social life of so-called higher classes.\textsuperscript{107} The untouchable status of Dalits and exclusion from mainstream social life is said to have emerged from the Hindu ideology of the Varna system based on Hindu scriptures such as Naradasmiriti and Yagyabalkyasthiti.\textsuperscript{108} The nature of caste discrimination in Nepal has been described as ‘a form of apartheid that manifests in segregation housing settlement and cemeteries, denial of access to common drinking water, restaurants,

\begin{footnotesize}
\textsuperscript{106} Om Gurung and Mukta S Tamang (eds), \textit{The Nepal Multidimensional Social Inclusion Index: Diversity and Agenda for Inclusive Development} (Central Department of Sociology/Anthropology, Tribhuvan University, 2014) 3.


\textsuperscript{108} See Prayag Raj Sharma, \textit{The State and Society in Nepal: Historical Foundations and Contemporary Trends} (Himal Books, 2004) 155; In the Varna system people were divided into four categories — Brahmin, Chhetri, Baishya, and Shudra. Shudras were treated as the lowest in the hierarchy and regarded as ‘untouchables’.
\end{footnotesize}
temples, teashalls, restrictions on marriage and other social interaction and mobility'.

Despite the constitutional and legal provisions aimed at abolishing the untouchability and discrimination associated with Dalithood, Dalits are still victims of discrimination in many areas of social life. For example, the Nepal Human Development Report 2014 identified a huge gap in income among caste groups. The report revealed that as a group Brahmins/Chhetris have the highest income per capita, followed by ethnic groups, and lastly Dalits. The per capita income of Hill Brahmins is 1.7 times that of Dalits in general, and twice than of the Madhesi Dalits. Although the population of the Dalits is about 13 per cent of the total population of the country, their representation in the judicial sector is only two per cent (and no Dalit has ever been a Justice or the Chief Judge of the Supreme Court), while Dalits’ representation in the civil service is only 0.9 per cent.

Despite the passage of the Caste-Based Act, this research found that Dalits are being excluded from the role of dispute settlers and their role is minimised in the entire process of dispute resolution in the TJS processes and this amounts to racial discrimination, which is contrary to the provisions of the Convention on the Elimination of Racial Discrimination (CERD). CERD defines racial discrimination as:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

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109 Kisan, above n 107, 48.
111 National Judicial Academy, above n 1, 5.
fundamental freedoms in the political, economic, social, cultural or any other field of public life.\textsuperscript{112}

The Committee on the Elimination of Racial Discrimination (hereinafter referred to as the CERD Committee) raised concerns ‘at the persistence of the de facto caste-based discrimination and the culture of impunity that apparently permeates the higher strata of a hierarchical social system.’\textsuperscript{113} In particular, the CERD Committee expressed concerns about ‘the existence of segregated residential areas for Dalits, social exclusion of inter-caste couples, restriction to certain types of employment, and denial of access to public spaces, places of worship and public sources of food and water’.\textsuperscript{114} To address the situation of racial discrimination in the Nepali context, the CERD Committee recommended that the Government of Nepal take effective measures to ‘prevent, prohibit and eliminate private and public practices that constitute segregation of any kind, and make determined efforts to ensure the practical and effective implementation of these measures’.\textsuperscript{115} In considering the multiple discriminations against women who belong to vulnerable groups, such as Dalits, the Committee recommended that the Government of Nepal take effective measures to eliminate such discriminations based on caste and ethnicity.\textsuperscript{116}


\textsuperscript{113} Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Nepal, 64\textsuperscript{th} sess, UN Doc CERD/C/64/CO/5 (28 April 2004) 3 [12].

\textsuperscript{114} Ibid.

\textsuperscript{115} Ibid.

\textsuperscript{116} Ibid 4.
The situation of Dalit women in general and in the context of Nepali TJS is different from and more complex than that of women from other communities and of Dalit men.

A report titled *The Situation of Dalit Rural Women* stated:

Poverty in Nepal has been ‘feminised’ as well as ‘dalitised’. The situation of Dalit women, who have less access to ownership of land, households and livestock, is significantly worse than that of Dalit men. When the effects of caste and gender discrimination are combined, Dalit women end up at the bottom of the socio-economic scale.117

The report reveals the situation of multi-layered exploitation at the intersections of race and gender, that Dalit women face in Nepal. As Elena Marchetti argues, studies ‘looking at race, law and legal processes rarely consider how other characteristics, such as gender, might complicate matters and create distinct and varied experiences of marginalisation.’118 According to Marchetti, law and legal processes tend to take into consideration only a single characteristic or a few aspects of a person’s situation to determine claims of injustice or discrimination and this does not adequately address the position of those at the intersections of two or more subordinated identities.119

Therefore, to understand and analyse the situation of Dalit women in the structure and operation of TJS in the Nepali context, an intersectional approach is required. Kimberle Crenshaw’s work on ‘intersectionality’ in the context of Black women’s experience in the US was discussed in Chapter 3 and provides an example of the impacts of multiple identities that resonates with the experience of Dalit women.

Among the Dalit groups, Dalit women experience both gender and caste-based discrimination and exploitation. Dalit women who are living in the Hill region are

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victims of gender and caste-based discrimination and Dalit women who are living in Terai are also victims of regional, cultural and linguistic discrimination. Caste and ethnicity-based identities and related discrimination are more common in rural areas where individuals are still identified on the basis of their caste or ethnicity. The Dalit group in Nepal is facing exclusion and discrimination in all spheres of social life. In addition, Dalit women face manifold exclusion and discrimination because they are Dalits as well as women and in most cases poor. A 2016 report noted that

Dalit women still face a high degree of social and economic exclusion and the traditional harmful practices of chhaupadi [menstrual social and dietary exclusions], kamlari [indentured servitude, sometimes lifelong] and child marriage continue despite legal abolition of these practices.

The effective exclusion of the Dalits (both men and women) from the role of dispute settler in all three selected TJS is another dimension of the exclusion and discrimination against the Dalits in everyday social life in the Nepali context. Ramu Bishwakarma, Valerie H Hunt and Anna Zajicek, in the context of education of Dalits women in Nepal, argue that the use of an intersectionality approach that takes into account ‘simultaneous operation of gender, racial, class and/or caste inequalities, has been recognized as an important tool for policy makers and scholars committed to addressing inequalities, especially as they are experienced by women’.

120 Bhattachan, above n 102, 62; Folmar, above n 1, 85–6.
121 Amar Bahadur BK, The Stigma of the Name Making and Remaking of Dalit Identity in Nepal (Social Science Baha, 2013) 33.
124 Bishwakarma, Hunt and Zajicek, above n 122, 44.
Similar to my PhD research, previous research in Nepal has documented minimal or non-existent representation of women and Dalits in the TJS structure and processes.\textsuperscript{125} The human rights-based perspective needs to be taken into account. HRBA prioritises ‘the meaningful participation in the activities of those being affected by a problem’ by considering such participation as a right.\textsuperscript{126} HRBA provides the means to integrate international human rights standards and principles, including women’s human rights and the prohibition of sex-based discrimination, in the TJS dispute resolution process.\textsuperscript{127} Therefore, a human rights perspective requires the meaningful participation of all concerned, including women and Dalits in the dispute resolution process through TJS in the Nepali context.

As a member state of the United Nations and a state party to a number of international human rights instruments, Nepal is under an obligation to ensure the meaningful participation of women, Dalits, and minority groups in activities that affect them. That includes the TJS dispute resolution process. Nepal, as a state party to the \textit{International Covenant on Civil and Political Rights (ICCPR)} is obliged to respect and ensure for all individuals the rights recognised in the \textit{ICCPR}, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{128} The \textit{ICCPR} further provides:

\begin{quote}
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination
\end{quote}

\textsuperscript{125} See Pun and Malla, above n 82, 30; Massage, Kharel and Sharma, above n 1, 15.


and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{129}

Therefore, the exclusion of women and \textit{Dalits} from being elected as dispute settlers and the overall functioning of the dispute resolution process in the selected TJS is contrary to the provisions of the \textit{ICCPR}.

Similarly, the exclusion of women from being elected and playing a role as dispute settlers is a form of discrimination against women and in violation of the provisions of the \textit{Convention on the Elimination of All forms of Discrimination against Women (CEDAW)}. \textit{CEDAW} defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.\textsuperscript{130}

In the situation of discrimination against women the state party is obliged to ‘pursue by all appropriate means and without delay a policy of eliminating discrimination against women’\textsuperscript{131} and that may include ‘taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’\textsuperscript{132} \textit{CEDAW} further obliges the state party to:

Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which

\begin{footnotesize}
\begin{footnotes}
\item[129] Ibid art 26.
\item[131] Ibid art 2.
\item[132] Ibid art 2(f).
\end{footnotes}
\end{footnotesize}
are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.\textsuperscript{133}

In their consideration of the reports submitted by the Government of Nepal and Nepalese civil society, the CEDAW Committee raised concerns about the patriarchal attitudes and deep-rooted stereotypes that discriminate against women and which remain entrenched in the social, cultural, religious, economic and political institutions and structures of Nepalese society and in the media.\textsuperscript{134} In order to address the situation, the CEDAW Committee urged the Government of Nepal, ‘to put in place without delay a comprehensive strategy, with concrete goals and timetables, to eliminate patriarchal attitudes and stereotypes that discriminate against women.’\textsuperscript{135} The CEDAW Committee expressed its deep concern for:

The extremely low level of participation of women, in particular Dalits and indigenous women, in high-level decision-making positions, the public service, the judiciary and the diplomatic service; in the National Human Rights Commission; and at the local level.\textsuperscript{136}

Thus, the CEDAW Committee recommended the state party take a number of necessary measures in order to accelerate the full and equal participation of women particularly from Dalits and Indigenous groups in public and political life in Nepal.\textsuperscript{137}

In considering the situation of discrimination and exclusion of some of the groups such as women, Dalits, Indigenous nationalities, Madhesi, Tharu, minorities, and the oppressed, the Constitution addresses the matter at least in part by providing for the

\textsuperscript{133} Ibid art 5(a).

\textsuperscript{134} Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women, Nepal, 49th sess, UN Doc CEDAW/C/NPL/CO/4-5 (11 August 2011) 4 [17].

\textsuperscript{135} Ibid 4 [18(a)].

\textsuperscript{136} Ibid 6 [23]. It did, however, welcome Nepal having achieved 33 per cent women representatives in the Constituent Assembly.

\textsuperscript{137} Ibid 6–7 [24(b)].
fundamental right of all to participate in state bodies on the basis of the principle of proportionate inclusion.\textsuperscript{138} These provisions ensure the fundamental rights of certain excluded groups to have proportionate inclusion in the state bodies (executive, legislative, judiciary and government institutions). However, the TJS are not recognised as state bodies; therefore, these constitutional and legal provisions may not necessarily be applicable legally to the situation of discrimination and exclusion in the context of the operation of TJS in Nepal.

\textbf{VII \hspace{1em} DISPUTE RESOLUTION AS A VOLUNTARY SOCIAL SERVICE TO THE COMMUNITY}

One of the major positive characteristics of the functioning of the TJS is considered to be their voluntary nature. The work of dispute resolution in the community is perceived to be one of the responsibilities of the leaders of that community.\textsuperscript{139} With few exceptions, the work of the dispute settlers in the three selected TJS was found to be a social service to the community. Dispute settlers, in most cases, were neither paid by members of the community nor by the government. One of the dispute settlers from the \textit{Shir Uthaune} system in the Dhankuta district stated that dispute settlers do not get paid and do not even expect any salary for the social service they provide and are happy with the respect they received in the community.\textsuperscript{140} This effectively excludes women and low paid workers from accepting such a position.

Given that the work of dispute resolution is voluntary or free of charge, the question may arise as to how dispute settlers earn their livelihood. A dispute settler from the

\textsuperscript{138} Constitution art 42(1).
\textsuperscript{139} See Forsyth, above n 1, 97.
\textsuperscript{140} Interview with Dhan-DS5 (9 November 2015).
Badghar system in the Bardiya district stated that he was involved in agricultural work and his eldest son had been to Malaysia for foreign employment and was providing economic support to his family.141

As in the Badghar system, in most of the villages of the Mustang district the work of Mukhiya is also voluntary and they do not get paid for their work. However, in some villages there is the provision of nominal remuneration for a Mukhiya. One Mukhiya stated that in his village each year every household pays in kind, by providing a small amount of food grain (around a kilo) to the Mukhiya. He added that as a Mukhiya he received food grain to the value of NRs 5000.00 (around AUD 60) per annum but he noted this was not sufficient for his family’s survival and he was also involved in agriculture (planting wheat and other crops) and owned a small apple orchard and a furniture factory.142 Likewise, another Mukhiya was found to be involved in a number of economic activities, such as owning a tourist hotel in Jomsom, as well as an agricultural farm and an apple orchard in the Mustang district.143

As in the Badghar and Mukhiya systems, the service of dispute settlers in the Shir Uthaune system of the Dhankuta district is also a voluntary and the people who are working as dispute settlers were found to be involved in a number of economic activities to support their family. A dispute settler in the Dhankuta district was a retired school teacher and owned an orange orchard from which he derived his family’s livelihood.144

141 Interview with Bard-DS1 (29 November 2015).
142 Interview with Mus-DS1 (5 September 2015).
143 Interview with Mus-DS2 (3 September 2015).
144 Interview with Dhan-DS5 (9 November 2015).
As to the question of whether dispute settlers would prefer to be salaried, the answer varied. A Mukhiya from the Mustang district stated that while a small financial benefit would be better than none, a regular salary would not have a positive impact overall because people would start competing for the position, not to provide a service but only for the sake of getting the salary.\textsuperscript{145} Contrary to this dispute settler from the Mukhiya system, a dispute settler from the Shir Uthaune system said that he does not get a salary nor any benefit of any kind and does not expect to get any benefit for his social service to the community. He added that to help each other within the community is a Rai community tradition.\textsuperscript{146}

An expert interviewee noted, however, that as the work of dispute resolution is voluntary, only the wealthy (who do not have daily subsistence problems) can become dispute settlers. He added that people living in the rural areas who are economically poor and have no means of obtaining an income have a lower chance of becoming a dispute settler.\textsuperscript{147} Statistics reveal that very few women own property\textsuperscript{148} in Nepal. They are also compelled to follow the traditional gendered division of labour (thus women generally work in the domestic sphere).\textsuperscript{149} In most cases, women’s economic dependence on a male member of the household is one of the major factors that

\textsuperscript{145} Interview with Mus-DS3 (16 September 2015).
\textsuperscript{146} Interview with Dhan-DS2 (8 November 2015).
\textsuperscript{147} Interview with Mus-EX2 (3 September 2015).
\textsuperscript{148} Central Bureau of Statistics, \textit{National Population and Housing Census 2011}, above n 94, 2. The report developed from the survey reveals that in urban areas, 26.77 percent of the households have female-ownership of fixed assets while the percentage stands at 18.02 in rural areas.
\textsuperscript{149} United Nations Development Program, \textit{Nepali Masculinities and Gender Based Violence}, above n 100, 2.
discourage women holding decision making positions in public life, including as dispute settlers in the TJS.  

*The Living Standard Survey* of 2010 conducted by the Central Bureau of Statistics of Nepal revealed that in Nepal 25.16 per cent of the population overall lived below the poverty line and some 15.46 per cent of the urban population and 27.43 per cent of rural population lived below the poverty line.  

At the same time, the report developed from the survey revealed that the poverty in the *Dalit* community is much higher than among the so-called high caste people. For example, according to the report only 10.34 per cent of *Brahmins* in the Hill area and 18.61 per cent in the Terai live below the poverty line.  

At the same time, the percentage of *Dalits* living below the poverty line in the Hill area and Terai area were 43.69 and 38.16 per cent respectively.  

The figures indicate a wide gap in the distribution of wealth between *Dalits* and high caste people in Nepal. The situation of *Dalits* has been described as follows:  

In general, their housing is of poor quality, sometimes crumbling, and relatively small. Some *Dalits* own land, but many are landless — most of the households have only the land upon which the house itself rests. Having no farmland and witnessing the declining of their traditional occupations, most *Dalits* are quite impoverished… Landless *Dalits* are also likely to have significant debts and have loans held by local landowning elites — mainly *Brahmins*, who charge interest in the range of three to five per cent per month. Such exorbitant interest rates cause long-term indebtedness, put *Dalits* at risk of losing their houses and commit future profits to paying off loans rather than to the pursuit of a better life, materially.  

Compared to the non-*Dalits*, people from the *Dalit* communities are far poorer; therefore, they have limited means to support their families. On the one hand,  

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150 Interview with Kath-EX3 (11 August 2015). See also Malla, above n 99, 42.  
152 Ibid 10.  
153 Ibid.  
154 Folmar, above n 1, 91.
traditionally the *Dalits* are discriminated against in social activities and on the other they are poorer compared to the so-called high caste people. This also is one of the reasons that the elites in the community do not let the *Dalits* occupy decision making positions such as dispute settler in TJS.

There is also the self-limitation the oppressed impose when they internalise the value system of the majority culture, or when they see the TJS as symptomatic or a tool of their oppression, such that in the instance a *Dalit* community representative in the Mustang district criticised the *Mukhiya* system as suited for *Thakali* people and not Dalits or other minorities as it is based on discriminatory practices against them.\(^{155}\)

Thus there is a combination of external and internal dimensions involved in the non-participation or lack of inclusion of women, *Dalits* and minorities in the TJS. It involves attitudes (of selves and others), systematic repression despite legislation, and economic, geographic, educational, caste, and gender identities. For genuine change to occur, each has to be addressed.

**CONCLUSION**

This chapter describes and analyses the major characteristics in regards to the structure and operation of the three selected TJS in the Nepali context. Though the selected TJS are practised in different geographic regions and among different Indigenous groups, many similarities in their structure and functioning were noticed. Some differences among and within the selected TJS were also noticed in the structure and operation.

\(^{155}\) Interview with Mus-EX2 (3 September 2015)
The next chapter explores the reasons that, in the context of the three selected TJS, the people living in rural areas in general, and Indigenous groups in particular, utilise TJS. The chapter also analyses the shortcomings of the selected TJS in the same context.
CHAPTER 6: REASONS FOR USING TRADITIONAL JUSTICE SYSTEMS AND SHORTCOMINGS OF THESE SYSTEMS

INTRODUCTION

The previous chapter analysed and established the current situation with respect to the structure and operational status of selected traditional justice systems (TJS) in the Nepali context. This chapter explores and analyses interview participants’ perspectives on the reasons for using three selected TJS — Badghar, Mukhiya and Shir Uthaune in three selected districts of Nepal (Bardiya, Mustang and Dhankuta respectively) — and also analyses the shortcomings of these TJS. The analysis of this chapter is based on the information gathered through in-depth interviews with dispute settlers, TJS users, expert interview participants, and formal justice system (FJS) actors, including judges, court officials and users of the FJS during the fieldwork in Nepal. The interview participants have different roles and were from different locations, caste and ethnic groups.¹

The chapter is divided into two parts. Part I deals with the reasons people use the TJS in the selected districts of Nepal. Part II analyses the shortcomings encountered in the TJS. The analysis in this chapter is based on the themes arising out of the field data collected in the Dhankuta, Kathmandu, Mustang and Bardiya districts of Nepal.

This chapter contributes to knowledge of the reasons for using TJS and the weaknesses of these systems in Nepal. Comparisons and contrasts are also made among and within the three selected TJS. A knowledge of the reasons for the utilisation of the TJS in various areas and situations is needed if one is to understand what potential there is for

¹ Chapter 4 Methodology of this thesis presents details of the interview participants, their roles in the FJS and TJS and their caste and ethnicity.
the expansion (or possible contraction) of such systems. In addition, a knowledge of any weaknesses (their extent and nature) is required if such weaknesses are to be overcome and so enhance the basis for utilising TJS in conjunction with (or better and more formally articulated with) the FJS.

I REASONS FOR USING TRADITIONAL JUSTICE SYSTEMS IN NEPAL

A Traditional Justice Systems are a Traditional Forms of Dispute Resolution for Indigenous People

In the Nepali context, TJS are used by many castes and ethnic groups across the country. All three TJS selected for this research are in operation by and for different Indigenous groups and others in different locations in Nepal. These systems are the primary forums for resolving disputes (especially all civil and petty criminal matters); it is only if the TJS are unable to resolve their disputes that the FJS is used. Of the eight TJS users interviewed for this research, five were from Indigenous groups. Four of the Indigenous interview participants expressed confidence and trust in the functioning of the TJS because TJS users and dispute settlers belong to the same community and everyone in the community follows the tradition of using TJS for resolving their disputes. TJS are part of the customs and tradition of the people and these systems have been used for generations; this is one of the primary reasons given by dispute settlers and users for their use. For example, all of the users of the Badghar system in the Bardiya district said that Tharu communities in that district utilise TJS for resolving disputes because that has been and continues to be their tradition. They

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3 Interview with Bard-TJSU1 (12 December 2015); Interview with Bard-TJSU2 (13 December 2015; Interview with Bard-TJSU3 (14 December 2015).
stated that because Badghars are selected from within the community and they are more familiar with the issues underlying a dispute, disputes can be resolved more reasonably than in the FJS. They believe that decision-makers in the FJS do not know the ‘real facts of a case’ (unlike TJS), and in many instances the FJS decide cases solely on the basis of documentary evidence. An expert from an Indigenous group in the Dhankuta district noted that generally Indigenous groups do not have a culture of preparing documentary evidence; mostly they rely on face to face and verbal communication. For this reason, Indigenous peoples prefer not to enter into the FJS where documentary evidence is greatly valued.

Likewise, interview participants from the Mukhiya and Shir Uthaune systems (Indigenous participants from the Mustang and Dhankuta districts respectively) also stated that they use TJS without question because they are following in the footsteps of their (Indigenous cultural group) ancestors. Users of the Shir Uthaune in the Dhankuta district also use TJS because their people have done so for a very long time and they are familiar with it. For instance, a TJS user from the Dhankuta district stated that the:

The Shir Uthaune system is practised by the Rai groups from our ancestors’ time and we count this system as a part of our culture and tradition. No one questions why we use it. I know from my childhood that people in our village use Shir Uthaune to resolve disputes at the local level.

It is interesting to note that people who do not belong to any Indigenous groups but are from the Dalit community also follow the Indigenous groups’ tradition and resolve

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4 Interview with Bard-TJS-U1 (12 December 2015); Interview with Bard-TJSU3 (14 December 2015).
5 Interview with Dhan-EX1 (1 November 2015).
6 Interview with Dhan-TJSU1 (13 November 2015); Interview with Dhan-TJSU2 (15 November 2015).
7 Interview with Dhan-TJSU2 (15 November 2015).
disputes through TJS. While the total population of Dalits in Nepal is around 13 per cent, as a caste rather than ethnic or Indigenous group they are scattered across the country (inhabiting the Terai as well as the Hill areas) and do not form a majority population in any one area and so make recourse to the particular TJS of the community in which they live. The Nepal Dalit Commission has identified and listed a total of 21 Dalit castes across the country (five of Hill origin Badi, Damai, Gaine, Kami and Sarki; and 16 of Madhesi origin Bantar, Chamar, Chidimar, Dhobi, Dom, Dushadh, Halkhor, Kakahiya, Khatbe, Khatik, Kori, Tatma, Mushar, Pattharkatta, Pasi and Sarvanga). Because of their scattered habitation they are not in the majority in the context of the selected districts and because of this they are compelled to follow the customs and tradition of the majority group.

The Tharu people, for example, use TJS because, like other Indigenous groups, they value their customs, traditions and community solidarity. Dalits are a minority within the population and make use of the Badghar system, as noted by a Dalit TJS user in the Bardiya district:

In my village there are around 75 households; of them 61 are Tharus and only six are Dalit families. Dalit peoples’ culture and traditions are influenced by the culture of Tharu groups such that we celebrate Tharu festivals and use the Badghar system to resolve disputes at the community level.

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8 For example, research participants Bard-TJSU1, Bard-TJSU3, and Dhan-TJSU1 are from Dalit groups.
12 Interview with Bard-TJSU1 (12 December 2015).
In some villages in the Mustang district, it was found that people use the *Mukhiya* system in first instance. This is because their tradition and customs do not permit filing a case in the FJS before going to the TJS. For example, a TJS user from that district stated: ‘As per our community’s rules [unwritten], the FJS cannot be approached in the first instance; therefore, we approach TJS. If the parties are not satisfied with the decision of the *Mukhiya* or the dispute cannot be resolved, it is only then that the FJS can be utilised.’¹³ This statement indicates the importance of the customs and traditions in the life of the *Thakali* people in the Mustang district.

B  *Traditional Justice Systems are Located in the Vicinity of the Service Seekers and are Readily Available*

In many instances, Indigenous people who are living in rural areas select TJS for resolving their disputes because there is no other easily accessible forum for resolving disputes.¹⁴ Interview participants (52 per cent) repeatedly cited TJS being ‘readily available’ and ‘situated close to the disputing parties’ as reasons for using TJS. For example, a TJS user from the Bardiya district stated the reason for using the *Badghar* as: ‘[T]he FJS is far from our village (40 km) and we are not familiar with the FJS. The *Badghar* is in my village and I am familiar with the dispute settlers and the process.’¹⁵

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¹³ Interview with Mus-TJSU3 (2 September 2015).


¹⁵ Interview with Bard-TJSU3 (14 December 2015).
The majority of the FJS interview participants (87 per cent) agreed that people residing in rural areas use TJS because these systems are located and available in their village. An FJS interview participant in the Dhankuta district stated:

TJS are available in the villages and are therefore easily accessible to the community people. In Dhankuta district there are some villages without road connection. From these villages people have to walk for a whole day or two to reach the district headquarters so as to bring a case to the court; therefore, in most instances they prefer using their local dispute resolution processes.\textsuperscript{16}

FJS interview participants in the Bardiya and Mustang districts also agreed with the observation that TJS are functioning at the community level while the formal courts of justice are situated in the urban centres (mostly in the district headquarters) and therefore people in rural areas have easier access to the local TJS for resolving their disputes, contributing to their use of TJS.\textsuperscript{17} An expert interview participant from the Kathmandu district not only highlighted that Indigenous people mostly live in remote areas and the FJS forums are located in the district headquarters and/or urban areas but also noted that they face other difficulties (such as lack of knowledge and financial problems) that impede their access to the FJS and for such reasons these people use TJS.\textsuperscript{18} Some other researchers have also identified that geographic accessibility of the TJS and distance to the FJS are important factors that influence the use of TJS in the Nepali context.\textsuperscript{19}

\textsuperscript{16} Interview with Dhan-CO3 (30 October 2015).
\textsuperscript{17} Interview with Bard-CO1 (5 December 2015); Interview with Bard-CO2 (6 December 2015); Interview with Mus-CO1 (25 August 2015); Interview with Mus-CO2 (27 August 2015).
\textsuperscript{18} Interview with Kath-EX1 (30 July 2015).
C Economic Affordability

The United Nations Report on the Commission on the Legal Empowerment of the Poor in 2008 (the Report) estimated that over 4 billion people around the globe who live in poverty are excluded from the FJS because without access to sufficient funds they can be far from its protection; instead, informal local norms and institutions govern their lives; and where they are not excluded from the FJS, they are often oppressed by it.20

The Report also identified the fact that people living in poverty and in rural settings may be unable to access justice through the FJS because of a lack of financial resources and knowledge of the FJS as well as illiteracy and lack of ‘paper records’ needed as evidence. These factors severely hamper their ability to interact with the FJS.21 The Report highlighted that in most countries, rich and powerful elites dominate politics and the economic sphere, and public policy and its outcomes are shaped by their interests, rather than those of the poor majority struggling to make ends meet.22 These economic and political inequalities tend to be reinforced by inequitable and dysfunctional laws and institutions, and the inability of the poor to access justice.23

Another United Nations report in 2012 also identified that in general, marginalised populations (such as women, and people living in poverty in rural areas) face many hindrances, such as the lack of access to economic and other resources, persistent fear

20 United Nations Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone (Working Group Report) (2008) vol I, 2–3. The report was prepared in three years, with 22 national consultation processes conducted with representatives from local governments, academia, civil society, and grassroots movements. The Report refers specifically to the Philippines, Ethiopia, Guatemala, Argentina, Tanzania, Egypt, Ghana and Pakistan among others and not specifically to Nepal but its observations remain highly relevant.

21 Ibid 32–3.

22 Ibid 32.

23 Ibid 43.
of intimidation, and victimisation by officials.\textsuperscript{24} Therefore, such marginalised people prefer to use TJS for accessing justice.

According to the World Bank income classification, Nepal falls into the category of ‘low-income group country’ which means gross national per capita is less than 1000 USD for the year 2017–2018.\textsuperscript{25} According to the Nepal Living Standard Survey ((NLSS 2010/11) of the Central Bureau of Statistics (CBS) of Nepal, 25.16 per cent of Nepali people (15.46 per cent in urban areas and 27.43 per cent in rural areas) are below the poverty line.\textsuperscript{26} Such people have limited means to afford access to justice services from the FJS and therefore, prefer to use TJS.

