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NEPAL RULE OF LAW ASSESSMENT

FINAL REPORT

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NEPAL RULE OF LAW ASSESSMENT

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ACRONYMS

ADR	Alternative dispute resolution
CA	Constituent Assembly
CIAA	Commission on the Investigation of Abuses of Authority
CDO	Chief District Officer
CPN-Maoist	Communist Party of Nepal (Maoist)
DANIDA	Danish International Development Agency
DFID	Department for International Development of the United Kingdom
DSC	District Security Committee
EU	European Union
FNCCI	Federation of Nepal Chambers of Commerce and Industry
ICITAP	International Criminal Investigative Training and Assistance Program, US Department of Justice
ICT	Information and communications technology
KSL	Kathmandu School of Law
LPC	Local peace committee
NC	Nepal Congress Party
NGO	Nongovernmental organization
NHRC	National Human Rights Commission
NJA	National Judicial Academy
OAG	Office of the Attorney General
OHCHR	Office of the High Commissioner for Human Rights, United Nations
ROL	Rule of law
TI	Transparency International
UML	Communist Party of Nepal (United Marxist-Leninist)
UNCITRAL	United Nations Commission on International Trade Law

UNICEF	United Nations Children’s Fund
UNDP	United Nations Development Program
US	United States of America
USAID	United States Agency for International Development
VDC	Village development committee
WB	World Bank

EXECUTIVE SUMMARY

The people of Nepal are striving to consolidate peace, create a stable constitutional order, and overcome a legacy of widespread poverty and social exclusion. United States policy aims to support the ongoing Nepali efforts to build and sustain a democratic, well-governed state that responds to the needs of its people. Contractor undertook the present assessment in this context to help USAID identify principal constraints and opportunities for rule of law development and to establish appropriate priorities and strategies.

Nepal's early systems for the administration of justice were based on Hindu beliefs. The first modern legal code was adopted in 1853, early in the Rana period of rule by hereditary prime ministers that continued for more than 100 years. With the political opening that occurred in the early 1950s, the country's legal system became more open to modernization and interest grew in the practice of other countries. This period saw the inauguration of university legal education, the founding of the Nepal Bar Association, and the establishment of a structure for the court system. Nepal adopted a number of institutions that reflected the experience of countries with legal traditions based on English common law. These included the binding force of superior court decisions as precedent, criminal prosecution by an Attorney General in an adversarial process, a judicial service commission for human resource management in the courts, and registrars to administer the courts.

Three distinct sets of activity are affecting rule of law development in Nepal at this time: the drafting of a new constitution by a constituent assembly; ongoing violence and generalized unlawfulness operating to the detriment of the general welfare; and, at the same time, several reform efforts seeking to improve court performance, modernize laws, and expand access to justice.

In this context, the assessment identified three principal challenges for rule of law development:

- The foremost challenge is a **widespread impunity** that is impeding law enforcement, fueling a breakdown in law and order, and enabling crime and violence to proliferate.
- A second major challenge is **limited access to justice**, especially for vulnerable and marginalized populations, and the **historic exclusion** of many from representation in justice institutions and the legal profession on grounds of gender, ethnicity, and caste.
- The third challenge is the need for **independence and professionalism** to enable the justice system to serve as a check on abuse and a protector of rights and constitutional norms.

Nepal's courts are arranged in three tiers. There are 75 first instance courts (district courts), 16 intermediate courts (courts of appeal), and an apex court (Supreme Court). There are also a few specialized tribunals, and certain administrative officials have quasi-judicial powers. The overall workload of the courts is not heavy, although there are major delay problems. The likely explanations for delay appear to be procedural and managerial, including inefficient allocation of judges and staff. While some district courts handle very few cases, the broad jurisdiction of the Supreme Court creates a relatively high rate of congestion. One significant factor in the workload of the courts is the low volume of criminal prosecutions by the Office of the Attorney General. The effectiveness of the courts is impaired by widespread disregard for judicial decisions and orders, many of which are not enforced.

The justice system includes a number of government agencies and autonomous commissions:

- **Government attorneys** are prosecutors and government legal advisers who are assigned to all 75 districts and are primarily under the supervision of the Attorney General. The Attorney General is a political appointee subject to change by each new Prime Minister.
- The **Nepal Police and the Armed Police** are separate national law enforcement agencies with a combined strength of 85,000 but plagued by low pay, limited investigative capacity, and inadequate equipment.
- The **Ministry of Law and Justice** frames legal policies for the government, prepares and reviews legislation and regulations, and coordinates with the Law Commission and the Law Book Management Board (statutory bodies that, respectively, develop legislation and publish statutes and subordinate legislation).
- The **National Human Rights Commission** investigates human rights violations and makes recommendations for preventive measures as well as for prosecution. The government is not obliged to accept these recommendations and has not initiated any prosecutions recommended by the Commission.
- The **Commission for the Investigation of Abuse of Authority** investigates allegations of public corruption, engages in corruption prevention measures, and prosecutes accused government officials in the Special Court, an anticorruption tribunal set up to hear such cases.

The legal profession in Nepal includes more than 9,000 lawyers in private practice in addition to lawyers in government and the academic community. A statutory Bar Council sets standards, prescribes an examination for admission to practice, and oversees a professional discipline system. The Nepal Bar Association represents the interests of lawyers and engages in activities such as provision of legal aid to expand access to justice. Legal education is provided primarily by the government-funded Tribhuvan University, which produces up to 500 law graduates each year.

Recent programs of international cooperation in the justice sector have addressed a wide range of issues. These include support for improved judicial policy and management, new information and communications technology, automated case tracking and case management procedures, mediation as an alternative to litigation, access to legal information, enforcement of judgments, commercial bench development, and civil society strengthening. USAID programs have involved many of these areas. However, the overall impact of assistance has been limited by constraints on the capacity of Nepali institutions, frequent leadership changes, and a rapidly changing political environment.

The assessment reveals a mixed picture of weaknesses in the rule of law and encouraging initiatives to address those weaknesses. The assessment team found that the principal challenges to the rule of law, enumerated above, pose a threat to ongoing efforts to sustain the peace, build a durable new structure of democratic governance, and create new opportunities for inclusive economic and social development in Nepal. Accordingly, the assessment recommends a focused strategic response that will have the most positive influence on achieving and sustaining a successful political, economic, and social transition. The overall goal

should be to advance public respect for the rule of law and to help make justice institutions worthy of public respect.

A USAID rule of law program in the contemporary political environment of Nepal will need to operate as an integral part of an active US policy with mutually supportive interaction between diplomatic and development instruments. The program will need to take into account the ongoing political dialogue within Nepal. And it will have to rely on and be coordinated with other programs to help Nepal strengthen overall democratic governance.

In addition, the assessment recommends some guiding principles for a USAID rule of law program. In particular, these principles emphasize transparency and inclusion in all program elements, a focus on sustainable capacity for continuous improvement in priority areas over the long term, and a major engagement of civil society to reinforce the efforts of the justice institutions and the commitment of political leaders.

The assessment concludes with recommendations for illustrative program activities to be discussed with local stakeholders. These illustrative activities are all focused on objectives that correspond to the three principal challenges that the assessment has identified. Activities under the three objectives are interrelated. The suggested areas for program activities, organized under the three objectives, are as follows:

- **Ending impunity and achieving the effective application of the law** will involve the engagement of civil society in public interest litigation; legal assistance for victims of impunity and others who are denied effective application of the law; advocacy, monitoring, and coalition building focused on this objective; and support for the implementation of commitments in the Interim Constitution to create a Commission on Disappearances and a Truth and Reconciliation Commission as transitional justice mechanisms. Other activities under this objective include support for efforts to increase the enforcement of judgments, overcome existing weaknesses in cooperation among police, prosecutors, and the courts (primarily through training activities under objective 3); and improve organization and management of land title registries.
- **Expanding inclusive access to justice and equal protection of the law** will involve civil society support for a broad campaign of public awareness and legal literacy, linked with civil society activities under objective 1. Another activity to be pursued primarily through civil society would involve expanding access to justice through improved quality and availability of access to mediation to resolve court-referred disputes, commercial disputes, and disputes that arise in communities whose inhabitants have little opportunity to use the formal justice system. Other activities under this objective include preparation for the anticipated creation of community and local courts and substantial support for increasing professional opportunities for women and marginalized groups. The latter activity would seek to lower the barriers to entry into the legal profession and public office for women and those from disfavored castes and regions who remain seriously underrepresented in the justice system. Activities might include scholarships for legal education and specialized training and support for professional networks that can provide mentoring and knowledge of opportunities.
- **Strengthening independence and professionalism** in the justice sector will involve an emphasis on training and strengthening the capacity of the National Judicial Academy (including with respect to issues of court management for increased productivity and strengthened performance of police and prosecutors in conducting criminal

investigations). In addition, activities under this objective would include objective support for research and dialogue on judicial independence, support for systematic publication of laws and judicial decisions (possibly through collaboration with the Free Access to Law Movement), and support for ongoing efforts to modernize legislation, including major reforms with respect to civil and criminal law and procedures, combating corruption, legal aid, and alternative dispute resolution.

Developing and carrying out such a sophisticated program will be extraordinarily difficult and complex. Nevertheless, this is a doable and worthwhile undertaking with a strong likelihood of making a significant contribution to the success of Nepal's multi-faceted transition to a more stable, safe, just, and prosperous society.

I. Introduction

The people of Nepal are engaged in a challenging and complex transition that will determine their country's future. They are striving to consolidate peace after a decade of civil conflict, create a stable constitutional order that will redefine the relationship between citizen and state, and overcome a legacy of widespread poverty and social exclusion that has left Nepal one of the poorest countries in the world. They confront a climate of high expectations, distrust among regional, ethnic, and political groups, political instability, and broad suspicion of and disrespect for the existing government institutions.

US policy aims to support the ongoing Nepali efforts to build and sustain a democratic, well-governed state that responds to the needs of its people. This policy includes a program of assistance with priority goals focused on transition toward effective, responsive, and democratic constitutional government; inclusive private sector-led economic growth; improved health and well being; and government control of national territory, public safety, enforcement of the law, respect for human rights, and the primacy of civilian authority.

Broad support exists within Nepal for these goals, as well as widespread recognition that the development and strengthening of the rule of law will be essential to their attainment. US assistance has long included various kinds of support for the justice sector. However, questions about the appropriate priorities in this sector in the current transition environment prompted USAID/Nepal to request a targeted analysis to identify principal constraints and opportunities for rule of law development and related USAID strategy.

USAID has developed a strategic framework to guide country rule of law assessments.¹ This strategic framework focuses analysis on the essential elements of the rule of law rather than on the laws or institutions that make up the justice sector. That is, it addresses how the legal framework and institutions deal with order and security, legitimacy, checks and balances, fairness, and effective application of the law. This framework provides the conceptual structure for the Nepal rule of law assessment. The statement of work is at Annex 1.

The Nepal rule of law assessment team was composed of James Michel (team leader), Barry Walsh and Mihir Thakur, all representing DPK Consulting, joined by Louis-Alexandre Berg, representing the Democracy and Governance Office of USAID/Washington. The team conducted a literature review and a number of interviews in the US in June 2009. This preparatory work was followed in July 2009 by an intensive program of interviews and meetings in Nepal with political leaders, the broader civil society, international donor partners, and stakeholders from the government, the judiciary, and the legal profession. The team completed its report in August 2009. Biographical summaries of assessment team members are at Annex 2. A bibliography of principal sources of the team's research is at Annex 3. At Annex 4 is a list of persons interviewed in the course of the assessment.

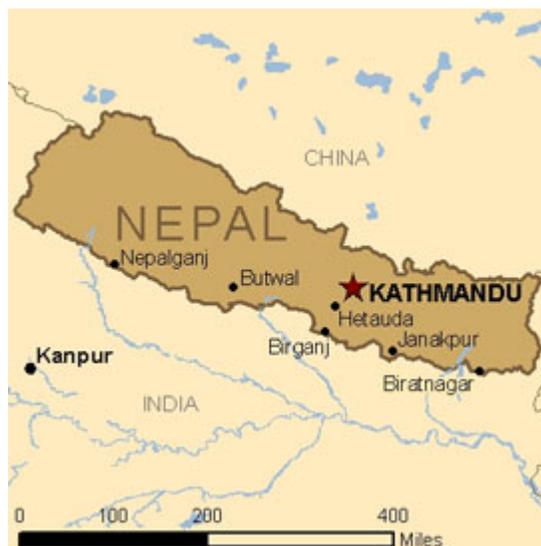
The findings and recommendations set out in this report are the responsibility of the assessment team. It is important to acknowledge, however, the extraordinary support provided by USAID/Nepal, under the leadership of Acting Mission Director Carolyn Coleman. In particular, David Billings and Bishnu Adhikari were generous with their time and provided consistently helpful guidance and support throughout the assessment. Special thanks are due to Sumitra

¹ USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, 2008, http://pdf.usaid.gov/pdf_docs/PNADM700.pdf.

Manandhar, who contributed greatly to the team's ability to meet so many people who enriched the assessment with their varied perspectives and knowledge.

II. The Context for Rule of Law Development in Nepal

A. The Country and Its People



Nepal is a landlocked country, bordering on India to the south and China to the north. Its size of 147,181 square kilometers (56,136 square miles) is comparable to Bangladesh or the state of Tennessee. The climate ranges from subtropical in the southern lowlands to moderate in the central hill region (which comprises more than 40 percent of the national territory) and to arctic conditions in the high mountains to the north.²

More than 80 percent of Nepal's 29 million people reside in rural areas. Almost 40 percent are under the age of 15. About 80 percent are Hindu and more than 10 percent are Buddhist. There are more than 100 regional and indigenous languages spoken by a comparable number of ethnic and caste groups. Members of the Brahmin, Chhetri, and Newar castes

have historically dominated politics and the national economy. Discrimination persists against women and marginalized regional and caste groups such as the Madhesi and Dalits. Poverty is widespread and only about half the population is literate, with a higher literacy among men than women. However, in recent years the country has experienced significant improvement in school enrollment (including much reduced gender disparity), as well as in reduced infant and maternal mortality.³

Nepal was never subjected to colonial rule. The national history is traced back to several ancient dynasties that established governance systems based on Hindu religious concepts. These principalities were unified into a single kingdom in the latter half of the 18th century. In 1846 the Kingdom of Nepal came under the control of the Rana family, a regime of hereditary prime ministers who ruled in the name of the King until 1951. In the 1950s Nepal became a constitutional monarchy. However, from 1962 until 1990, the King presided over a "partyless" system known as Panchayat. Multiparty democracy was restored by a new constitution in 1990 following widespread protests. Further political turmoil followed, including the outbreak of a Maoist-led insurgency in 1996; the 2001 killing of the royal family, apparently at the hand of the Crown Prince; and a 2005 attempt by the new King to seize direct rule. The King's effort to regain hereditary powers united the opposition. This, in turn, led to the signing of a

² See Library of Congress, "Country Profile: Nepal," November 2005, <http://memory.loc.gov/frd/cs/profiles/Nepal.pdf>.

³ *Ibid.* See also World Bank, World Development Indicators Database, April 2009, http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?&CF=1&REPORT_ID=9147&REQUEST_TYPE=VI EWADVANCED&HF=N&WSP=N; World Bank, "Nepal Country Overview 2009," April 2009, <http://www.worldbank.org/np/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/NEPAEXTN/0,,contenMDK:22147453~pagePK:141137~piPK:141127~theSitePK:223555,00.html>; Timberman, David, and David Garner, "Nepal Democracy and Governance Assessment Final Report," USAID, December 2008.

comprehensive peace agreement in 2006 to end the decade-long insurgency, the adoption of a new interim constitution in 2007, and the election of a constituent assembly in 2008 with a mandate to develop a new constitution while also serving as an interim Parliament.

B. Roots of the Legal System

In ancient times, the Nepalese kings proclaimed and administered justice based on Hindu beliefs (Dharma). It was the first Rana Prime Minister, Jung Bahadur Rana, who introduced a modern code of laws, the Muluki Ain, and recognized the courts as institutions distinct from the executive. The Muluki Ain, which entered into effect in December 1853, incorporated many provisions of existing law, but also introduced new ideas borrowed from Europe. Indeed, the development of this first national code was inspired by the Code Napoleon, which the Prime Minister had observed in practice during a trip to Europe. The Muluki Ain remained a basic law of Nepal until it was replaced by the Civil Code in 1963.

With the end of the Rana period and the Interim Government of Nepal Act in 1951, Nepal's legal evolution became more open to modernization and interest grew in international practice. The early 1950s saw the inauguration of university legal education, the formation of the Nepal Bar Association, and the enactment of legislation to determine the jurisdiction and powers of the courts and the qualifications for judicial appointment. During this period, ideas found in English law came to be more widely accepted. Nepal has adopted the concept that decisions of superior courts are binding as precedent. Also, a number of institutions for the administration of justice reflect English practice. For example, Nepal has established an Office of the Attorney General with authority to prosecute crimes, replacing the role of a judge as investigating magistrate. In addition, Nepal has a Judicial Service Commission with responsibilities for human resource management and registrars who are responsible for administration of the courts.

There have been a number of changes in the structure of the courts since the 1950s. However, the present three-tier structure of courts has been in place since the 1990 Constitution. A persistent issue has been whether the 75 district courts, 16 appellate courts, and the Supreme Court, together with the limited quasi-judicial powers of local officials to deal with minor offenses, are sufficient to provide access to justice for Nepal's highly rural, broadly dispersed, and mainly poor population. Surveys have indicated that the majority of disputes that are adjudicated in Nepal are handled not by courts or government officials but by informal local actors such as village chiefs.⁴

C. Current Trends

The immediate future of rule of law development in Nepal will be determined in large measure by three distinct but related sets of activities:

- The Constituent Assembly's 14 committees are drafting the provisions of a new constitution that is to be completed by May 2010, although this deadline can be extended by six months.⁵
- Various interest groups are engaging in disruptive tactics and violence to advance their own interests, diminishing the general welfare and creating a climate of unlawfulness.

⁴ A detailed account of Nepal's legal history can be found in Khanal, Bishal, *Regeneration of Nepalese Law*, Bhrikuti Academic Publications, Kathmandu, 2000.

⁵ Interim Constitution of Nepal, Article 64.

- In this volatile environment, several reform efforts are underway to improve the performance of the courts, modernize the legal framework, and expand access to legal knowledge and access to justice.

In the **Constituent Assembly**, a committee on fundamental rights is considering more than 190 recommendations for constitutional rights identified in public consultations. These include universal economic rights, such as employment, and social rights, such as health care and clean water, as well as particular rights of certain population groups who have experienced past discrimination, such as the Madhesi and Dalits.

A second committee is considering the structure of the state. Broad support exists for the idea of federalism that would allow a measure of autonomy for several regions, with scope for distinct regional and local government systems. However, broadly divergent views predominate on what federalism should mean about the relationship between a national government and regional governments. For example, what authority should regional governments have to prescribe laws and establish courts and other institutions to apply them? And what legislative, executive, and judicial processes and subjects should be reserved to the national government?

A third committee is considering the judiciary, including how to balance the needs for independence and accountability. In these deliberations some have been advocating for legislative review of certain judicial decisions, a notion incompatible with generally accepted views of judicial independence. Another judicial independence issue under discussion involves standards and procedures for the appointment and removal of judges. This committee is also considering the possibility of granting authority in the new constitution for regional governments to establish a fourth tier of courts that could operate at the community level and thereby expand access to justice.

Disruptive tactics and violence are being employed in furtherance of the perceived interests of various groups, even as the Constituent Assembly is seeking consensus on the terms of a new constitution. Recent press reports confirm the widely expressed concerns about the lack of social cohesion and disrespect for law and government institutions that these practices represent.⁶ These reports cite more than 500 *bandhs* (protests) by political parties and other groups in the past six months, as well as strikes, roadblocks, explosions, threats, and abductions. Many blame these activities on the lack of government services and the delay of development programs in many communities where local officials and civil servants have been attacked or threatened. The police have been unable to control the widespread disregard for the law and have themselves been attacked and intimidated by hostile groups. As discussed below, this trend has become the principal challenge for rule of law development.

Reform efforts have less visibility than the highly publicized work of the Constituent Assembly or the pervasive deterioration of order and security. Nevertheless, several current initiatives show considerable promise for strengthening the rule of law in Nepal. These include the strategic planning effort of the Supreme Court, the legislative modernization initiatives of the Ministry of Law and Justice and the Nepal Law Commission, and the extraordinary growth in civil-society-led support for alternative dispute resolution mechanisms at the grass roots.

⁶ See, e.g., the following *Himalaya Times* articles: July 6, 2009, "Federation of Nepalese Chambers of Commerce and Industry to work to end impunity"; July 16, 2009, "Security situation puts budget implementation under cloud"; July 17, 2009, "Security fear looms large." <http://www.himalayatimes.com>.

The Supreme Court has just completed implementation of the first Strategic Plan of the Nepali Judiciary, a serious and participatory effort to identify and address major issues affecting the situation of the judiciary. The plan examined the performance of the judiciary's core functions of adjudication, supervision and monitoring, and court management and provided for an operational plan with strategic interventions to address 21 objectives. The plan was inaugurated in 2004. Its implementation was reviewed in 2008 and completed in 2009. Building on this experience, the Supreme Court has just adopted a second plan which identifies 12 priorities and proposes activities relating to each of them.⁷

The Nepal Law Commission, with the support of the Ministry of Law and Justice, has a lead role in the development of legislation. The Commission and the Ministry are presently working on several noteworthy initiatives:

- A task force led by the Supreme Court on revision of the codes of criminal law and procedure is expected to produce an updated body of laws by December 2009. This reform will fill a number of gaps in the offenses now covered by Nepali law and will also facilitate streamlined procedures to improve case management.
- A second task force, also headed by the Supreme Court, is scheduled to complete recommendations on new codes of civil law and procedure by March 2010. This code reform will facilitate the establishment of a commercial bench in the Appellate Courts under the Supreme Court's new strategic plan.
- A third task force is working on revisions to a broad range of Nepali laws to bring them into conformity with the UN Convention against Corruption, with a view to then ratifying the Convention.

All these task forces are operating under procedures that will involve consultation with civil society, the bar, and subject matter experts. The Ministry intends to defer any request for the enactment of legislation based on the task force recommendations until the new constitution is adopted in 2010.

The Ministry is also developing draft legislation to address the increasing popularity of community mediation. The Ministry is consulting with interested civil society organizations and proposes to establish legislative guidance on procedures, qualifications for mediators, preservation of local traditions consistent with constitutional safeguards and international human rights obligations, and linkages between informal remedies and the formal justice system.

III. Principal Challenges for Rule of Law Development

A. Ending Impunity and Achieving Effective Application of the Law

The foremost challenge to the rule of law in Nepal is the aforementioned widespread impunity that is impeding law enforcement, fueling a breakdown in law and order, and enabling crime and violence to proliferate. This climate of impunity is manifested most starkly in the criminalization

⁷ The 12 priorities specified in the new Strategic Plan of the Judiciary are: case management; execution of judgments; human resource development; infrastructure; information and communications technology; inspection and supervision; security; judicial independence, accountability, autonomy, and values; research on reform issues; access to justice, including legal aid, mediation, and a court users' charter; and capacity of the courts for strategic planning.

of politics and politicization of crime. Despite the end of the civil war, the major political parties have established armed wings – most notably the Young Communist League affiliated with the Maoist party and the Youth Force of the United Marxist-Leninist party (UML) – that use extortion and violence to protect their parties' interests. Dozens of other armed groups are affiliated with various smaller parties, particularly in the Terai region, claiming to represent the political interests of particular ethnic groups.⁸ Many of these groups lack clear political agendas and are seen as attempts by organized criminal groups – often with links across the Indian border – to avoid prosecution while they exploit opportunities for smuggling, trafficking in persons, abduction, and extortion. A few groups have gone as far as seizing control of local government buildings, setting up checkpoints, and “taxing” local farmers, drivers, and workers. The related phenomenon of resorting to strikes, *bandhs*, *chakajams*, and sometimes violence to demand jobs, wage increases, government benefits, and compensation after accidents or crimes adds to the climate of impunity and general insecurity. Crimes both small and large are regularly ignored, long-simmering disputes boil over into violence and retribution, and citizens regularly take the law into their own hands, sometimes attacking and even killing alleged criminals.

At the national level, the lack of a clear political framework, shifting coalition governments, the lack of political control over the army and police, and the continued presence of the Maoist People's Liberation Army have fed a climate of uncertainty as people wonder who is – and will remain – in charge. The Home Ministry under successive governments has heightened the politicization of the police and local government officials through tight control of recruitment, promotion, and transfers. Each party has used its control of government ministries to protect its own members from accountability under the law. A notable example is the use of the executive pardon, an authority granted to the Council of Ministers by Article 151 of the Interim Constitution. The parties in government have used this provision to drop hundreds of pending criminal cases, ostensibly to avoid politically-motivated prosecutions but many of the cases have involved murder, rape, and other serious crimes.

At the local level, there has been a vacuum of authority since police and local government officials fled their posts during the insurgency. Few have returned, preferring to remain in the relative security of district headquarters. Few of the local peace committees envisioned in the peace accords have become operational. In this vacuum, unelected local party representatives make political decisions and divide up government resources through a negotiation process known as the All Party Mechanism. While this mechanism can help resolve inter-party disputes, each party tends to favor its own interests and members. Party representatives regularly exert pressure on the police, chief district officers, prosecutors, and other officials not to investigate or register criminal cases and to release party members who are accused of crimes. Lacking political backing, law enforcement officials feel compelled to comply with their demands.

Where law enforcement authorities have the space to act, they suffer from limitations in capacity. After years of being a primary target of the Maoist insurgents, losing scores of personnel, and experiencing the destruction of over 800 of their 1200 stations, the police are often described as “demoralized.” Their numbers are insufficient, they are poorly equipped, and many officers lack basic skills. Low salaries, as low as \$100 a month, create incentives for political pressure, corruption, and even involvement in organized crime. Investigative skills are

⁸ The Maoist Young Communist League and the UML's Youth Force have been the most active. In mid November 2008, three additional parties formed new youth groups: the TMDP, RPP(N), and Chure Bhawar Rastriya Ekata Party. Terai-based groups include Janatantrik Terai Mukti Morcha (JTMM), Madhesi Tigers, Terai Madhesi Mukti Tigers, Terai Cobra, Terai Liberation Force, and Madhesi Virus Killers.

limited and there are few specialized investigators. Hampered by political pressure and limited resources, law enforcement authorities have not yet been able to replace fear with public trust and confidence that are critical for democratic, public-service oriented law enforcement.

The police tend to rely heavily on confessions and witness testimony that often do not hold up in court. They sometimes fail to register cases at all and are known to keep uncharged suspects in prolonged detention. Prosecutors, who also suffer from insufficient personnel, limited training, and constantly changing leadership, rarely take an active role in directing investigations, resulting in relatively few criminal cases initiated in court. Chief district officers with detention and adjudication powers for minor offenses possess varying levels of knowledge or relevant skills and are frequently transferred to assignments in other ministries, regions, or sectors.