A significant reason for use of the TJS was its affordability or the fact that it was free. In the Nepali context, all the dispute settlers, experts and TJS users stated that the dispute resolution services of the TJS in their respective locations were almost free of cost. However, in some villages disputing parties needed to pay some costs associated with the process or contribute in some other way. For example, in the Shir Uthaune system in the Dhankuta district there were no costs for the TJS process but in many villages the disputing parties were asked to provide light snacks (such as tea and biscuits) during the village meeting. However, this requirement can be waived where the parties are too poor:

\begin{quote}
We do not charge any fees for the dispute resolution services. On some occasions, the disputing parties are asked to pay for tea and biscuits (light snacks) for the participants
\end{quote}


in the village gathering. This is also not a compulsory rule. Where a party or both parties are from poor financial backgrounds, they may not be asked for tea and biscuits.\(^{27}\)

Dispute settlers or the village people know the financial situation of the disputing parties and decide accordingly whether to ask for the provision of light snacks.

Similarly, in the *Mukhiya* system in the Mustang district all of the services rendered by the *Mukhiya* — including dispute resolution services — were generally free of cost. However, in one of the villages every family makes a small contribution to the village *Mukhiya* (e.g., three kilograms per annum of food grain).\(^{28}\)

A dispute settler from the *Shir Uthaune* system in the Dhankuta district noted that their dispute settlers ‘do not charge any fees for the service rendered. Dispute resolution service in *Shir Uthaune* is free of cost, therefore community people, rich or poor, can equally access the services.’\(^{29}\)

One expert who was interviewed noted that a labourer would lose a day’s wages and on top of that they needed to meet travel and other associated costs (such as court fees and lawyers’ fees) if they wished to use the FJS.\(^{30}\) An FJS interview participants who filed a writ petition in the Supreme Court of Nepal challenging the relevant government authority’s decision not to promote her, described her experience as follows:

> I found that the cost incurred in the court case was very high compared to my income. When I approached a senior lawyer, he said ‘as a civil servant you will not be able to pay my actual fees therefore I will make special discount for you’. I felt humiliated by his words. I spent time and resources to prepare documents, registration and pleading

\(^{27}\) Interview with Dhan-DS4 (8 November 2015).

\(^{28}\) This practice is in Thini village of Mustang district.

\(^{29}\) Interview with Dhan-DS5 (9 November 2015).

\(^{30}\) Interview with Kath-EX4 (8 August 2015).
Likewise, an Appellate Court judge who participated in this research expressed a similar view in relation to the high costs incurred in the FJS:

A case was filed against me about an ownership of a plot of land. I approached a renowned senior advocate who became ready to take my case but I was very much surprised to hear his unreasonably high legal fees. The amount asked was more than two months of my salary, so I decided not to hire the lawyer. He later hired another lawyer who was cheaper than the one he had initially approached, and the case is yet to be resolved. In the Nepali context, civil servants and judges are the privileged in society due to having a stable income. If they feel that the cost in the FJS is unreasonably high, then it is unlikely that marginalised people, such as women, Dalits, Indigenous groups and people living in rural areas, can afford the costs in the FJS.

A similar experience was recounted by a court user who was a low income rural woman in the Dhankuta district: ‘To file a case in the court I paid lawyers’ fees, court fees, bus fares and costs for food and lodging. I do not have any job or property so I am going through a serious financial problem. I think I will not be able to continue the court case.’ Rural women who do not have income and are dependent on the family’s income face extra financial hardship to access justice through the FJS. In the Nepali context, past research has also identified that the services of FJS are not accessible to people who are living in poverty, those in the rural areas far from urban centres, and those do not know the way the FJS functions. These people are, therefore, compelled

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31 Interview with Kath-FJS-U1 (18 August 2015).
32 Interview with Dhan-CO4 (30 September 2015).
33 Interview with Dhan-FJS-U1 (18 November 2015).
to use TJS for resolving their disputes. Likewise, a study by the Antenna Foundation, a non-governmental organisation (NGO) in Nepal, on access to justice by women, youth, and marginalised ethnic, caste and religious communities in Nepal also concluded that the people who are living in poverty in rural areas far from district headquarters and who are not able to meet the associated costs of the FJS are compelled to lodge their disputes with the TJS.

D Procedural Flexibility and Simplicity

TJS have simple or flexible procedures making them easier for people to use. The simplicity and flexibility in the functioning of the TJS has been noted in previous research as one of the major reasons for community members to use these systems.

The discussion in Chapter 5 of this thesis, examining the operational aspects of the three selected TJS, provides further information about how these systems follow flexible procedures during a dispute resolution process, from bringing and resolving disputes to the implementation of the decision.

All 17 dispute settlers who were interviewed for this research agreed that there are no set rules and procedures regarding the initiation of cases, the way in which dispute resolution meetings are conducted, or the ways in which decisions are made and

34 See Coyle and Dalrymple, above n 19, 2; International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 19, 8.


implemented. In most situations, the process evolved by consensus amongst the community people.\textsuperscript{37} For example, regarding the flexibility of the procedures in the TJS, a dispute settler from the \textit{Shir Uthaune} in the Dhankuta district stated:

In our dispute resolution system [\textit{Shir Uthaune}], there are no set rules for receiving disputes, dispute resolution meeting, and the implementation of decisions. Generally, we conduct our dispute resolution activities by achieving consensus among the dispute settler, the disputing parties and the people who are present in the meeting. For instance, a dispute can be referred to a dispute settler in writing, verbally or by telephone. All the procedures involved in the dispute resolution are flexible and simple.\textsuperscript{38}

All of the TJS users (eight) who were interviewed also agreed that the TJS follow flexible and simple procedures for resolving disputes. As discussed in Chapter 5 of this thesis, TJS in Nepal consider disputes to be not only the problem of the disputing parties but also the problem of society as a whole and there is, therefore, an attempt to try to find consensus on how to resolve the dispute, with the cooperation of community people. For instance, a TJS user who used the \textit{Mukhiya} system of the Mustang district for resolving his dispute stated:

I was beaten by drunken boys in a local market two years back. Then I immediately reported the case to the \textit{Mukhiya} and asked for justice. When he saw my situation, he took immediate action and asked the village people to gather the next day to resolve the situation. The next day a dispute resolution meeting was convened and the issue resolved. My experience was that the process of dispute resolution by the \textit{Mukhiya} system was very simple.\textsuperscript{39}

Similarly, a TJS user from the Bardiya district expressed satisfaction with the procedural simplicity in the TJS operation and stated:

One day I was returning home after collecting fodder from a nearby forest. A \textit{Tharu} lady accused me of stealing fodder from her land. The verbal quarrel soon transformed into a physical altercation. The lady knocked me to the ground, at which time my left hand was broken. Immediately, I approached the \textit{Badghar} and explained the incident.

\textsuperscript{37} For details about the process of dispute settlement and implementation of the decision, please see Chapter 5 of this Thesis.

\textsuperscript{38} Interview with Dhan-DS4 (8 November 2015).

\textsuperscript{39} Interview with Mus-TJSU1 (28 August 2015).
and asked for an appropriate remedy. The next day, in a gathering of village people, the lady was asked to publicly apologise. In addition, she was asked to pay me compensation and the full treatment cost. The lady immediately realised her mistake and apologised and agreed to pay the full amount ordered by the Badghar.  

When interviewees were asked questions in regard to flexibility, simplicity and geographic proximity, they often compared TJS and the FJS operations. For example, an FJS interview participant in the Mustang district stated:

> Due to the statutory provisions, the FJS needs to follow complex and formal procedures. In many instances, people having no formal education and from the rural areas face difficulties in understanding and following such complex and formal FJS procedures. In comparison with the FJS procedures, the TJS processes are far more flexible and easy for village people to understand and follow.

The adversarial nature and statutory provisions on procedure that govern the FJS result in complex and cumbersome processes. In the Nepali context, an assessment report prepared by Department of International Development, United Nations Resident and Humanitarian Coordination Office and Danida/HUGOU describing access to security, justice and the rule of law noted that: ‘existing laws and procedures are complex, time consuming and orientated to process rather than results’.  

Almost all of the FJS interview participants (91 per cent) also accepted that the TJS procedures are easily understandable and simple to follow. An Appeal Court judge noted that the FJS, in many instances, depends on documentary evidence and many people in rural settings do not have the knowledge required to create and produce documentary evidence since they are not accustomed to such practices.

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40 Interview with Bard-TJSU2 (13 December 2015).
41 Interview with Mus-CO1 (25 August 2015).
43 Interview with Dhan-CO1 (28 October 2015).
E  Speedy Service

As noted in several of the quotes above, one of the reasons users select TJS for resolving disputes is because TJS rapidly resolve them. The reasons why disputes are resolved so quickly are: (i) TJS are located in villages and therefore approaching these systems for dispute resolution is much faster than for the FJS; and (ii) TJS follow informal processes that make their operation simple and speedy. For example, the TJS user (quoted above) from the Mustang district who was beaten by drunken boys, expressed his satisfaction that he was able to receive justice the day after the incident. He noted with satisfaction that according to the TJS decision the wrong doers were to pay NRs 2000 (around AUD 24) to him as compensation to cover his medical expenses and they also had to pay a fine of NRs 1000 (around AUD 12) that was to be deposited to the village fund. The TJS user expressed his satisfaction with the simple and speedy process followed by the TJS as this allowed him to feel justice had been achieved almost immediately. Similarly, the participant from the Bardiya district who was accused of stealing fodder, quoted above, explained how a Badghar resolved the dispute within a week and the decision was immediately implemented.

45 Interview with Mus-TJSU1 (28 August 2015).
46 Interview with Mus-TJSU1 (28 August 2015). Effective from 1 February 2016, the minimum daily wages rate for workers is NRs. 395 (approximately AUD 5); Wendy Zeldin, 'Nepal: Minimum Wage Increased', Global Legal Monitor (online) 23 May 2016 <http://www.loc.gov/law/foreign-news/article/nepal-minimum-wage-increased>.
47 Interview with Mus-TJSU1 (28 August 2015).
48 Interview with Bard-TJSU2 (13 December 2015).
In contrast, the procedure in the FJS is unnecessarily lengthy and time-consuming due to its formalities and complex procedures.\textsuperscript{49} The 2011 \textit{Access to Security, Justice and Rule of Law in Nepal: An Assessment Report} noted that ‘courts, particularly through delays, and failure to enforce judgements have failed to provide satisfactory results, especially for women and marginalised groups’.\textsuperscript{50} An FJS user in the Kathmandu district, who filed a case in the Supreme Court (also quoted above) described her experience of the FJS court delays and said that after filing the case she had waited for three years without any effective remedy. When she obtained promotion from the regular administration process, the court case then became meaningless. She, with great frustration with the FJS process, stated ‘due to the unnecessary delay in the court proceedings, I used resources and wasted three years to get nothing’.\textsuperscript{51} She also promised that she would never again come to the FJS and she would suggest that other people also not to go to the court but rather resolve disputes out of court by negotiation, mediation or by using other possible swift processes.\textsuperscript{52}

\textbf{F \hspace{1em} Use of Local Customs and Language}

The majority of the TJS users (75 per cent) and dispute settlers (82 per cent) interviewed stated that one of the major reasons for Indigenous people using TJS is that the TJS follow customary practices and the dispute resolution proceedings are


\textsuperscript{50} DFID, UN Resident and Humanitarian Coordination Office and Danida/HUGOU, above n 42, 18.

\textsuperscript{51} Interview with Kath-FJSU1 (18 August 2015).

\textsuperscript{52} Interview with Kath-FJSU1 (18 August 2015).
conducted in an informal manner using local languages. For example, a TJS user from the Dhankuta district stated:

As a member of the Rai group, I am familiar with the Rai’s traditions, customs and cultures. While resolving disputes the local dispute resolution system, Shir Uthaune, uses these customs and traditions; therefore, I preferred to use Shir Uthaune for dispute resolution. On top of that, in the Shir Uthaune process the dispute resolution meeting and the discussions were also conducted in the Rai language which is my mother tongue and I always feel confident to express myself in the Rai language.  

All the TJS users who were interviewed and who were from Indigenous groups (six in total) noted that these systems use local customs and language, and that this is why they felt comfortable and confident when participating in the TJS dispute resolution processes. These systems are also recognised under the international human rights instruments, such as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP). While those using TJS may not always be aware of this recognition (by such international instruments) of the systems they use, this recognition could provide a path to broader recognition and increasing utilisation of TJS in the longer term, thus maintaining their availability to vulnerable segments of the population, particularly in circumstances where access to the FJS is limited and resolution of disputes via the FJS not only exceedingly slow in many instances but also often unaffordable. However, as discussed in Chapters 2 and 5 of

53 Interview with Dhan-TJSU2 (15 December 2015).
this thesis, factors such as gender, caste, and economic status still limit the disputing parties’ equal participation in the TJS process.\textsuperscript{55}

Some of the interview participants (38 per cent) from Indigenous groups, have interpreted the use of local customs, traditions and language in the TJS dispute resolution process as their human right of Indigenous peoples. Chapter 7 of this thesis further explores the use of Indigenous law, customs, tradition and culture as part of the human rights of Indigenous groups.

\textbf{G Formal Justice System is the System for ‘Others’}

People living in rural areas, Indigenous people and other marginalised groups (such as women, and the poor) are hesitant to approach the FJS, so they use the locally available TJS dispute resolution. These people often consider the FJS as a system ‘for others’ and not for them.\textsuperscript{56} Marginalised groups felt that they were not properly represented in positions of power and their voices not heard in the formal justice forums. For example, a female TJS user in the Bardiya district stated: ‘I am not familiar with the procedures and languages used in the court. Therefore, I think the courts are not for serving people like me who are living in poor economic situations and in rural areas. That makes me use TJS’.\textsuperscript{57}

The use of the Nepali language (though constitutionally mandated) serves to alienate those for whom it is not their mother tongue. This is reinforced by the complex and unfamiliar vocabulary of the FJS. The use of Nepali, the language of the

\textsuperscript{55} The level of participation of different groups in the selected TJS operation is explored in greater detail in Chapters 5 and 7 of this thesis.

\textsuperscript{56} Wojkowska, above n 36.

\textsuperscript{57} Interview with Bard-TJSU1 (12 December 2015).
Chhetri/Brahmin class that dominates the judiciary, reinforces their hegemonic status. It increases the sense of ‘otherness’ that renders the FJS ‘unwelcoming’ for Indigenous and minority users.

An FJS interview participant belonging to an Indigenous community in the Bardiya district stated that almost all judges, court officials, and lawyers come from the high caste Brahmin/Chhetri community and these so-called high-class people do not represent minority groups in the FJS. In a similar way, an expert from the Kathmandu district noted that most of the uneducated people, rural people, Indigenous and the Dalits do not consider that the FJS is for them; rather they think this is the place for elite and wealthy people.

As discussed in Chapters 2 and 3, Nepal was not colonised by external forces but within the country and so-called high-caste Brahmin/Chhetri males supported by institutions and policies that were introduced or confirmed by the hegemonic groups continue to dominate powerful positions, including the FJS. As a result women, Dalits, Indigenous groups, and Madhesi people experience domination in every sector of social life, including the FJS, which results in their alienation from these systems.

Ian Duncanson and Nan Seuffert argue that ‘colonialism continues in a society through

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58 Interview with Bard-CO4 (8 December 2015).
59 Interview with Kath-EX1 (30 July 2015).
its class and gender structures’. In a multiethnic and diverse situation such as the Nepali context, where one group has been predominant in powerful positions, it needs to be acknowledged that people are not equal in material conditions and marginalised people (including Indigenous groups, women, Dalits and the poor) suffer social, political and economic disadvantage that impedes access to justice. Use of theories that analyse intersectional axes of oppression can assist in understanding these situations. Chapters 2 and 5 deal with the exclusion and marginalisation that women, Dalits, the poor, Indigenous and other minority groups face in the Nepali context in general and in accessing justice either through TJS or the FJS. As argued by Bishwakarma, Hunt and Zajicek, applying the intersectionality framework to analyse and formulate policy in the context of access to justice of Dalits and Indigenous women in Nepal would be appropriate; however, there is a paucity of gender and caste disaggregated data that is essential for intersectionality analysis in Nepal. For example, the annual report of the Supreme Court of Nepal reveals that in the year 2015–16 the court decided total of 6448 cases and the number of remaining cases were 21 872, and there are 10 015 cases that have been waiting for more than two years for a

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determination by the Supreme Court.\textsuperscript{65} However, the data does not tell us whether the disputing parties are male or female, or Indigenous female or Dalit female or others) in these cases. Similarly, the 2013 National Judicial Academy (NJA) report reveals that:

[w]omen, despite making 51.5% of the national population, are represented in the judicial sector by 13.9% only. Brahman/Chhetri, constituting 32.1% of the national population, account for 77.6% of total judiciary staff, while the representation of Janajati in the judiciary is only 14.5% even if they constitute 36% of total population. Similarly, other backward communities, such as Dalit are represented in judicial sector by 4.8% and 2% respectively, who constitute 13.8% and 13.3% of national population. The non-Hindu religious groups, comprising 18.7% of the national population, are poorly represented by less than 5% in all segments of judicial sector.\textsuperscript{66}

The NJA study also failed to reveal the situation of Indigenous and Dalits in the Nepali judiciary.

According to the 2017 \textit{Annual Report of the Supreme Court of Nepal, in 2015–16} there were 20 judges in the Supreme Court of Nepal, 79 in Appeal Courts, and 237 in District Courts across the country. However, there were no Dalit and Indigenous female judges in these numbers.\textsuperscript{67} In this context; therefore, it is important to utilise an intersectional framework to analyse access to justice in general and for Dalit and Indigenous women and other minority groups because such ‘problem identification … helps policy makers and planners view the existing situations critically, and facilitates formulation of new policies and programs that can realistically address the core problems’.\textsuperscript{68}


\textsuperscript{66} National Judicial Academy, \textit{Gender Equality and Social Inclusion Analysis of the Nepali Judiciary}, above n 60, v–vii.

\textsuperscript{67} Supreme Court of Nepal, \textit{Annual Report of the Supreme Court of Nepal 2016-17} (2017) 5.

II SHORTCOMINGS OF TRADITIONAL JUSTICE SYSTEMS IN NEPAL

While a large number of people are using TJS to access justice, previous research has identified a number of concerns, indicating that these systems are not problem-free.\(^69\) This section adds to that research, and analyses the shortcomings and weaknesses of the TJS from the perspectives of TJS and FJS interview participants. This data is consistent with the previously identified problems of (a) lack of recognition of TJS as dispute resolution forums, (b) elderly male domination and exclusion of women, \textit{Dalits} and minority groups and (c) its inappropriateness for a heterogeneous society and identifies other problems, those of (d) uncertainty in the process and outcomes, (e) lack of respect for international Human Rights principles and (f) political influence and manipulation.

A Lack of Recognition of Traditional Justice Systems as Dispute Resolution Forums

As discussed in Chapter 2 of this thesis, TJS are not formally or legally recognised by state law and the Constitution in Nepal. The term ‘recognition’ used in this thesis in the context of the TJS and FJS relationship is used in a broad sense and may include a range of situations, such as the adoption of normative content, jurisdiction, authority, adjudicatory process, and enforcement of decisions made by TJS.\(^70\) The various permutations of ‘recognition’ and legal pluralism are covered further below (in Chapter 8) and range from tacit recognition to full integration.

\(^69\) See Wojkowska, above n 36, 20; Ubink, above n 36, 3; Danish Institute for Human Rights, above n 24, 11.

Many interviewees see negative practical implications due to this lack of recognition. A large number of interview participants (76 per cent) from both TJS and the FJS believe that the lack of recognition of TJS by the state has contributed to a situation where many people do not trust TJS to secure justice, and this is in part because the TJS are unable to enforce judgements.

All of the dispute settlers who were interviewed (a total of 17) from the three selected TJS were aware that TJS in Nepal are not recognised by the state, and a large majority (82 per cent) expressed concern over the situation of lack of recognition and noted that this has contributed to weakening these systems because people prefer utilising legally recognised forums such as local level bodies and the courts. For example, a dispute settler from the Mustang district stated:

> Although the Mukhiya system is operating widely in Mustang district and resolving a large number of disputes, the system [Mukhiya] is not recognised as a dispute resolution forum by the state. Due to this, on some occasions people raise questions about the TJS’ authority to resolve disputes. The state authority does not consult Mukhiyas on social, legal or any other matter. Therefore, as a Mukhiya I feel powerless while working as a dispute settler.  

The statement indicates that on some occasions disputing parties raise questions in relation to the legal authority of TJS operations due to the lack of state recognition.

The majority (62 per cent) of TJS actors who were interviewed thought that non-recognition by the state is one of the major problems of TJS. For example, a TJS user from the Mustang district who was unhappy with the decision of the Mukhiya questioned its legal authority: ‘I know that they [Mukhiya] do not have any authority to decide my case; therefore, I am planning to challenge the illegal decision of the TJS in the formal court of justice’.  

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71 Interview with Mus-DS1 (5 September 2015).
72 Interview with Mus-TJSU3 (2 November 2015).
petition prepared by his lawyer and told me that he was going to file it soon in an appropriate court. However, later he stated although he was still unhappy with the decision of the Mukhiya, he had decided against pursuing the case in the FJS because the process was long, costly and complex and because outcomes were uncertain.73

Similarly, dispute settlers from the Shir Uthaune and Badghar systems were also aware that TJS are not recognised by the State, and that they do not have any power and authority (according to state law) to resolve disputes and enforce the decisions they make.74 Decision making power at a local level (including decisions relating to dispute resolution) is being shifted to the political parties, elected local level bodies and government offices, committees and courts leaving dispute settlers feeling that they are being deprived of the power to perform their traditional role, that is, that their role has been superseded by other, more recently created institutions.75 However, a decreasing acceptance of TJS could result in the gradual extinction of such a dispute resolution practices,76 which would deprive rural dwellers, women, the poor, Dalits, minorities and Indigenous people of access to a valuable forum for justice.

Expert interview participants (50 per cent) also agreed with the dispute settlers’ and TJS users’ view that non-recognition of the work of TJS by the state is one of the system’s problems and, in their opinion, one which ultimately weakens these systems;

73 Telephone conversation with Mus-TJSU3 (5 December 2016).
74 Interview with Mus-DS2 (3 September 2015); Interview with Bard-DS4 (1 December 2015).
75 Interview with Mus-DS4 (26 August 2015); Interview with Mus-DS5 (6 September 2015).
76 Interview with Dhan-DS2 (6 November 2015); Interview with Dhan-DS4 (8 November 2015). See Rajaure, above n 11.
this is a view shared by FJS participants from the Dhankuta, Bardiya and Mustang districts.\textsuperscript{77}

The above discussion shows that the lack of recognition of TJS by the state (in the Constitution and statutes) in the context of a multicultural and diverse country like Nepal reflects a state of non-recognition of the existence of legal pluralism. However, this is merely a failure of the state and the FJS to recognise the reality that Indigenous people and people living in remote areas in the country use TJS for accessing justice (see Chapters 2, 5 and 7 for further discussion how legal pluralism is in practice in the selected locations of Nepal). This legal pluralism is similar to that described by John Griffiths. Griffiths argues that the presence of more than one source of ‘law’ in the same social field is a situation of legal pluralism.\textsuperscript{78} The way Nepali justice system operates is a legal centralism where the Constitution and law of the country do not formally accept the TJS’ role in resolving disputes in Nepal. As discussed in Chapter 2 of this thesis, the Constitution and legal framework in Nepal do not recognise TJS as forums of dispute resolution so there is a lack of endorsement of legal plurality in the country, while on the ground they continue to operate and contribute to dispute resolution and justice in Nepal. Further discussion on legal pluralism in the Nepali context is presented in Chapters 3, 5 and 8 of this thesis.

The relation between TJS and the state is further explored from legal pluralistic and human rights-based perspectives in Chapters 7 and 8 of this thesis.

\textsuperscript{77} Experts: Interview with Mus-EX1 (30 August 2015); Interview with Dhan-EX1 (1 November 2015); Interview with Bard-EX2 (11 December 2015). FJS interview participants: Interview with Dhan-CO2 (29 October 2015), Interview with Dhan-CO4 (30 October 2015); Interview Bard-CO2 (6 December 2015); Interview with Mus-CO2 (27 August 2015).

\textsuperscript{78} John Griffiths, 'What is Legal Pluralism?' (1986) 24(1) \textit{Legal Pluralism and Unofficial Law} 1, 38.
Elderly Male Domination and Exclusion of Women, Dalits and Minority Groups

One of the weaknesses of TJS is due to the domination of elderly males and the lack of meaningful participation of members of less powerful sections of the community — such as women and minority groups — in their structure and functioning. (Dispute settlers who participated in this research were from Indigenous groups who were in the majority in their particular location.)

Of the 17 dispute settlers who were interviewed, the youngest dispute settler was a Badghar from Bardiya district who was 35 years old, and the eldest from Mukhiya from Mustang district who was 88 years old. The average age of the dispute settlers who were interviewed was 57 years, which reflects the aging population of dispute settlers across the three districts.

The majority of the TJS users (62 per cent) raised the issue of male domination and exclusion of women, Dalits and other minority groups in the selected TJS. For example, a female TJS user from the Mustang district noted that there was no representation of women in the Mukhiya system and it was always elderly men who work as Mukhiya. She argued that the men were unable to understand the feelings and emotions of a woman. A Dalit female TJS user in the Bardiya district similarly stated:

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80 Interview with Mus-TJS-U2 (1 September 2015).
When I went to the dispute resolution meeting, I saw that most of the people in the village meeting were men and the Badghar was also a wealthy Tharu man. The entire process of the dispute resolution was dominated by the Badghar and other male members. Only two or three women spoke in the meeting.\textsuperscript{81}

Similarly, a TJS user who was not satisfied with the decision of the dispute settlers, stated: ‘I do not think in this modern age TJS can provide justice …. A few elite males continue their domination in the village and the TJS process but no one dares to speak against them.’\textsuperscript{82} For example, a study on intimate partner violence (IPV) in Nepal revealed:

IPV is experienced at much higher rates by women from underprivileged castes and ethnic groups … such as for women from underprivileged castes and ethnic groups such as Madhesi, Terai indigenous, Muslim, and untouchable women compared to their high caste Hindu counterparts.\textsuperscript{83}

Lodging a complaint in regard to IPV (and continuing with the process in the face of familial and societal criticism, where the language of ‘blame’ and ‘shame’ are often adopted) is generally recognised as extremely difficult for women. The absence of women, their ‘lack of voice’ as contributors in meetings generally and as dispute settlers in the TJS and as judges, court staff and police in relation to the FJS contributes to further alienation and a feeling of ‘unwelcome’ at a time of great suffering for the women.

The IVP study also found that ‘at the intersection of caste/ethnic affiliation and poverty, IPV was markedly high among certain ethnic groups. … poor women belonging to the Madhesi ethnic group were 2.56 times more likely to experience IPV

\textsuperscript{81} Interview with Bard-TJS-U2 (13 December 2015).
\textsuperscript{82} Interview with Mus-TJS-U3 (2 September 2015).
The finding shows that the experiences of women are shaped by various axes such as ethnicity, caste and poverty. It is only when multiple axes are taken into account that experience of the most disadvantaged groups (Dalit and Indigenous women) can be accommodated in the TJS dispute resolution process. As an Indian scholar and literary theorist, Gayatri Spivak, in her famous essay ‘Can the Subaltern Speak’ concludes that ‘the subaltern cannot speak’. She argues that ‘the subaltern cannot be heard; the subaltern cannot speak; the subaltern is being silenced; and the subaltern escapes us’.

An expert interview participant representing the Dalit community from the Mustang district strongly criticised the lack of inclusion in the TJS:

The Mukhiya system discriminates against the Dalits and other minority groups and is dominated by the hegemonic Thakali community. The Thakali group thinks minority groups like Dalits should follow Thakali customs and traditions…. The Thakalis consider their customs and traditions are superior to those of the Dalits.

This statement shows the dissatisfaction of an expert interview participant from the Dalit community with the manner in which the hegemonic culture (Thakali culture in this context) dominates the minority group’s culture (Dalit culture in this context) in the operation of the Mukhiya system in the Mustang district.

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84 Ibid 85-6. The research revealed that approximately 29 per cent of the women had experienced IPV in the past 12 months. Within caste and ethnic groups, the lowest IPV rate was found among high caste Hindu (19.4 per cent). The highest IPV rates were found among Terai indigenous (49.2 per cent), followed by Muslim (46.1 per cent), Madhesi (43.8 per cent), untouchables (39.5 per cent), hill indigenous (25.7 per cent).


87 Interview with Mus-EX2 (3 September 2015).
FJS participants from the Mustang, Bardiya and Dhankuta districts thought that the TJS process is mostly elite, elderly male dominated and therefore the chance of women, Dalit, youth and weaker sections of the population obtaining justice and achieving a fair outcome is very minimal.\textsuperscript{88} In this regard, an Appellate Court judge stated:

\begin{quote}
As I know, almost all TJS practised by the Indigenous groups in Nepal are dominated by the elites in the society and it is noticeable that there is a discrimination against Dalits, women and other minority groups in the entire functioning of the TJS. This is the reason that Dalits and women are rarely acknowledged as dispute settlers in these systems.\textsuperscript{89}
\end{quote}

An FJS user from Dalits community of the Dhankuta district who was a victim of attempted rape shared her experience:

\begin{quote}
When I told my mother of the incident of attempted rape by two Rai boys, my mother consoled me and advised me not to make the incident a big issue. Because we were living in the village that is dominated by the Rai community, the voice of Dalits will not be given any importance in the village meeting [Shir Uthaune]. She further suggested: ‘if we bring the case to the village gathering they will not listen to us because Rai boys are involved in the incident; therefore, it is better to remain silent’.\textsuperscript{90}
\end{quote}

The above quote indicates how a poor, Dalit female perceived her status in the community, and how they are silenced by the mother’s expectations that they will not find justice but only discrimination in the TJS dispute resolution process. According to MacKinnon, in a male-dominated society the women’s voice is frequently ignored. Writing in reference to sexual assault, harassment, domestic violence, she states:

\begin{quote}
When women say, ‘this happened to me’, we are not usually believed. He denies it. You cannot prove it. Nothing happened. Women's particular experiences are not information. They are not seen as the basis for knowledge. They do not receive analysis.\textsuperscript{91}
\end{quote}

\textsuperscript{88} Interview with Dhan-CO2 (29 November 2015); Interview with Dhan-CO3 (30 November 2015).
\textsuperscript{89} Interview with Kath-CO2 (27 July 2015).
\textsuperscript{90} Interview with Dhan-FJS-U2 (22 November 2015).
\textsuperscript{91} Catharine A MacKinnon, 'Feminism in Legal Education' (1989) 1(1) \textit{Legal Education Review} 85, 87.
The situation of the Dhankuta women is complicated by caste and economic vulnerabilities. In many situations in Nepal, Dalits do not own agricultural land but depend on the land of dominant caste people. Hence in such situations, even when Dalit women face physical or sexual violence from persons from this dominant class, these women are not in a situation where they are able to expose such violations.\textsuperscript{92} In the context of violence against Black women in the US, Kimberle Crenshaw argues that the experience of women is not only shaped by gender but other dimensions of their identities, such as race; therefore, according to her, a ‘focus on the intersections of the race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed.'\textsuperscript{93} In the context of Black women in the US, she argues:

> In most cases the physical assault … is merely the most immediate manifestation of the subordination they experience. … Many women of color are burdened by poverty, child care responsibilities, and lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face.\textsuperscript{94}

Regarding the intersection of race and gender in relation to rape she further argues:

> In sum, Black women who are raped are racially discriminated against because their rapists, whether Black or white, are less likely to be charged with rape; and, when charged and convicted, are less likely to receive significant jail time than are the rapists of white women.\textsuperscript{95}

In the context of Nepal, the intersectional approach is useful to understand and analyse the experience of a Dalit woman who, as a victim of attempted rape, was silenced in the TJS and unable to raise or ask for redress for the harm caused to her. Instead, the

\textsuperscript{92} Navsarjan Trust (India), FEDO (Nepal) and International Dalit Solidarity Network, \textit{The Situation of Dalit Rural Women} (2013) 2.


\textsuperscript{94} Ibid.

\textsuperscript{95} Ibid 1278.
The victim decided to file a ‘first information report’ at the nearby police station. The Police conducted an investigation and with the assistance of Public Prosecutors filed an attempted rape case with the District Court. The case was still running at the time of the interview for this research. However, as has already been discussed in Chapter 2 of this thesis, accessing justice through the FJS is not easy for a Dalit woman in the context of Nepal.96

Feminist legal scholars have criticised the dominant ‘legal myths that the legal person is genderless, that one’s life is a matter of personal choice alone, and that law is neutral, objective and fair.’97 It has been progressively accepted in respect of the dominant discourses of all academic disciplines, including law, that the accounts, which have been presented as universal and true, are in fact partial because they are based almost exclusively on a masculine point of view.98 Feminist legal scholarship is critical of the liberal view that ‘knowledge is ideally non-political, a description of the way things are, which is not influenced by the knower’s position in society or political belief.’99

As Catherine MacKinnon observed, feminism entails a multifaceted approach to society and law as a whole, a methodology of engagement with a diverse reality that includes empirical and analytical dimensions, exploratory as well descriptive aspirations, practical as well as theoretical ambitions.100 In the context of Nepali TJS, it is sometimes assumed that the male dispute settlers are working impartially as

98 Ibid.
decision makers at the community level but feminist scholars counter-argue that the legal ideas of objectivity and neutrality and impartiality are in fact a major problem for those seeking to represent members of groups who have been historically discriminated against. Assumptions of objectivity, neutrality and impartiality remain problems, for in reality they act as masks for masculine interests, perpetuating bias against women.\textsuperscript{101} Therefore, the domination of men and marginalisation of and discrimination against women in the TJS process in the Nepali context creates a situation where women’s experience and concerns either are not properly heard or are trivialised and not provided adequate attention. This situation of exclusion limits the possibility of women’s access to justice.

All nine interview participants from the Dalit groups were found to be unhappy with the structure and operation of the selected TJS. However, the nature and extent of the unhappiness and criticism varied. Among the Dalit interview participants, mostly the educated and comparatively privileged interview participants, such as a judge, a lawyer and an expert interview participant, were found to be critical of the discrimination and exclusion faced by the people from the Dalit community in the structure as well as the functioning of the selected TJS.\textsuperscript{102}

\textbf{C \quad Not Appropriate for a Heterogeneous Society}

In modern times, societies are becoming more heterogeneous due to internal migration and urbanisation and this has caused problems in the functioning of TJS. Firstly, if a society is made up different groups of people, there might be confusion as to whose

\textsuperscript{101} Ruth Fletcher, 'Feminist Legal Theory' in Reza Banakar and Max Travers (eds), \textit{An Introduction to Law and Social Theory} (Hart, 2002) 135, 136.

\textsuperscript{102} Among 9 Dalit interview participants in this PhD research, 1 was a judge, 2 of them were expert interview participants and the remaining 6 were users of the TJS and the FJS.
dispute resolution system should be used where a dispute involves member from different communities that use different TJS; and secondly, if a party does not want to follow the TJS of another group, then a problem may arise. Likewise, people from urban areas were found to be less interested in using TJS, preferring instead to seek justice in the FJS.

An FJS interview participant from the Dhankuta district shared his experience of a case of extra marital relations between a Dalit woman and a Rai man. The Rai community wanted to resolve a dispute through Shir Uthaune but the Dalit woman and her family members preferred to come to the FJS rather than use Shir Uthaune. The case was brought to the Dhankuta District Court where it was still unresolved when the interview was conducted. Based on his experience, the court official stated: ‘The TJS cannot work effectively in a heterogeneous society. People from different groups may have their own dispute resolution practices and in such a situation the problem may arise as to which TJS to use.’ 103 A dispute settler from the Shir Uthaune system in the Dhankuta district also stated that due to internal migration and urbanisation, society is becoming increasingly heterogeneous and therefore using TJS is becoming difficult because people other than the Rai community members prefer not to follow the customs and tradition of Rai community and use Shir Uthaune for dispute resolution. 104

A dispute settler from an urban area of the Mustang district shared that he had not resolved any dispute in over a year because people in his village prefer to go to the nearby Police station or office of other appropriate government bodies, including

103 Interview with Dhan-CO1 (28 October 2015).
104 Interview with Dhan-DS3 (8 November 2015).
District Administration Office, District Forest Office or the District Court.\footnote{Interview with Mus-DS2 (3 September 2015).} He further stated: ‘In urban areas, like my village, many people are from other ethnic groups than the Thakali and these people do not like to follow the Thakali customs and traditions for dispute resolution.’\footnote{Interview with Mus-DS2 (3 September 2015).}

D \hspace{0.5cm} \textit{Uncertainty in the Process and Outcomes}

One of the shortcomings of TJS is that there is uncertainty about the process and outcomes because these systems function without any written laws and rules. Such systems are supposed to follow local customs and traditional practices and these are not rigid but fluid, changing over time and place.\footnote{See Wojkowska, above n 36, 26; Ubink, above n 36, 7.} In all three selected TJS, there is no system of documentation of the dispute settlement process and outcomes. Likewise, there is no provision for an appeal in case of dissatisfaction with the decision made by dispute settlers (except in the Mukhiya system in some villages of the Mustang district where Mir-Mukhiya hears an appeal).

However, all 17 dispute settlers denied the uncertainty and argued that there is flexibility in the TJS process and that these systems follow the customs and traditions of the Indigenous group. For example, a dispute settler from the Mukhiya system in the Mustang district stated: ‘I do not think that TJS process and outcomes are uncertain. We are flexible according to the need of people but operate according to the customs and traditions of the Tharu.’\footnote{Interview with Mus-DS3 (16 September 2015).} Almost all the dispute settlers are elite males of the Indigenous group that is in the majority in that particular location, therefore they
are unlikely to be critical of the processes they perform and control. As has been discussed above, women, Dalits and minority groups can have different views on whether the process and/or outcome is satisfactory, and while they may understand in general terms how the TJS operates, its very flexibility leads to a degree of uncertainty as regards the predictability of outcomes.

The lack of documentation in the process and outcomes of TJS may lead to discriminatory and unpredictable decisions by dispute settlers, while a lack of provision for appeal and a proper accountability mechanism may result in an injustice that goes uncorrected. The issue of the absence of the provision for an appeal in the FJS has also been raised in previous research. Ewa Wojkowska argues that the right to appeal is considered ‘integral to an accountable and transparent legal system’ however she notes that ‘is not always present’ in TJS. Prior research has argued that the TJS institutionalise poor quality justice for the marginalised people while rich people access justice through FJS. To some extent, this researcher agrees with previous research identifying the limited nature and sometimes ‘poor quality’ of the justice provided. On the basis of the current research contained in this thesis, a number of reforms are proposed to improve TJS justice provision.

E  Lack of Respect of International Human Rights Principles

TJS function as per customs and traditions of particular communities. In cases where the customs and traditions are contrary to the international principles of human rights,

109 Interview with Dhan-CO3 (10 October 2015).
110 Wojkowska, above n 36, 22.
112 The situation of adherence of human rights principles by the selected TJS is discussed in greater detail in Chapter 7 of this thesis.
contradictions arise. TJS follow customary practices; they are against modern beliefs and the modernisation of society.113 In the name of ‘continuation of customs and tradition’, in some situations TJS also uphold harmful practices. A report by the United Nations Commission on the Legal Empowerment of the Poor in 2008, *Making the Law Work for Everyone*, suggested that TJS tend to reinforce existing power structures, and that as these systems are based on consensus, women and disadvantaged groups may not be assisted to overcome differences in levels of relative power of participants.114 The report also noted that sometimes local norms suggest solutions that are clearly against the interests of the marginalised groups, such as women, the poor, and minority groups.115 On many occasions TJS are seen ‘to discriminate against marginalised groups and perpetuate entrenched discriminatory power structures within the local community.’116 However, it is not correct to imagine that the traditional values are always against the interests of marginalised groups and that the formal laws are just.117 For example, Indigenous people consider disputes as a social problem rather than a personal problem of disputing parties and therefore the whole community is involved to resolve the dispute.118 In the context of the Pacific, a New Zealand Law Commission Report states: ‘Customary values include those relating to sharing, caring for others, hospitality, reciprocity in developing human relations, and community decision making…’119

113 Nagaraj, above n 70, 21.
115 Ibid.
117 Ibid 5.
118 Interview with Dhan-DS5 (9 November 2015). See Chapter 5 for detailed discussion in this regard.
In the Nepali context, some of the interview participants from the FJS (10 out of 23), TJS (8 out of 25), and experts (6 out of 10) stated that TJS operate as per the traditional norms in the society; therefore, they tend to follow harmful practices, such as untouchability in the villages. Though untouchability is prohibited by law in Nepal, it is still in practice in rural areas and TJS indirectly support the continuation of such discriminatory behaviour. For example, an expert interview participant stated: ‘TJS follow customs and traditions of a particular community; therefore, the practice encourages the continuation of discriminatory behaviour such as untouchability against Dalits though it is crime under Nepali law.’ In the name of following the tradition and culture of a particular group or a location, the TJS process may also reinforce continuation of the subordination of women and disadvantaged groups such as in gendered labour division.

The FJS participants (10 out of 23) from the Dhankuta, Bardiya and Mustang districts also thought that TJS by their nature may be discriminatory especially to women and Dalits. For example, two interview participants expressed concern regarding the bias or favouritism shown by dispute settlers in the operation of TJS. In some instances, the dispute settlers make decisions not based on the facts in the case but based on their biases. Dispute settlers can favour one side over the other due to political or close family connections. For example, if a dispute is between a Dalit and a Tharu,

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120 As per the traditional Varna system in Hindu society, Dalits were considered untouchables. But currently, to practise untouchability is a punishable crime according to Nepali law. See discussion on caste system in Nepal and untouchability in Chapters 3, 5 and 7. See also Guneratne (ed) above n 60; Mahesh Chandra Regmi, Nepal: An Historical Miscellany (Adroit, 2002) 39.

121 Interview with Kath-EX1 (30 July 2015).

122 Interview with Kath-EX3 (11 August 2015); Interview with Kath-EX4 (8 August 2015).

123 Interview with Mus-CO1 (25 August 2015); Interview with Mus-CO2 (27 August 2015); Interview with Bard-CO1 (5 December 2015).
in such a situation the Badghar (mostly from the Tharu group) can be biased to favour the Tharu individual.  

F  Political Influence and Manipulation

Interviewees raised the matter of whether TJS operation (including decision making) is influenced by factors that would be traditionally regarded as foreign to TJS operation. For example, an expert interview participant from the Kathmandu district representing Madhesi groups raised the issue of influence of political parties on TJS structure and operation. He argued that such the impact of political influence adversely affects the institution’s credibility and people’s trust in the functioning of such systems. He stated:

In a democratic society, political parties have an important role to play. Political parties always try to broaden their vote base in every sector of society. In some cases, we have noticed that those political parties want to select dispute settlers from among their party supporters and pressure them to decide cases in the party’s favour. Such unwanted political influence ultimately weakens the credibility of and the trust in the TJS and gradually makes the systems weaker.

According to him, political parties at the local level can be interested in selecting dispute settlers from among their supporters, resulting in decisions that are convenient for the party and its supporters, and that adversely affect the independent operation of TJS. Some other researchers have also noticed the possibility of political influence on the work of TJS in the Nepali context. Similarly, a 2011 Saferworld report reported political influence on the TJS and the FJS:

These traditional leaders are also often members of political parties, and the outcomes of disputes are influenced by disputants’ association with particular parties. Political

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124 Interview with Bard-TJSU1 (12 December 2015).
125 Interview with Kath-EX2 (3 August 2015).
parties often manipulate the outcomes of cases being dealt with by the formal sector to the benefit of their party members.¹²⁷

CONCLUSIONS

This research identified various reasons for the use of TJS by the people of selected districts in Nepal. These include: Indigenous groups use the TJS as they are traditionally accustomed to using these systems and are familiar with their operation; economic factors (poverty) and geographic accessibility of the TJS for people living in rural areas in poor economic conditions; TJS having simple procedures and speedy service. People from Indigenous communities mentioned that they feel comfortable accessing justice through TJS because these systems use the local language, customs and traditions for resolving disputes. Further women, Dalits and Indigenous groups think that the FJS is not there to serve them; therefore, they generally prefer to approach TJS. It was also found that in some rural areas and for some people, TJS are only the feasible options for resolving disputes due to geographic remoteness, lack of economic resources or knowledge about the FJS.

Although a large number of rural populations in the selected districts were found to be accessing justice through TJS, these systems were not found to be free of weaknesses. These include: TJS were resolving disputes without any formal authority and without state recognition; TJS were found to be dominated by elderly males; and it was also revealed that women, Dalits, and minority groups have minimal or no role in the structural and functional level; TJS were functioning as per the laws, customs and tradition of particular groups so that in some instances some limitations were noticed where they failed to abide by the international human rights principles and instead

¹²⁷ Coyle and Dalrymple, above n 19, 51.
followed discriminatory practices against women, Dalits and minority groups, such as untouchability against Dalits.

The next chapter explores the situation of respect for the international principles of human rights in relation to the operation of the selected TJS in the Nepali context.
CHAPTER 7: TRADITIONAL JUSTICE SYSTEMS AND ADHERENCE TO INTERNATIONAL PRINCIPLES OF HUMAN RIGHTS

INTRODUCTION

The previous chapter explored and analysed the reasons for using three selected traditional justice systems (TJS) — Shir Uthaine, Mukhiya and Badghar — in Nepal and also analysed the shortcomings with respect to the operation of these TJS. This chapter analyses the extent to which the selected TJS operate in accordance with international principles of human rights that are relevant to access to justice. The analysis in this chapter is primarily based on the information gathered through in-depth semi-structured interviews with the formal justice system (FJS) and TJS actors, such as judges, court officials, dispute settlers, experts and users of the FJS and TJS from the Kathmandu, Mustang, Bardiya and Dhankuta districts of Nepal. Relevant secondary sources that focus on the extent to which TJS are able to follow international human rights principles also inform this analysis.¹

The human rights principles which are the particular focus of this analysis are derived from the international human rights instruments to which Nepal is a state party, which

set out principles in relation to: (i) non-discrimination and equal participation;2 (ii) absence of torture, or physical or mental harm;3 and (iii) recognition of law, tradition, language and institutional processes of Indigenous groups.4 The reasons for focusing on the above mentioned principles are: (i) the selected human rights principles are considered the most relevant and important in relation to accessing justice through utilising TJS because these principles need to be respected in the TJS structure and operation;5 (ii) the selected human rights principles are not only enshrined in international human rights instruments but also defined as fundamental rights by the Constitution;6 and (iii) these principles derive from the international human rights instruments to which Nepal is a State party.7 For example, non-discrimination is

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5 See Danish Institute for Human Rights, above n 1; Massage, Kharel and Sharma, above n 1. Relevance of these international principles of human rights in relation to this thesis is presented in Chapter 3 of this thesis.

6 The Preamble to the Constitution sets out the aim of the Constitution as: Protecting and promoting social and cultural solidarity, tolerance and harmony, and unity in diversity by recognising county’s multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics, resolving to build an egalitarian society founded on the proportional inclusive and participatory principles in order to ensure economic equality, prosperity and social justice by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste-based untouchability. The Constitution defines Nepal as ‘a multiethinic, multilingual, multi-religious, multicultural’ nation (art 3); recognises all languages spoken as the mother tongues in Nepal are the languages of the nation (art 6) and provides the right to equality (art 18) and provides right against torture (art 22).

enshrined in many international human rights instruments, such as Articles 2(1) and 2(3)(b) of the *International Covenant on Civil and Political Rights (ICCPR)* and Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. As discussed in Chapter 2 of this thesis, according to the *Treaty Act of Nepal 1990*, any law inconsistent with the international treaties or conventions ratified by Nepal will be void to the extent of the inconsistency, meaning that the provision of international instruments prevails over the national laws and regulations. International principles of human rights also provide a basis to define ‘legitimate demands and obligations in regards to people’s wellbeing’ and to ‘empower the poor and other disadvantaged people’ so that their legitimate demands — including justice related demands — are able to be realised. Therefore, on the one hand, Nepali people have the right to enjoy these human rights in all situations, including when accessing TJS for dispute resolution; on the other hand, the Government of Nepal has an obligation to respect, protect and fulfil these rights. As Charlesworth argues, international human rights principles are not a perfect blueprint for countries to follow but they can ‘offer a useful translation of human rights norms that could be adopted

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8 The sources of these international human rights principles are discussed separately in the latter part of this chapter.

9 *Nepal Treaty Act 1990* s 9(1).

10 The relevance of international principles of human rights in the TJS context in Nepal is discussed in Chapter 3 of this thesis. The role of the Supreme Court of Nepal to declare void the legal provisions which are inconsistent with the human rights instruments to which it is a party discussed in Chapter 3 and below in this thesis.


and incorporated’ into national legislation. In Nepal, however, these principles have been incorporated into national legislation through the Treaty Act 1990 and therefore are specifically enforceable and may also be used to invalidate other legislation that is inconsistent with the international covenants to which it is a party. Through its five year plan, the Nepali judiciary has also committed to ensure access to justice to all Nepali people based on the relevant principles of international human rights. In addition (as discussed in Chapter 2), on many occasions the Supreme Court of Nepal has invoked international principles of human rights in its decisions to invalidate state laws.

Human rights obligations are applicable to the TJS structure as well as its operation because the ‘state has obligation to ensure the respect, protection and fulfilment of human rights, including where TJS are the main provider of justice.’ In the analysis of TJS, ‘their ability to deliver human rights compliant structures, procedures and outcomes’ need to be taken into consideration. (Researchers have observed that similar evaluations also need to be made in this regard of the FJS that often coexists with TJS).

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17 Ibid.

18 Ibid.
International research has identified the discrimination faced by women and other marginalised groups when accessing dispute resolution services through TJS in the countries where rural people utilise TJS. In the context of Nepal, the majority of the interview participants (71 per cent) raised a concern regarding the question of whether TJS operate and deliver dispute resolution services in accordance with the international principles of human rights.

Among the interview participants, all the dispute settlers (17 including one female) expressed the view that they lacked knowledge of the international principles of human rights. More than two-thirds of them (70 per cent) thought that they did not need knowledge of such principles because they were of the view that TJS follow the customs and tradition of Indigenous peoples, not the state law and the human rights principles. For example, a dispute settler from the Mustang district stated: ‘I do not have knowledge of international human rights principles, and in my view, I do not need to have it because as a Mukhiya, while resolving disputes, I follow the customs and traditions of the Thakali community, not international human rights principles.’

However, four dispute settler interview participants (24 per cent) who were involved in promotion and protection of the rights of Indigenous peoples (such as advocacy, awareness raising programs among Indigenous communities) had some knowledge of human rights principles as they related to Indigenous people, including principles enunciated in the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) and the United Nations Declaration on

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19 Chopra and Isser, above n 1, 24; Wojkowska, above n 1, 21; Danish Institute for Human Rights, above n 1, 98–9; Swaine, above n 1, 14; Massage, Kharel and Sharma, above n 1, 13.

20 Interview with Mus-DS4 (24 August 2015).
the Rights of Indigenous People 2007 (UNDRIP). For example, a dispute settler from the Dhankuta district stated that as an Indigenous peoples’ rights advocate, he had the chance to attend short term training events on the issues of Indigenous rights and he was actively involved in awareness raising activities on the same issues in the community.

Nearly one third of the dispute settler interview participants (30 per cent) who were unaware of the international human rights principles acknowledged that they would benefit from acquiring knowledge of human rights principles. In their view, the knowledge and application of international human rights principles can open the possibility of a wider acceptance of the operation of TJS and recognition of their work in relation to dispute resolution by other stakeholders, such as FJS actors (judicial officers, judges, lawyers). For instance, a dispute settler from the Bardiya district stated:

I do not have knowledge of international human rights principles and we are resolving disputes as per the customs and tradition of the Tharu community. In my opinion, knowledge of human rights standards would be supportive of making a Badghar’s work recognised by the wider population [not only by the particular Indigenous group] and the formal justice forums, such as courts and other government institutions.

According to this dispute settler, knowledge of human rights principles might increase the level of confidence of disputing parties and the FJS actors have in relation to the operation of the TJS. The overwhelming majority of the expert interview

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21 Such as Mus-DS3 and Dhan-DS3.
22 Interview with Dhan-DS3 (8 November 2015). The dispute settler was from the Rai community in Dhankuta where he teaches in a local school.
23 Interview with Bard-DS2 (29 November 2015).
24 Interview with Bard-DS2 (29 November 2015).
participants\textsuperscript{25} (88 per cent) and the FJS interview participants (87 per cent) were concerned about the non-adherence to international human rights principles of the TJS dispute resolution process in the Nepali context. Detailed discussion is presented below in regards to the concern expressed by these interview participants.

I  \textbf{NON-DISCRIMINATION AND EQUAL PARTICIPATION}

Non-discrimination is one of the important human right principles widely recognised by many binding and non-binding international human rights instruments.\textsuperscript{26} For example, Article 2 of the \textit{Universal Declaration of Human Rights (UDHR)} provides that in regard to the enjoyment of the rights and freedoms set forth in the \textit{UDHR}, there will be no

\begin{quote}

\hspace{1cm} distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status… Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status.
\end{quote}

Likewise, Article 2(1) of the \textit{ICCPR} prohibits the state parties making any distinction with regard to the provision of rights contained within it on the grounds of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ which then applies to Article 14(1) which enshrines a right to equality before courts of law and tribunals. The Human Rights Committee observed that ‘[n]on-discrimination, together with equality before the law and equal

\textsuperscript{25} As defined in Chapter 4 of this thesis, ‘expert’ interview participants are the interview participants from academia, international and national non-governmental organisations who have knowledge and experience in relation to access to justice in Nepal. Judges and court officials can also be experts in the area of access to justice but for the purpose of this research they are categorised as FJS interview participants.

\textsuperscript{26} For example see \textit{UDHR} arts 2, 7; \textit{ICCPR} preamble, arts 2, 3, 4, 14, 24, 26; \textit{CERD} preamble, arts 2, 5; \textit{ILO Convention 169} preamble, arts 2, 3; \textit{UNDRIP} preamble, arts 2, 9, 16, 21; \textit{CEDAW} preamble, arts 2, 3, 10. See International Labour Organisation, \textit{Indigenous and Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No 169} (Programme to Promote ILO Convention No 169, International Labour Standards Department, 2009).
protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights’. However, the Committee observed that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective’ and if such a distinction is to achieve substantial equality. The Committee further stated that ‘the principle of equality sometimes requires state parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant’. Discrimination against women is defined as ‘any distinction, exclusion or restriction made on the basis of sex’ that adversely affects women’s human rights and freedoms in the political, economic, social, cultural, civil or any other field. This is irrespective of their marital status, on the basis of equality of men and women. Similarly, Article 25 of the ICCPR provides the right to equal participation for all ‘to take part in the conduct of public affairs, directly or through freely chosen representatives’. The Human Rights Committee in its general comment further expanded and explained the right to participation and observed:

The Covenant [ICCPR] recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. …the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

The Committee defines the conduct of public affairs as ‘a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive 

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27 Human Rights Committee, General Comment No 18, Non-discrimination, 37th sess, UN Doc HRI/GEN/1/Rev 9 (vol I) (10 November 1989) 1 [1].
28 Ibid 3 [10].
29 Ibid 2–3.
30 CEDAW art 1.
and administrative powers’. Similarly, Article 21 of the UDHR, Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Articles 7 and 8 of CEDAW, and Articles 5 and 8 of UNDRIP contain the provisions of right to participation. For example, Article 18 of UNDRIP states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Similarly, the Committee on the Elimination of Racial Discrimination, recommends that state parties ‘ensure that Indigenous peoples have equal rights to participate in public life and that no decisions relating directly to Indigenous peoples are to be taken without their informed consent.’ These provisions make clear that Indigenous peoples have right of participation on all the matters affecting them including the TJS dispute resolution process.

In the Nepali context, the Constitution recognises non-discrimination and equality before the law as fundamental rights of the people of Nepal. The Constitution prohibits discrimination among citizens ‘on grounds of origin, region, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds’.

32 Ibid.


35 Constitution art 18(1).

36 Ibid art 18(3). The full text of Article 18 is as follows: ‘Right to Equality: (1) All citizens shall be equal before law. No person shall be denied the equal protection of law; (2) No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds; (3) The State shall not discriminate citizens on grounds of origin,
The preamble of the Constitution sets out a commitment to end discrimination based on ‘class, caste, region, language, religion and gender.’\textsuperscript{37} However, the proviso of Article 18 allows for positive discrimination (affirmative action) in order to empower certain groups, such as women, Dalits, and Indigenous groups.\textsuperscript{38} In order to ensure the participation of Dalits and empower them Article 40 of the Constitution provides wide a range of rights to Dalits in Nepal that include proportional inclusion in all bodies of the state, free education and scholarship, healthcare and social security.\textsuperscript{39}

Non-discrimination and equal participation of both parties in a dispute resolution process is an important aspect of the human rights-based approach (HRBA) for accessing justice. According to the human rights based perspective, ‘the meaningful participation’ of those being affected by a problem is itself considered as right,\textsuperscript{40} and helps to address power imbalances to some extent.\textsuperscript{41} For the purpose of the analysis contained in this chapter, the terms ‘non-discrimination’ and ‘equal participation’ are understood to refer to the principle of non-distinction among people accessing justice through the selected TJS in the Nepali context — including women, Dalits, Indigenous peoples and minority groups — to ensure their equal participation in the dispute

\begin{itemize}
  \item religion, race, caste, tribe, sex, economic condition, language, region, ideology or on similar other grounds;
  \item (4) No discrimination shall be made on the ground of gender with regard to remuneration and social security for the same work;
  \item (5) All offspring shall have the equal right to the ancestral property without discrimination on the ground of gender.’
\end{itemize}

\textsuperscript{37} Ibid preamble. For further details, see Surendra Bhandari, \textit{Constitutional Design and Implementation Dynamics: Federalism and Inclusive Nation Building in Nepal} (HIDR, 2016) 277.