The government's failure to respect or enforce court decisions further undermines respect for the law and fuels impunity. The courts enjoy slightly more public confidence than other branches of government.⁹ Yet their impact is limited since their decisions are seldom enforced. As a result of procedural maneuvers, lack of cooperation by the police, corruption, incompetence, or some combination of these factors, many convicted felons are not imprisoned, fines are not collected, and judgments are not executed. Government agencies routinely ignore court orders. The Supreme Court has made some decisions aimed at protecting citizen rights by ordering the government to take specific actions – often spurred by public interest litigation brought by civil society organizations – yet these decisions are rarely implemented. A notable example is a 2007 Supreme Court decision ordering the government to establish a Commission on Enforced Disappearances, file criminal charges against those responsible, and compensate the victims' families. As of mid-2009, the government had not taken any of these steps.¹⁰

One of the most troubling aspects of this phenomenon is the failure of the army and other security forces to submit to the law or court decisions. According to the National Human Rights Commission, not a single human rights abuse has been prosecuted in Nepal. Despite the systematic collection of thousands of reports of forced disappearances, abductions, and killings by government and insurgent forces, not a single individual has been held accountable for these abuses, which continue.¹¹ The government's failure to implement the Comprehensive Peace Accords' call for the creation of a Commission on Disappeared and a Truth and Reconciliation Commission contributes to the prevailing climate of impunity.

The inability of the government to enforce the law has fueled a growing lack of trust in the government and the legitimization of violence as an accepted way to achieve political, economic, and social goals. The current trend has deep roots in Nepal's experience. Not only did the Maoists achieve political recognition through violence, but all of the mainstream parties started out as violent movements.¹² The use of strikes and *bandhs* generally pay off as the

⁹ See Fajardo, Carla and Warisha Farasat, "Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparation and the Transition in Nepal," International Center for Transitional Justice and Advocacy Forum, March 2008, <http://www.ictj.org/images/content/8/3/830.pdf>.

¹⁰ See Uprety, Kishor, "Against Forced Disappearance: the Political Detainees' Case before the Nepal Supreme Court," *Chinese Journal of International Law*, Volume 7, No. 2, 2008, page 429.

¹¹ According to the Informal Sector Service Center, from 1996-2008, there were 8,464 deaths committed by the state and 7,746 deaths by non-state actors. In 2008, 541 people were killed by state and political groups, 729 were abducted, along with numerous beatings, abductions, injuries, and threats. See INSEC, *Human Rights Yearbook 2009*.

¹² See Bhattarai, Binod, Mohen Mainali, Jogendra Ghimere, and Akhilesh Upadhyay, "Impunity in Nepal: An Exploratory Study," The Asia Foundation, September 1999,

government responds to political pressure. Yet, the disorder has reached a new level as people are increasingly taking the law into their own hands, often escalating into mob violence. This cycle of impunity, increasing violence, and generalized insecurity is undermining respect for the law. It is a major impediment to the investment, job creation, and sustainable economic growth that Nepal needs, and it undermines efforts to build a stable political foundation of consensus and competition within established and respected rules.

B. Expanding Inclusive Access to Justice and Equal Protection of the Law

Another fundamental challenge to the rule of law in Nepal is the limited access to the justice system, particularly for vulnerable and marginalized groups. Courts are not a viable option for most of the population. As in many countries, they are costly, apply complex procedures, and can be difficult to reach for Nepal's rural population who inhabit mountainous terrain with few roads and have limited means of transportation.

Even those who can gain access to the courts are deterred by long delays and perceptions of weak capacity. The business community complains that the courts are too slow in resolving contract, debt, or other commercial disputes, with 7 to 10 years typically required to obtain a final judgment. Many perceive judges and court staff as poorly trained, particularly in commercial law topics with any degree of complexity. One estimate put the minimum length of a criminal trial at over a year if all of the basic procedural rights are exercised – even without the additional adjournments frequently requested by lawyers and routinely granted by the courts. Almost all cases are appealed to the heavily backlogged appellate courts and the Supreme Court, further extending delay for cases to be finally resolved. Much of the backlog in the courts consists of land cases, which require retrieving records from chaotic and poorly managed Land Offices, a process that can take months or years. The expectation of delay and lack of confidence provide strong motivations for settlement of disputes, but also permit recalcitrant litigants to evade legal responsibility for years.

Most cases never make it to the courts, leaving the judiciary with a relatively low caseload for the population it serves. Criminal cases reported to the police are most often dealt with by the police themselves. Police often choose not to register cases due to the logistical challenges in remote locations and the lack of investigative capacity. Other cases are addressed outside of court by the chief district officer, who has the authority to order detention for minor offenses. Many civil cases are mediated through traditional or informal means, while others – particularly unresolved land cases – escalate into violence. Many cases do not reach the courts because citizens do not understand the court system, the legal process, or their rights as citizens more broadly. There has been little systematic education to raise awareness of the role of the courts, how they can protect citizens' rights, or what rights citizens possess. Access to free legal counsel or legal aid that could help citizens through the process is also limited. An effort by the Nepal Bar Association to set up legal aid centers under government guidance and with donor support has been hampered by insufficient resources and lack of commitment by the lawyers because of severely limited compensation. Civil society efforts to provide legal aid are helpful in reaching some of those in need, but are similarly limited in coverage.

Confidence in justice sector institutions is further weakened by the historic exclusion of many groups from representation in those institutions and from the legal profession more broadly. The police force, courts, and prosecutor staff are almost entirely made up of men of high castes and

http://asiafoundation.org/pdf/nepal_impunity.pdf. This 10-year old study describes events and attitudes in a manner that has a disturbingly contemporary resonance.

dominant ethnicity. Only five of the roughly 240 judges are women. Women and other excluded groups face significant obstacles in trying to become lawyers, judges, or other professionals, ranging from cultural resistance to more structural barriers. For instance, while most lawyers begin their careers in unpaid “apprenticeships” with senior lawyers, women and marginalized groups often lack the financial means to complete this stage and cannot break into professional networks dominated by men of the traditionally privileged castes and ethnicities. The police have initiated a policy of more representative recruitment, but the judiciary and other institutions have not broadened inclusion. The absence of familiar faces in these institutions significantly erodes people’s confidence that they will be treated fairly.

Some alternatives to the courts exist for resolving certain types of disputes. However, these are limited in scope and do not always protect fundamental rights. Traditional mediation is common, as well as informal mediation within professional networks and social circles. Community mediation programs supported by donors have sought to build on these traditions while protecting human rights and empowering individuals from marginalized groups by training them to operate as mediators. USAID and other donors have supported court-annexed mediation, as well as mediation centers in chambers of commerce. These efforts have received increasing popular interest and international support. Yet, they have achieved only limited usage and geographic coverage so far. (See the map of coverage at Annex 5.) None of these alternatives guarantees consistent outcomes or ensures that rights are protected. Nor is the legal framework in place to ensure legal recourse if rights are violated. However they can be further developed as quicker and more accessible ways to resolve disputes.

Another factor undermining the equal protection of the law is the law itself, and the failure of the legislature to enact or revise legislation in a timely fashion. Procedural laws are complex and out of date, and there are major gaps in criminal and commercial laws. Innovations that could address some rule of law challenges, such as expanded use of mediation or the establishment of transitional justice mechanisms, await the passage of new laws. As previously noted, there are significant efforts underway to revise the criminal and civil codes and procedures, as well as to develop key legislation like a mediation law. However all these efforts will require engagement by a legislature that is presently consumed with the fundamental issues of developing a new constitution and has little time for a normal legislative agenda.

C. Strengthening Independence and Professionalism in the Justice Sector

A third major challenge to the rule of law in Nepal is the need for independence and professionalism of the judiciary. The ability of judges and prosecutors to withstand pressure to make impartial decisions and serve as a check on abuse is critical to the rule of law both in the current politicized climate and in implementing a new constitution going forward.

The courts have historically been less politicized than other institutions and have largely managed to stay out of the political fray – although they are dominated by the same elite groups as the rest of the government. The Supreme Court has emerged as one of the more progressive voices in protecting citizens’ rights. For the most part, however, without active pressure by civil society the courts have been tolerant of powerful interests. More threatening are weaknesses in the capacity and professionalism of the judiciary that undermine public perceptions of judicial fairness and independence.

- The appointment process for judges – controlled by a Judicial Council made up of the Chief Justice, the Minister of Law and Justice, judges and members of the bar – is

perceived to be prone to adopt recommendations based more on political connections than on qualifications.

- A judicial ethics code was recently adopted, but professional standards of conduct are not rigorously enforced. The system for investigating judicial misconduct under the Judicial Council is not being applied, and there is no procedure for regular, periodic evaluation and monitoring of judges' performance.¹³
- Training opportunities for judges and staff are limited, although the National Judicial Academy has begun to fill this gap by offering regular courses for judges and staff and the Judicial Training Center offers some additional training.
- The Supreme Court publishes its case law jurisprudence in paperback and hard cover book form via the *Nepal Law Reports*, which is up to date and generally of a high standard of production and scholarship. The Court's decisions are not yet published in electronic form, although the Supreme Court intends to begin this practice in 2009. No other Nepali courts publish their judgments or orders either in printed form or on websites as is common in other countries.

All of these factors contribute to a perception of weakness that threatens to undermine the independence of the judiciary

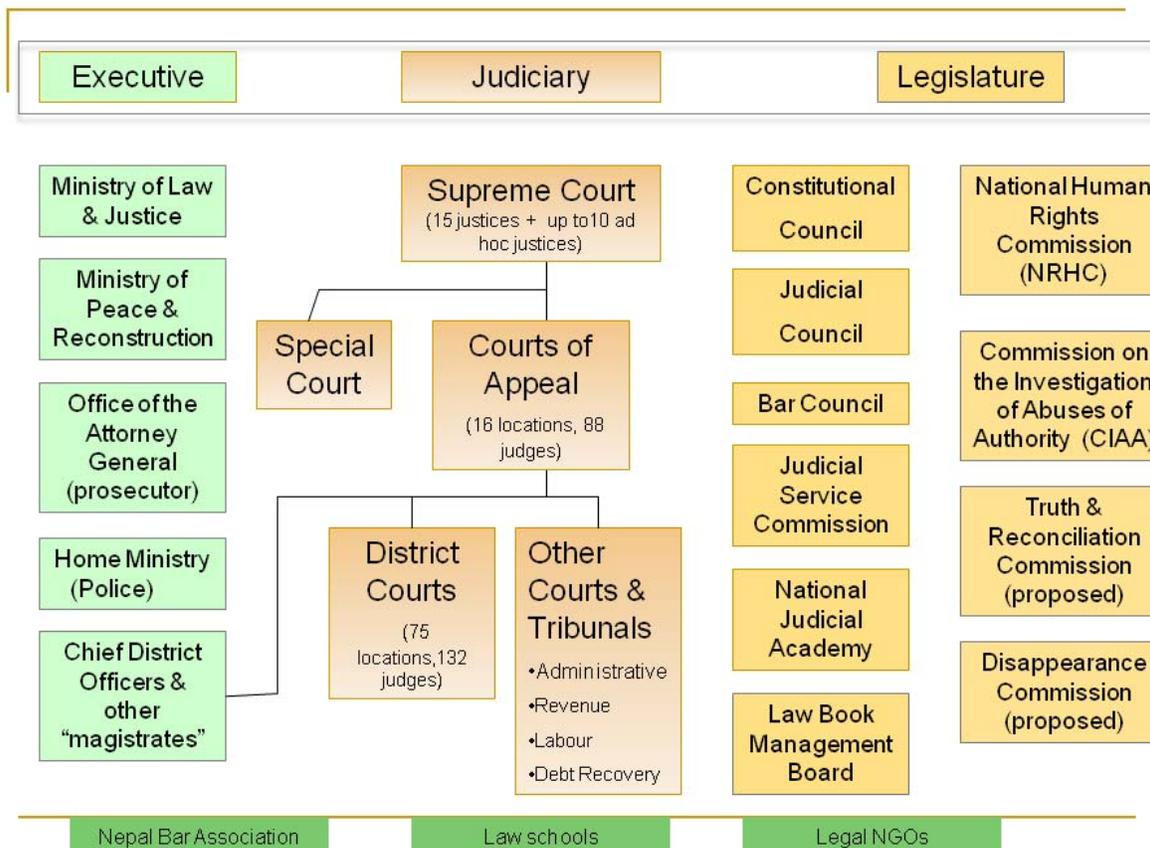
The constitutional debate in the Constituent Assembly directly addresses these issues. As of August 2009, the committee on the judiciary remains divided on the issue of judicial independence. The UML and Nepali Congress parties prefer to preserve the current Judicial Council's role in the appointment and promotion of judges, perhaps adding an additional check through legislative approval. The Maoists have proposed to centralize the nomination, confirmation, and impeachment processes in the legislature, while giving legislators the right to review and decide anew certain court decisions of constitutional significance. Current proposals would also preserve the budgetary process for the judiciary, leaving the Ministry of Finance with the ability to approve the judicial budget and allocate funds under that budget. Increased budgetary autonomy would help enhance judicial independence. Yet, so far, there has been only limited activity on the part of the judiciary, Nepal Bar Association, or other stakeholders to mobilize and advocate strengthened judicial independence under the new constitution.

IV. The Justice System

Nepal's justice system involves a normative framework that draws on the historic roots of local traditions but has over the past two centuries adopted many characteristics of European and other Western systems. The structure of the principal institutions that make up the system is illustrated below in Figure IV-1. Available data about staffing and workload are included in the following discussion of the various institutions that make up the system in order to provide an accurate picture of the performance of the justice system and the challenges it faces.

¹³ See Bhandar, Krishna Prasad, "Opportunity Knocks for Nepal's Flawed Judiciary," in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems*, pages 236-239, http://www.transparency.org/publications/qcr/qcr_2007.