\textsuperscript{38} The proviso of art 18 of the Constitution reads: ‘Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or development of the citizens including the socially or culturally backward women, Dalit, Indigenous people, Indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender and sexual minorities, persons with disabilities, persons in pregnancy, incapacitated or helpless, backward region and indigent Khas Arya.’

\textsuperscript{39} Constitution art 40. For detailed discussion, see Bhandari, above n 37, 128.

\textsuperscript{40} United Nations Development Program, \textit{Program for Justice}, above n 11, 17.

\textsuperscript{41} Ibid.
resolution processes and in the outcomes. MacKinnon argues that the participation of women in decision-making is important because women’s experiences and needs are different from those of men; therefore, bringing women’s experience into the decision-making process is essential.\textsuperscript{42} However, in the Nepali context, the level of participation of women, Dalits and Indigenous peoples in the governance, political, economic, professional domains and other decision making roles remains limited compared to the participation so-called high caste males.\textsuperscript{43}

In many court cases, the Supreme Court of Nepal has upheld the principle of non-discrimination and equality before the law. For example, in relation to a writ petition, filed by female flight attendants working for the Royal Nepal Airlines Corporation, that challenged the rules of service that had fixed different periods of service and age for compulsory retirement for male and female flight attendants, the Supreme Court held that:

\begin{quote}
The impugned provision appeared to be discriminatory, violating the spirit of the Constitution. … The Constitution had embodied the noble vision of elimination of discrimination on the basis of sex and implementation of the culture of equal treatment in equal situations. The impugned rule was also held to be in apparent contravention with the State Policy enshrined in Article 26(7) of the Constitution.\textsuperscript{44}
\end{quote}

The Supreme Court declared the impugned provision to be ultra vires because the provision was against the letter and spirit of the equality provision of the Constitution.

\begin{footnotes}
\end{footnotes}
of the Kingdom of Nepal 1990 and the provisions of international human rights
instruments to which Nepal is a State party, including the CEDAW.\footnote{Ibid.}

Discrimination against women, \emph{Dalits}, Indigenous peoples and marginalised groups
continues to be present in the structure and practices of TJS in many countries

Analysing the human rights situation of 159 countries including Nepal, Amnesty International found that in Nepal ‘discrimination on the basis of gender, caste, class, ethnic origin, sexual orientation, gender identity and religion persisted. Women and girls were not adequately protected against gender-based violence.’\footnote{Amnesty International, \textit{Amnesty International Report 2016/17: The State of the World's Human Rights} (2017) 269.} Amnesty International also pointed out that ‘constitutional amendments did not guarantee equal right to citizenship for women, or provide protection from discrimination to marginalized communities, including \emph{Dalits} and lesbian, gay, bisexual, transgender and intersex people’.\footnote{Ibid.} Despite the fact that the report was referring to the general scenario of discrimination in Nepal, it could equally be applied to the context of TJS dispute resolution as part of social activity.

The extent to which women, \emph{Dalits}, Indigenous peoples and minority groups are being excluded and discriminated against within the structure of TJS has already been discussed in Chapter 5 of this thesis; therefore, the discussion that follows is mainly focussed on the operation of the three TJS researched in this study. In the context of Nepal and in general, this and previous research has revealed that the opportunity to

\footnote{45 Ibid.}
\footnote{46 Ibid.}
\footnote{47 Ibid.}
\footnote{48 Ibid.}
bring a claim and ‘have a say’ is limited for females and Dalits because of their lower socio-economic status in the society.49 Gayatri Spivak’s argument that the Subaltern cannot speak and is not heard properly in the hegemonic context is equally applicable in the context of Nepal’s female and Dalit participants of TJS.50

All dispute settler interview participants (17) in this research stated that they did not discriminate during the dispute resolution process; they implemented the customs and traditional practices of the particular groups. For example, a dispute settler from the Bardiya district stated:

We treat all the disputing parties equally and resolve disputes according to the customs and traditions of the Tharu community. As a Badghar, I have never discriminated against anyone. I always treat women, Dalits and minority people in a similar way and apply the customs and traditions of the Tharu community to resolve a dispute. I know that my work is to serve people by resolving disputes fairly. Village people would not have elected me as a Badghar if I had shown discriminatory behaviour to the people in my village.51

However, a number of TJS users interviewed for this research, including from the Bardiya district (the very location of the above quoted dispute settler) did not agree that the dispute settlers did not discriminate. For example, a TJS user (Dalit female) from the Bardiya district (also quoted in Chapter 6) stated that there was a lack of representation of Dalits in the TJS structure and in the dispute resolution meeting and she felt ‘excluded from the entire process’.52 According to MacKinnon, ‘[i]n societies in which gender has hierarchical consequences, there are no truly gender-neutral persons. In such societies, neutrality is a strategy to cover up the realities of male


51 Interview with Bard-DS5 (2 December 2015).

52 Interview with Bard-TJSU1 (12 December 2015).
power.\textsuperscript{53} She further argues that the ‘experience of women as women, and men as men, in all its multiplicity and variety, exists in social space in the real world’;\textsuperscript{54} therefore, in order to properly analyse and understand the complex situation of women, Dalits and minority people in the operation of TJS in the context of Nepal, it is important to consider not only the experience of the dispute settlers (almost all elite males from the majority groups) but also that of the women, Dalits and other minority groups.

Unlike the dispute settlers, all 10 expert interview participants in this research acknowledged that there is a possibility of discrimination against people from marginalised groups (such as women, Dalits and other minorities in the community) in the operation of TJS. For example, expert interview participants from the Dalit community (two) and females (four) firmly raised the issue of discrimination against marginalised groups, such as women and Dalits during the TJS dispute resolution process. An expert interview participant who was from Dalit community in the Mustang district stated: ‘In my district in the TJS [Mukhiya] dispute resolution process, Dalits and women face discrimination in every step, from the selection of dispute settlers to resolution of the dispute. The elderly male from upper caste people [Thakali] is dominant in the process.’\textsuperscript{55} According to this participant, women and Dalits face discrimination in many ways. Firstly, very few women and Dalits take part in the dispute resolution meeting. Secondly, when they are present in the meeting they hesitate to speak and, even if they speak, elderly males from the so-called high caste

\begin{footnotes}
\item[53] MacKinnon, ‘Feminism in Legal Education’, above n 42, 89.
\item[55] Interview with Mus-EX2 (3 September 2015).
\end{footnotes}
do not pay attention to their voices and in most cases their voices are not taken into consideration in the decision making.\footnote{Interview with Mus-EX2 (3 September 2015).}

In the Nepali context, Meena Vidyā Malla (a professor of political science in Nepal) noted that in a patriarchal and male-dominated society like Nepal, tradition, perceptions and culture are against women taking an active role (outside the domestic sphere) — and against \textit{Dalit} women in other than menial but often harsh agricultural and manual labouring tasks — and so women are not assigned the decision-making role.\footnote{Meena Vaidya Malla, \textit{Political Socialization of Women in Nepal} (Adroit, 2011) 42.} Similarly, one expert female from the Dhankuta district stated: ‘In my experience TJS practice is discriminatory against \textit{Dalits}, women, poor and marginalised people; therefore, there is a need to reform these systems so that they become accommodative and non-discriminatory.’\footnote{Interview with Dhan-EX1 (1 November 2015).} These two statements of the expert interview participants from different districts and TJS (one was from the Mustang district representing the \textit{Mukhiya} system, another was from the Dhankuta district representing the \textit{Shir Uthaune} system) illustrate that in their experience women and \textit{Dalits} face discrimination in TJS dispute resolution processes.

Among the nine TJS user interview participants, six (66 per cent) shared their experience of having faced some form of discrimination including not being allowed to speak during the process, not being taken into consideration when decisions were made, and inappropriate behaviour, such as practising untouchability\footnote{According to the traditional Hindu \textit{Varna} system, \textit{Dalits (Shudras)} were considered untouchables. In Nepal, untouchability is abolished, and it is an offence punishable in accordance with law. Practising untouchability during TJS proceedings could involve being made to sit separately, not being able to eat refreshments if served to the gathering nor even touch a vessel carrying water to a high caste person. It can also mean reluctance to hear a complaint being brought by a \textit{Dalit}, or unwillingness to give the} during the TJS
process of dispute resolution in the TJS. Of the remaining TJS users who were interviewed for this research, around one third (34 per cent) belonged to an Indigenous group such as a Thakali, Tharu or Rai group.\textsuperscript{60} They appeared satisfied with the operation of TJS. For example, a TJS user from an Indigenous group in Dhankuta district stated: ‘I am satisfied with the decision of Shir Uthaune in my case. I have never felt any discrimination against either the other party or me. In my case and in the other cases, as I know, dispute settlers do not discriminate against anyone.’\textsuperscript{61} In contrast, a female TJS user, from a Dalit community stated:

During the village meeting [Shir Uthaune process] I felt the villagers’ attitude towards my husband and me was negative. Some villagers said that as we were Dalit individuals we were creating trouble in the village. As a Dalit woman, I felt weak and helpless in the meeting. Due to the lack of knowledge of the FJS process and a lack of financial resources we were compelled to use the TJS but I always felt discriminated against during the entire TJS process.\textsuperscript{62}

This participant, like many other female and Dalit participants, found using TJS did not result in a fair or just process or outcome. The experience of females and Dalits appears worse than that of male Indigenous TJS users. This accords with the findings of the United Nations Office of the High Commissioner for Human Rights in 2011:

The practice of caste-based discrimination and untouchability in Nepal is still far from being eradicated. Most Dalits, who are on the lowest rung of the caste hierarchy, remain confined to the traditionally assigned roles and occupations that restrict their access to education and health care, and in turn restrict their employment opportunities, perpetuating the cycle of exclusion and poverty.\textsuperscript{63}

\begin{flushright}
\textsuperscript{60}However, minority Indigenous groups in particular locations were not found to be satisfied because laws, customs and traditional processes of the majority groups were used not those of the minority group. See below views of an interview participants from the Gurung Indigenous group that is in the minority in the Bardiya district.

\textsuperscript{61}Interview with Dhan-TJSU2 (15 November 2015).

\textsuperscript{62}Interview with Dhan-TJSU1 (13 November 2015).

\end{flushright}
This statement shows that Dalits experience caste-based discrimination and exclusion in their social life that limits their educational opportunities and their working lives as well as in relation to accessing justice. In the Nepali context, it has been stated that Dalits ‘have been dehumanized by the words in religious books, … are oppressed by people in their communities, and … remain virtually unprotected against discrimination by the state’s ineffective criminal justice system [FJS].’ A female Dalit rights activist in Nepal, Durga Sob, states in regards to the situation of Dalit women in Nepal:

> Dalit women are politically unheard, educationally disadvantaged, socially untouchable and economically exploited. Moreover, rape, sexual assault, human trafficking, inter-caste marriage based atrocities, gender based violations and landlessness continue to pose severe threats to their security.

Dalit women face discrimination and exclusion at the intersection of race, gender and class, as ‘women’, as ‘Dalit’ and due to their position at the bottom of the social hierarchy in terms of poverty and literacy rates. For example, the per capita income of Brahmin is 1.7 times higher than that of Dalits in Nepal, while (in general) 25.2 per cent people are below poverty line in Nepal, for Dalits the percentage is 43.6. A proper intersectional analysis would start with data distinguishing between Dalit males and females and boys and girls as they have different needs and life experiences.

64 Ibid ii–iii.
However, in the Nepali access to justice context, such disaggregated data is unavailable. In the Nepali context, it has been argued:

 DALIT women are ranked lowest in the Nepali social structure with … poor health conditions and very low wages. DALIT women engage, for the most part, in agricultural operations and constitute the major workforce doing hard manual labor. They experience most acutely the interlocking oppressions of class, caste and gender.

From this statement, it can be inferred that DALIT women are at the bottom of the social hierarchy in Nepal and that status has negatively impacted their job opportunities, social life, and access to health, education and justice. They experience manifold subjugation due to their class, caste and gender. The interviews for this research indicated that not only the DALITS but also the majority of the female interview participants (62 per cent) experience discrimination in the TJS dispute resolution process. This includes Indigenous women.

A TJS user female representing an Indigenous group from the Mustang district stated:

In the village meeting, most of the people present were men. Therefore, the problem I was facing was not heard and understood properly. My husband did wrong to me but no one pointed out his mistake. I felt that our community and dispute settlers were not able to understand the feeling of a female who had gone through domestic violence. The people in the dispute resolution meeting including the dispute settler always think from the perspective of a male and ask women to tolerate the injustice.

This female TJS user stated that, due to the lack of representation of women in the TJS process, cases and evidence regarding women’s issues (in this instance, domestic violence) are not heard and understood properly. According to her, for this reason,

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70 Interview with Mus-TJSU2 (1 September 2015).

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instead of deciding a case in favour of the victim, dispute settlers often suggest that women tolerate the injustice and enter into an agreement to achieve a peaceful settlement of the case. Social and familial cohesion are prioritised over the female victim’s experience.

One report on the FJS response to domestic violence discusses the attitude of police in relation to gender-based violence, stating: ‘With regard to the prosecution of gender based violence; beyond it being seen as a “family affair” even if the case is reported to the police, priority is given for settling it within the family or community before taking it further’.71 Despite the fact that the case had been registered with the police and a court case filed, the matter was still in the process in the District Court at the time of this woman’s interview, which was one year after she had filed the complaint. The United Nations Development Program in Nepal has identified that access to justice for victim of gender-based violence is problematic:

> It is difficult for female victims to obtain justice because of various factors, including: discriminatory laws, slow legal processes, persistence of patriarchal norms and expectations, as well as the predominance of men in law implementing institutions, which is perceived to impede both access to justice and favourable decisions for female victims.72

Approximately two thirds of the FJS interview participants (65 per cent) in this research thought that there was always a chance of some form of discrimination against women, Dalits and other marginalised groups in the TJS operation. For example, a court official from the Dhankuta district stated:

> On many occasions, customs and traditions are discriminatory against women, Dalits and other marginalised people in the community. In addition to that, there is no

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accountability mechanism, such as an appeal and oversight mechanism for the TJS in the Nepali context.\(^\text{73}\)

According to this interview participant, there is a possibility of discrimination against women, *Dalits* and marginalised groups in TJS operating in the Nepali context because TJS generally follow customs and traditions that are in many situations discriminatory as they are ‘patriarchal, sexist, caste-ridden and based on beliefs and practices that are enshrined in the customary law and practice on which decisions are based’.\(^\text{74}\) In addition, there is no oversight and accountability mechanism in place for TJS in that there is generally no avenue of appeal. One exception is in the Thak Saatse region of the Mustang district where decisions of a *Mukhiya* can be appealed under a provision of a *Mir-Mukhiya*, as was discussed in Chapter 5 of this thesis.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) Nepal in the context of the FJS concluded that ‘deeply entrenched prejudices and structural failures … make the justice system inaccessible to the majority of Nepali people, and especially those from the *Dalit* community’.\(^\text{75}\)

Of the 10 expert interview participants in this research, eight (80 per cent) expressed the view that because of the existing power imbalance in the society it was hard to ensure equal participation of women, *Dalits* and other minority groups in the TJS process.

\(^{73}\) Interview with Dhan-CO3 (30 September 2015). It is difficult to determine how much knowledge an FJS actor has in relation to the operation of TJS in Nepal because most of them are trained in law schools in Nepal and abroad but TJS is not included in the curriculum of most of the law schools. The knowledge FJS actors shared in this research is either based on their experience in their respective communities or their own study.

\(^{74}\) Interview with Dhan-CO3 (30 September 2015).

\(^{75}\) UNOHCHR Nepal, above n 63, ii.
As discussed in Chapters 3, 5 and 6, untouchability against Dalits is still in practice in the society; despite its criminalisation, discrimination continues. There is a distinction between law and practice, between what is ‘on the books’ and what occurs in practice.

Among the FJS interview participants, almost two thirds (61 per cent) had a perception that ensuring equal participation and providing an accountability mechanism for monitoring and equal participation for all the disputing parties in the TJS dispute resolution process was a challenging task. This is because of the social structure of the society in Nepal where women, Dalits and the poor face exclusion and discrimination in many areas of social life.

II TORTURE, PHYSICAL OR MENTAL HARM OR COERCION

Among all human rights violations, ‘torture is the most serious violation of the human right to personal integrity and dignity.’ Torture has been recognised as one of the most severe and widely prohibited human rights violations by customary international law and treaty-based international laws, and the prohibition of torture is considered ‘one of the most fundamental values of democratic society.’ Discussion and analysis of the use of torture, physical or mental harm or coercion (hereinafter ‘torture’) in the TJS dispute resolution process is necessary because one of the major criticisms of TJS internationally is that they use torture or physical or mental harm or coercion to resolve disputes. This is said to arise as a result of either the initial compulsion of parties to bring the case to a particular TJS, during the dispute resolution process or while

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implementing the decision. This section analyses the situation of torture in the operation of TJS in Nepal.

According to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1989*, torture means:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The definition indicates that any act containing all of the following three elements amounts to torture: (i) the intentional infliction of severe mental or physical suffering; (ii) the direct or indirect involvement of a public official; and (iii) the act being undertaken to achieve a specific purpose, such as gaining information. However, it does not include pain or suffering arising only from inherent in or incidental to lawful sanctions. Likewise, the *Compensation Relating to Torture Act 1996* (Nepal) (hereinafter the *Nepali Torture Act*) defines torture as: ‘physical or mental torture inflicted upon a person in detention in the course of an investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her.’ This definition only includes physical or mental suffering inflicted in detention during the investigation, inquiry or trial or for any other reason. For the purpose of this thesis, torture is not used as per the strict sense as defined by Article

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79 CAT art 1(1).

80 s 2(a).
1(1) of the CAT and Section 2(a) of the Nepali Torture Act. Rather the word ‘torture’ is used in this thesis to describe a situation where an individual or individuals are made to suffer any violent pain (physical or mental that may not be as severe the CAT and the Nepali Torture Act require) or coercion in order to compel them to do or to desist from doing something\footnote{Philip Alston and Ryan Goodman, \textit{International Human Rights: Text and Materials} (Oxford University Press, 2013) 243. The reason for expanding the definition of torture for the purpose of this thesis is that the CAT definition does not include the pain or suffering inflicted by a person or persons who are not in a public and officially recognised position. The main theme of this thesis is TJS and these are not recognised as formal dispute resolution forums in Nepal; therefore, in this context the expansion of the definition of torture to pain and suffering inflicted by an individual or group of people in the TJS setting is necessary.} during the course of TJS dispute resolution process in the selected TJS in Nepal.

The reason for not adopting the definition offered by the CAT or by the Nepali Torture Act in this context is because both definitions define torture in the context of physical or mental pain inflicted by someone who holds public office or under state authority and during the detention for investigation, inquiry or trial. TJS processes are not carried out by officially recognised public officials and they are not public process of state or local governments. For this reason, the word torture in this discussion is used in a wider sense than in the CAT and the Nepali Torture Act, so that it can accommodate torture (all acts as listed above) inflicted in the process of TJS dispute resolution.

In international law, the right to freedom from torture has been defined as a peremptory norm which is accepted as a principle of \textit{Jus cogens}.\footnote{Hemang Sharma, \textit{Right to Freedom from Torture in Nepal} (PhD Thesis, University of Southern Queensland, 2016) 1–2. See also Ian Brownlie, \textit{Principles of Public International Law} (5th ed, Oxford 1998).} The \textit{Universal Declaration Human Rights (UDHR)} prohibits torture absolutely. It provides: ‘No one shall be
subjected to torture or to cruel, inhuman or degrading treatment or punishment’.\textsuperscript{83} Likewise, the \textit{ICCPR} and \textit{CAT} prohibit torture in all circumstances.\textsuperscript{84} Article 2 of the \textit{CAT} prohibiting torture provides:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

In its General Comment, the Committee against Torture stated that ‘the prohibition against torture is absolute and non-derogable. … no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction.’\textsuperscript{85} According to the provisions of the \textit{UDHR}, the \textit{ICCPR} and the \textit{CAT}, torture and other cruel, inhuman or degrading treatment or punishment are prohibited absolutely and my argument is that such prohibition should include the torture, physical or mental harm or coercion that may be inflicted in the process of TJS dispute resolution in Nepali context.

In Nepal, Article 22(1) of the Constitution provides a fundamental right of freedom from torture or cruel, inhuman or degrading treatment for those who are arrested or detained. Similarly, section 3 of the Nepali Torture Act prohibits torture that takes place in detention. In Nepal, torture is prohibited but not defined as a punishable crime.

\textsuperscript{83} UDHR art 5.
\textsuperscript{84} ICCPR art 7; CAT arts 2, 16 (1).
\textsuperscript{85} Committee against Torture, \textit{General Comment No 2, Implementation of Article 2 by State Parties}, UN Doc CAT/C/GC/2 (24 January 2008) 2 [5].
under the domestic laws of the country. Therefore, those who engage in torture do not face any criminal sanctions.

In spite of the absolute prohibition of torture in Nepal by the Constitution, statutory legislation and the international instruments to which Nepal is a state party, the practice of torture in Nepal is prevalent. In 2007, the Supreme Court of Nepal held that provisions of CAT and the ICCPR are applicable in Nepal as the domestic law of Nepal under section 9 of the Treaty Act 1990 and the court took the extraordinary measures issuing a directive order in the name of Government of Nepal to formulate a domestic law that defines the act of torture as a crime punishable. After a fact-finding mission in Nepal in 2005, the United Nations Special Rapporteur on torture concluded that:

Torture is systematically practised by the police, armed police and Royal Nepalese Army. Legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation and rehabilitation.

The report covered the situation of torture during the armed conflict (1996–2006) in Nepal. It was estimated that during this period more than 30 000 people in the country experienced torture either by the government security forces (who suspected that the persons they tortured were Maoist sympathisers or cadre members) or the Maoist rebels (who suspected that the persons they tortured were opponents of the proposed


88 Advocate Rajendra Ghimire and Kedar Dahal v Prime Minister of Nepal, Nepal Kanoon Patrika [Nepal Law Reporter] 2008, 452. For discussion in this regard, see Bhandari, above n 34, 434. However, the Government of Nepal is yet to promulgate such domestic law that defines torture as a crime punishable.

revolution or government sympathisers).\(^{90}\) After the *Comprehensive Peace Agreement in 2006* between the Government of Nepal and the Maoist rebels was concluded, torture in the country has decreased significantly.\(^{91}\) However, it remains prevalent and *Dalits* and *Madhesi* people (minority group members) have been found to be more vulnerable to torture than so-called high, dominant castes, such as the *Brahmin* and *Chhetri* populations.\(^{92}\) In 2016, a Kathmandu based Nepali human rights non-governmental organisation (NGO) prepared a report by interviewing 1212 detainees in 10 districts of Nepal and found that 17.2 per cent of them had experienced torture in police custody.\(^{93}\) According to the report, the figure was 16.2 per cent in 2014.\(^{94}\) Of the 1212 detainees, 39.5 per cent were from Indigenous groups and 10.9 per cent were *Dalits*. Among the interviewees who experienced torture, 49 per cent and 17.4 per cent (a disproportionate number) were from Indigenous groups and *Dalits* respectively.\(^{95}\)

Amnesty International reported in relation to torture in Nepal in its 2016/2017 report that: ‘Torture in police custody continued, particularly during pre-trial detention to extract confessions and intimidate people. The use of torture and unnecessary or excessive force against protesters in the Terai region were not effectively investigated’.\(^{96}\) A 2014 report titled ‘Situation of Access to Justice of the Victims of Torture in Nepal’ found that victims of torture in Nepal face many obstacles when


\(^{92}\) Sharma, Massagé and McDonald, above n 87, 254.


\(^{94}\) Ibid.


\(^{96}\) Amnesty International, above n 47, 270.
accessing justice in the FJS, such as: the lack of criminalisation of torture in legislation; regulation under the statute of limitations of 35 days for lodging complaints of torture; insufficient remedies for victims of torture, lack of effective protection of victims and witnesses, social stigma attached to victims of torture; weaknesses in terms of medico-legal documentation; and the lack of legal support and rehabilitation services for victims of torture.\textsuperscript{97}

According to a human rights-based approach, any form of torture, physical or/and mental harm cannot be tolerated during dispute resolution processes.\textsuperscript{98} Some studies suggest that TJS in a number of countries (including Nepal, Bangladesh, Malawi and the Philippines) may use torture, physical or mental harm, or some form of coercion to force parties to use the dispute resolution forum, or in its operation (for example, by forcing parties to confess) or to force parties to abide by the TJS decision.\textsuperscript{99} For instance, a study conducted in 2004 by the Centre for Victims of Torture, Nepal concluded that some forms of physical punishment, such as compelling persons to stand in a public place for a few hours, were still being imposed by the Kisan Court\textsuperscript{100} in the Jhapa district of Nepal.\textsuperscript{101}

The three groups of TJS interview participants in this research have different responses with regard to the issue of torture or physical or mental harm in the operation of TJS.


\textsuperscript{100} Kisan Court is a form of TJS that is practised by the Kisan community in the Jhapa district of Nepal.

\textsuperscript{101} Chhetri and Kattel, above n 1, 52.
Of the dispute settlers, almost all (16 of the 17 interviewed) denied that infliction of torture or physical or mental harm to the parties occurs during the dispute resolution process. However, most of them accepted that in the past (some decades ago) torture, physical or mental harm or coercion were common in the operation of TJS. All the dispute settlers who participated in this research were aware that inflicting torture or physical mental or pain on an individual is not appropriate. For example, a TJS dispute settler interview participant from the Dhankuta district stated:

In the Shir Uthaune dispute resolution process there is no need for the infliction of torture or physical or mental harm because, in most of the cases, we make a decision on the consensus of both disputing parties. We [dispute settlers and village people] are aware of the fact that torture or physical and mental harm to a person is not permitted by the state law.  

In one rare instance, in the past, villagers have carried out their own ‘rough justice’ against a corrupt TJS dispute settler without recourse to the FJS on at least one occasion. An elderly (88 years old) dispute settler from the Mustang district narrated a story that he heard from his grandfather that a Mukhiya was thrown from a high cliff resulting in his death as a punishment for his wrongdoing as a Mukhiya (dispute settler). According to him, the incident happened because — in the ancient past (exact date unknown) — a rich businessperson from Tibet came to Nepal and improperly influenced and bribed the Mukhiya, manipulating his way into owning a big plot land that was used as a public grazing land. When the village people realised that the Mukhiya had been bribed by the businessperson resulting in his ownership of the land, the village people organised a village assembly and decided to kill the Mukhiya (who was considered a wrongdoer because he accepted the bribe and gave the ownership of the land to the rich business person from Tibet) by throwing him

102 Interview with Dhan-DS4 (8 November 2015).
103 Interview with Bard-DS5 (2 December 2015).
from the cliff. This is an example that shows the extent to which the village people can use violence to impart their views of what is just. It also shows that scolding or beating by hand or stick is much less cruel than what had been done to the wrongdoer in this instance.

More generally, one of the dispute settlers from the Badghar TJS in the Bardiya district did not completely rule out the use of torture or physical force or coercion in the TJS dispute resolution process. According to this dispute settler, if a disputing party disobeys a dispute settler’s summons notice or an order to implement the decision made by a Badghar, physical force or coercion could be applied. In such situations, according to him, a Badghar has the right to send the Chaukidar and his people to bring the disputing party to the meeting by using force (using physical force (such as beating by hand, stick or pipes, or kicking) or threatening to use physical force) and compelling the party to implement the decision made by the Badghar. However, he denied such use of force and infliction of torture, physical force or coercion during his tenure as a Badghar.

Of the ten expert interview participants, more than two thirds (80 per cent) thought that there was a high possibility that torture or physical or mental harm was used during the TJS dispute resolution process. For example, an expert interview participant in the Kathmandu district stated: ‘To my knowledge, there is a possibility of physical (slapping in the face area and random beating by hand or wooden sticks) or mental

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104 There is no documentary evidence and date for this event but people believe this story and that reveals the power of village assembly to punish a dispute settler in case of his wrongdoing. Many dispute setters and common people narrated this story to the researcher.