**FIGURE IV-1
STRUCTURE OF THE PRINCIPAL INSTITUTIONS OF NEPAL'S JUSTICE SYSTEM**



A. The Normative Framework

Participation and codification are two significant features in the development of Nepal's legal structure. A commission of 230 persons prepared the initial national code of 1853 (Muluki Ain), and the resulting text was reviewed and approved by senior civil and military officials.¹⁴ The revised code of 1963 was developed using similar processes of participation and consultation.¹⁵

Participatory processes have also prevailed in the formation of Nepal's constitutions. Both the 1990 Constitution and the 2007 Interim Constitution, in particular, are products of drafting commissions and public consultations. The constitution presently under development by the broadly representative 601 member Constituent Assembly is the subject of an impressive ongoing process of consultations, written comments, and publication of voluminous materials.¹⁶

The Interim Constitution endorses the pre-existing framework of the separation of powers between the judiciary, the executive, and the legislature and preserves the validity of pre-

¹⁴ See Khanal, note 4, *supra*.

¹⁵ Thakur, Mihir, Kumar, "Nepalese Legal System in Transition: Some Stabilizing Elements," in Sakya, Purna Man, *Essays on Constitutional Law*, Nepal Law Society, July 2001.

¹⁶ See Constituent Assembly Internet Portal, <http://www.nepalcaportal.org/EN>.

existing laws, all of which, of course, reflect the historical and political context from the time of their enactment over the years. Within this framework the courts apply a codified body of law, ordinances, treaties to which Nepal is a party, and secondary legislation and regulations. The courts also regard the decisions of superior courts as a source of law.

In recent times the development of legislation has been primarily the responsibility of the Nepal Law Commission, a statutory body which operates with administrative support and direction from the Ministry of Law and Justice. The Commission carries on the participatory tradition. It establishes priorities and forms working teams which engage experts, prepare research papers, conduct workshops and consultations, and prepare draft legislative texts.¹⁷

B. The Institutional Framework

1. The Courts

The Nepal court system is arranged into three levels comprising a first instance tier, an intermediate appellate tier, and a superior court at the apex, as illustrated in Figure IV-1, above. The Supreme Court has 15 justices and up to another ten temporarily appointed *ad hoc* justices, who normally sit in benches of two or more in determining substantive matters and almost always in the capital city. At the second tier are courts of appeal in 16 locations across Nepal, averaging five judges at each location. An appeal bench is normally constituted by a minimum of two judges. The third tier is made up of the first instance district courts located in each of Nepal's 75 administrative districts. A district court bench is constituted by a judge sitting alone and there is an average of just under two district judges per district. District court judges determine even the most serious offenses at first instance and without juries, such as murder and sexual assault cases, although it seems that almost all decisions of district courts on felony matters are routinely appealed by either the prosecution or the defense to a court of appeal. Most judges at each level of the court system administer a generalized caseload of both civil and criminal cases, there being little specialization at any level. In addition, there is an intermediate level Special Court, which hears and determines prosecutions of corruption cases referred by the Commission on Investigation of Abuses of Authority (CIAA). Staffing of the Supreme Court, courts of appeal, and district courts is shown in Chart IV-2, below.

Table IV-2
Staffing of the Courts (2008-09)

Court Level (number of court locations)	Number of Judges	Judicial Vacancies	Judge Vacancy Rate	Judges per Court Station (on average)	Number of Court Staff	Judge-to-Staff Ratio
Supreme Court (1)	21	0	0%	21	326	1:16
Courts of Appeal (16)	96	22	23%	6	795	1:8
District Courts (75)	135	2	1%	2	2,591	1:19
Totals	252	24	10%	3	3,712	1:15

A few specialized tribunals exist. These include the Administrative Tribunal, which is effectively an employment law court for government employees, and the Labor Court that has similar functions for certain private sector employees. Revenue tribunals determine disputes about

¹⁷ See Nepal Law Commission Act, 2007, and the Nepal Law Commission website, <http://www.lawcommission.gov.np>.

government charges and taxation, and a Debt Recovery Tribunal hears cases relating to the banking and financial sectors. Also falling within the system is the senior civil servant in each district, the chief district officer. In addition to supervising police operations, these officials administer a range of magisterial powers to detain suspects, find them guilty of certain minor offenses, and hold them in detention for up to three months. Certain senior forestry officers have similar powers in respect of smuggling and firearms offenses. The decisions of chief district officers and forestry officers are usually appealable to a court of appeal.

Court procedures in Nepal correspond more closely with English common law traditions than with European systems. The courts usually apply adversarial procedures, follow a system of binding case law, use judges sitting alone to try cases at first instance, and select a significant number (about 20 percent) of appellate and superior judges from the ranks of the private legal profession. There are vestiges of continental civil law traditions, such as the Nepal criminal code that was originally derived from Europe; and there is a career judiciary within the lower courts at the entry level. Otherwise, most aspects of court administration and jurisprudence have much in common with countries influenced by English practice, such as India, the US, and the United Kingdom.

The **performance of Nepal's court system** is illustrated by the case disposal figures in Table IV-3, which were derived from the Supreme Court's latest annual report. Having regard to Nepal's population of 29 million people, the figures suggest that overall the courts have very light civil and criminal caseloads. Total disposals are less than 50,000 cases a year for all courts and tribunals. This compares with disposals in, say as a comparison, the capital city state of Delhi in India, with a population of around 14 million, which consistently disposes in excess of 260,000 court cases per year (excluding traffic infringement cases).¹⁸ Little is known in any reported statistical sense about the age of cases that are finalized in Nepali courts or how they are finalized. Average rates of judicial productivity appear to be low. On average, a judge in Delhi disposes of over 800 cases a year. The average disposal rate in Nepal is 252 cases per judge when all courts are counted together. By comparison, in the US an average disposal rate in the range of 1,200 to 1,500 cases a year per judge over an entire system is common, due to large volumes of readily disposed small cases and because of high rates of civil case voluntary settlements and criminal guilty pleas (often the result of bargaining for reduced sentences).

The Supreme Court annually publishes statistics on court dispositions. However, the assessment team was unable to discern from these annual reports the specific details about the types of cases disposed, the way cases are disposed, and the time it takes to process them. Based on interviews with judges and legal practitioners, it appears that probably most cases are contested, most first instance decisions are appealed, and most cases of all types take years before they are disposed. And although most courts in Nepal are disposing of almost as many cases in a year as there are new cases registered (with the latest clearance rates of almost 90 percent in district courts), they also have proportionately small volumes of pending cases.

The congestion rate in district courts, Nepal's busiest courts, indicates that the volume of pending cases is less than the volume of cases district courts are able to process in a year; a proportion that usually suggests there is not a major backlog problem. And yet by all accounts there is a major delay problem measured typically in years rather than weeks or months. Each of these factors suggests that the problems of case delay cannot be explained by insufficient numbers of judges or too many cases. The likely explanation is that procedural methods and the

¹⁸ Annual reports of the District Courts and the High Court of Delhi indicate that those courts have 293 judges whose disposals each year are in the order of 220,000 and 43,000 substantive cases respectively.

geographic and structural allocation of judges are working against judicial productivity. It would seem that too many cases, for example, are being processed in the Supreme Court and too few in the courts of appeal and district courts.

**Table IV-3
Case Processing in the Courts, (2008-2009)**

Court	Pending cases at year's end	New cases registered in the year	Cases finalized in the year	Clearance rate (finalized/new cases)	Congestion ratio (pending/finalized)	Average finalized cases per judge
Supreme Court (1)	13,476	5,088	5,608	110%	2.4	267
Courts of Appeal (16)	7,803	10,539	8,620	82%	0.9	90
District Courts (75)	30,819	32,902	29,404	89%	1.0	218
Other Courts/Tribunals	2,174	850	1,186	140%	1.8	
Totals	54,272	49,379	44,818	91%	1.2	252

Source: Annual Report. Supreme Court of Nepal, 2008/09

In times of national crisis, it is common for superior-level courts to meet special needs aimed at helping the state restore order and the rule of law. There are significant impediments for the Nepali courts in attempting to meet this need. The Supreme Court has the means to influence the maintenance of the rule of law by using its writ jurisdiction, which allows it to compel officials to act according to law and to punish those who disobey. But at the beginning of 2008 it was reported that 60 percent of pending writ cases in the Supreme Court were older than two years,¹⁹ suggesting that such cases are affected by delay as much as other types of court actions. And although Nepal's 16 courts of appeal have a range of writ jurisdiction powers, including *habeas corpus*, interviews suggest that they are seldom invoked, forcing would-be litigants aggrieved by human rights abuses to seek relief directly from the Supreme Court. This problem illustrates the structural as well as procedural impediments to accessing important court remedies in Nepal.

Continuing impunity from judicial orders is a related aspect of the effectiveness of Nepal's judicial system. The phenomenon of impunity renders meaningless a large proportion of court decisions. The Supreme Court has identified the need to improve enforcement of its decisions as a major objective in its new strategic plan. A study published in 2007 on the implementation status of 100 selected Supreme Court directives showed that only 13 were fully implemented and another six partially.²⁰ According to the Supreme Court's 2007 annual report, 70 percent of its orders and verdicts had not been implemented. The Supreme Court has been reluctant to bring government agencies to account for these failures by using its contempt power to imprison defiant officials.

Criminal prosecutions are a significant part of the work of the judicial system. The most recent annual report of the Office of Attorney General indicates that in the year up to July 2008, 4,380 criminal cases were filed in district courts, an average of 58.4 cases a year or five cases a month in each district. In the same year, 3,083 cases were filed by government attorneys in

¹⁹ Mid-Term Report – Judiciary Strategic Plan 2004/5 to 2008/9, page 5.

²⁰ National Judicial Academy, *An investigative study on Implementation Level of the Directive Orders issued by the Supreme Court*, January-February 2007.

district administration offices for determination by chief district officers, an average of 34 cases per district in the year, or 3.4 cases a month. This means that, on average, criminal cases were filed at a monthly rate of only 8.3 per district. The statistical record is summarized below in Table IV-4.

**Table IV-4
Prosecutions by the Office of the Attorney General, Fiscal Year (2007-2008)**

Where filed	Pending at end previous year	Filed in current year	Convicted	Not convicted	Total finalized	Pending at end current year	Conviction rate
Supreme Court	2,590	740	293	599	892	2,438	33%
Special Court	159	90	56	47	103	146	54%
Appellate Court	1,410	1,754	716	741	1,457	1,707	49%
District Court	4,081	4,380	2,357	968	3,325	5,136	71%
District Office	2,964	3,083	2,667	56	2,723	3,324	98%
	11,219	10,086	6,097	2,439	8,536	12,769	71%

Source: Office of the Attorney General, Annual Report

The corresponding figures for government attorney filings in the Supreme Court is 740 cases or 62 cases per month and 90 cases in the Special Court or 7.5 cases per month. It is obvious from these figures that most criminal complaints are settled privately or in police stations and go no further. Although rates of conviction for prosecutions initiated by government attorneys in district courts is high, there is a wide gap between reported crime and investigations referred by police for prosecution, compared with cases that are actually prosecuted. Only a small proportion of prosecutable offenses result in prosecution, suggesting that reported conviction rates should be much higher than they are. It is also evident from court statistics that normally high volumes of small criminal cases, such as traffic infringements, are not prosecuted at all. These results validate the widespread view that the contribution of courts of justice in either deterring or punishing crime in Nepal is almost imperceptible in statistical terms.

In Nepal as in other countries, **judicial regulatory bodies** provide institutional arrangements aimed at establishing and maintaining the quality and independence of courts of justice. Under the interim constitution there is a Judicial Council responsible for recommending appointments of judges, including justices of the Supreme Court other than the chief justice. The Chief Justice is selected by the Constitutional Council, which is essentially concerned with appointment of persons to each constitutional office. The Judicial Council has a secretariat that administers the transfer of judges and other personnel administration functions affecting judges. There is also a Judicial Service Commission, which operates as a civil service administration authority for non-judicial employees of courts. Unfortunately, the Commission's practices continue to include reliance on seniority-based promotion, limited transparency, and few promotions of women or members of minority groups to senior administrative positions from whose ranks many judges are ultimately recruited.

Judicial development is principally the responsibility of the National Judicial Academy (NJA), an educational institution established by legislation in 2007. The NJA is administered by a representative board and is responsible for training and continuing education of judges,

prosecutors, government attorneys and private attorneys. Despite the broad scope of its training charter, in practice it tends to provide training according to available funding, much of which is sourced from donors. Considerable funding support has been provided for development of judges and judicial staff and relatively little for other categories to date. The volume and diversity of donor interest, however, has resulted in the NJA being quite active over its first two years in judicial training. The value in sustaining an active and effective academy is underscored by widespread perceptions that many judicial appointments are guided by political allegiance of appointees rather than on merit, a factor which puts a premium on efforts to overcome perceptions of the limited competencies of some judges.

2. Legal Agencies of the Government and Autonomous Commissions

Government attorneys: The roles of prosecutors and government salaried advisors and civil law advocacy lawyers are most often kept institutionally distinct in the legal systems of other countries. In Nepal they are part of the single cadre known as government attorneys. All government attorneys, including prosecutors, are either in the Office of the Attorney General (OAG) or are on long- or short-term attachment to other state ministries, agencies, and special commissions. The effect is to obscure the distinction generally made between prosecutors and other state lawyers, such as those who might be concerned with criminal defense or the rights of crime victims.

Not only is the special role of the independent prosecutor obscured in the OAG cadre structure, but the occupancy of the Office of Attorney General is itself highly transitory. The Attorney General is regarded as a political appointee and changes with each successive Prime Minister. In recent years, the typical duration of each appointment has usually been no more than a few months at a time, compromising continuity of leadership, policy discipline, and independence. In practice, the level of true interference with prosecutorial decision-making, both from external sources and from within OAG, is said to be largely unrestricted.

The effect of interference in prosecutorial decision-making is most likely to result in cases being prematurely dropped, rather than inappropriately continued. The figures for prosecution rates, as with rates of court case disposal, are conspicuously low, as shown in Table IV-4, above. According to the OAG annual report for 2007-08, government attorneys achieve a conviction rate of 98 percent in district administrative offices (*i.e.*, before chief district officers) and 73 percent in district courts. These are high rates in normal circumstances, but not surprising in this context where it appears that most reported crime is not prosecuted at all. There are no figures available on the number of police reports that are not referred to prosecutors or the cases prosecutors receive that they decline to prosecute. And by reason of the high turnover of Attorneys General, there is difficulty in developing momentum for change in the way prosecution programs are administered, a factor that seems to have discouraged the interest of most donors.

The police are struggling to rebuild after years of insurgency. There are two police forces in Nepal, both under the Ministry of Home Affairs. The National Civil Police is the traditional police force that conducts the range of police functions from patrol to investigation. They were heavily targeted during the insurgency and experienced significant losses in personnel, equipment, and infrastructure. The Civil Police Force stands at roughly 57,000 officers. Many lack equipment and training in basic skills. Police receive basic skills training at the police academy, but there is little capacity to train in specialized skills. Recruitment, promotion, and transfer are conducted according to set criteria but in practice are affected by political connections and influence. Operationally, the Civil Police are directed by the Ministry of Home Affairs at the national level,

and by the district security committee, chaired by the chief district officer, at the local level. In practice, they face significant pressure from political parties on individual cases and operations, with little political support at the local or national level to resist such pressure.

In addition to basic public order management, the civil police are primarily responsible for investigating the majority of crimes. Most officers, however, lack training in investigative skills or crime scene management. There are roughly 150 scene-of-crime officers responsible for investigation that were trained and equipped with support from the United Kingdom, and the police are training approximately 16 more each year. This number is low relative to the need, and many of these officers are called to other duties, or lack the basic equipment or logistical support necessary to arrive at crime scenes or manage them once they arrive. Lacking the necessary skills and equipment and faced with logistical and geographic barriers and political pressure, police deal with many cases outside of the justice system, either by failing to register cases or failing to conduct timely investigations, leaving little evidence for the prosecution.

The Armed Police Force is a separate force of 28,000 personnel. They were established as a paramilitary force specifically to combat the insurgency and placed under the operational command of the Army. Their role in a peaceful Nepal has not yet been determined; they remain on call by the district security committee to respond to incidents or support the civil police.

One of the biggest challenges facing the police overall is defining its role in a more democratic, pluralistic society, notably by moving beyond repressive tactics and gaining the trust and confidence of the public. The Civil Police has developed plans to enhance its investigation capacity and equipment, improve its training capacity and institute specialized technical and officers training, rebuild infrastructure and enhance its communications network, and institute community policing, with the support of some donors. They have also begun to apply a 45 percent entry-level recruitment quota for marginalized groups to diversify the force and make it more responsive. However resources are limited and the police are dependent on outside support to take on these initiatives. More significant obstacles exist in the weak capacities of many police officers and in the limited political support for a more professional, accountable, and publicly-oriented force.

The **Ministry of Law and Justice** is the line ministry responsible for framing governmental policies concerning matters of law and administration of justice. It formulates legislation and policies specifically with respect to reviewing and reforming justice administration. It has responsibility for drafting and approving bills, ordinances, rules, and orders; and monitoring implementation of existing laws and international legal instruments. It coordinates among the judiciary and other law agencies, such as the Law Commission, which selectively researches legal reform issues and develops draft legislation, and the Law Book Management Board, a statutory agency established to print and publish statutes and subordinate legislation, including consolidated statutes. While the Board generally fulfills its basic role in paper publishing, it has no capacity for electronic publishing. For its part, the Law Commission publishes a limited range of (mainly recent) laws on its website in Nepali and also a handful in English.

Several **autonomous commissions** are important actors in the justice system. The Interim Constitution provides for the establishment of a Commission on Disappearances and a Truth and Reconciliation Commission as instruments of transitional justice. To date, neither of these has been established although the process for doing so is linked to the current timetable for adopting a new constitution.

The **National Human Rights Commission** (NHRC) has existed since 2000, initially as a statutory body and as a constitutional body from 2007. It has five commissioners and an organizational structure supported by professional and other staff, regional offices, and an annual budget around US\$1 million. Its functions include investigating complaints, evaluating existing human rights, conducting inquiries, and making recommendations on the adoption of measures to end or prevent human rights violations and to take action against those responsible. It has operated alongside the UN Office of the High Commissioner for Human Rights (OHCHR) and benefited from substantial donor assistance. NHRC gained initial credibility through its advocacy and influential investigations. But its independence continues to be held in question because of the appointment of its members on the basis of political consensus. As with the enforcement of court decisions, its success in investigating and pursuing alleged human rights abuses has been hampered by the government's failure to act on the vast majority of its recommendations. When the new transitional justice commissions are finally established, the NHRC will likely play a critical role in facilitating the development of workable restorative justice mechanisms that the new commissions may utilize.

The **Commission for the Investigation of Abuse of Authority** (CIAA) is a constitutional commission that investigates and prosecutes cases against persons holding public offices who abuse their positions corruptly or by improper conduct. The CIAA's authority is limited to the investigation of public officials and it is not empowered to investigate persons employed in the private sector, members of the judiciary, other constitutional officers who are subject to impeachment, or members of the armed forces. As with anti-corruption agencies in other countries, the CIAA pursues, in addition to prosecutorial activities, preventive measures that include advising agencies on processes for preventing corruption and publishing associated promotional material. CIAA prosecutions are initiated by the filing of proceedings in the Special Court using seconded government attorneys who act on powers delegated by the Attorney General. The CIAA has a staffing complement of less than 300 officers and does not have offices outside the capital, instead using the services of chief district officers.

**Table IV-5
Facts and Figures on CIAA Activities**

Particulars	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
CIAA Meetings	117	129	160	192	145	164
Number of Decisions	219	351	401	482	382	427
Total Complaints	3966	3732	4759	4324	3564	2732
Resolved	2481	3188	3709	3353	2976	2135
Cases Filed	147	93	113	114	115	70
Department Activities	25	38	39	45	26	28
Warning	25	24	42	19	16	19
Attention Drawn	9	3	6	6	13	13
Suggestions	22	20	22	13	96	13

Source: CIAA pamphlet, 2009.

The annual reports of the CIAA indicate relatively low levels of activity. As shown in Table IV-5, above, fewer than 150 prosecutions are initiated each year in response to several thousand registered complaints. The CIAA has a good statistical record of success in the cases it has prosecuted, winning convictions in 95 of the 127 cases it filed with the Special Court in the year ending July 2009. However, chronic resource constraints, the continuing vacancies in three of

the five Commissioner positions, and some troubling losses in high-profile cases brought against senior officials suggest a somewhat qualified commitment to reducing public sector corruption.²¹

3. The Legal Profession

The organization of the legal profession in Nepal generally corresponds with legal profession arrangements found in developed countries -- lawyers acquire university qualifications in law and then enter either private practice or government employment. Private practice normally entails solo practice or small partnerships, as there are relatively few large law firms with salaried lawyers or numerous partners.

A statutory Bar Council is responsible for setting standards for law practice, prescribing admission examinations, registering those admitted, and disciplining advocates charged with professional misconduct. The effectiveness of the Council in assuring high standards of professional practice is difficult to ascertain. Advocates are not required to obtain annual practicing certificates or to submit to compulsory continuing training. It is likely that in practice the Bar Council has only a limited capacity to detect, investigate, and act upon allegations that advocates are abusing their positions, such as practicing corruption.

The Nepal Bar Association (NBA) is a national organization of private lawyers, effectively a professional association concerned with representing the interests and needs of its members. In 2009, there were over 9,300 members of the NBA or associated regional bars. In addition to its central administration in Kathmandu, there are 83 bar units in various localities across Nepal. The NBA has five members on the Bar Council appointed after a ballot among its members and is usually represented on other statutory and ad hoc committees and boards concerned with the administration of justice. The NBA is also active as an NGO in partnership with donors and government in areas concerned with development of the legal profession and legal services, such as legal aid. It pursues policies that tend to reinforce existing opportunities for its members. Few positions on its governing board and its various committees and programs are occupied by women or persons from disadvantaged groups. The NBA, along with most legal NGOs, is affected by the phenomenon of the politicization of its members, leading to partisan difference about the management of issues and services and complicating the taking of positions on public justice issues by the NBA as an institution.

Legal education is provided mainly at Tribhuvan University by Nepal's only government-funded university law faculty. The University produces up to 500 law graduates each year. As a government university, its management and programs have been affected over the years by sustained political interference, budgetary constraints, disruptive strikes, intimidation from student political groups, and corruption of personnel.

Private legal education providers, such as the Kathmandu School of Law (KSL) and small legal research NGOs, have been the main sources of experts with whom donor and government programs have collaborated in recent years on legal education development activities. While KSL has introduced innovative and quality-assured teaching services, it currently produces only

²¹ The 2008 *Global Corruption Report* places criticism on the Special Court for acquittals of senior public officials charged with corruption, suggesting that CIAA cases "are certainly not perfect" but that "its investigations are generally painstaking and founded on a decade of experience." See "Nepal" in *Global Corruption Report, 2008*, Transparency International, pages 207-210, http://www.transparency.org/publications/qcr/qcr_2008#7.3.

about 50 graduates a year, suggesting that sustaining adequate levels of legal training and expertise will be a continuing challenge for some time to come.

4. Access to Remedies and Legal Assistance for the Poor and Disadvantaged

Legal aid through government: There are only limited legal aid services available to disadvantaged Nepalis other than those in localities that benefit from donor supported programs. Two government-funded schemes operate formally for the benefit of indigent litigants and accused persons. The first is administered by the Supreme Court by which it appoints and supervises one member of the bar as a *stipendiary advocate* in most court locations. There are two stipendiary advocates attending the Supreme Court, one in each appellate court, and one in most district courts. The advocate is paid a relatively low monthly retainer to represent those who lack legal representation in the courtroom. Although available in almost all district court stations, poor funding and the apparent absence of systems for monitoring the effectiveness of the scheme suggests that it fails to render more than a low level of assistance to those eligible to use the service.

The second scheme, launched under the Legal Aid Act of 1997, is administered by the Ministry of Law and Justice and relies on a system by which legal aid committees in collaboration with local bar cells are established in each district to assess legal aid applications and appoint private lawyers to act for those granted assistance. That scheme is also impaired by poor levels of government funding and dispenses aid only to those who meet stringent means tests and then only in a limited range of districts. Donors, particularly the current EU Conflict Mitigation Program, have been active in supporting the establishment of new committees, in equipping their offices, and in providing training. A range of other donors, including USAID, have supported such services in connection with other programming that focuses on community support programs. The prognosis for sustainably improving the quality and accessibility of legal aid via these initiatives, however, remains in doubt for as long as operational funding falls short of the actual demand for legal aid services. The only salaried government officials with responsibility for either dispensing legal aid funding or directly providing legal aid services are those assigned to a small secretariat that supports the central legal aid committee in Kathmandu and a single staff person assigned to each district legal aid committee.

Private legal advocacy: Legal NGOs, i.e. civil society groups and law firms established for the purpose of acting for the legally disadvantaged, have been supported by a wide range of donor programs. Those programs have been used to support civil society in participating in legal reform processes, such as the development of Nepal's constitution and other socially progressive legislation, as well as for the purpose of providing direct legal representation in court. Such programs have been used to build the capacity of NGOs that will offer legal representation to both litigate and defend court actions aimed at establishing test cases. These actions are typically intended not only to defend the rights of the individuals concerned, but to induce the courts and the government to enforce laws and administrative policies more consistently and impartially. A number of these actions have succeeded in areas concerned with victims of the ten-year insurgency, environmental causes, labor cases, and human rights monitoring. A number of donor-assisted legal NGOs have succeeded in these activities. However, most organizations at the national and grassroots level are affiliated with political parties, making coalition-building between organizations quite difficult and not readily sustainable.

Alternative Dispute Resolution: Most donors that are active in supporting rule of law reforms in Nepal have sought to be involved in the development of alternative dispute resolution (ADR)

initiatives. This has been essentially due to the difficulties for donors in making practical progress with improving formal justice systems in ways that are likely to benefit the poor or the disadvantaged within a reasonable timeframe. ADR initiatives enable services to be offered directly to those in immediate need in ways that are not dependent on the readiness of justice agencies. The chief manifestation of these programs has been in the area of community mediation, but they also include programs concerned with extending general and public interest legal aid, programs concerned with court-referred mediation, and capacity building of NGOs active in counseling and supporting those in need.

Community mediation programs have been supported by donors to extend the choices available to those who are otherwise excluded from practical access to the formal justice system. This has been achieved by establishing mediation programs at the village and town level by which disputes may be resolved through negotiation independently of police, courts, or government administrators. Donors have supported the establishment of dispute resolution committees at village level, relying on NGOs but sometimes also overlapping with existing local government committee structures, by training people in the skills of mediation and by providing ongoing assistance in meeting basic costs. These programs have generally succeeded wherever they have been introduced across Nepal. At Annex 5 is a map produced by DANIDA in February 2009 that illustrates the range and geographic spread of donor activity. While readily classified as successful, these programs suffer from a lack of active government or legislative recognition or support, almost no connection with formal justice systems, and continued dependence on financial support from donors. Should donors withdraw their support, community mediation would likely rapidly diminish as an accessible alternative dispute resolution option.