105 Interview with Bard-DS5 (2 December 2015).

106 Interview with Bard-DS5 (2 December 2015).
torture or coercion (such as banishment) to the disputing parties in the TJS dispute resolution.'\textsuperscript{107} Such methods are used to gain compliance by the alleged wrongdoer, whether in regard to attending a dispute resolution meeting or accepting a decision.

Of the FJS interview participants (a total of 23), the majority (82 per cent) were of the view that the TJS process is susceptible to the use of mental or physical torture or coercion (such as random beating, being smeared with black soot, and garlanded with used shoes and slippers\textsuperscript{108}) against those who do not obey the traditional norms or the orders or decisions made by the dispute settlers. According to them, in general there is no accountability and oversight mechanism in place to ensure that the community and state authorities become aware of any torture. An FJS interview participant in the Kathmandu district identified the following reasons for why torture might be used:

As per my experience, physical harm, such as slapping and coercion was normal in the TJS in the past but nowadays the extent of physical and/or mental harm has reduced significantly. However, in some instances, there is still a chance of torture in the TJS dispute resolution process. One of the reasons for continuing some form of torture in the TJS is because in some instances it is accepted in the society that it is justified to beat or use physical force if somebody is involved in wrongdoing.\textsuperscript{109}

On 29 June 2017, a national media outlet in Nepal under the heading 'Dalit beaten for entering temple' reported: ‘A person from the Dalit community was beaten for entering a temple in Saptari [district]... [he] was critically injured when he was assaulted by a group of non-Dalit people for entering a local temple to offer prayers.'\textsuperscript{110} Though this incident did not occur during a TJS dispute resolution process, it shows how the so-called high caste people treat Dalits in the rural parts of Nepal and

\textsuperscript{107} Interview with Kath-EX4 (8 August 2015).

\textsuperscript{108} Forced to use garland of shoes and slippers signifies a severe form of defamation.

\textsuperscript{109} Interview with Kath-CO1 (25 July 2015). The law does not allow persons to beat or coerce others but on some occasions people in the village meeting use such measures.

the rapidity with which some will resort to violence if they see their perceived norms broken.

Importantly, in contrast to dispute settlers’ accounts of their experiences, of the nine TJS users who participated in this research, two thirds (66 per cent) either experienced some form of physical or mental torture or witnessed such behaviour in the functioning of the local TJS. One of the TJS user interview participants from the Dhankuta district who experienced coercion in the TJS dispute resolution process stated: ‘Some of the so-called high-caste males used abusive words when addressing me during the dispute resolution meeting and threatened me (with banishment) so that I would accept the decision they made’.\footnote{Interview with Dhan-TJSU1 (13 November 2015). The TJS user participant was an uneducated \textit{Dalit} woman and she brought the domestic violence case in 2012 to the local TJS but she felt that she had not been heard properly but instead was threatened by the elite males in the village meeting.} Likewise, another \textit{Dalit} female FJS user in the Bardiya district shared how justice was denied to her in the TJS and how the elites of the community tried to stop her from accessing justice from the FJS. She stated:

\begin{quote}
My 75 year-old mother, a widow, was brutally beaten by one of our neighbours alleging she was a witch. She was rushed to a nearby health post and got treatment. When the case was brought to the local \textit{Badghar} and we asked for compensation, treatment costs, punishment to the wrongdoers and assurance of not repeating such acts in the future. But the \textit{Badghar} and elders in the village assembly did not take the case seriously. When I told them that I would be going to the FJS, they asked me not to do so because it may defame the entire community. They threatened my family and me that if we went to the FJS we would have to face dire consequences (such as exclusion from the community).\footnote{Interview with Bard-FJSU1 (16 December 2015).}
\end{quote}

This case is an example how people from marginalised groups are being denied justice in the TJS process and threatened if they do not follow the direction of TJS dispute settlers and the elites of the community. The allegation of witchcraft against a woman
is a form of gender-based violence and that amounts to a crime punishable in Nepal.\textsuperscript{113} However, unwillingness of victims to take legal action, the remote nature of many of the villages where the abuse takes place, and lack of knowledge of legal provisions among victims limits the possibility of victims accessing justice in the FJS forums.\textsuperscript{114} Therefore, victims approach their local TJS for justice.

The above-mentioned experiences of Dalit women during the TJS dispute resolution process (the use of abusive language and threats/coercion against them) need to be analysed within the context of the lower social status of Dalit women in the Nepali society. As discussed in Chapters 3 and 5 of this thesis, Dalit women are situated at the bottom of the social hierarchy in Nepal; therefore, they — as poor Dalit women — experience such behaviour on the part of members of hegemonic groups in general and during the justice seeking process.\textsuperscript{115} Their experience contrasts with that of other justice seekers.

One third (34 per cent) of the TJS user interview participants found the TJS dispute resolution process friendly and welcoming. The TJS users who thought this way were mostly males from Indigenous communities. For example, a TJS user from the Dhankuta district stated: ‘I am satisfied with the dispute resolution of TJS because in the TJS my case was resolved quickly, without spending any money and in an open


\textsuperscript{114} WHRIN, PPR Nepal and BHRC, Witchcraft Accusations and Persecution in Nepal: 2014 Country Report (2014) 9. However, some cases were being field to the FJS with the help of human rights organisations.

\textsuperscript{115} See UNOHCHR Nepal, above n 63, 41; Cameron, above n 65, 15; Kharel, above n 69, 114.
environment with the help of village people.' He also observed that he never noticed any form of torture or coercion in the TJS dispute resolution process.

The findings of this research are consistent with the results of some of the previous research in relation to the operation of TJS in Nepal in that torture (physical and mental) or coercion was prevalent in the past during the TJS dispute resolution process but nowadays the extent of its use of in the TJS process has significantly decreased. It does, however, remain a problem as is shown by the accounts of the majority of TJS participants in this study, who stated that they either suffered or witnessed such harm. Their accounts also demonstrated that violence, torture or threat of harm is more likely to be utilised against lower status persons (women and Dalits).

III RECOGNITION OF LAW, CUSTOMS, TRADITION, LANGUAGE AND INSTITUTIONAL PROCESS OF INDIGENOUS GROUPS

The right to use customary law, language, customs and tradition in general and in relation to Indigenous people’s dispute resolution processes is one of their internationally recognised human rights. As James Tully suggests, there are more than 15 000 cultures on earth and they all seek constitutional recognition and that is one of the important constitutional issues in the world. A number of binding and

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116 Interview with Dhan-TJSU2 (15 November 2015). The TJS user is a male from the Rai community.


119 Andrew Sharp, 'What is the Constitution of “The Spirit of Haida Gwaii”? Reflections on James Tully’s Strange Multiplicity: Constitutionalism in an Age of Diversity' (1997) 10(2-3) *History and
non-binding international human rights instruments ensure the right of continuation of law, tradition, customs, language and institutional processes for use by Indigenous groups.\textsuperscript{120} The literature suggests that, in general, the FJS functions in accordance with the statutory law and uses a language of a hegemonic group in the country but TJS operate in accordance with the customary rules and language of a particular group in the community.\textsuperscript{121} With respect to the use and recognition of Indigenous law, customs, tradition and language in the operation of TJS around the world more generally, Ewa Wojkowska in 2006 found that TJS ‘proceedings are usually conducted in the local language and follow local customs, therefore people are less likely to be intimidated in these settings.’\textsuperscript{122} In the Nepali context, past research also found that TJS function according to laws, customs, and tradition of Indigenous groups and use their own language.\textsuperscript{123} For example, United Nations Development Programme (UNDP) 2005 research found that in Nepal the TJS disputes were ‘processed at the local level, especially in traditional institutions in a language the disputants understand and with reference to norms and values they know’.\textsuperscript{124}

Nepal is a state party to major international human rights instruments, such as the \textit{ICCPR} and the \textit{ILO Convention 169}. These instruments protect the right to use the law, tradition, language and institutional process of the Indigenous community in the

\textsuperscript{120} For example, \textit{ICCPR} art 27; \textit{ILO Convention 169} arts 8, 9, 28, 30; \textit{UNDRI} arts 5, 9, 11, 13, 18; for detail see Anaya, above n 118, 15; see International Labour Organisation, above n 26.

\textsuperscript{121} Wojkowska, above n 1, 13, 16; Fernand de Varennes, 'Linguistic Rights as an Integral Part of Human Rights - A Legal Perspective' in Matthias Koenig and Paul de Guchteneire (eds), \textit{Democracy and Human Rights in Multicultural Societies} (UNESCO & Ashgate, 2007) 115, 117–19.

\textsuperscript{122} Wojkowska, above n 1, 16.

\textsuperscript{123} Massage, Kharel and Sharma, above n 1, 17–18.

\textsuperscript{124} Pradhan, above n 46, 5.
dispute resolution processes.\textsuperscript{125} For example, Article 27 of the \textit{ICCPR} provides that ‘in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, … to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ Similarly, the \textit{ILO Convention 169} provides that ‘the social, cultural, religious and spiritual values and practices of these [Indigenous] peoples shall be recognised and protected’\textsuperscript{126} and such people ‘shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.’\textsuperscript{127} Similarly, \textit{UNDRIP} provides that ‘Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions’\textsuperscript{128} and that they have ‘the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies’\textsuperscript{129} as well as the ‘right to participate in decision-making in matters which would affect their rights’.\textsuperscript{130} In addition, \textit{UNDRIP} provides that while establishing dispute resolution systems in the country, the state ‘should give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights’.\textsuperscript{131} The above mentioned

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{126} \textit{ILO Convention 169} art 5(a).
  \item\textsuperscript{127} Ibid art 169 art 8(2). (emphasis added).
  \item\textsuperscript{128} \textit{UNDRIP} art 5.
  \item\textsuperscript{129} \textit{UNDRIP} art 12 (1).
  \item\textsuperscript{130} Ibid art 18.
  \item\textsuperscript{131} \textit{UNDRIP} art 40.
\end{itemize}
\end{footnotesize}
provisions of the *ILO Convention 169*, *UNDRIP* and the *ICCPR* are relevant for the analysis of TJS dispute resolution process that are practised by Indigenous communities in Nepal.\textsuperscript{132} The Government of Nepal, as a state party to these international human rights instruments, is obliged to protect the rights of Indigenous groups.

The Constitution recognises Nepal is a nation that has multiethnic, multilingual, multi-religious, multicultural characteristics and diverse regional characteristics\textsuperscript{133} and Article 32 of the Constitution provides the rights relating to language and culture. Article 32(1) provides that every person and community in Nepal has a right to use their language. Similarly, the Constitution provides every person and community in Nepal with ‘the right to participate in the cultural life of their communities’ and ‘the right to preserve and promote its language, script, culture, cultural civilization and heritage.’\textsuperscript{134} The Constitution, to promote and protect the rights on Indigenous peoples, embraces a state policy:

> To make the Indigenous nationalities participate in decisions concerning that community by making special provisions for opportunities and benefits in order to ensure the right of these nationalities to live with dignity, along with their identity, and protect and promote traditional knowledge, skill, culture, social tradition and experience of the indigenous nationalities and local communities.\textsuperscript{135}

Therefore, on the one hand, the Indigenous groups in Nepal have rights enshrined in the international human rights instruments and the Constitution to utilise their own Indigenous law, tradition, customs, language and institutional processes and, on the other hand, the state is under an obligation to create an environment conducive to the

\textsuperscript{132} Further discussion regarding the relevance of these provisions is presented in Chapter 3 of this thesis.

\textsuperscript{133} Constitution preamble, arts 3, 4(1), 6.

\textsuperscript{134} Ibid arts 32(2)(3).

\textsuperscript{135} Ibid art 51(j)(8).
protection and implementation of the Indigenous people’s rights in an effective manner.\footnote{Nepal Treaty Act 1990 s 9(1).} Implementing the above mentioned constitutional provisions requires enabling law, policies, institutional mechanisms and resources. However, the Government of Nepal is reluctant to formulate laws and policies and invest adequate resources to implement these rights of Indigenous communities.\footnote{Adhikari, above n 125, 173; Shankar Limbu, ‘Provisions Related to Indigenous Peoples in Prevaling Laws’ in Tahal Thami and Gobinda Chhantyal (eds), Indigenous Peoples Rights in Nepal: Policy Status, Challenges and Opportunities (Lawyers’ Association for Human Rights of Nepalese Indigenous Peoples, 2017) 199, 208–10.}


A study conducted by the Lawyers’ Association for Human Rights of Nepalese Indigenous Peoples in 2014 found that nearly 80 per cent Indigenous peoples speak their own language in their household.\footnote{Lawyers’ Association for Human Rights of Nepalese Indigenous Peoples, A Study on the Socio-Economic Status of Indigenous Peoples in Nepal (2014) 131.} The report pointed out the fact that due to their habit of speaking their native language in their household Indigenous peoples face difficulty in speaking the Nepali language (which is the language of official use at the national level) in educational institutions and government offices and that this includes interactions with police and courts.\footnote{Ibid 132.} All three of the TJS studied here are practised by Indigenous groups and all three use local languages, customs, and institutional processes while resolving disputes. All the participants in this research agreed that the TJS respect the rights of Indigenous groups in relation to local law,
tradition, language and institutional process of the majority group of the particular location. For example, in the Bardiya district, the Badghar system uses Tharu language and customs and customary practices of the Tharu community. A TJS user who belonged to the Tharu Indigenous community in the Bardiya district stated: ‘The Badghar system operates according to the Tharu group’s customs, tradition and values. Most of the time Tharu language is used in the dispute resolution process.’

Similarly, an expert interview participant from the Kathmandu district stated:

One of the reasons Indigenous peoples prefer to use TJS for dispute resolution is the use of local customs, language, traditional and spirituality of the Indigenous groups by the TJS. Local people are familiar with these customs and traditions and feel comfortable participating in the TJS process. On the other hand, those not preferring to use the FJS do so because the FJS ignores their customs and traditions and applies statutory laws.

According to this female Indigenous expert interview participant, one of the reasons Indigenous people do not prefer to access the FJS was because the FJS does not recognise and utilise their customs, traditions, language and spiritual practices when deciding a case, rather they utilise overly formal and cumbersome procedures.

However, participants from the Dalit community and members of any ‘other than the majority’ community expressed their dissatisfaction over the use of customs, language and tradition of majority groups, not their minority group customs, language or traditions. For example, a TJS user from Dalit community in the Dhankuta district stated:

In Shir Uthaune, customs, traditions and language of the Rai community are used not of those of the Dalit community. Therefore, the TJS process does not care about our [Dalit] customs and traditions and on most occasions Dalit people are compelled to follow the Rai people’s customs, tradition and institutional process. Use of the Rai

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141 Interview with Bard-TJSU2 (13 December 2015).
142 Interview with Kath-EX5 (13 August 2015).
143 Interview with Kath-EX5 (13 August 2015).
language also causes a problem for us [Dalit people] because we could hardly understand the discussion in the dispute resolution meetings. In such situations, we [Dalit people] prefer the Nepali language to be used in the dispute resolution process.\textsuperscript{144}

The view of this Dalit community member stems from the fact that their mother tongue is the Nepali language; therefore, either they do not understand the Rai language or prefer not to use the Rai groups’ language.\textsuperscript{145} Not only were the Dalits dissatisfied with the use of customs, tradition and institutional process of the majority group of that particular area but people from other minority Indigenous groups were also not happy with the use of hegemonic group’s customs, tradition and institutional process. For instance, an FJS participant from the Bardiya district who belongs to Gurung\textsuperscript{146} community stated:

We [Gurung] are in the minority in our area and the Tharu people are in the majority. The Badghar system, a traditional dispute resolution process of the Tharu community, is used for dispute resolution at the local level. The Badghar follows the customs, tradition, language and process of the Tharu community not ours [Gurung’s]. I do not know why we are compelled to follow Tharu groups’ customs and traditions.\textsuperscript{147}

The statement reveals the dissatisfaction of a person from a minority Indigenous group with regard to following the customs, traditions and language of hegemonic Indigenous groups in the TJS dispute resolution process.

**CONCLUSION**

This chapter described and analysed the extent to which the selected TJS in Nepal follow the international human rights principles that are relevant to accessing justice.

\textsuperscript{144} Interview with Dhan-TJSU1 (13 November 2015).
\textsuperscript{145} Nepali language is considered more of a universal language that is spoken as a mother tongue by 44.6 per cent of people across the country: For details see Central Bureau of Statistics, Government of Nepal, *National Population and Housing Census 2011: National Report* (2012) vol 1, 4.
\textsuperscript{146} Gurung is also an Indigenous group recognised by the Government of Nepal that is in minority in Bardiya district.
\textsuperscript{147} Interview with Bard-CO4 (8 December 2015).
Likewise, this chapter provided a detailed analysis of the operation of the selected TJS from the perspectives of international human rights principles, namely non-discrimination and equal participation, absence of torture or physical or mental harm, and recognition of law, customs, tradition, language and institutional process of Indigenous groups. The discussion concluded that in many instances the operation of selected TJS in Nepal was found to not be meeting the required level of adherence to the international human rights principles related to access to justice. The current research found that the rights of marginalised groups, such as women, Dalits and minority groups have either been not protected effectively or have been violated. It was revealed that the selected TJS in their operations respect and utilise Indigenous law, customs, traditional, language and traditional process. The next chapter analyses the existing situation of linkage between TJS and the FJS and the future options to establish a relationship for improving access to justice in general and particularly for the people using TJS in the context of Nepal.
CHAPTER 8: OPTIONS FOR LINKING TRADITIONAL JUSTICE SYSTEMS AND THE FORMAL JUSTICE SYSTEM IN NEPAL

INTRODUCTION

The previous chapter analysed the extent to which international principles of human rights that are relevant to access to justice are respected in the operation of the three selected traditional justice systems (TJS) in Nepal which are the subject of this research. This chapter examines the existing relationship between TJS and the formal justice system (FJS) in the Nepali context. In addition, the chapter aims to explore the possible modalities for establishing functional engagement between TJS and the FJS for coordinating the two systems to better meet the justice needs of Nepali people.

The analyses in this chapter are primarily based on the themes arising from the data collected through the semi-structured in-depth interviews in four different locations of Nepal — Kathmandu, Dhankuta, Mustang and Bardiya. The themes that emerged from the data analysis were the need to link TJS and the FJS, for example, with the judicial bodies, such as the district courts; to link TJS with local level government bodies; and to recognise the TJS in legislation and ensure that these systems work independently yet in cooperation with the state bodies concerned. For the purpose of this thesis, the ‘link’ between TJS and the FJS refers to a situation of a working relation between these two justice systems, whether that be recognition (meaning of recognition in this context is presented in Chapter 6 of this thesis) of the work of each other, supporting each other, coordinating each other or hearing appeals.

In addition to the primary data, the analysis in this chapter is supported by a number of secondary sources. These include journal articles, government and non-governmental organisations’ reports, and conference papers on issues such as the
relationship between TJS and the FJS in general, and particularly in the context of Nepal. This chapter makes a significant contribution to the literature by analysing the existing relationship between TJS and the FJS. It also proposes a range of possible options for linking TJS and the FJS from the perspectives of the TJS and FJS interview participants (including dispute settlers, experts, judges, court officials and users of TJS and the FJS) in order to improve access to justice for Nepali people in general and particularly for TJS users, a topic that has not been addressed earlier.

I THE EXISTING RELATIONSHIP BETWEEN TRADITIONAL JUSTICE SYSTEMS AND THE FORMAL JUSTICE SYSTEM

Chapter 1 of this thesis discussed how TJS in the Nepali context are not empowered by the Constitution or any statutory Act of Nepal to resolve disputes; nevertheless, the Nepali TJS resolve a significant number of disputes, particularly in rural areas. No legal relationship (defined by law or policy) exists between TJS and the FJS and these two justice mechanisms work separately. In 2011, a study conducted by Saferworld, an international non-governmental organisation (INGO), noted that TJS and the FJS in Nepal function in isolation, which has ‘undermined their

contribution to a holistic, comprehensive system of justice’ in Nepal. The report recommended that ‘the government and local authorities establish a system for monitoring the activities and outcomes of TJS’ to ‘strengthen the accountability’ of TJS while also improving access to justice in Nepal.

It has, nevertheless, been found that in rare instances TJS and FJS actors, such as the court, police, mediators and dispute settlers already refer disputes to each other and provide necessary support where needed. In 2005, the United Nations Development Programme, Access to Justice Project study (UNDP 2005 Report) found that, in the two districts studied, the district courts, police, chief district officers and village development committees acknowledged the work of TJS and recorded good informal working relations between TJS and the FJS. Likewise, both the UNDP 2005 Report and the International Alert 2012 study concluded that coordination between state and non-state justice mechanisms exists, but that it was ad hoc and driven by individuals rather than the system, and the relationship was not found to be guided by any rules or regulation but rather operated inconsistently according to individual preferences.

All of the TJS and FJS interview participants (a total of 58) who were interviewed for this research agreed that no formal relationship existed between TJS and the FJS in the three districts selected. The data collected also accorded with the existing research in indicating that in some instances the people operating in the two systems cooperate.

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2 Coyle and Dalrymple, above n 1, 1; International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 1, 7.
3 Coyle and Dalrymple, above n 1, 55–6.
4 Suku Pun and Gehendra Lal Malla, Local Mediation Practices in Bardiya and Solukhumbu Districts (UNDP, Access to Justice Programme, 2005) 32–5. The study was conducted in two districts of Nepal: Bardiya and Solukhumbu.
5 International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 1, 60; Pun and Malla, above n 4, 23.
with each other to resolve disputes. For instance, a dispute settler interview participant from the Dhankuta district shared this experience:

Two years ago, a case of simple battery between two men in a Rai community was filed in the local police office. The Police Officer [FJS stakeholder] suggested to both the parties that it would be better to resolve the case through the TJS [Shir Uthaune] and the case was referred to the local TJS. Then the disputing parties came to the Shir Uthaune, and a dispute settlement meeting was conducted in the village. The first Shir Uthaune meeting remained unsuccessful in resolving the dispute but after two weeks another meeting was organised where the case was resolved.⁶

According to the Police Act 1955 of Nepal, the objectives of the Nepal Police are ‘to prevent and investigate crime and maintain law and order’⁷ in the country and the Act does not have any provision for coordination with TJS. However, in some instances such cooperation and referral occurs.

In some instances, it was also found that TJS actors cooperate with the FJS proceedings. For example, a dispute settler interview participant in the Mustang district shared his experience of assisting a formal court of justice to resolve a dispute.

In my village, there was a dispute between two individuals about money lending. The case was brought to me as a Mukhiya of the village. I organised two village meetings in order to resolve the case but could not get it resolved. Then a party to the dispute filed a case in the District Court of Mustang. The court requested that I be present at the proceedings and appear as a witness and cooperate with the court to resolve the case. As per the court order, I went to the court and recorded my statement as a witness. The case is still in the court process.⁸

According to the state law and the court rules, there is no recognition of TJS dispute settlers; in this case, however, the court heard the dispute settler testify about what happened from the perspective of his role as a Mukhiya in this case. This example demonstrates that a court can take notice of a TJS.

⁶ Interview with Dhan-DS4 (8 November 2015).
⁸ Interview with Mus-DS5 (6 September 2015).
Of the 10 expert interview participants in this research, only three identified instances of occasional coordination between TJS and the FJS. An expert interview participant from the Kathmandu district stated:

In my village, the local police always encourage people to resolve disputes through TJS rather than reporting the case to the police office. For instance, two years back in the local market, a group of local boys got into a fight after heavy drinking and the case was reported to the police. Then the police officer suggested that the disputing parties go to the TJS and he also informed the local dispute settler that he was sending the dispute for resolution. Later, the dispute was settled by the TJS dispute settlers.9

According to this expert interview participant, before sending the case to the TJS the police officer explained about the costs, time and lengthy formal process involved in using the FJS. This resulted in the parties deciding to go to the local TJS to resolve the case.10 The reason for such a referral may have been the police officer’s trust in the work of TJS. This is an example of ad hoc recognition and coordination based on the personal judgement of an individual police officer.

All the FJS interview participants (a total of 23) acknowledged that there is no formal or institutional relationship between the FJS and the TJS. The FJS participants stated that they knew a little about the work of TJS but their knowledge of these systems was sparse. For example, an FJS interview participant from the Dhankuta district stated:

I do not know much about TJS because I work with the FJS and there is no institutional and formal relationship between these two systems. The reason for my limited knowledge of the TJS is because I have been transferred to seven different courts during my 15 year career. Therefore, I never got the chance to gain in-depth knowledge about the local dispute resolution practices where I worked. I never tried to find out or study about the functioning of the TJS neither at high school nor in the law school curriculum.11

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9 Interview with Kath-EX2 (3 August 2015).
10 Interview with Kath-EX2 (3 August 2015).
11 Interview with Dhan-CO1 (28 October 2015).
In Nepal, TJS is not included in high school curricula nor in law degree courses; therefore, the FJS stakeholders are not knowledgeable about the structure and operation of the TJS and their contribution in access to justice in Nepal. The above statement makes clear that although TJS in Nepal resolve vast number of disputes in rural areas, little value is placed on these systems.

Although judges and court officials are not bound to have the knowledge about TJS and their functioning, some of them were found to be interested in obtaining such information regarding the operation of the TJS in their areas. For example, an Appellate Court judge in the Dhankuta district became interested in knowing about the functioning of the Shir Uthaune of the Rai community when he came to know that the system was working well for resolving disputes at the local level. He subsequently visited the place where such dispute resolution was conducted and informally interacted with disputes settlers, social workers and police personnel, gathering information about the functioning of the Shir Uthaune in that village. One FJS interview participant (a judge) highlighted the importance of an in-depth study being conducted (like the research conducted for my PhD thesis) which would cover all TJS practised in Nepal to inform policy in relation to the functioning of TJS and their relationship with the FJS.

If there is inadequate knowledge about the existence and operation of TJS, there is little or no chance of managing or interacting and cooperating with such systems. It is, therefore, not surprising that for the most part TJS and the FJS exist and work in

12 Interview with Dhan-CO3 (30 October 2015).
13 Interview with Bard-CO1 (5 December 2015).
14 Some of the FJS interview participants, such as Dhan-CO1, Dhan-CO3, Bard-CO1 and Mus-CO1, mentioned that they lack comprehensive knowledge in relation to the operation of TJS in Nepal.
parallel without any linkage, although on rare occasions, these two systems intersect on an ad-hoc or personal basis.

The next section explores possible options for formally recognising TJS as dispute resolution forums, options for linking TJS and the FJS and the benefits of doing so.

II OPTIONS FOR ESTABLISHING A RELATIONSHIP BETWEEN TRADITIONAL JUSTICE SYSTEMS AND THE FORMAL JUSTICE SYSTEM

As discussed in Chapter 2 of this thesis, scholars hold differing views about whether to link TJS and the FJS and also about the various options for linking TJS with the FJS, and if they are linked, what that should look like. These range from recommending abolition of TJS to the recognition of TJS as formal dispute resolution forums. With regard to the relationship between TJS and the FJS, Miranda Forsyth, in her international study of TJS, notes that in the majority of countries, the TJS–FJS relationship was ‘not mutually supportive’; she, therefore, recommends a necessary modification of that relationship to enhance coordination in order to accomplish the task entrusted to these systems.

Only a few existing studies have touched upon the possibility of establishing a relationship between TJS and the FJS in the Nepali context. For instance, a World Conservation Union, Nepal (IUCN Nepal) 1998 publication analysed the formal and informal dispute settlement mechanisms in the field of natural resource management in Nepal. The report noted that for the effective resolution of disputes in the field, not

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15 See Wojkowska, above n 1, 14; Erica Harper, ‘Engaging with Customary Justice Systems’ in Janine Ubink and Thomas McInerney (eds), Customary Justice: Perspectives on Legal Empowerment (International Development Law Organization, 2011) 29, 30; Forsyth, above n 1, 75; Connolly, above n 1, 248.

16 See Forsyth, above n 1, 108.
only state laws and regulations but also customary laws and norms were being used by the local people in Nepal. The report noted that TJS provided for easy access to dispute settlement services for the users of natural resources. A 2014 study by Bishnu Raj Upreti, a well-known expert in conflict management in Nepal found that TJS were effective in resolving local disputes in Nepal and he therefore recommended the adoption of a complementary approach by combining the strengths of TJS and the FJS for the betterment of overall dispute resolution processes. Similarly, the Saferworld 2011 and International Alert 2012 studies recommended some level of functional coordination among justice providers and the establishment of a system of monitoring the procedures and outcomes of TJS to facilitate better access to justice. The International Alert 2012 study noted that ‘greater coordination between these [TJS and the FJS] would support improving access to justice’ in the context of Nepal. A UNDP 2005 study found that in the Solukhumbu district, TJS and the FJS ‘have good relations and cooperation with each other’ and consequently most cases are settled through TJS with a resulting low FJS case load.

The data collected for my PhD on the question regarding the need for establishing a relationship between TJS and the FJS — and whether such a relationship would bring positive change to the situation of access to justice in the Nepali context — can be broadly grouped into two different categories: (i) 76 per cent of the participants

18 Ibid 73–5. The analysis was based on two case studies from Lamjung and Kaski districts.
20 Coyle and Dalrymple, above n 1, 55.
21 International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 1, 60.
22 Pun and Malla, above n 4, 30.
proposed a linkage between TJS and the FJS so that access to justice for justice seekers can be improved; and (ii) 21 per cent of interview participants suggested retaining the independent existence of TJS together with cooperation between TJS and the FJS. Around 3 per cent stated that they had insufficient knowledge about the need and options for such a linkage, and that they were therefore unable to comment.

A Need for Linkage between Traditional Justice Systems and the Formal Justice System

A total of 44 interview participants (76 per cent) from both TJS and the FJS thought that a linkage between TJS and the FJS was necessary and that such linkage would contribute to improving the situation of access to justice for the people of Nepal in general and more specifically for those using TJS. Among these participants, however, different views were expressed about how such a linkage could be established and the nature of that linkage. Since the interviews conducted for this research were semi-structured, participants were able to add context and nuance to their responses regarding the possible modalities of linking TJS and the FJS.

From a theoretical standpoint, the views expressed by the participants who thought that linking TJS with the FJS would lead to improved access to justice for the Nepali people generally fall under the purview of weak legal pluralism as stipulated by John Griffiths (discussed in Chapter 3 of this thesis).23 According to him, a weak legal pluralism encompasses the situation where a sovereign state recognises different bodies of laws for different groups in the population, such as Indigenous groups,
religious groups, nationalities and also according to geography or locality.\textsuperscript{24} He further states that such state recognition of TJS is in a true sense a situation of legal centralism that is practised as a justifiable technique of governance on practical grounds.\textsuperscript{25} Sally Engle Merry also considers legal pluralism as a situation where parallel legal regimes exist for different groups of people based on their ethnicity, religion, nationality or geography and that function under the command of a nation’s sovereign power.\textsuperscript{26} In the Nepali context, where no formal recognition of TJS currently exists, the approach of recognising TJS and/or linking TJS with the FJS would require the Nepali sovereign state to legally recognise TJS as forums for dispute resolution. If this happened, TJS practised in Nepal, such as Shir Uthaune, Mukhiya and Badghar, would be recognised by the country’s Constitution or statutory laws and these TJS will formally fall under Nepali state sovereignty. Forsyth has argued that formal recognition of TJS by a state generally empowers the TJS ‘to exercise jurisdiction, and also provides support in terms of using its [the state’s] coercive powers to enforce decisions’ made by TJS.\textsuperscript{27}

The different views that emerged during the data analysis can be categorised into three broad groups regarding how TJS and the FJS should be linked (see Table 8.1 below). Firstly, more than two-thirds of interview participants (70 per cent) thought that linking TJS with the local level government was an appropriate option for linking TJS and state bodies. Secondly, one-fifth of interview participants (20 per cent) expressed the view that linking TJS with a lower level court, such as the district court, was a most appropriate option for recognising and linking TJS and the FJS. Finally, the remaining

\begin{itemize}
  \item \textsuperscript{24} Ibid.
  \item \textsuperscript{25} Ibid.
  \item \textsuperscript{26} Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) \textit{Law & Society Review} 869, 871.
  \item \textsuperscript{27} Forsyth, above n 1, 95.
\end{itemize}
interview participants (10 per cent) suggested that TJS as practised in Nepal should be recognised by the Constitution and statutory laws, and that these systems should remain autonomous and be able to operate independently.

Table 8.1: Participants’ perspectives on the options for linking TJS and the FJS

<table>
<thead>
<tr>
<th>Themes</th>
<th>Number of Participants (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Linking with the local level bodies</td>
<td>31 (70%)</td>
</tr>
<tr>
<td>Linking with the courts</td>
<td>9 (20%)</td>
</tr>
<tr>
<td>Independent recognition of TJS</td>
<td>4 (10%)</td>
</tr>
<tr>
<td>Total</td>
<td>44 (100%)</td>
</tr>
</tbody>
</table>

1 Linking Traditional Justice Systems with the Local Level Government Bodies

Among the participants who thought linking TJS and the FJS would bring positive change in access to justice in Nepal, more than two-thirds (70 per cent) suggested linking TJS with local level government bodies as the most appropriate option. In the context of this research project, the term ‘local level government bodies’ means the lowest level unit of governance in the country that exists and functions at the grassroots
level in contrast to the central or district government bodies that are situated in the national capital or the district headquarters or the urban areas.\textsuperscript{28}

Before the promulgation of the Constitution, Nepal was a unitary state that was divided administratively into 5 development regions, 14 zones, 75 districts, 217 municipalities and 3157 Village Development Committees.\textsuperscript{29} However, the Constitution transformed Nepal from a unitary state into a federal state where three levels of government institutions are in place, namely: (i) the federal, (ii) the province, and (iii) the local level.\textsuperscript{30} All three levels exercise power as entrusted by the Constitution and the country’s statutory laws.\textsuperscript{31}

According to the Constitution, the local level structure of the government consists of village institutions, municipal and district assemblies and a number of wards in a village institution and municipality as determined by the federal law.\textsuperscript{32} The Constitution empowers the local level governing bodies with executive, legislative and judicial powers that shall be exercised pursuant to the Constitution and statutory laws.\textsuperscript{33} The list of the powers of local level bodies and the concurrent powers of federal, state and the local level, as provided by the Constitution, is shown in the Appendix 4 of this thesis.

\begin{itemize}
\item \textsuperscript{28} Constitution of Nepal 2015 (hereinafter ‘Constitution’) arts 56, 57.
\item \textsuperscript{30} Constitution art 56(1).
\item \textsuperscript{31} Ibid art 56(2).
\item \textsuperscript{32} Ibid art 56(4). The federal law is in the process of promulgation in the Parliament of Nepal.
\item \textsuperscript{33} Ibid arts 214, 217, 221. Schedules 8 and 9 of the Constitution provide the list of local level power and the list of concurrent powers respectively of the Federation, State and Local levels.
\end{itemize}
According to the Constitution, in order to settle disputes under their respective jurisdictions in accordance with the law, the local level body shall have a three-member judicial committee coordinated by a vice-chairperson in the case of a village body and by a deputy mayor in the case of a municipality.\textsuperscript{34} The Constitution further provides that the local level judicial bodies shall be subordinate to the District Court. The District Court is empowered to ‘inspect as well as supervise and give necessary direction to its subordinate judicial bodies.’\textsuperscript{35} It has also been argued that the judicial power accorded to the local level bodies ‘will contribute towards building alternative forums for justice at the local level in lieu of the formal judicial mechanism that is inaccessible and also expensive for the common people’.\textsuperscript{36}

Currently, there are 753 local level governing bodies comprising 460 village councils, 276 municipalities, 11 sub-metropolitan cities and 6 metropolitan cities.\textsuperscript{37} As per the Constitution, the local level governing bodies are the lowest level of people’s representative bodies in the federal structure.\textsuperscript{38}

In relation to the options and types of linkage of the selected TJS with the local level government bodies, participants mentioned a number of different ways this could be achieved. This includes statutory recognition of the TJS as formal forums for dispute

\begin{flushright}
\textsuperscript{34} Ibid art 217. The enabling legislation to this provision that determines the types of disputes, jurisdiction, procedures to be followed, is yet to be promulgated.

\textsuperscript{35} Ibid art 148(2). The state law in relation to this provision is yet to be promulgated.

\textsuperscript{36} Mukti Rijal, ‘Customary Institutions Challenge To Legal Centralism’, \textit{The Rising Nepal} (Kathmandu), 7 August 2017\textless\texthttp://therisingnepal.org.np/news/18182\textgreater, 2.

\textsuperscript{37} Nepal Rajpatra [Nepal Gazette], pt 66, no 58 (10 March 2017). The Government of Nepal appointed a nine-member committee to determine the number of local level bodies as per art 295(3) of the Constitution. Based on the Committee’s recommendations, the Government of Nepal determined the number of local level bodies in the country. Details of all local level bodies can be found on the website of Ministry of Federal Affairs and Local Development, Government of Nepal \textless\texthttp://103.69.124.141/website\textgreater (accessed 14 February 2018). These are the bodies that 70 per cent of interviewees of this research thought TJS should be connected to.

\textsuperscript{38} Constitution art 56.
\end{flushright}
resolution with specific jurisdiction and necessary financial support, office space, logistics (such as furniture, stationery), and capacity enhancement activities (including training program on mediation, the basic principles of constitutional, legal and human rights).

According to interview participants whose views favoured linking TJS with the local level government bodies, reasons given for the desirability of such a linkage were:

(i) Local level bodies functioning at grassroots level are geographically closer to the users of TJS than other state organs, such as court, state government and federal government and therefore are easily accessible to TJS users;

(ii) Local level bodies are the people’s representative structures empowered by the Constitution at the local level and function as local government; therefore, their role is constitutionally supported. Importantly, the people in the community who use TJS are familiar with the structures and institutions at the local level. This is because the users are part of the local population, that is, the local government body is culturally closer to the TJS and local users;

(iii) The local level body comprises representatives from the local community; therefore, there is a greater possibility of these people understanding local customs, tradition, language and the TJS dispute resolution practices; and

(iv) Article 217 and Schedule 8 of the Constitution provide powers regarding dispute resolution, mediation and arbitration to the local level bodies; therefore, it is relevant to link TJS to the local level bodies so that judicial powers can be exercised in accordance with the Constitution and statutory laws.
A District Court judge, one of the interview participants from the Bardiya district, stated:

In my view, it is better to establish linkage between TJS and the local level government. Local government can recognise TJS’s work of dispute resolution at the local level and provide support to them to perform their job. For me, linking TJS with the District Court is not practical for two reasons. Firstly, District Courts are located in the district headquarters, mostly in urban areas [which are municipal, sub-metropolitan and metropolitan areas]; therefore, they are not easily accessible to the rural people. Secondly, the working style of the formal court of justice and TJS are different because the courts are too formal and follow formal procedural rules whereas TJS are flexible and function in an informal manner. Therefore, for me, linking TJS and local level bodies is a feasible option.  

According to this interview participant, local TJS can be linked with the local level government body and such a body can provide the necessary infrastructure, such as financial support and office space, and also facilitate the TJS dispute resolution work. To clarify his point, the interview participant gave an example from the Bardiya district (total population 426,576 and an area of 2025 square kilometres) where there are 33 village development committees and only one District Court. According to him, if TJS were linked with the District Court, coordination between them would be impractical because district courts are located in the district headquarters. But if the linkage were established with the local level government bodies, TJS actors in that area would find it easier to participate. Likewise, one expert interview participant who favoured of linking TJS with the local level bodies stated:

TJS need to be recognised by the statutory laws as a forum for dispute resolution so that they get empowered. After recognition of the TJS, these systems need to be linked with local level bodies; … people will be able to get service at their door steps. For

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39 Nepal is divided into 77 districts with one district court in each district.
40 Interview with Bard-CO1 (5 December 2015).
41 Interview with Bard-CO1 (5 December 2015).
43 Interview with Bard-CO1 (5 December 2015).
me, linking TJS with the state bodies means recognising the TJS as dispute resolution forums and providing these forums with an office and other logistic supports.  

According to this interview participant, TJS first need to be recognised in legislation as dispute resolution forums, and should then be provided with office space, financial support and logistics. They should also have organised capacity enhancement programs for dispute settlers, especially on subjects such as the international principles of human rights (including rights of women, Dalits and minority groups) and mediation knowledge and skills.  

Among the dispute settler interview participants, seven (41 per cent) thought that linking TJS with the local level bodies is an appropriate option for improving access to justice for the TJS users. For example, a dispute settler from the Mustang district stated:

In my view, recognition of TJS by the state is one of the necessary steps to strengthen TJS. Besides, engaging TJS with the local level government can bring a favourable situation for the continuation of dispute resolution by the TJS. The local level government should cooperate with the TJS and provide necessary support so that people’s trust in TJS will increase and the quality of service rendered by the TJS be enhanced.

Regarding the requisite areas of capacity enhancement, the interview participant stated that it should not be generalised for all TJS but rather they should be determined after a needs assessment of the particular TJS.

The dispute settlers who thought that linking TJS with the local level bodies was the best option, emphasised that in linking TJS with the FJS, core values of TJS — such as, speediness, low cost, flexible procedures, and use of local customs, tradition and

44 Interview with Kath-EX3 (11 August 2015).
45 Interview with Kath-EX3 (11 August 2015).
46 Interview with Mus-DS1 (5 September 2015).
47 Interview with Mus-DS1 (5 September 2015).
language — should not be compromised. Any such linkage should be carefully constructed. For instance, a dispute settler from the Mustang stated:

I am in favour of linking TJS with the local level bodies so that TJS can be formally accepted as one of the dispute resolution mechanisms at the community level. At the same time, we must be careful of the fact that the TJS should not lose fundamental characteristics (free of costs, swiftness in resolving a dispute, simplicity in the process, informal procedure and use of local customs) while linking with the local level bodies.48

Among TJS user interview participants, one third (33 per cent) expressed the view that linking TJS with the local level government bodies is the most practical option from the users’ point of view. For example, a TJS user interview participant from the Mustang district stated:

Linking TJS with the local level body is the most feasible option for us [people living in rural areas] because both [TJS and local level bodies] exist at the local level and are close to the community people. One of the reasons people are using TJS is because TJS are easily accessible to the disputing parties at the community level. If the TJS linked with local level bodies, they would not lose their characteristics of being local to the rural people. On top of that, the local level body consists of locally elected people that are familiar with the operation as well as the usefulness of TJS for the Indigenous community.49

Similar to the dispute settlers, this TJS user specified the need for legal recognition of TJS, and the provision of necessary support, such as office space and capacity development activities for TJS actors.50 To clarify the importance of geographical proximity of dispute resolution services, he gave an example from his own village. He said that if TJS were linked with local level bodies, such a service could be reached within an hour’s walk from his village, but if the linkage were made with the District Court, the district headquarters for the District Court would be about 35 kilometres from his village, creating problems if TJS users had, for some reason, a need to attend

48 Interview with Bard-DS6 (3 December 2015).
49 Interview with Mus-TJSU1 (28 August 2015).
50 Interview with Mus-TJSU1 (28 August 2015).
District Court. There was no road access between his village and the district headquarters, which meant it would take more than a day for justice seekers to reach it. According to this interview participant, as the local level body is composed of and operated by local people, there is also a greater possibility of these people being supportive of the function and work of TJS.\textsuperscript{51}

The above discussion shows that the research participants’ emphasis was on the need for geographic proximity and the advantage of the familiarity of the local level government bodies with customs, personnel, and language. Hence linkage of TJS with the local level body was the preference for a majority of those who desires some form of linkage between TJS and the FJS. There were, however, a minority who disagreed and favoured linkage with the formal courts of justice.

2 \textit{Linking Traditional Justice Systems with Formal Courts of Justice}

Among the interview participants who were in favour of linking TJS with the FJS, one fifth (20 per cent) thought that it would be better to have links between TJS and the formal courts of justice, such as the District Court. The following reasons were provided in support of their position: (i) dispute resolution is basically a function of a judicial body; therefore, TJS as dispute resolution forums need to be linked with the courts; and (ii) courts in Nepal function according to the Constitution and the statutory laws of the country as well as following international human rights principles; therefore, TJS, if linked with the formal courts of justice, will also receive encouragement from the FJS and work in an environment conducive to following international principles of human rights relating to dispute resolution. Brynna

\textsuperscript{51} Interview with Mus-TJSU1 (28 August 2015).
Connolly argues that, internationally, linking TJS with lower level state courts ‘preserves the fundamental local nature of dispute resolution while ensuring that questions of bias or denial of fair trial have the opportunity to be heard within the formal legal system’.\textsuperscript{52} She further argues that such a linkage could be especially appropriate for the marginalised groups in the society who are less likely to file an appeal against the decision of a local TJS.\textsuperscript{53}

On the question of the type of relationship that should be in place if TJS and the formal courts of justice are linked, a number of areas of cooperation were suggested, such as the formal courts of justice being able to help build TJS actors’ capacity in regard to various matters, including modern techniques of dispute resolution, mediation and international principles of human rights.\textsuperscript{54} Such a linkage would also make TJS more accountable and allow for the correction of mistakes that occur during TJS dispute resolution as the formal court of justice could hear appeals against TJS decisions.\textsuperscript{55} However, such appeal system can create difficulties because the FJS functions according to formal laws and TJS follow local laws, customs and norms. In addition, regular interaction programs among TJS and FJS actors could be organised for experience sharing and TJS actors could be trained to properly record the dispute resolution process and outcomes.\textsuperscript{56} The courts could also contribute as an oversight

\textsuperscript{52} Connolly, above n 1, 271.

\textsuperscript{53} Ibid.

\textsuperscript{54} Interview with Bard-CO2 (6 December 2015).

\textsuperscript{55} Interview with Dhan-CO5 (4 November 2015); Interview with Kath-CO2 (27 July 2015).

\textsuperscript{56} Interview with Kath-EX4 (8 August 2015).
body for the overall operation of TJS, so that TJS become accountable to the country’s Constitution and statutory laws.\textsuperscript{57}

In relation to the options for linking TJS and the formal courts of justice, a District Court judge stated:

The task of dispute resolution falls under the judicial function of the state and as per our judicial practice and the constitutional provision, the judiciary has been empowered to take this role. Therefore, linking TJS with the District Court is the most practical option so that TJS come under the purview of the formal courts of justice. In my view, such a linkage empowers TJS to continue their work in coordination with the FJS with statutory power to resolve certain kinds of disputes.\textsuperscript{58}

This FJS interview participant argues that the work of dispute resolution is primarily the role of the FJS; therefore, the TJS should be linked to the courts. He noted that if a party or parties are not satisfied with a TJS decision, a system of appeal could be established whereby District Courts could hear appeals against TJS decisions.\textsuperscript{59}

One FJS interview participant from the Kathmandu district who thought that linking TJS with District Court is the most feasible option stated:

To my knowledge, the main deficit of TJS dispute resolution process is in relation to abiding by international principles of human rights. The courts are functioning as per the Constitution and statutory provisions that ensure equality before the law, non-discrimination, equal participation, absence of torture and fairness. Therefore, linking TJS with the courts brings about a situation in which TJS will become sensitive to the rights of people, especially women, Dalits and minority groups.\textsuperscript{60}

However, linking TJS with the FJS is not necessarily a problem-free solution to compliance with international human rights principles. While it is true that in many cases Nepali courts have upheld the fundamental rights of the people and international

\textsuperscript{57} Interview with Kath-CO2 (27 July 2015).
\textsuperscript{58} Interview with Dhan-CO5 (4 November 2015).
\textsuperscript{59} Interview with Dhan-CO5 (4 November 2015).
\textsuperscript{60} Interview with Kath-CO2 (27 July 2015).
principles of human rights (including gender justice, equality before the law, and the right against torture), there is also extensive literature to the contrary. Concerns regarding the adherence to international principles of human rights by the formal courts of justice in the Nepali context include that the FJS is not inclusive of women, Dalits and minority groups and do not respect the rights of these groups in their operations or deliberations. Therefore, there is no guarantee that linking TJS with the formal courts of justice would automatically transform TJS into forums amenable to international principles of human rights.

Among the 10 expert interview participants, only two viewed linking TJS with the courts as the most feasible option of recognising the work of TJS and improving the situation of access to justice in Nepal. According to these 2 interviewees, linking TJS with the formal courts of justice would contribute to recognising the important task that TJS are performing across the country, and the justice wielding actors of TJS (such as dispute settlers and their assistants) would feel empowered by an association with the formal courts of justice. One of the experts who was working as a mediation trainer and a mediator within and outside the court suggested that TJS could be linked

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63 Interview with Kath-EX4 (8 August 2015); Interview with Dhan-EX2 (5 November 2015).

64 Interview with Kath-EX4 (8 August 2015); Interview with Dhan-EX2 (5 November 2015).
with the Mediation Council\textsuperscript{65} so that the Council could enhance the capacity of TJS actors on various subject matters, such as mediation skills and knowledge, gender justice and human rights principles so that they could deliver a quality service to those using TJS.\textsuperscript{66} The Mediation Council is a nine member board chaired by a Supreme Court judge and is established under the \textit{Mediation Act 2011} of Nepal.\textsuperscript{67} According to the Act, the functions and duties of the Council include carrying out activities to promote mediation to resolve disputes; providing policy recommendation to the Government of Nepal in relation to reform of prevailing laws in regards to mediation; approving the mediation training curricula, monitoring and evaluating the institutional capacity of the organisation that provides mediation services and mediation training; preparing the framework of a permanent structure at local level for community based-mediation; and providing policy recommendations to the Government of Nepal in relation to reform of prevailing laws in regards to mediation.\textsuperscript{68}

The Mediation Council is a body that has primarily a policy recommendation authority in relation to the use and development of mediation in Nepal. After considering the Council’s powers and duties, present institutional set up, available human and financial resources, and geographic coverage,\textsuperscript{69} it does not seem that the Council is an appropriate institution to engage with TJS that are operating at the local level across the country. One of the experts interviewed for this project pointed out that the Mediation Council is a comparatively recently created body under the \textit{Mediation Act} of Nepal, with its only office in the country’s capital, Kathmandu, and a small

\textsuperscript{65} \textit{Mediation Act 2011} (Nepal) art 26.
\textsuperscript{66} Interview with Dhan-EX2 (5 November 2015).
\textsuperscript{67} \textit{Mediation Act 2011} (Nepal) s 26.
\textsuperscript{68} Ibid s 27.
\textsuperscript{69} See <http://www.mediationcouncil.gov.np>. Note: This is a Nepali language website.
secretariat; therefore, in its present form, the Mediation Council does not have the capacity (technical and financial) to assist with TJS.70 According to this interviewee, linking TJS with the formal courts of justice is, therefore, currently the best option to bring TJS under the FJS.71

The option of linking TJS with the courts was criticised by interviewees on three grounds: (i) Judicial power is not solely vested in the courts, contrary to what these participants stated, as the local level bodies do have the power to settle disputes.72 The Constitution provides for a judicial body within local level government bodies to ‘settle disputes under their respective jurisdictions in accordance with law’;73 (ii) The District Courts are already burdened with heavy caseloads and they lack the resources (human and financial) and technical knowledge to coordinate and work with TJS;74 (iii) Such a linkage would enshrine FJS domination of TJS so that there is a high possibility of TJS losing their fundamental characteristics, such as flexibility, informality and accessibility.75

It was, however, also argued that a right of appeal against the decisions of TJS to the formal courts of justice (such as the District Courts) could make the operation of TJS more accountable and human rights friendly, and provide an opportunity to correct substantive as well as procedural mistakes made by TJS.76 The problem with this

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70 Interview with Kath-EX4 (8 August 2015).
71 Interview with Kath-EX4 (8 August 2015).
72 Interview with Mus-DS1 (5 September 2015).
73 Constitution art 217.
75 Interview with Mus-DS1 (5 September 2015).
76 Such an argument was made by at least three participants: Dhan-CO5, Kath-CO2 and Kath-EX4.
approach is that the TJS are operating in accordance with the customs, traditions and Indigenous laws of a particular location and group of people but the formal courts of justice, including the District Court, function in accordance with the Constitution and statutory laws of the country; therefore, hearing an appeal against a decision made under a different type of law in the courts of law may not be practical.

It is interesting to note that none of the dispute settlers and TJS users who participated in this research thought that the option of linking TJS and the formal courts of justice was a feasible option for recognising and linking TJS with the FJS. All the participants (expert and FJS participants) who thought that TJS could be linked with the formal courts of justice highlighted the need for reform of TJS on aspects such as adherence to the international principles of human rights, and record keeping of the process and outcomes of the TJS.

3 Independent Recognition of Traditional Justice Systems

Among the interview participants who favoured the recognition of TJS, four participants (10 per cent) expressed the view that the TJS needed to be recognised by the state but that there was no need to link TJS with the FJS. Rather, they thought TJS should be allowed to work independently. For example, an FJS interview participant stated:

The FJS and TJS are operating separately to achieve one goal, that is, to provide dispute resolution services to the people. However, TJS are not recognised as a dispute resolution forum by the Constitution and statutory laws. In my view, TJS in the Nepali context should be recognised by formal state law and the state should provide necessary financial and technical support to TJS so that these systems function properly. These two systems of justice [TJS and the FJS] should work without
interfering with each other. A choice should be provided to disputing parties of dispute resolution forum.\textsuperscript{77}

The participant argued that there is no need for any linkage between these two justice systems. They could operate separately with people able to choose which one to use for accessing justice, with the state responsible for providing the necessary resources for both. He further stated that linking these two systems might disturb TJS operations because they might lose their simplicity and accessibility. According to him, state recognition of the TJS would suffice and allow them to retain their simplicity and accessibility for dispute resolution for people living in rural Nepal.\textsuperscript{78}

Two dispute settler interview participants from different districts (one from the Dhankuta district and the other from the Bardiya district) expressed similar views. For instance, the dispute settler from the Dhankuta district stated:

I do not think linking TJS and the FJS is necessary. Without linking with the FJS, we [Shir Uthaune dispute settlers] are resolving disputes and providing services to the people who seek justice. As a dispute settler, I think recognition of TJS as a forum for dispute resolution by the state is necessary. Personally, I am not happy to be a part of the FJS; I prefer that TJS should operate independently and provide a dispute resolution service to the users. There is no point of making TJS dependent on the state mechanism in the name of linking.\textsuperscript{79}

Among the expert interview participants, only one thought that TJS should be recognised by the state law, although there was no need to have a close relationship or linkage with the FJS.\textsuperscript{80} She stated:

From our ancestors’ time, TJS were functioning at the local level independently and they are meeting the justice needs of the people. Though TJS and the FJS both resolve disputes, the methods and procedures they use are different in many ways, such as in the TJS a dispute is taken as a social problem and is resolved according to the social and cultural norms [especially of the Indigenous peoples] but in the FJS formal laws

\textsuperscript{77} Interview with Bard-CO2 (6 December 2015).

\textsuperscript{78} Interview with Bard-CO2 (6 December 2015).

\textsuperscript{79} Interview with Dhan-DS5 (9 November 2015).

\textsuperscript{80} Interview with Kath-EX5 (15 August 2015).
apply. Therefore, I do not think there is any benefit in linking these two systems. However, it is an important human right of the Indigenous people that the state should recognise Indigenous people’s traditional dispute resolution process and institution.\textsuperscript{81}

This statement demonstrates how an Indigenous female thought that the state recognition of TJS is a matter of Indigenous people’s human rights but, according to her, there was no need for linkage between TJS and the FJS because these two systems operate separately.

Miranda Forsyth finds four advantages where a state recognises TJS as independent dispute resolution forums: (i) such a flexible relationship allows both systems to work independently and address local needs; (ii) the TJS is ‘able to define its own norms and procedural framework, allowing it to remain dynamic and legitimate at the grassroots level’;\textsuperscript{82} (iii) as ‘community agreement’ is the sole means for enforcing compliance, dispute settlers endeavour to demonstrate fairness while remaining loyal to their community’s values and norms; and (iv) TJS operate in rural areas where the FJS is not represented and ‘keep a high percentage of cases out of the state system with no cost to the state’.\textsuperscript{83}

\textbf{B \hspace{0.25cm} No Need for a Relationship between Traditional Justice Systems and the Formal Justice System}

More than one fifth of the interview participants (21 per cent) thought that there was no need for any linkage between TJS and the FJS in the Nepali context. In this research project (as mentioned earlier), I used the semi-structured in-depth interview method to gather data; therefore, participants were able to provide a number of different

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\textsuperscript{81} Interview with Kath-EX5 (15 August 2015).\textsuperscript{82} Forsyth, above n 1, 75.\textsuperscript{83} Ibid.
responses as to why there was no need of recognition or linkage between TJS and the FJS in the context of selected TJS in Nepal. The reasons supplied by the participants can be broadly categorised into two groups.