V. Current Programs of International Cooperation

A. Areas of Support

Support to the judiciary: Various projects in recent years have supported the judiciary in policy development, continuing judicial education, and case management improvements. DANIDA supported strategic planning for the courts between 2002 and 2008. UNDP is supporting programs for reforming civil and criminal procedural codes and coordination within the justice sector via a Justice Sector Coordination Committee. (This committee, which is chaired at the central level by a justice of the Supreme Court, is augmented by corresponding committees in each district. The committees are aimed at improving coordination and communication between justice sector actors and include representatives of the courts, the police, the prison service, the OAG, and the Ministry of Law and Justice. The central committee is concerned with developing new policies, including legislative change proposals that might improve the efficiency and effectiveness of justice services and processes. At the district level the committees are largely concerned with implementing policies and resolving local problems of coordination.) In addition, USAID has supported court-referred mediation programs, records management improvement, and development of case tracking software in pilot courts. The World Bank is supporting the development of new commercial court benches that were established by the Supreme Court in four courts of appeal in 2009.

ICT infrastructure in courts: With the exception of the Supreme Court's central building, Nepali courts have access to very little information and communications technology (ICT) infrastructure. All of the Supreme Court's registries and administrative branches use networked computer systems, and all essential systems of work rely on the collection and use of electronic

information. In other courthouses computers are used only for word processing and limited case tracking. The courts do not have the resources to acquire and sustain extensive use of technology without significant enhancements to their recurrent and capital budgets. Even the ICT facilities of the Supreme Court were substantially underwritten by donor funding. The current EU Conflict Mitigation Project aims to provide up to 2 million Euros of assistance to install new networked technology in most major court facilities. However, that project is limited to initial procurement and will not cater for long-term maintenance and training costs. Other donors have offered new technology in courts in recent years, including USAID and the UNDP, each of which has advanced pilot court programs of various kinds. While the conventional wisdom is that court technology is essential for modernizing case management, donor programs that include pilot-level automation of courts in Nepal have not resulted in tangible improvements either in the rates of sustained ICT usage or in improved case processing outcomes. Whatever factors may be cited to explain this, ICT development has been shown to be a risky approach to pursuing rapid improvements in court efficiency or access to justice.

Court case tracking software development: Another dimension of ICT development is the design and commissioning of software for use by courts to register and track cases and to facilitate better case management, procedural transparency, and associated reductions in case delay. Although several donor projects have pursued this goal and projects supported by USAID and the EU are still under way, few courts in Nepal use such technology other than as a means of validating the accuracy of paper systems the software was designed to replace. Specially developed case management software is yet to make a lasting impact on court efficiency or effectiveness. Software development, even in courts that have reasonable levels of access to ICT, remains a field in which the risks of failure seem to be quite high.

Court case management procedural improvement: Donor-funded programs concerned with procedural reforms have generally failed to achieve more than to advocate change that fails to gain acceptance. Pilot court initiatives have contributed to some basic yet significant procedural changes, such as creating criminal and civil dockets and collecting basic statistics on caseload. Yet the vast majority of procedures and administrative processes remain unchanged. Attempts to implement more comprehensive, results-based management changes have tended to be frustrated by the need for legislation that does not get enacted, needed competency improvements that staff do not acquire, training budgets that are inadequate for the needs, change program durations (mandated by donor timetables) that are too short, priorities that frequently change with shifting leadership, and limited capacity throughout the courts – particularly at the lower levels – to manage complex change processes. The result is that while some case management improvements have been adopted, they have not contributed to consistent or comprehensive results in addressing efficiency, transparency, or access to justice.

Court-referred and non-court mediation: Court-referred or court-annexed mediation has been developed by programs supported by UNDP and USAID. Court-referred mediation has been used as a means of engaging the judiciary and the legal profession in utilizing mediation as a tool for settling civil court cases or for accelerating the adjudication of cases that do not settle. While these programs can be considered to have succeeded in demonstrating the benefits of mediation and in developing mediation skills among those associated with the courts, there is no clear evidence that they have had an impact on actual rates of case finalizations or on the duration of case waiting times. Even in the pilot courts in which mediation has been provided, only a small proportion of civil cases have been referred to mediation, putting in doubt the extent of acceptance of mediation by the judiciary or the bar. Nor has court-referred mediation yet been used outside the scope of pilot court programs supported by donors. USAID has supported non-court mediation through the chambers of commerce. However, these efforts are

relatively recent and commercial mediation centers have had little use so far. The limited use of these mediation options points to limited success so far in raising awareness or support for this new concept and its incorporation into the judicial process – although some inroads have clearly been made. The Supreme Court has indicated interest in extending the use of court-referred mediation to courts in general, and a small but committed group of lawyers has formed a Mediation Society to promote the concept. Community Mediation has caught on more easily due to its low cost, easy accessibility, and potential to empower and meet the needs of vulnerable populations. Most donors work with NGOs to establish community mediation centers. This approach has created some effective, grassroots models. Yet, these models lack a consistent approach or legal framework to ensure rights are protected. Overall, while there has been progress in introducing the concept of mediation and raising awareness, additional and sustained efforts will be needed to translate this initial progress into a significant impact on access to justice or on court performance.

Court staff training: Donor programs concerned with pilot courts, new technology in courts, mediation, and other activities associated with court administration have usually included significant training components. Since the establishment of the National Judicial Academy, its facilities have been used to provide much of this training, an arrangement that has helped in providing training programs in a fashion that is most likely to be sustainable beyond the duration of the donor programs concerned. Use of the academy for such programs allows it to acquire and nurture expertise in the field of training, utilize its network of faculty members, and leverage economies in the costs of delivering courses. A shortcoming of training provided to date, however, is that the scope of donor programs has always been limited to pilot courts, particular branches of subject agencies, or particular geographic regions of trainees. No programs sponsored by donors, for example, have yet been offered to all staff of the Nepali courts. The selectivity of donor sponsored training offered, often compelled by limited funding, has meant that the appointment of persons to attend the training has necessarily been selective. In an environment in which positions within government agencies including courts are biased heavily against promotion of women, minority groups, or persons of traditionally lower social castes, then the offering of limited training opportunities is likely to reflect these selection biases. Thus an unintended consequence of donor sponsored training for which not all employees who could benefit are eligible is that it can tacitly reinforce existing inequalities of opportunity. Donors need to be mindful of this potentially perverse consequence of their programmatic support in programs that may be targeted too narrowly.

Access to legal information: A dimension of access to justice is the ability of citizens to know what the law says and to be able to obtain advice from qualified people about the opportunities and duties that laws provide. Much remains to be done in Nepal to increase access to legal information such as statutes, government regulations, and court judgments and orders. As previously noted, very little of the body of Nepali public laws and regulations is published electronically, and the Supreme Court has not yet initiated its planned Internet publication of its significant decisions. The ADB supported a technical assistance project in 2003 to assist the Law Book Management Board and the Supreme Court in providing online access to statutes and judgments. However, that project did not succeed in establishing such a service. While the Nepal Bar Association publishes a range of statutory material and case law via its website, access to it is limited to its paying members. Neither the Tribhuvan University law school nor the Kathmandu School of Law publishes laws or cases on their public websites.

The case for programs to make legal information broadly available remains strong. Donors could assist in underwriting the usually modest costs of establishing online publication of laws and by supporting Nepali courts and the agencies of the Ministry of Law and Justice to publish

public legal information in accordance with principles adopted by the Free Access to Law Movement,²² which is concerned with ensuring that public information, including that which is produced using donor funding, is thereafter made available free of charge to anyone, including via the Internet.

Enforcement of civil and criminal court judgments: The criticism leveled at the system for enforcing orders of civil courts in Nepal is that the processes of enforcement give judgment debtors the opportunity to re-litigate the matter in issue as if the judgment was never given. Procedurally, civil judgments are enforceable by the judgment creditor filing an application that is treated as if it is a fresh action. The process then necessarily requires the issue of the summons and the scheduling of a hearing. It is said by judges and legal practitioners that delays in the enforcement process, which can also be subject to numerous opportunities for lodging procedural appeals, can match the delays encountered in reaching the original judgment. And in the case of the enforcement of criminal fines payable by those not held in detention, there are similar opportunities for process evasion and bribery of public officials to avoid paying.

In its strategic plan for 2009-2013, the Supreme Court identified enforcement proceedings as a major priority for reform. A judicial committee has considered proposals for reforming enforcement procedures which are said to be part of a broader package of reforms under consideration by the task forces that are reviewing the criminal and civil procedure codes. However, these reforms require new legislation, the timing of which remains uncertain. Donors, chiefly UNDP and USAID, have attempted to assist by supporting procedural reform and enforcement registry capacity building, such as the development of databases to track enforcement cases. These initiatives have not yet had any impact on the problem. Yet, they may have contributed to greater focus on the issue by the Supreme Court and some movement to take action. As recently as July 2009, the Supreme Court announced that it intended to create a new directorate for enforcing judicial decisions, which would begin its work by surveying all enforcement registries to ascertain why judgments were not being enforced and implementing solutions to overcome these obstacles. Continuing donor support in implementing workable solutions is likely to be worthwhile, especially after procedural reforms are enacted. Unlike court disputes at first instance, enforcement processing ought to be less labor intensive, more amenable to office automation, and less dependent on developing large scale change programs. It remains a worthy area of continuing donor interest.

Commercial bench development: Improving the means by which commercial disputes might be heard and determined more expeditiously and according to high standards has been a theme of a range of donor support activities, chiefly by the World Bank and the ADB. Legislation has been enacted in recent years governing secured transactions, banking, and other laws designed to align Nepal's commercial and trade structures with its trading partners. In early 2009, the Supreme Court established *commercial benches* within four courts of appeal. The World Bank is supporting this process by offering technical assistance that will help develop special court rules and associated training of judges and staff to reinforce new commercial court procedures. Implicit in these preparations is the intention to provide some degree of priority attention to those disputes that are considered to have significance for Nepal's trade and major economic development projects. The challenge for the Supreme Court in taking this direction is in dealing with the demand for special commercial benches in circumstances in which the courts of appeal are affected by high judicial vacancy rates, ineffectual general systems of case processing, and very low levels of judicial productivity. The modest levels of donor support aimed at developing commercial courts may prove to be insufficient.

²² See Montreal Declaration on the Free Access to Law (2007) <http://www.worldlii.org/worldlii/declaration>.

Support to Judicial Council and Justice Sector Coordination Committee: UNDP has been active in offering technical assistance aimed at assisting the judiciary in advancing reform programming. These projects are small, but serve to prompt the judiciary to give attention to micro reform activities that are not dependent on large scale expenditures. UNDP assistance includes supporting the secretariat of the Judicial Council, which is effectively the personnel administration unit for Nepal's 270 permanent and ad hoc judges. It also includes supporting the research and operational work of the central Justice Sector Coordination Committee.

Support to the Office of the Attorney General (OAG): Due largely to the short tenure of most who have occupied the position of Attorney General in recent years, there has been only negligible donor support to the OAG's prosecutorial functions. In the event of a renewed commitment by government to increase levels of prosecution activities, the prosecutors will not be ready by reason of their lack of numbers, the poor depth of individual prosecutorial competencies and experience, and the lack of reliable office staff and systems. Donors could assist by helping to establish automation of a central prosecutorial office distinct from other parts of the OAG and by offering training on skills in presenting evidence to courts of justice, possibly as part of a broader program of capacity building. In the absence of some degree of capacity improvement among prosecutors, no amount of reforms to criminal court processes are likely to be effective in improving either the volume or the quality of criminal prosecutions.

Support to the Police: Several attempts to initiate donor-funded programs to strengthen the police have been affected by political changes. The UK has been most active in supporting the police. While the UK effort succeeded in supporting limited improvements in investigative capacity through training "scene of crime" officers, efforts to promote broader institutional strengthening were disrupted with frequent changes in political authority, starting with the assertion of control by the monarchy in 2002. Several donors have more recently begun to explore possible engagements with the police. The UK is exploring possible assistance, the US Embassy is exploring communications, training, and infrastructure support, and the US Institute of Peace has begun to work with the police on a strategy for community policing and police-prosecutor cooperation. Plans by the Civil Police to bolster investigative capacity and strengthen the training academies provide possible entry points for support given a sufficient commitment. However, all of these plans remain subject to political approval by the Ministry of Home Affairs, and so far the shifting leadership has not enabled any cohesive reform plan to take shape.

Support to the Commission for Investigation of Abuses of Authority (CIAA): The CIAA did benefit from significant technical and material assistance under USAID in 2005 when it was headed by activist leaders who pursued high profile cases. Its public profile and reported activities suggest that it is at least partly successful in pursuing and prosecuting some cases of corruption. It is also active in anti-corruption prevention and promotional activities, consistent with practices applied by comparable agencies in other countries. Its profile diminished following a change in leadership and the vacancy of most of its commissioners. Yet it still plays an important role and could be reactivated through effective leadership and political support. Donors seeking to contribute to improving prosecutorial capacity could support capacity building of the CIAA in the areas of investigative and prosecutorial skills and office automation. As the prosecutor for the Special Court, the CIAA offers a potential area in which programs aimed at improving the quality of prosecution might be evaluated against the results achieved in the Special Court.

Support to civil society: Several donors have pursued various rule of law development objectives through engagement with civil society. Notable areas of activity have been in developing community based mediation, constitutional and statutory reform research and

advocacy, public interest litigation, legal aid programs, and human rights monitoring, reporting, and advocacy. A risk factor for this work has been the difficulties in assuring enduring benefits in terms of improving civil society capacity and policy outcomes in a politicized environment. Despite this problem, donor programs seem to have generally achieved their various goals in terms of the conduct and performance of participating NGOs. Several NGOs have become highly competent in achieving their mandates of legal aid, public interest litigation, and human rights reporting, thanks in part to core funding and capacity building support provided by DANIDA, USAID, the EU, the UK, and others. Donors can validly continue support for civil society as a strategy for fostering political and social reforms on which improvements in the rule of law will depend.

B. Contributions of USAID Programs

USAID rule of law programming in Nepal has addressed many of the areas outlined above. Starting in 2005, the focus has been on increasing transparency, improving the administration of justice, supporting capacity building in judicial institutions, and expanding access to justice. Investments have been made in introducing improved case registration and management techniques and software, training judges and court personnel in case management, publishing judicial decisions, and improving archiving in selected courts. These activities have introduced new concepts and ideas and built a foundation for longer-term improvements in judicial administration. For instance, efforts to introduce more streamlined approaches to enforcing judicial decisions have helped the Supreme Court to develop its approach to these issues as a priority in its new strategic plan, setting the stage for progress in this area.

USAID-supported new concepts in the area of mediation have gained supporters among judges, members of the bar, and the Chambers of Commerce and Industry, although mediation has yet to be fully accepted as an acceptable alternative to litigation. USAID has also helped expand access to justice, primarily through support to some dynamic civil society organizations that pursue public interest litigation and provide legal aid to women and marginalized groups. In each of these cases, USAID assistance has further helped to catalyze assistance by other donors, leading to innovations being picked up and expanded by other donors or by Nepali institutions themselves.

The overall impact of this assistance has been limited by many of the same constraints that have affected other donor programs, as described above. Many government institutions have been unable to fully or rapidly absorb assistance and manage complex reforms to their management and procedures in multiple areas at the same time. In every institution, constantly changing leadership has hampered continuity, as new officials arrive with their own priorities and only a few months to implement them.

One notable exception has been the Supreme Court, which is now in its second strategic plan and benefits from the continuity of the registrar's tenure. Yet even in the courts, limited management skills among personnel, particularly at the district and appellate levels, make it difficult to sustain and manage complex change processes. Innovations introduced in pilot courts have not resulted in changes to the underlying processes that give rise to delays and limit access to services. The limited scale, reach, and timeframe of assistance programs, often confined to a few pilot locations with a few counterparts while pursuing a variety of different approaches at once, has also limited the overall impact of this assistance. Some of the innovations will require sustained and focused effort – and much more investment in social marketing and change management – to bear fruit. To be sure, there are change agents in the

judiciary and other institutions, as well as in civil society. However these agents will require more sustained support and capacity building to move change through their institutions.

The rapidly changing political environment has also limited the ultimate impact of programs. The conditions affecting Nepal during the design of most donor programs have drastically changed. Rising crime and insecurity, the frequent intervention of political actors, rapidly shifting leadership, and the uncertainty in the country's political future have eroded the impact and continuity of efforts to strengthen institutions. More attention to short-term priorities, while strengthening advocacy for addressing these priorities from outside and inside the institutions, may lead to more immediate and visible results. Nonetheless, especially in this uncertain climate, those professionals who make up the core of justice institutions and those who may be able and willing to lead change in the future are especially worthy of support as the basis for longer-term improvements in institutional capacity and rule of law more broadly.

VI. A Proposed USAID Strategic Response to Principal Rule of Law Challenges

A. Program Objectives

The present state of rule of law development in Nepal is a cause for concern, but also gives reason for hope. The present assessment has confirmed that there are many weaknesses in the administration of justice and also that there are several encouraging initiatives to address those weaknesses. Principal among these are the sustained commitment of the Supreme Court to the disciplined implementation of a strategic plan, the deliberate and participatory ongoing process, under the guidance of the Ministry of Law and Justice and the Nepal Law Commission, to reform important legislation, and the vigorous activism of a number of civil society organizations determined to protect and strengthen the rule of law. Within this mixed picture, the assessment has identified three primary challenges that together pose a threat to the ongoing efforts in Nepal to sustain the peace, build a durable new structure of democratic governance, and create new opportunities for inclusive economic and social development. As discussed above, these three challenges are:

- Ending impunity and achieving effective application of the law;
- Expanding inclusive access to justice and equal protection of the law; and
- Strengthening independence and professionalism in the justice sector.

It is the judgment of the assessment team that USAID should address these primary challenges now as the objectives of a USAID program with the overall goal of advancing public respect for the rule of law and making justice institutions worthy of public respect. Each of these challenges will have a significant impact on the outcome of current policy deliberations about the future of Nepal's governance. And as the key policy decisions are made, successful implementation will depend substantially on the capacity of institutions in the justice sector. The USAID program, therefore, should concentrate on assisting Nepali decision-makers – in government, the judiciary, and civil society – to establish a foundation in the rule of law for sustainable democratic governance and the capacity to build an inclusive society based on that framework. This will require a sophisticated strategy that takes into account the interests and incentives relevant to the various stakeholders.

This is not a time for routine support or broad, indiscriminate efforts to help to increase the overall efficiency or improve service delivery in justice institutions. Nor is it a time to withdraw

from programming in the justice sector while awaiting the resolution of the fundamental issues that Nepal confronts. This is a time, we believe, to engage in a focused, strategic response to help Nepal address each of the above-listed primary challenges in a manner that will have the most positive influence on achieving and sustaining a transition to peace, stability, democratic governance, and broadly shared development.

Of course, a USAID rule of law program cannot succeed on its own in the complex and volatile political climate of contemporary Nepal. It will be important that the USAID program operate in the context of an active US policy with mutually supportive interaction between diplomatic and development instruments. The USAID program will also need to take account of, and provide objective support for, the ongoing political dialogue on rule of law issues in Nepal, especially the ongoing deliberations in the Constituent Assembly. In addition, the USAID program will have to rely on the support of other programs – by USAID and others – to help Nepal strengthen democratic governance. For example, addressing access to dispute resolution mechanisms at the community level will require close coordination with programs that support local governance. Similarly, engaging on the highly political aspects of application of the law and judicial independence may require complementary engagement with political parties.

B. Guiding Principles

Disciplined adherence to some guiding principles and constant attention to issues of consistency and effectiveness will be important to a successful USAID rule of law program. The assessment team recommends the following:

Transparency and inclusion are cross-cutting issues to be integrated into all program activities. For example, it will be important to establish transparent procedures that will facilitate the merit selection of participants, including the need to include qualified women and disadvantaged minorities. In some cases this will require reaching understandings with multiple local institutions. For example, the Judicial Council recommends new candidates for judicial appointment while the Nepal Judicial Academy provides their initial training. Without the commitment of the Judicial Council, the Academy cannot ensure either merit selection or inclusion. Expanding inclusion of marginalized groups may require creative approaches, such as expanding training activities for court staff and other personnel from whose ranks judges are often recruited, where marginalized groups are better represented.

Another aspect of transparency is the need for practices that can be easily and reliably monitored and verified and thereby will be open to measurement of impact and resistant to waste or corruption. Transparency should include the collection of baseline data, performance monitoring, and publication of results. Program activities provided should include assistance to build the capacity of targeted institutions to collect, publish, and disseminate performance data. These kinds of measures should help to raise expectations for the quality of public management and facilitate public oversight.

Sustainable capacity for continuous improvement in priority areas over the long term should be a hallmark of the USAID program. The program needs to focus on the important issues of the moment – impunity, inclusion, independence – in a manner that is significant for the immediate policy deliberations and also the longer term implementation of the decisions that are made. This means a high degree of selectivity in choosing program activities with transformational potential and vigilance against spreading efforts too thinly to achieve the desired results. For example, if court-referred mediation in a district court with an annual

workload of 300 civil cases is producing only 15 mediated settlements annually, it would not seem worthwhile to give priority to efforts to increase settlements from 15 to 20 or 30.

Civil society must be engaged in active, persistent, and substantial support of all three objectives. The three proposed objectives for USAID programming involve major changes from the *status quo*: holding accountable those who have enjoyed impunity, including women and disadvantaged minorities in the ranks of decision-makers, and strengthening the independence of justice institutions from inappropriate political or economic influence. These kinds of changes have been beyond the reach of internal reformers within the concerned institutions. The active, persistent, and substantial engagement of civil society will need to reinforce the efforts of the justice institutions and the commitment of political leaders if substantial and durable progress on these tough issues is to be achieved.

C. Illustrative Program Activities

With these guiding principles in mind, the assessment team has considered key issues and relevant activities within the range of USAID expertise and offers the following possibilities for inclusion in the program design. These illustrative activities are proposed with a word of caution, however. The team's recommendations were inspired and informed over the course of our research and especially our extensive dialogue with stakeholders in Nepal. However, converting these recommendations into specific program activities with identified actors, quantitative targets, and agreed timeframes will require additional consultations with those who will have the greatest stakes in program results and the greatest knowledge of the practical issues involved in achieving those results. In a sense, the following recommendations are more a suggested agenda for in-depth stakeholder dialogue than a confident prescription of the precise measures needed to achieve the stated program objectives.

1. Ending impunity and achieving effective application of the law

Ending impunity is the most urgent challenge facing the rule of law in Nepal, but also the most political. The targeted activities described below can help civil society advocate for a response and assist key institutions in overcoming obstacles to enforcing the law. Visible progress, however, will require commitment by the main political parties to refrain from interfering in the legal process and by leading government institutions to provide an active response. Civil society advocacy, litigation, and assistance to victims should be complemented by diplomatic dialogue on these issues. One entry point for such engagement would be to advocate for concrete action on "emblematic cases" in coordination with other donors and international organizations. Visible progress toward the prosecution of individuals responsible for high profile crimes can build momentum for more consistent application of the law. USAID support in the following areas can contribute to such action while also addressing the more systemic factors that contribute to the climate of impunity.

Civil society activism is the recommended starting point. This range of activities will raise issues and press the public sector to confront them.

One element is **public interest litigation**. As described above, the Supreme Court has jurisdiction to entertain public interest lawsuits and the Court has shown a willingness to exercise that jurisdiction. At the same time, competent organizations in Nepal have demonstrated success in obtaining judicial attention to public policy issues. USAID support could enable these organizations to expand their work while strengthening their internal management and ability. Support for public interest litigation focused on issues of impunity and

denials of justice seems a powerful tool for obtaining public scrutiny and judicial determination of rights and obligations

In addition to litigation directed at issues of broad public interest, **legal assistance** should be increased for individual victims of impunity and those denied effective application of the law. The assessment has confirmed major shortcomings in legal aid in Nepal and also the presence of NGOs that are able to provide credible representation. Legal assistance to victims would help focus attention on enforcing the law and protecting rights. Several organizations have provided advocacy, legal advice, and legal services and could benefit from continued support. The program focus on issues of impunity and denial of justice might include such matters as lawsuits by families of the disappeared to compel attendance of witnesses from the public sector in court proceedings or inquiries of the National Human Rights Commission, or to compel the Human Rights Commission to conduct public hearings rather than closed interviews. Obviously, there is considerable room for overlap between what might be considered a public interest lawsuit on the one hand and a suit to obtain relief for a particular individual or group on the other.

Beyond vigorous action in the courts, civic organizations interested in restoring respect for the law can be given support for **advocacy, monitoring, and coalition building** focused on impunity and effective application of the law. Participating organizations can be expected to have many interests they will wish to pursue. It will be important to reach agreement on which activities have sufficient relevance to the objective of ending impunity and achieving effective application of the law so as to qualify for USAID support. For instance, focusing on high profile issues like enforced disappearance, other human rights abuses, or enforcement of judicial decisions can lead to broad public support and momentum for action.

A fourth activity for focused civil society engagement is in the field of **transitional justice**. The government and the Constituent Assembly have been struggling with the creation of a Commission on Disappearances and a Truth and Reconciliation Commission, both of which are called for by the Comprehensive Peace Accords and are identified in the Interim Constitution as “responsibilities of the state.”²³ Advocacy for implementation of these constitutional responsibilities and, once these transitional justice bodies are established, support for raising public awareness, monitoring and publicizing proceedings, mobilizing grassroots networks, advocating for the rights of victims and vulnerable groups in the proceedings, and helping to gather testimonies and other kinds of evidence could contribute significantly to this policy objective. While action has not yet been taken to establish either commission, there is some expectation that the Commission on Disappearances legislation may move forward in the near future. USAID support to complementary civil society efforts could add valuable momentum.

Enforcement of judicial decisions and orders is the second area for activities under this program objective. Civil society demands in the courts will be for action, not just judicial opinions that are declarative of rights but without practical effect. Effective judicial relief will require that the judgments of the courts be enforced. Execution of judgments is a well known weakness in the justice system of Nepal and a top priority in the Supreme Court’s new strategic plan. As discussed above, the Court’s initial response has been the formation of a judicial enforcement directorate and the collection of reports from the district courts. This may provide a starting point to give real force to court orders and decisions. However, there may also be a need for additional research and modifications to court rules or statutes to make the rule of law have

²³ Interim Constitution, Articles 33(p) and (s). As previously noted, the duty to create the Commission on Disappearances is also the subject of a specific decision of the Supreme Court. See Uprety, Kishor, note 10, *supra*.

binding consequences. USAID could provide assistance to this new directorate by gathering information on actual practices and mapping obstacles to effective enforcement, sharing best practices from other jurisdictions around the world, recommending legal, procedural and administrative changes, and helping to implement these changes to ensure more consistent enforcement of judicial decisions. If timed appropriately, recommendations could feed into the ongoing efforts led by the Ministry of Law and Justice and the Law Commission to revise the criminal and civil procedure codes.

A third element of giving the judicial system greater force to end impunity and achieve effective application of the law involves the existing weaknesses in **cooperation among the police, prosecutors, and the courts**. Enhanced cooperation is crucial both in investigating and prosecuting criminal cases to bring more cases to conviction, and to enforce decisions of the courts. Given the formidable obstacles to broad institutional reform in both the Nepalese Police Force and the OAG at this time, a prudent but effective course for USAID could be to concentrate on training activities, especially through the National Judicial Academy (which would be a focus for attention under the third objective of the proposed strategy, discussed below). The activity would seek to build a cadre of investigators and prosecutors from among the police, OAG, and independent commissions who understand what is needed to meet standards of proof under the law and how to work collaboratively to meet those standards.