Firstly, three participants (one Indigenous and two from the Dalits group who were TJS users and an expert) thought that there was no need to link TJS with the FJS because, in their view, TJS were incapable of rendering justice; therefore, these systems do not need any linkage with the FJS — as abolition was preferable. According to them, there was no need for linking with the FJS because they do not follow any rules and regulations; rather, they are making biased and baseless decisions.\(^{84}\) Likewise, an interview participant from the Dalit community also expressed his views against linking TJS with the FJS as a dispute resolution mechanism as he favoured abolition of TJS. He too thought therefore that there was no need to link TJS with the FJS. In this regard, he stated:

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\text{I am in favour of abolishing the TJS because these systems are not able to provide justice to the Dalits, women and other weaker sections of the society. For me, linking TJS with the FJS means recognition and continuation of the TJS in some form and at some level. Therefore, I do not see any need of establishing a relationship between TJS and the FJS; rather they should be abolished.}^{85}\]

According to him, TJS should not be recognised and linked with the FJS; rather, he desired abolition of TJS because these systems were unable to provide justice to the Dalits, women and other marginalised groups in the society. Such comments reflected dissatisfaction with TJS, and a lack of trust in their processes and outcomes on the part of a minority group member. From the theoretical point of view, the views expressed

\(^{84}\) Interview with Mus-TJSU3 (2 September 2015); Interview with Mus-EX2 (3 September 2015). At the time of his interview with this researcher, the Indigenous TJS user from the Mustang district was not satisfied with the Mukhiya’s decision in his case. Therefore, he was against the Mukhiya system and their work.

\(^{85}\) Interview with Mus-EX2 (3 September 2015).
by the above mentioned three interview participants (one an Indigenous male TJS user, other two from the Dalits groups (one an expert and the other a TJS user)) indirectly support the situation of ‘legal centralism’ because of the problems they face in the TJS operation and despite any shortcomings of the FJS. According to John Griffiths, in the ideology of legal centralism:

Law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions … In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from a sovereign command … or from the bottom up as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s). 86

Griffiths describes the characteristics of legal centralism as the situation where all the law is made by the state and is equally applicable to all and administered by one set of institutions. This unified hierarchical normative ordering is based on state power and appears to be the opposite of legal pluralism with its parallel institutions. In legal centralism all other normative orderings (such as religion or family), to the extent they exist, are subordinate to that state law and institutions. Thus, in a system embodying legal centralism, there appears to be little or no space for customary law and special law for the groups with different needs such as Indigenous peoples, women and the poor. However, Griffiths argues that legal plurality is the reality ‘on the ground’ and legal centralism is a myth that is not applicable to the real situation which fails to reflect the ‘ideals’ of legal centralism. This is particularly the case for (but not limited to) colonial and post-colonial states where more than one set of societal values perhaps

86 Griffiths, above n 23, 3.
more frequently collide. Here legal pluralism — either ‘weak’ or ‘strong’ - is what actually exists.\(^87\)

The second category of interview participants (a total of nine, all from Indigenous groups) who thought there was no need for any relationship between TJS and the FJS belonged to different Indigenous groups (the Thakali, Tharu and Rai). These participants thought that TJS have an independent identity different to and separate from the FJS so that it is preferable for such a situation to continue. This group of interview participants expressed a concern that creating a formal relationship between TJS and the FJS may lead to a situation where the TJS will become dependent on the FJS, and in such a situation TJS would not be able to use Indigenous customs, traditions and values but rather they would increasingly need to follow formal law enacted by the state. That is, the nature of the TJS would change over time and these systems would become more an arm of the FJS and statutory legislation. For this group, the continuation of the parallel functioning of the systems was far more desirable and integral to the exercise of human rights of Indigenous people.

From a theoretical standpoint, this second group who opposed the idea of linking TJS with the FJS and preferred that TJS continue to function independently, supports the notion of strong legal pluralism as suggested by John Griffith.\(^88\) According to him, strong legal pluralism is a situation where ‘not all law is state law nor administered by a single set of state legal institutions’ and one where law ‘is therefore neither systematic nor uniform’.\(^89\) Similarly, Franz von Benda-Beckmann defines legal

\(^87\) Ibid 2, 4.
\(^88\) Ibid 5.
\(^89\) Ibid.
pluralism as ‘the theoretical possibility of more than one legal order or mechanism within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state.’ Both definitions of legal pluralism suggest that in a genuine situation of legal pluralism different forms of laws can co-exist in the same jurisdiction without formal legal validation by the state.

According to the participants in the second category, TJS risk losing their basic characteristics — such as informal setting, speedy dispute resolution, no or minimal cost associated with the justice process, the use of local language and even their adherence to locally and culturally relevant customs and traditions — if they are linked with the FJS. For example, a dispute settler who opposed the idea of linking TJS and the FJS argued:

I do not think there is any benefit of linking TJS with the FJS because TJS are working in informal settings and they follow flexible procedures. The TJS are following local customs, traditions and language in their operation and are functioning independently but linking with the FJS may lead to the situation where TJS need to follow government rules and regulations not the Indigenous groups’ customs and tradition. In my opinion, such a linkage is harmful for the continuation of the original nature of TJS, such as flexibility in procedures, informal settings etc.

He also expressed the view that Indigenous groups have a special relationship with their ancestral land and they follow traditional spiritual practices which are unfamiliar to non-Indigenous people and the FJS. In such a situation, linking TJS with the FJS might cause a problem in the continued traditional practices of the Indigenous groups. In order to preserve the original nature and cultural relevance of TJS and their modality of operation, the need to retain use of Indigenous language, spirituality, traditional

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91 Interview with Mus-DS2 (3 September 2015).
92 Interview with Mus-DS2 (3 September 2015).
practices and customs seems legitimate and valid. As Brynna Connolly also observed, linkage between TJS and the FJS may lead to a situation where Indigenous groups’ traditions, customs and institutional process may not continue in operation due to the encroachment of the formal law of the state.\textsuperscript{93} In the context of Nepal, this research emphasises the need to link TJS with the FJS without compromising the core values of TJS and the traditions, customs and institutional processes of Indigenous groups.

Similarly, interview participants who were educated and conscious of Indigenous peoples’ rights as well as the dominance of so-called high caste Brahmin and Chhetri in the Nepali FJS context expressed their views against linking TJS and the FJS.\textsuperscript{94} They wanted TJS to remain free from the FJS so that these systems will be able to protect the rights of Indigenous groups. For example, a dispute settler stated:

\begin{quote}
To continue Indigenous groups’ dispute resolution process and institution without any interference of the hegemonic group is a part of the human rights of Indigenous people. I think if we link TJS with the FJS, a situation will arise where the TJS need to follow state laws instead of the Indigenous groups’ customs and traditions. This amounts to the violation of Indigenous group’s rights.\textsuperscript{95}
\end{quote}

Two interview participants, who were both Indigenous, had the perception that the FJS was corrupt and biased towards rich and powerful people; therefore, they argued, the general population including women, Indigenous groups, Dalits, the poor and people living in rural areas would have less possibility of accessing justice through the FJS. Some expressed the view that if the TJS were linked with the FJS, corrupt practices, such as bribery and a bias towards elites, as well as lengthy formal procedures would be adopted by the TJS. This would have an adverse impact on poor and marginalised

\textsuperscript{93} Connolly, above n 1, 272.
\textsuperscript{94} Mus-DS3 and Dhan-DS3 have been dispute settlers and indigenous rights activists for decades and both have formal academic qualifications of a Bachelor of Arts.
\textsuperscript{95} Interview with Dhan-DS3 (8 November 2015).
people, resulting in their access to justice becoming quite impossible. For example, a TJS user from an Indigenous group stated:

I have heard that in the FJS corruption and bribery exist at every step. Therefore, only rich and powerful people can access justice thorough the FJS. If our TJS [Mukhiya in this case] is linked with the FJS, corrupt practice will start within the TJS; therefore, in my opinion, TJS should remain independent without any interference from the FJS so that TJS can serve rural people who are in poor economic circumstances.\(^\text{96}\)

Similar claims of corruption have surfaced in the past. In 2007, Transparency International found that ‘Nepal’s judiciary is perceived to be one of the most corruption-afflicted sectors in the country’\(^\text{97}\) and the Nepali courts are ‘riddled with irregularities in which court employees are the main actors, often in collusion with lawyers.’\(^\text{98}\) Similarly, in 2012 the Department of International Development, United Nations Resident and Humanitarian Coordination Office and Danida/HUGOU prepared a report, which assessed the security, justice and rule of law in Nepal. The Access to Security, Justice and Rule of Law in Nepal stated:

There is nonetheless evidence to support the view that elements in the Judiciary are subject to influences of coercion or corruption to produce perverse verdicts in cases involving the powerful or well-connected. There is also a widespread belief that judges have little enthusiasm for settling cases of common citizens that have been awaiting settlement for a long time, in some instances for several years, thus contributing to court backlogs.\(^\text{99}\)

Two dispute settlers and an expert interview participant who were all Indigenous also spoke about their lack of trust in the FJS and their resulting lack of support for linking TJS and the FJS. One of the two dispute settlers stated:

\(^{96}\) Interview with Mus-TJSU2 (1 September 2015).


\(^{98}\) Ibid 238.

We, Indigenous people, are not familiar with the formal court system and we do not feel that the FJS is for serving us. We feel that the court is run by others and for the purpose of serving others. Therefore, we do not think that linking with the FJS will bring any positive change to us. By tradition, we are not familiar with the formal procedures and preparing and maintaining documents, records and evidence; therefore, linking TJS with the FJS may bring more complexities to the Indigenous people that are using TJS.\textsuperscript{100}

The participant also found the FJS supported a notion of ‘otherness’ by its dismissal of the experiences of Indigenous people. Not only are Indigenous people unfamiliar with the FJS, more importantly they ‘do not feel the FJS … is for serving us’; rather it is ‘run by others … for serving others’.\textsuperscript{101} The ‘other’ is a key concept in post-colonial theory which, unlike colonial narratives, no longer privileges the colonial viewpoint but instead revisits the material from the colonised peoples’ perspective. Indeed, ‘the concept of the “other” has invariably been used to produce categories and images of non-European populations as appropriate (and convenient) to the political, legal, economic, and social state of Western civilisation at a given epoch’.\textsuperscript{102} This sense of ‘otherness’ of the Indigenous as opposed to national hegemonic groups extends to the experience of accessing justice, especially through the FJS. In the context of Nepal, generally Indigenous groups feel that they as positioned as ‘others’ when accessing the FJS; they therefore feel much more comfortable accessing justice through TJS and want these systems to remain untouched by others. The voices of Indigenous people in favour of not linking TJS with the FJS, but rather for retaining an independent dispute resolution system promotes the strong legal plurality as suggested by Griffiths and Benda-Beckmann.

\textsuperscript{100} Interview with Bard-DS5 (2 December 2015).
\textsuperscript{101} Interview with Bard-DS5 (2 December 2015).
CONCLUSION

The choice of a policy option for a specific country in relation to establishing linkage between TJS and the FJS should be based on the particular circumstances of the state, such as legal traditions, history, culture and the local population. In the Nepali context, in accordance with their knowledge and experience, research participants suggested a number of policy options ranging from the abolition to the independent functioning of the TJS. In relation to the reasons for linking TJS and the FJS, more than two thirds of participants (71 per cent) suggested that establishing such a linkage would bring positive change in relation to the accessibility of justice by the people using TJS. This is because if the TJS recognised as a form of dispute resolution and linked with the FJS, the people using TJS would be enabled to get justice according to their tradition and customs, in their vicinity, with lower costs, in informal settings and with their participation in decision making. This would enhance the situation of access to justice to the people who are currently using TJS. However, participants who thought there was a need to establish a TJS–FJS linkage suggested that TJS be reformed so that these systems better meet the justice needs of the people of Nepal in general and especially those of the rural population and Indigenous groups using the TJS. Finally, it can be concluded that in the Nepali context, TJS that operate in the rural areas need to be recognised as formal forums of dispute resolution through state legislation but details of the modalities for linkage between TJS and the FJS should be left to the local level bodies so that they can make arrangements in accordance with local justice needs and circumstances. Theoretically speaking, such TJS–FJS linking arrangements in Nepal can be described as ‘weak legal plurality’ (John Griffiths’ terminology). As a state party to the various international human rights instruments,

103 Connolly, above n 1, 238–9.
such as the *ICCPR*, the *ILO Convention 169* and the *UNDRIP*, Nepal is under an obligation to protect and promote the rights of Indigenous groups including their dispute resolution processes and institutions.104 Accommodating the rights of Indigenous groups and embracing legal plurality will allow state sovereignty to accommodate all TJS practised by rural populations or Indigenous groups across the country and ultimately contribute to improving access to justice in general and particularly for those using TJS in Nepal. Past research has also noted the need for an appropriate legal and policy framework recognising TJS and regulating the relationship between TJS and the FJS so that TJS can play an important role in providing access to justice in rural areas.105

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104 Detailed discussion in this regard appears in Chapters 3 and 7 of this thesis.
105 International Alert, Forum for Women and Legal Aid and Consultancy Centre, above n 1.
CHAPTER 9: CONCLUSION AND RECOMMENDATIONS

INTRODUCTION

This chapter summarises the major findings of this PhD research, presents conclusions and offers recommendations for improving access to justice in general and especially for the people who are using TJS in Nepal. It firstly revisits the research questions that were outlined at the beginning of this research. Secondly, based on the research findings and conclusions, recommendations are made as to how TJS in the Nepali context could better meet the justice needs of the people utilising these systems while at the same time protecting their human rights. Recommendations are also made in relation to the options for establishing a linkage between TJS and the FJS that would help achieve such aims.

This research addressed the following questions:

- What are the strengths and weaknesses of TJS in Nepal?
- To what extent do the TJS in Nepal deliver justice in accordance with the international principles of human rights?
- What type of relationship exists between TJS and the FJS in Nepal?
- What type of relationship should exist between TJS and the FJS so as to improve access to justice in Nepal?

In order to answer these questions, the structure and operation of TJS in three selected districts of Nepal were examined: the Shir Uthaune (Dhankuta), Mukhiya (Mustang) and Badghar (Bardiya). The research is primarily based on 58 semi-structured in-depth interviews with TJS and FJS stakeholders, including dispute settlers, judges, court officials, experts, and users of TJS and the FJS from four districts (Dhankuta,
Kathmandu, Mustang and Bardiya) of Nepal. All of the interviews were conducted face-to-face between July and December 2015 during a field visit to Nepal. Relevant secondary sources, such as books, journal articles, conference papers, and reports prepared by various national and international institutions (including the United Nations and the state agencies, such as the Supreme Court of Nepal) are used to support the analyses in this thesis.

The analyses in this thesis are informed by a number of theoretical frameworks — legal pluralism, a human rights-based approach (HRBA) and critical legal theories. As this research analyses the three selected TJS, each one of which is practised by one of three different Indigenous groups of Nepal, a ‘decolonising methodology’ approach, as recommended by Tuhiwai Smith¹ was used for the entire process of this research from project design to data analysis. This methodological approach enabled me to be mindful of and sensitive to Indigenous voices, their experiences, customs, culture and language.²

The following section, firstly, presents the summary of the major findings and conclusions based on the themes that have been analysed in the previous chapters of this thesis, and secondly, presents the way forward and recommendations for reforming, recognising and establishing an operational linkage between TJS and the FJS that contributes to improve access to justice in general and especially for the marginalised groups (such as women, Dalits, Indigenous groups and the poor) in Nepal.

² Chapter 4 presents the details in this regard.
I SUMMARY OF THE MAJOR FINDINGS AND CONCLUSIONS

With regards to their structure, operation and procedural rules, all three selected TJS were found to be similar in many ways although some differences did exist. In the Badghar and Mukhiya systems, an individual is selected or elected to act as a dispute settler, whereas in the Shir Uthaune system there is no individual or body of persons elected or selected but, rather, trusted elderly males serve as dispute settlers who are approached by disputants on an individual basis for any one dispute. The predominance of males as dispute settlers was evident in all three TJS, although in two rare exceptions Indigenous females in the Mustang and Bardiya districts were found to be working as a dispute settler (a Badghar in the Bardiya and a Mukhiya in the Mustang district). There was also an absence of Dalits as dispute settlers, with the sole exception of Dalit male dispute settler in the Bardiya district. No strict procedural rules guided the operation of TJS, including the dispute resolution process and implementation of any decision. Easy implementation of TJS decisions and their consequent high frequency of implementation are strengths of TJS in Nepal, unlike court decisions in the FJS where non-implementation or partial implementation is common.\(^3\)

A lack of inclusiveness of women, Dalits and minority groups in the TJS structure and dispute resolution process has attracted broader concern in the TJS literature in the context of Nepal. Similar concerns regarding women’s and minority or Indigenous participation in TJS of other countries (such as Indonesia, Bangladesh and Somalia) have also been expressed in the relevant literature.\(^4\) Non-participation or nominal

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participation of women and Dalits in the structure and operation in the selected TJS also reflects the patriarchal values entrenched in the society, including gender based discrimination, gendered division of labour, and women’s economic dependency on male family members. Caste based discrimination was also present.\(^5\) The analysis in Chapter 5 in relation to the exclusion, marginalisation, discrimination, and injustices faced by women and Dalits in general, and in the structure and operation of TJS in the Nepali context in particular, was informed by an adoption of an intersectional race and gender approach to the material so that gender, ethnicity and caste were considered together in conducting the analysis.\(^6\) Women are not a homogenous group in Nepal; their life experiences are different based on ethnicity, culture, caste, regional and religious groupings.\(^7\) As Seira Tamang, a noted feminist scholar from an Indigenous group in Nepal, argues, the idea of ‘Nepali women’ is a fiction in the context of Nepal’s ethnic diversity since their experience is shaped by gender, caste, ethnicity and


economic status.\textsuperscript{8} From an intersectional perspective, Dalit women are located at the bottom of the social hierarchy in general and in the process of dispute resolution through the FJS or TJS. Therefore, it is important to use an intersectional approach to analyse the experience by Dalits and Indigenous women of exclusion and subjugation in the TJS. Such a framework is also important for formulating policies to address such disparities.\textsuperscript{9} This research and past research has revealed that Dalit women experience exclusion in society, the family and in the TJS dispute resolution process on the basis of being Dalit, female and often also poor.\textsuperscript{10}

A number of reasons were revealed for using TJS for dispute resolution at the local level. These were that TJS: (i) embody the traditional practices of the Indigenous peoples in each location; (ii) are located geographically closer and are therefore more readily available than the FJS; (iii) are free of cost or cheaper than the FJS, (iv) provide speedier services as they operate with greater procedural flexibility and simplicity than the FJS; (v) offer dispute resolution process that respect local customs and traditions (including using local languages); (vi) are far more familiar to locals — especially the Indigenous peoples and the marginalised groups such as women, Dalits and the poor — who in some instances consider the FJS alien; and (vii) are in some situations the only available option for the resolution of disputes for the local people.


\textsuperscript{9} See Bishwakarma, Hunt and Zajicek, above n 7.

Weaknesses of the FJS in Nepal have also contributed to widespread use of TJS. For example, the FJS is not inclusive of women, *Dalits* and Indigenous groups;¹¹ nor is it accessible to these groups due to the costs associated with its use, obstacles posed by geographic distance, its use of formal language and complex procedures; and the prevalence of corrupt practices in the FJS.¹²

The TJS in Nepal, however, were not found to be free of shortcomings. The TJS resolve disputes without any formal authority from and recognition by the state. They are dominated by elderly males while women, *Dalits* and minority groups are often excluded and discriminated against in TJS structures and operations. There is uncertainty in the processes and outcomes and as the TJS operate in accordance with customs and traditions, on some occasions lapses were noticed in regards to respect for international human rights principles. As a result, TJS were found to be unable to protect the rights of these marginalised groups. In the Nepali context, *Dalits* have a lower status than other ‘castes’ under the caste system (even if the concept is explicitly forbidden by law, its residual impacts are widely felt) and *Dalit* women with their multiple disadvantages are at the bottom of the social hierarchy and experience manifold exclusions and exploitation.¹³

The situation regarding adherence to the international principles of human rights in the operation of TJS is a primary concern.¹⁴ This research revealed that all of the dispute


¹³ Sob, above n 5, 57.

¹⁴ See Ram B Chhetri and Shambhu P Kattel, *Dispute Resolution in Nepal: A Socio-Cultural Perspective* (Centre for Victims of Torture Nepal, 2004); Ingrid Massage, Satish Krishna Kharel and Hemang
settlers (17 in total) who were interviewed were not aware of the overarching international human rights principles embodied in a number of international instruments (such as the *Universal Declaration of Human Rights*) and more than two-thirds (70 per cent) of them thought that they do not need such knowledge because the TJS were operating according to the customs and tradition of the Indigenous peoples, not international human rights principles and state legislation. However, about one quarter (24 per cent) of the dispute settlers were found to be aware of the human rights of Indigenous peoples (such as those instituted in the *International Labour Organisation Convention 169 (ILO Convention 169)*) and the *United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)*.

Non-discrimination and equality before the law are fundamental rights recognised by the Constitution, the *International Covenant on Civil and Political Rights (ICCPR)* and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. The Supreme Court of Nepal has also upheld these rights. However, the interview participants in this research — 100 per cent of the expert interview

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participants, 66 per cent TJS users and 65 per cent of the FJS interview participants — shared either their experience of or the perception of the possibility of violation of the rights of non-discrimination and equal participation by women, Dalits and other minority groups during the operation of the selected TJS in Nepal.

Another issue is the use of torture. The Constitution and a number of international human rights instruments prohibit torture or physical or mental harm being inflicted in Nepal and provide for the right against torture for all people in Nepal. Evidence reveals that the use of torture, mental and physical harm or coercion in the TJS dispute resolution process is decreasing. However, the possibility of such behaviour in TJS settings is not ruled out completely. Past research has shown that torture is prevalent not only in the TJS in Nepal but also in the formal criminal justice processes, and that marginalised groups, such as Dalits, are more vulnerable to torture compared to so-called high caste people. The use of torture or undue physical force or intimidation in the justice process was confirmed by interviewees. This included when disputants or dispute settlers were attempting to obtain a party’s presence at a dispute settlement, or ensuring compliance with a judgement in a TJS matter, or during interview in relation to a police matter in the FJS. While the incidence may have fallen, the practice of obtaining a statement or confession under duress has not been eliminated nor has

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18 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘CAT’) art 2; ICCPR art 7; Constitution art 22(1); See Hemang Sharma, ‘Rights against Torture in Nepal: Commitment and Reality’ (2015)(4) International Human Rights Law Review 104.

19 See also Massage, Kharel and Sharma, above n 14, 19; Chhetri and Kattel, above n 14, 49.

20 Interview with Kath-EX4 (8 August 2015); Interview with Kath-CO1 (25 July 2015).

the use of a degree of intimidation in both the FJS and TJS in relation to ‘dropping’ a matter (or failing to appear) when this is desired by a more powerful party.

Again, Nepal is a nation defined as ‘multiethnic, multilingual, multi-religious, [with] multicultural characteristics and … geographical diversities’ and recognised Indigenous populations, and the ILO Convention 169, the ICCPR, and UNDRIP recognise the rights of Indigenous peoples (in Nepal as elsewhere), including the right to continue their customs, traditions, institutional processes and use of language. TJS in Nepal were found to be operating in accordance with the customs, traditions and institutional processes of the Indigenous peoples of particular locations, such as the Tharu and Thakali customs, culture and institutional process in the Bardiya and Mustang districts respectively. However, it was also revealed that the customs, culture, institutional process and language of the minority Indigenous groups and the Dalits were not recognised and respected but rather were ignored or violated in some instances.

II WAY FORWARD AND RECOMMENDATIONS

This research has confirmed earlier findings that one of the major problems the TJS in Nepal are facing is a lack of inclusiveness within their structure and operations. Therefore, appropriate reform initiatives are recommended below so that the TJS structure and operations become inclusive of all groups including women, Dalits and

24 Interview with Bard-CO4 (8 December 2015).
25 Pun and Malla, above n 4, 30; Danish Institute of Human Rights, above n 4, 11.
minority groups. Areas of additional research are also recommended that may be required for determining the best ways to not only encourage but achieve far greater inclusion across diverse TJS while remaining sensitive to their individual traditions and cultures in order to meet the justice needs of people using TJS in the Nepali context.

In Nepal, TJS are making a significant contribution in resolving disputes, but they are not recognised by the state as dispute resolution forums. Therefore, in order to strengthen the TJS and acknowledge the contribution they are making in resolving disputes, it is recommended that these systems be formally (that is, legally) recognised as forums for dispute resolution. In order to establish a link between TJS and the FJS, the Constitution or state law can ‘provide for official forms of collaboration (including appeal procedures, referrals, division of labour, advice, assistance and so forth), but, even where this is not the case, there are often various forms of unofficial collaboration’. In the Nepali context, this means that the Constitution (through required amendment) or statutory law made by the parliament can define all the TJS operating across the country as formal forums of dispute resolution. In such a situation, the TJS gain power and authority through constitutional or statutory provision. To maintain and particularise law in relation to an existing situation, legal provisions can provide power and authority to TJS within a particular territory or in relation to resolving certain types of disputes in a particular community. For example, a Nepali law can recognise the Badghar systems and provide power to resolve disputes among the Tharu population across the country. If, in the event that a party is not from the

26 A comprehensive study in this regard is lacking; however, it is estimated that only 15 per cent of total cases are resolved through the FJS. See Nepal Law Society, The Judiciary in Nepal: A National Survey of Public Opinion (2002) 15.

27 Danish Institute of Human Rights, above n 4, 9.
Tharu community, the disputing party has a right to choose whether to use TJS (Badghar) or other forums of dispute resolution such as the FJS. Likewise, a Nepali law can be formulated that enables the Mukhiya system to resolve disputes among the Thakali people within the Mustang district or across the country. Such constitutional or legal provision should clearly spell out the roles, responsibilities and jurisdiction of the TJS and its actors (such as dispute settlers, disputing parties). These need to be made clear so that the users and actors concerned (from TJS and the FJS) are able to function properly.

As discussed in Chapter 7, TJS dispute settlers are unaware of the international human rights principles and operate without meeting the required standards of international human rights. In some instances, they have been either unable to protect or have even violated the rights of the marginalised groups such as women, Dalits and minority groups, and this has contributed to compromising access to justice for disadvantaged people utilising TJS. For instance, although untouchability is prohibited and a crime punishable by the law, on some occasions in the TJS settings untouchability is still practised and victims of such discrimination have not been able to obtain justice.28 Similarly, the CEDAW Committee had in 2011 raised its concerns regarding the multiple forms of discrimination against women from disadvantaged groups (such as Dalits and Indigenous groups) and urged the Government of Nepal to take effective measures to combat such discrimination against women, such as the ‘adoption of legal provisions and comprehensive programmes, including public education and

awareness-raising campaigns involving the mass media and community and religious leaders.\textsuperscript{29} Hence it is important for TJS stakeholders to be trained and utilise that knowledge and skill on how to apply these international principles of human rights that are relevant to access to justice in the TJS dispute resolution process and outcomes. Their capacity needs to be enhanced by making them aware of the relevant provisions of the Constitution and state law so that TJS will be able to protect the rights of the people who access their services. It is also an obligation of the state to ensure that people’s fundamental and legal rights that are enshrined in the Constitution, the statutory laws of the country, and the international human rights instruments are respected, protected and fulfilled.\textsuperscript{30} Therefore, the Government of Nepal is required to take the measures necessary to ensure that the rights of the people — especially marginalised groups, such as women, \textit{Dalits} and minority groups — are respected and protected in the structure and operation of TJS. Not only this research but past research has highlighted the need for ‘systematic reforms that address the deeply entrenched prejudices and structural failures that make the justice system inaccessible to the majority of Nepali people, and especially those from the \textit{Dalit} community.’\textsuperscript{31} A 2011 UNOHCHR study pointed out the need for awareness raising programs on \textit{Dalit} issues (especially in rural areas), inclusion of \textit{Dalits} in justice related institutions (such as courts, police), and empowering the \textit{Dalit} community with education and poverty reduction programs so that they become able to seek and obtain justice.\textsuperscript{32}


\textsuperscript{31} UNOHCHR Nepal, \textit{Opening the Door to Equality}, above n 12, ii.

\textsuperscript{32} Ibid 83–5.
This research has confirmed that Dalit women experience various forms of discrimination and exclusion in the society, as well as in the TJS dispute resolution processes, compounding issues related to access to justice. However, before initiating any reform in the justice system (TJS and the FJS), one should be mindful of the fact that the justice reform initiatives are not short term technical exercises but long-term processes that are ‘bound up in the complexities of culture, socio-economic realities and politics’ of the nation. Therefore, it is recommended that necessary legal and policy measures should be initiated that guarantee an equal number of female dispute settlers in the TJS; and legal provision should ensure a fair representation of women (including Dalit and Indigenous women), Dalits and other minority group members in the decision-making body of each TJS operating in Nepal. Inclusion of women in decision making is important because women’s experiences and needs are different from those of men and laws and legal institutions mostly fail to recognise and embrace the experiences of women and thus can be an instrument to silence women.

It was revealed that TJS lack a system of record keeping for the processes and outcomes of the dispute resolution and mostly they operate verbally. It is anticipated that written record keeping would make TJS operation ‘monitoring easier and has the potential of simultaneously increasing accountability of informal justice mechanisms within communities and facilitate their monitoring’.

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36 Wojkowska, above n 4, 37.
promotes ‘transparency, enhances oversight, strengthens enforcement mechanisms and, in some circumstances, promotes legal certainty’,\textsuperscript{37} sometimes which have been evident in countries such as Malawi,\textsuperscript{38} the Philippines\textsuperscript{39} and Sierra Leone\textsuperscript{40} where record keeping has been initiated. Once there is record keeping of TJS procedures and outcomes, disputing parties can obtain copies of decisions, which can be useful for preventing future disputes in similar cases.\textsuperscript{41} Therefore, in order to assist TJS become more predictable, which promotes the perception of procedural justice,\textsuperscript{42} and in outcomes, it is recommended that a system of proper record keeping be established.

The exact nature of the record keeping, storage of information and its dissemination in the specific TJS (and perhaps across various TJS and the FJS) would need to be carefully researched to achieve the best outcome for the investment that would be required. For example, necessary regulations can be formulated that manage the method of record keeping of the TJS operation, such as a record book that needs to be maintained for the registration of disputes within the TJS. In addition, formats should be prescribed for recording an agreement or decision so that uniformity can be maintained among TJS. A system of safe deposition of all the records should be in place in the TJS office so that such records can be accessed for purposes such as the monitoring of TJS decisions, research or other necessary purposes.

\textsuperscript{37} Danish Institute for Human Rights, above n 4, 25.
\textsuperscript{38} Ibid 19.
\textsuperscript{39} Wojkowska, above n 4, 51.
\textsuperscript{40} See Braima Koroma, \textit{Local Courts Record Analysis Survey in Sierra Leone} (Institute of Geopgraphy and Development Studies, Niala University, 2007). The Local Court in Sierra Leone is the only institution with lawful authority to adjudicate cases governed by customary law as established by or under the Local Courts Act 1963 (Sierra Leone).
\textsuperscript{41} Danish Institute for Human Rights, above n 4, 25.
The Government of Nepal is obliged to ensure Indigenous peoples’ right to utilise their law, customs, traditions, languages and traditional dispute resolution processes while accessing justice in accordance with the international principles of human rights, especially ILO Convention 169, the ICCPR and UNDRIP. For example, in order to recognise Indigenous law, customs, and traditions (including dispute resolution processes), the Nepali Constitution or statutory legislation could reflect the principles in Article 246 of the Constitution of Columbia which provides:

The authorities of the Indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic. The law shall regulate the way this special jurisdiction will relate to the national judicial system.

It is recommended that the government protects the rights of Indigenous groups in the operation of TJS. In order to do so, the government needs to, as a minimum: (i) recognise TJS that are practised by Indigenous groups in Nepal as formal dispute resolution forums; (ii) allow TJS to use Indigenous law, local language, customs, traditions and dispute resolution practices; and (iii) ensure government agencies (such as police, administration) cooperate with the TJS stakeholders to continue and strengthen TJS functioning. For example, arrangements that allow TJS to use customary rules in their operation have already been adopted in Bangladesh and the Philippines (Shalish and Barangay justice systems respectively).

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43 Chapter 7 presents a detailed analysis in this regard.


The right to appeal is considered an essential element for an accountable and transparent justice system but, in many instances, TJS in Nepal lack such a system.\footnote{Wojkowska, above n 4, 22.} In general, there is no provision of an appeal in the Nepali TJS context. Therefore, it is recommended that a system of appeal against a decision of TJS be created and formalised. The right to hear an appeal against a decision of a TJS could be given to the local level body’s judicial committee (not the District Court) where that committee would be required to apply customs, laws and traditions of the TJS in its deliberations. Thus, if an appeal is filed against the decision of a Badghar, that appeal should be heard according to the customs, laws and traditions of the Tharu group. This would require the judicial committee members to increase their knowledge, perhaps substantially, of material other than the country’s enacted legislation. It would also be a move towards a stronger form of legal pluralism as such an appeal system would not be linked to the FJS courts (see below). Capacity enhancement of both TJS decision makers / dispute settlers and the local judicial committees is integral to the implementation of any such appeal system linkage.

The work of TJS has not been formally recognised by the state — their role as dispute resolution mechanisms is largely ignored in Nepal. Therefore, to strengthen TJS and recognise their work, it is recommended that a system of coordination be established between the TJS and a state body, such as a local level government body. In the Nepali governance hierarchy, the local level body lies at the bottom. According to the Constitution, federal government functions at the centre and highest level of responsibility (as federal government represents the apex of the government structure),
provincial government operates at the province level, and local level government functions at the local community level.47

This research identified a variety of options for linking TJS and the FJS that were broadly categorised into three different groups that are discussed in Chapter 8 of this thesis. Among the interview participants who favoured the linkage of TJS and FJS, the majority (70 per cent) thought that the TJS need to be linked with the local level governance body. From the theoretical perspective, the majority this view is in support of ‘weak legal pluralism’, as defined by John Griffiths.48 In the context of Nepal, this would mean that the TJS would be linked with the FJS as dispute resolution forums either by the Constitution or statutory law, and that these systems would work within the national legal framework established by the nation’s Constitution and statutory laws. Practically speaking, if this model is adopted in Nepal for establishing a relationship between TJS and the state, all the TJS practised in Nepal would need to be recognised as dispute resolution forums by the Constitution and/or the state law, and the TJS would operate within the legal framework of the Constitution and/or relevant state law. The reasons provided for linking TJS with the local bodies included geographical proximity, familiarity of community people with the local level bodies, familiarity of people in the local level bodies with the local customs, tradition and language that are used in the TJS, and the constitutional provision of judicial authorities to the local level bodies. In relation to the way that local bodies contribute to the TJS, the interview participants thought that constitutional or legislative recognition of the TJS as dispute resolution forums is necessary, as is provision of

47 See Chapter 8 and for detailed discussion on local level bodies and their judicial powers.
48 John Griffiths, ‘What is Legal Pluralism?’ (1986) 24(1) Legal Pluralism and Unofficial Law 1, 5. Detailed discussion in this regard can found in the theoretical framework and Chapter 8 of this thesis.
financial support, office space, record keeping arrangements, furniture, stationary and
capacity enhancement activities for the TJS actors so that they can meet the justice
needs of the people. Such an arrangement linking TJS with the local level government
is practised in Bangladesh where Salish (a form of TJS) is linked with the Union
Parishad (the lowest unit of elected government). The Salish is empowered to settle
civil disputes and petty criminal offences, in rural and urban areas respectively.49

Coordination among TJS and government bodies (such as the law ministry, courts and
police) would permit the state to provide TJS with financial and other assistance. This
may include human resources, office space and stationery; and capacity enhancement
activities in response to an on-going needs-based assessment of the country’s TJS.

Programs of interaction should also be organised to facilitate the sharing of
experiences in the operation of TJS and FJS among TJS and the FJS actors. Such
interaction would support both justice systems to understand each other’s strengths
and weaknesses and encourage the TJS and FJS to work in a coordinated manner that
encourages the referral of cases where needed. Therefore, it is recommended that
regular (at least biannually) meetings of TJS and the FJS stakeholders (including
dispute settlers from the TJS and judicial staff from the FJS) are held so that they can
share their experiences on subjects such as methods of dispute resolution; inclusion of
women, Dalits and minority groups in the decision making process; the human rights
concerns of the disputing parties; record keeping; and speedy resolution of disputes.

49 Golub, above n 45, 7. An examination of the workings of both the government-facilitated and rural
traditional Salish provides a note of caution. For potential and actual abuses (often detrimental to women
and the poor) in both the government facilitated and the traditional Salish, the role of political influence
and corruption, see Golub, above n 44, 3, 6–7; Sarwar Alam, Perspectives of Self, Power, & Gender
among Muslim Women: Narratives from a Rural Community in Bangladesh (Palgrave Macmillan,
2018) 57.
Matters related to possible cooperation on issues that are relevant for easy access to justice for the people could also be discussed.

As Golub suggests, approaches to reform and linking TJS with the FJS should be based on a ‘careful analysis of their [TJS] functioning as they may differ from village to village’. Therefore, the experience of justice seekers and systems (both formal and informal) that operate to meet their needs in other contexts (nationally and internationally) can be inspiring but there can be no ‘one-size-fits-all’ model in this regard. The nature of the reforms required to produce locally responsive, culturally sensitive TJS that are still able to interlock or function effectively with each other and the FJS, require careful consideration to produce workable solutions, for justice seekers. An example of existing differences (as discussed in Chapter 5) that may or may not be accommodated is the way dispute settlers are appointed. In the Shir Uthaune system in the Dhankuta district there is no pre-selected individuals or body identified as possible dispute settlers. Rather, dispute settlers are selected on a case-by-case basis. This contrasts with the approach used in the Badghar and Mukhiya systems (in the Bardiya and Mustang districts of Nepal) where there is a provision of pre-selected dispute settlers. This example illustrates that responses need to be mindful of the local community context in which the TJS is based.

This research revealed that the FJS stakeholders were not well informed in relation to the operation of TJS across the country in Nepal. Therefore, TJS related materials should be included in the law curricula of law colleges, judicial service exams and legal practice exams so that law students and those who training to be lawyers and

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judicial officers will be knowledgeable about TJS. Such knowledge will enable lawyers and judicial officers to understand the role of TJS in access to justice in Nepal and the need to coordinate the TJS and the FJS while working with the FJS. Legal awareness programmes for community people can help them to learn about their rights and recognise violation of their rights by TJS dispute settlers and thus enable them to take appropriate action in the event of any rights violations.  

This (and prior) research has identified that there is a lack of systematic documentation in relation to the number of TJS that are in operation in Nepal. Prior to this study, national and international researchers had not studied TJS and FJS engagement ‘within the larger state structure … in depth’. The research here presented is able to provide some insights and recommendations in relation to the operation of TJS and linking TJS and the FJS in Nepali context.

Research and publications about TJS not only contributes to the TJS stakeholders but also ‘helps judges and other staff of the formal justice system to better understand and take into consideration indigenous methods of justice when they have to deal with cases relating to Indigenous peoples’. It is recommended that further research is undertaken to identify the number of TJS that are operating in Nepal (this research covers three of the 77 districts of Nepal) and where and how they are operating. It is critical that these be systematically documented and their structure and operation


52 Rajendra Pradhan, Legal Anthropology and Traditional Disputing Process in Nepal (Access to Justice Programme, UNDP/Nepal, 2005) 78–80; Massage, Kharel and Sharma, above n 14; Coyle and Dalrymple, above n 52.

53 Connolly, above n 45, 239.

54 United Nations Development Program, above n 51, 103.
analysed as well as the necessary reform measures identified before formulating national policies, plans and programmes in relation to recognition of TJS, linking TJS with the FJS, and initiating necessary reforms in the TJS. It is also recommended that such research be informed by the relevant theoretical frameworks, such as the human rights framework, legal pluralism and an intersectional framework, so that decision makers will be able better able to take into account the rights as well as experiences of Indigenous groups, Dalits, women and other minority groups in Nepal in the research and in policy formulation.
APPENDICES

APPENDIX 1: FORMAL AND INFORMAL JUSTICE ACTORS/Mechanisms in Nepal

Institutions having the authority to decide or mediate cases

Institutions providing support

→ Provides training/capacity building support

→ Provides case referral and other support
APPENDIX 2: INTERVIEW QUESTIONS ASKED TO THE INTERVIEW PARTICIPANTS

Questions relating to the formation of dispute settlement body

- Could you please explain the process of selecting/electing dispute settlers?
- Could you please explain the composition of dispute settlement body?
  - Number of male and female
  - Number of members from *Dalits* community
  - Number of members from Indigenous community
- How long is tenure of a dispute settler?
- Is re-election/reappointment possible?
  If yes, how may terms?
- Is there any process of removing a dispute settler before his/her term? If yes, what are the grounds? What is the process for such removal?
- Do any educational qualification needed to be appointed as dispute settler?
- Do you have any knowledge of international human rights standards?
- Do you have any knowledge of national law?

Questions relating to the process of dispute settlement

- Could you please explain how a case is referred to you?
- Could you please explain the process of dispute settlement?
- How a decision made by TJS implemented? Have you ever faced any problem on implementing decision of TJS? If yes, explain how such problems were solved.
- What is the role of women, *Dalit*, youth and minority groups in the dispute settlement process?
- What are the cases you deal with?
• Do the TJS (process and outcomes) respect following rights of parties?
  o Non-discrimination (especially women, child, Dalit and poor people, marginalised)
  o Equal opportunity to clarify their position during the process,
  o Absence of physical punishment or cruel, inhuman or degrading behaviour

• Do you have any formal or informal relations with the FJS or other dispute solving forums (Police, Courts, and Village Development Committee etc.)?

• Do you charge any fee to the disputing parties?

• Do you get paid for the work you do as a dispute settler?

• In your opinion, what are the strengths of TJS?

• In your opinion, what are the weaknesses of TJS?

• What are the problems you are facing while working as a dispute settler?

• What are the measures, in your opinion, that can be taken to make the TJS more effective in terms of dispute settlement process?

• What are the measures that can be taken to improve TJS so that they better meet the justice needs of TJS users?

• Do you have anything to add

• Is there anyone else I should talk to?

Questions asked of the users of TJS included:

Questions relating to the formation of dispute settlement body

• Could you please explain the process of selecting dispute settlers?
• What are the qualifications for becoming a dispute settler?
• Could you please explain the composition of dispute settlement body?
  o Number of male and female
  o Number of members from *Dalits* community
  o Number of members from Indigenous community
• Is there any process of removing a dispute settler before his/her term? If yes what are the grounds and who decides? What is the process for such removal?
• Do the dispute settles have any knowledge of international human rights standards?
• Do the dispute settles have any knowledge of national law?

Questions relating to the process and outcomes of dispute settlement

• Who sets the process of dispute settlement?
• Who decides the venue for dispute settlement?
• Who decides the date for dispute settlement?
• Is the date, venue, time and process for dispute settlement fixed with the consent of disputing parties?
• Did you get enough opportunity to explain your arguments during the process of dispute settlement?
• Is the hearing of all types of cesses conducted in public? If not please explain.
• Could you please explain the process of dispute settlement in the TJS?
• Were you satisfied with the TJS process (selection of dispute settlers, case hearing, dealing with parties, outcomes etc.)?
• Do the TJS (process and outcomes) respect following rights of parties?
Non-discrimination (especially women, child, Dalit and poor people, marginalised),

Equal opportunity to clarify their position during the process,

Absence of physical punishment or cruel, inhuman or degrading behaviour

- Could you please explain why you chose TJS for dispute settlement?
- Were you satisfied with the outcomes?
- If you were not satisfied will you be taking any further steps?
- In your opinion how can the TJS be strengthened so that it better meets the needs of the people using it?
- Do you think that linkages between TJS and the FJS may contribute for improved service?
- If yes, how can TJS and the FJS can be linked?
- Do you have anything to say in this regard?
- Is there anyone else I should talk to?

Question asked to the experts

- Could you please explain the reasons why people use TJS?
- In your opinion, what are the strengths of TJS?
- In your opinion, what are the weaknesses of TJS?
- How do you think TJS can be made more effective in terms of process and outcomes?
- Do the TJS (process and outcomes) respect following rights of parties?
- Non-discrimination (especially women, child, Dalit and poor people, marginalised),
- Equal opportunity to clarify their position during the process,
- Absence of physical punishment or cruel, inhuman or degrading behaviour

- Do you think that linkages between TJS and the FJS may contribute for improved services?
- If yes, how can TJS and the FJS can be linked?
- Do you have anything to say in this regard?
- Is there anyone else I should talk to?

Questions asked of the FJS actors included

- In your opinion, to what extent the FJS meets justice needs of marginalised groups (e.g., Women, Dalits, Indigenous groups, poor)?
- What are the problems the FJS facing to cater for justice needs of marginalised groups?
- In your opinion, what are reasons for using TJS by community people?
- Are there any relationship (formal/informal) between TJS and the FJS?
- Do you think relationship between TJS and the FJS contribute for improving access to justice for the marginalised groups?
  
  Yes □  No □

- If yes, what should be the relationship between TJS and the FJS?
- Do you have anything to say in this regard?
- Is there anyone else I should talk to?
In your opinion, what are reasons for using TJS by community people?

Could you please explain strengths and weaknesses of TJS?

Do the TJS (process and outcomes) respect following rights of parties?
  - Non-discrimination (especially women, child, Dalit and poor people, marginalised),
  - Equal opportunity to clarify their position during the process,
  - Absence of physical punishment or cruel, inhuman or degrading behaviour

How do you think TJS can be made more effective in terms of process and outcomes so that they better meet the justice needs of the people using it?

Do you feel need of linking TJS with FJS for improving access to justice in Nepal?

If yes, how TJS and the FJS can be linked?

Is there anyone else I should talk to?
APPENDIX 3: CONSENT FORM AND INFORMATION SHEET

Consent Form for Interview Participants from Traditional Justice Systems

Improving Access to Justice: A Study of Traditional Justice Systems
(A Case Study of Nepal)

Researchers/Investigators:

Supervisor/Principal Investigator: Professor Elena Marchetti

Co-Supervisor/Investigator: Professor Nan Seuffert

Student/Co-investigator: Rajendra Ghimire

I have been given information about research project ‘Improving Access to Justice: A Study of Traditional Justice Systems (A Case Study of Nepal)’ and discussed the research project with Rajendra Ghimire who is conducting this research as part of a PhD research supervised by Professor Elena Marchetti and Professor Nan Seuffert in the Faculty of Law, Humanities and the Arts at the University of Wollongong.

I have been advised of the potential risks and burdens associated with this research, and have had an opportunity to ask Rajendra Ghimire any questions I may have about the research and my participation. I understand that my participation in this research is voluntary, I am free to refuse to participate and I am free to withdraw from the research at any time. My refusal to participate or withdrawal of consent will not affect
me anyway. I understand that the interview will be recorded but that my identity will be protected and my responses will be reported in a de-identified manner.

If I have any enquiries about the research, I can contact Prof Elena Marchetti (email: elenam@uow.edu.au and phone no: +61 42214632), Professor Nan Seuffert (email: nseuffer@uow.edu.au and phone no: +61 242392550) and Rajendra Ghimire (email: rg984@uowmail.edu.au and phone no: +61 0450116408) and or if I have any concerns or complaints regarding the way the research is or has been conducted, I can contact the Ethics Officer, Human Research Ethics Committee, Office of Research, University of Wollongong on +61 4221 3386 or email rso-ethics@uow.edu.au.

By signing below, I am indicating my consent to participate in an audio taped interview for 30-60 minutes with the researcher asking me about traditional justice systems I am using for dispute settlement. I understand that the data collected from my participation will be used primarily for a PhD thesis, and will also be used for publication, and I consent for it to be used in that manner.

Signature:

................................................................. ....../...../......
Participant

................................................................. ....../...../......
Date:

................................................................. ....../...../......
Rajendra Ghimire
Date:
Rajendra Ghimire is a practicing lawyer, having interest in the field of promoting access to justice for the marginalised groups in Nepal, currently conducting a PhD research in the Faculty of Law, Humanities and the Arts, University of Wollongong. The objective of his PhD research is to explore the extent to which traditional justice systems (TJS) in Nepal accord with international human rights principles and to find the potential relationships between TJS and the formal justice system (FJS) to improve access to justice in general and especially, for the users of TJS in the Nepal. His principal supervisor is Professor Elena Marchetti and co-supervisor is Professor Nan Seuffert.

Rajendra’s PhD research aims to strengthen the academic discussion about access to justice in Nepal. This project potentially benefits to the users of TJS because it aspires
to find and recommend practical ways on how TJS may be reformed so as to meet international human rights standards. He also seeks to establish a relationship between TJS and the FJS that, in turn, leads to improved access to justice to the users of TJS in Nepal. Likewise, the project seeks to increase access to justice for the users of TJS in Nepal by recommending possible reforms drawn from discussions with research participants and on analysis of scholarly work on the issue. His PhD project aims to analyse dispute settlement practices of three Indigenous groups - Tharu, Rai and Thakali - of Nepal.

Rajendra would like to interview you to talk about your perspective of overall functioning of selected TJS, the possible relationship between TJS and the formal justice system (FJS) to improve access to justice and adherence of human rights standards in the FJS. It is envisaged that the interview will take about 30-60 minutes. All the information gathered will remain completely confidential and your anonymity will be protected. Apart from your time for the interview, we can foresee no risks for you. Apart from your time for the interview, we can foresee no risks for you. However, if the situation of distress arises (a) immediately the interview will be ended and (b) arranged to refer you to the Dhankuta District Hospital, Hulak Tole, Thadobazar Street, Dhankuta Municipality or the B. P. Koirala Institute of Health Sciences, Buddha Road, Dharan, Sunsari.

Your participation in the research is voluntary, and you are free to end the interview at any time and withdraw any data that you have provided to that point. The decision not to participate, or to withdraw from the research, you will not be penalised in any way. Rajendra would like to audiotape the interview and he is seeking your consent to do that. If at any point in the interview you would like Rajendra to stop the recorder,
he will of course do so. The reason for recording the interview is so that he has an accurate record of what was discussed during the interview for analysis. Once transcribed and analysed the recording will be destroyed. The data will be stored in a locked filing cabinet and password protected computer in the Building 67, room no. 235, UOW. The data will be accessed only by the researchers. The data collected from my participation will be used primarily for a PhD thesis, and will also be used for publication.

The examples of questions Rajendra is going to ask to you are: in your opinion, to what extent does the FJS meet the justice needs of marginalised groups (e.g., Women, Dalits, Indigenous groups, poor)? How do you think TJS can be made more effective in terms of process and outcomes so that they better meet the justice needs of the people using it? Are there any relationships (formal/informal) between TJS and the FJS? Do you think there should be a relationship between TJS and the FJS in order to improve access to justice for marginalised groups? If yes, what should that relationship be?

Should you have any questions about the research project, please do not hesitate to contact Rajendra by telephone on +61 0450 116409 or by email on rg984@uowmail.edu.au.

The University requires that all interview participants be informed that this study has been reviewed by the Human Research Ethics Committee (Social Science, Humanities and Behavioural Science) of the University of Wollongong. If you are not happy with the way this research has been conducted, you can contact the Ethics Officer at the University on (02) 4221 3386 or email rso-ethics@uow.edu.au.
This research is funded by a scholarship from the University of Wollongong and the field research is supported by Open Society Foundations. Rajendra’s thesis will be completed sometime in 2017. At that time a summary of his findings will be available if requested.

Thank you for taking the time to read this information sheet and for your anticipated participation in this study.

Interview Participants Information Sheet for the Interview Participants from Traditional Justice Systems

Improving Access to Justice: A Study of Traditional Justice Systems

(A Case Study of Nepal)

Investigators/Investigators:

Principal Investigator/Supervisor: Professor Elena Marchetti
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PhD Candidate: Rajendra Ghimire
Faculty of Law, Humanities and the Arts
University of Wollongong, NSW 2522
Phone: +61 450116409
Rajendra Ghimire is a practicing lawyer, having interest in the field of promoting access to justice for the marginalised groups in Nepal, currently conducting a PhD research in the Faculty of Law, Humanities and the Arts, University of Wollongong. The objective of his PhD research is to explore the extent to which traditional justice systems (TJS) in Nepal accord with international human rights principles and to find the potential relationships between TJS and the formal justice system (FJS) to improve access to justice in general and especially, for the users of TJS in the Nepal. His principal supervisor is Professor Elena Marchetti and co-supervisor is Professor Nan Seuffert.

Rajendra’s PhD research aims to strengthen the academic discussion about access to justice in Nepal. This project potentially benefits to the users of TJS because it aspires to find and recommend practical ways on how TJS may be reformed so as to meet international human rights standards. He also seeks to establish a relationship between TJS and the FJS that, in turn, leads to improved access to justice to the users of TJS in Nepal. Likewise, the project seeks to increase access to justice for the users of TJS in Nepal by recommending possible reforms drawn from discussions with research participants and on analysis of scholarly work on the issue. His PhD project aims to analyse dispute settlement practices of three Indigenous groups - Tharu, Rai and Thakali - of Nepal.

Rajendra would like to interview you to talk about the overall functioning of selected TJS, selection of dispute settlers, state of adherence to international human rights standards, process of dispute settlement, strategies used to make decisions, strengths and weaknesses of TJS, and the possible relationship between TJS and the formal
justice system (FJS) to improve access to justice. It is envisaged that the interview will take about 30-60 minutes. All the information gathered will remain completely confidential and your anonymity will be protected. Apart from your time for the interview, we can foresee no risks for you. However, if the situation of distress arises (a) immediately the interview will be ended and (b) arranged to refer you to the Dhankuta District Hospital, Hulak Tole, Thadobazar Street, Dhankuta Municipality or the B. P. Koirala Institute of Health Sciences, Buddha Road, Dharan, Sunsari.

Your participation in the research is voluntary, and you are free to end the interview at any time and withdraw any data that you have provided to that point. The decision not to participate, or to withdraw from the research, you will not be penalised in any way. Rajendra would like to audiotape the interview and he is seeking your consent to do that. If at any point in the interview you would like Rajendra to stop the recorder, he will of course do so. The reason for recording the interview is so that he has an accurate record of what was discussed during the interview for analysis. Once transcribed and analysed the recording will be destroyed. The data will be stored in a locked filing cabinet and password protected computer in the Building 67, room no. 235, UOW. The data will be accessed only by the researchers. The data collected from my participation will be used primarily for a PhD thesis, and will also be used for publication.

The examples of questions Rajendra is going to ask to you are: Could you please explain the process of selecting/electing dispute settlers? How long is the tenure of a dispute settler? Is re-election/reappointment possible? If yes, how many terms? What is the process of removing a dispute settler before his/her term? On what grounds? Could you please explain the reasons for choosing TJS? Why did you choose the TJS
and not the FJS? Do TJS have any relation with the FJS? Do you think linkages between TJS and the FJS may contribute for improved services? If yes, how to establish a linkage? Did the internal armed conflict (between Maoist rebels and the Government security forces) affect the functioning of TJS? If yes, please explain the way it impacted.

Should you have any questions about the research project, please do not hesitate to contact Rajendra by telephone on +61 0450 116409 or by email on rg984@uowmail.edu.au.

The University requires that all interview participants be informed that this study has been reviewed by the Human Research Ethics Committee (Social Science, Humanities and Behavioural Science) of the University of Wollongong. If you are not happy with the way this research has been conducted, you can contact the Ethics Officer at the University on (02) 4221 3386 or email rso-ethics@uow.edu.au.

This research is funded by a scholarship from the University of Wollongong and the field research is supported by Open Society Foundations. Rajendra’s thesis will be completed sometime in 2017. At that time a summary of his findings will be available if requested.

Thank you for taking the time to read this information sheet and for your anticipated participation in this study.
APPENDIX 4: LIST OF LOCAL LEVEL POWER AND CONCURRENT POWERS OF FEDERATION, STATE AND LOCAL LEVEL

Schedule 8 - List of Local Level Power

(Relating to clause (4) of Article 57, clause (2) of Article 214, clause (2) of Article 221 and clause (1) of Article 226)

1. Town police
2. Cooperative institutions
3. Operation of F.M.
4. Local taxes (wealth tax, house rent tax, land and building registration fee, motor vehicle tax), service charge, fee, tourism fee, advertisement tax, business tax, land tax (land revenue), penalty, entertainment tax, land revenue collection
5. Management of the Local services
6. Collection of local statistics and records
7. Local level development plans and projects
8. Basic and secondary education
9. Basic health and sanitation
10. Local market management, environment protection and biodiversity
11. Local roads, rural roads, agro-roads, irrigation
12. Management of Village Assembly, Municipal Assembly, District Assembly, local courts, mediation and arbitration
13. Local records management

14. Distribution of house and land ownership certificates

15. Agriculture and animal husbandry, agro-products management, animal health, cooperatives

16. Management of senior citizens, persons with disabilities and the incapacitated

17. Collection of statistics of the unemployed

18. Management, operation and control of agricultural extension

19. Water supply, small hydropower projects, alternative energy

20. Disaster management

21. Protection of watersheds, wildlife, mines and minerals

22. Protection and development of languages, cultures and fine arts

**Schedule 9: List of Concurrent Powers of Federation, State and Local Level**

(Relating to clause (5) of Article 57, Article 109, clause (4) of Article 162, Article 197, clause (2) of Article 214, clause (2) of Article 221, and clause (1) of Article 226)

1. Cooperatives

2. Education, health and newspapers

3. Health

4. Agriculture

5. Services such as electricity, water supply, irrigation

6. Service fee, charge, penalty and royalty from natural resources, tourism fee
7. Forests, wildlife, birds, water uses, environment, ecology and bio-diversity

8. Mines and minerals

9. Disaster management

10. Social security and poverty alleviation

11. Personal events, births, deaths, marriages and statistics

12. Archaeology, ancient monuments and museums

13. Landless squatters management

14. Royalty from natural resources

15. Motor vehicle permits
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