Land title registration, organization, and management is the fourth potential area for USAID support under this objective. The assessment team has been impressed by how consistently land disputes have been identified as a source of civil suits as well as violent conflict and criminal charges. It has also been evident in all our visits to courts that adjoining land registration offices appear to be crowded, disorderly, and backlogged in their service to the public. USAID projects elsewhere have successfully introduced orderly management systems and practices to public offices of various kinds (not only for land title registration, but also for functions such as business licenses, customs processing, and notarial services). These considerations have led us to believe that management improvement in land registration might be a useful public service without the need to address the controversial issues of legal ownership of land. Making land records more accessible could be important in achieving effective application of the law.

At the same time, the assessment team acknowledges that the sensitivity of political issues in Nepal relating to land tenure and property rights could give rise to misunderstandings and even false accusations about the nature of the USAID program. Accordingly, the team recommends that USAID consider a modest and highly transparent effort to improve recordkeeping and customer service in the land registries, demonstrating results and avoiding any involvement in issues concerning Nepalese property law. Eventually, this might serve as a useful entry point to achieve greater political consensus and address broader land issues.

2. Expanding inclusive access to justice and equal protection of the law

This objective focuses on expanding the reach and accessibility of court and other legal and justice services, while ensuring that all of these services fall within a transparent and predictable legal framework that guarantees fair and equal treatment for all. Rather than try to increase the efficiency of the courts to reduce delay, given the relatively low caseload within the courts, the assessment team recommends focusing on reducing some of the barriers to reaching the courts, while raising the quality and consistency of non-court mechanisms. Chief among the barriers to access are the lack of understanding by citizens of their rights to access the courts, the absence of available legal services, and the lack of diversity within a justice system that

does not represent many of the groups in society and thereby undermines their confidence that they will receive a fair hearing.

Again, **civil society support** is the assessment team's recommendation as the leading edge of the USAID strategy. Access to justice and equal protection of the law begin with people knowing their rights. A broad campaign to increase public awareness and legal literacy could be linked with the advocacy efforts recommended under objective 1. It also could form a part of efforts to expand the use of community mediation, discussed below. Coordination with other programs of international support, such as the extensive UNICEF network of several thousand paralegal centers, would provide opportunities to multiply impacts.

Also to be pursued primarily through civil society is the improved use of **mediation** and other informal dispute resolution mechanisms to expand access to justice. Four kinds of activities are recommended:

- For the **court-referred mediation**, it would seem useful to conduct research on where this procedure can be most helpful and to focus efforts there. From the assessment team's observations, it appears that concentration on busy trial courts in urban centers rather than in rural districts with small caseloads or in appellate courts where incentives to settle are small would be more appropriate. Designing incentives for targeting the types of cases which are most appropriate for mediation, along with social marketing and awareness raising efforts, can help expand the use of mediation where it has the greatest impact. The Nepal Mediation Society and the Supreme Court, among others, would undoubtedly be interested in collaboration to improve the quality of court-referred mediation.
- **Commercial mediation** appears to have considerable promise. However, commercial mediation centers have not attracted many users. Neither the business community nor the organized bar appears to have encouraged use of these centers. In particular, they have not promoted the use of mediation clauses in commercial contracts that would oblige the parties in the event of a future dispute to mediate their differences. This is an essential part of expanding the use of commercial mediation. USAID could work with the Federation of Nepal Chambers of Commerce and Industry (FNCCI) and other private sector actors on broader outreach and marketing efforts and to help identify and overcome obstacles to the use of commercial mediation.
- The most impressive use of **mediation** has been **at the community level**, with centers now present in almost all districts throughout Nepal. Uncomplicated, inexpensive, and participatory means to resolve common disputes through consensual approaches can play an important role in providing justice as a public service, restoring trust, building social capital, and empowering women and minorities. (There are some indications that, at a local level, the percentage of women using community mediation is higher than the percentage of women who appear as litigants in court and that mediation settlements are more durable than results achieved in court.) However, there are many varieties of mediation being practiced, with financing from many international sources, an absence of standards about qualifications of mediators, and uncertainties about jurisdiction, human rights protections, and the legal status of mediation agreements. (For example, if the parties to a land boundary dispute settle their competing claims through mediation, can their mediation agreement be registered in the land records as a legally valid disposition of their respective land titles?)

These questions suggest that even as USAID supports the expansion of community mediation to extend access to justice to more people who have little recourse to the formal justice system, it should also work with civil society organizations and the international community to build more common approaches, standards, measures of sustainability, and linkages to the rest of the justice system. For instance, supporting advocacy for the passage of the draft mediation law, along with the development of common standards can help address some of these challenges. This can help to assure that this promising mechanism will be a source of substantially equal justice for all and a legitimate component of Nepal's justice system, rather than risk its deterioration into a second-class remedy for the poor and disadvantaged. Work to build consensus and informed judgment on the part of civil society about the future of community mediation would be a valuable contribution to policy dialogue about legislation on this subject, as discussed below under objective 3.

- Cutting across all three types of mediation is the need to **raise professional standards and quality of mediation** to ensure its viability and conformity with legal standards. Small constituencies for professional mediation have formed, through the Nepal Mediation Society and a number of community mediation groups. Working with these organizations, USAID could help support the development of mediation (and other ADR mechanisms such as arbitration) that are relevant to Nepalese society along with standards to ensure that mediation is of high quality. Developing standard training programs offered by private actors, certification requirements and procedures, and self-regulation mechanisms can contribute to institutionalizing these practices in a way that strengthens the rule of law while providing a valuable service.

Community and local courts may well be authorized in the new constitution, providing a fourth tier of courts at a provincial level. The idea of authorizing the establishment of such courts, closer to the people than the present district courts, has achieved momentum in the Constituent Assembly. Establishing a new set of courts, let alone multiple sets of provincial courts, would be an enormously complex and difficult undertaking. Questions of finance, staffing, jurisdiction, procedures, appeals, and a host of other issues would need to be decided and structures put in place and people selected and trained to implement the decisions made. Should this type of court continue to be contemplated in the emerging text of the constitution, USAID might consider support for broadly participatory research, public consultations, and even pilot efforts to help this initiative for increased access to justice become a success.

Professional opportunities for women and marginalized groups should receive substantial USAID support. The majority of Nepalis confront a troubling shortage of educational opportunities and an absence of support networks for those seeking to penetrate barriers to entry into professions and public offices long reserved for the sons of privilege. The reality of a very low level of representation of women and those from disadvantaged castes and regions contradicts the Interim Constitution's declarations of equality. The assessment team recommends a substantial USAID investment in affirmative action efforts. Beneficiaries of USAID scholarships have historically made disproportionate contributions to democratic governance and economic and social development around the world. In addition to scholarships for legal education, USAID could support professional training scholarships to enable women and other disadvantaged groups to complete the unpaid training period that comes at the beginning of a legal career. Specialized courses and training opportunities can help members of disadvantaged groups compete for entrance exams and promotions. Support for professional support networks can provide the mentoring and knowledge of opportunities necessary for individuals who lack these existing networks to succeed. Such a program seems to be

especially likely to have a significant positive impact over time in achieving both the appearance and the reality of equal protection of the law in Nepal.

3. Strengthening independence and professionalism in the justice sector

This objective, more than any other, involves working closely with public sector institutions. There are many areas of potential activity that could address the needs for greater independence and professionalism. However, the guiding principle remains that the USAID program should build sustainable capacity by pursuing actions with transformational potential and it should avoid spreading efforts too thinly. In the present uncertain climate of political transition, this guiding principle suggests that broad programs of institutional reform in the major justice sector institutions would be misplaced. The assessment team recommends instead a sharp focus on the human capacity within those institutions, with an emphasis on training for judges, judicial staff, prosecutors, and investigators to develop the skills needed to carry out their roles more effectively and to manage ongoing and future reforms within their institutions.

With respect to **training**, the National Judicial Academy has had a productive initial experience and is mandated to serve most institutions within the justice sector including judges, prosecutors, lawyers, and court personnel. It has capable and prestigious leadership, but its work remains heavily dependent on donor interests. Support for the development of a sustainable management system and core curriculum for the Academy seems a highly desirable starting point. Ideally, the Academy should be able to provide basic introductory and in-service courses on a regular basis, while also responding to needs to introduce new training as the law changes. Support for the Academy would be consistent with the Supreme Court's strategic plan, which gives high priority to human resource development.

As to particular themes for training, two subjects stand out: First, the delay and congestion in the courts described above are primarily the result of judicial management practices. A strong Academy curriculum on **court management for increased productivity** could have a significant impact. (Of course, this will have to be monitored to see if the training is effective.) This training should be targeted to all personnel involved in judicial management, from judges and prosecutors to clerks and other court staff. A second area of concentration could be the weak performance of police and prosecutors in conducting **criminal investigations** and presenting evidence of guilt corresponding to the elements of offenses proscribed by law. Courses on basic investigation skills, crime-scene management, handling and presentation of evidence, prosecution and trial advocacy, with an emphasis on inter-institutional coordination for police, prosecutors, judges, and defense lawyers, would seem especially worthwhile. The purpose would be to improve capacity to end impunity and achieve effective application of the law (objective 1, above). A third training priority may come into play if the ongoing code reform efforts come to fruition and new procedural and substantive codes are enacted. This will generate a significant need to develop training on the new codes and procedures for all justice personnel and members of the bar.

As is the case for all components of the USAID program, it will be important that the selection of candidates be merit-based and that women and disadvantaged minorities be represented in significant numbers in the Academy training.

Research and dialogue on judicial independence is a second area for USAID attention under this objective. The concept of judicial independence has been under attack in the Constituent Assembly. The debate appears frequently to lack a full appreciation of why this principle has come to be universally respected as a safeguard of liberty. As the debate goes on over the next

year, it could be very helpful to the participants to have the benefit of objective research by Nepali experts, media attention, and dialogue involving the bench, bar, civil society, political parties, and others. In this regard, judicial independence should be a major theme in civil society- oriented activities under objectives 1 and 2.

Systematic publication of laws and judicial decisions could contribute significantly to greater professionalism by assuring that judges, governmental attorneys, and others are informed about the current state of the law. The Free Access to Law Movement, a group of more than 20 legal information institutes, has long advocated free access to public legal information, principally via the Internet, and has recognized the primary role of local actors in publishing their own national legal information.²⁴ Member institutes of the Movement, such as the Australasian Legal Information Institute²⁵ in Asia, have established collaborative relationships with counterpart organizations in developing countries with a view to increasing local publication (including electronic publication) of laws, regulations, court decisions, and treaties. In the absence of a counterpart organization in Nepal, the content of the World Legal Information Institute and the Asian Legal Information Institute websites for Nepal is quite limited.²⁶ Exploring the possibility of establishing a link between, for example, AustLII and Kathmandu School of Law could lead to major progress in expanding access to up-to-date knowledge of the law. In addition, increased publication of free legal information would be of great help in fostering broad public awareness and legal literacy within Nepal (objective 2).

Modernization of legislation is a fourth, albeit less immediate area for USAID consideration. The major reforms on the agenda of the Nepal Law Commission and the Ministry of Law and Justice – civil and criminal codes and procedures, combating corruption, legal aid, and alternative dispute resolution – will all have profound impacts on rule of law development. They will also have significant implications for legal education (including in the National Judicial Academy) and in public support for mediation, discussed above. Japan’s technical assistance for civil code reform will surely be helpful. However, it is not clear what interest there may be from the government, the judiciary, the bar, or civil society stakeholders in international practice regarding the subjects on the legislative reform agenda. Further discussion of this subject would seem warranted.

VII. Conclusions

This assessment has demonstrated that the rule of law will be a central factor in determining the outcome of Nepal’s ongoing transition to peace, inclusive democratic governance, and broadly based economic and social development. The assessment has identified the salient challenges that exist in Nepal to the development and strengthening of the rule of law. These may be summarized as overcoming impunity, exclusion, and inequality in the society while enhancing independence and professionalism in the justice sector. And the assessment has also identified opportunities to address those challenges, based on the vision, capabilities, and efforts of Nepalese stakeholders. It recommends a proposed strategy for USAID, including suggested program objectives, guiding principles, and illustrative program activities.

²⁴ See note 22, *supra*, and accompanying text.

²⁵ AustLII is a joint undertaking by the faculties of law of the [University of New South Wales](http://www.unsw.edu.au) and the [University of Technology, Sydney](http://www.uts.edu.au). It supports the regional Asian Legal Information Institute.

²⁶ See <http://www.worldlii.org/catalog/2133.html>; see also <http://www.asianlii.org/cgi-bin/sinosrch.cgi?query=nepal&results=50&submit=Search&rank=on&callback=on&method=auto&meta=%2Fasianlii&lii=AsianLII>.

It is clear that the challenges the assessment has identified have implications beyond the rule of law and that those challenges will be influenced by considerations beyond the control of USAID. It seems equally clear that, while a proactive US response to the challenges can benefit from a carefully focused USAID program, the effectiveness of such a program will be determined by several factors:

- How the program operates as a component of a coherent US policy of support for Nepal's transition;
- How the program engages the internal political dialogue and is aligned with local priorities;
- Whether the program is designed and implemented in a collaborative way that inspires local ownership, establishes shared objectives with measurable results, and assures mutual accountability; and
- How well the program is coordinated with other international cooperation efforts.

Developing and carrying out such a sophisticated program will be extraordinarily difficult and complex. However, with attention to all the above elements this is a doable and worthwhile undertaking. The assessment team confidently believes that a focused program based on the objectives, guidance, and suggested activities proposed in this report will have a strong likelihood of advancing respect for the rule of law and helping Nepal's justice institutions to be worthy of respect. The program's success will contribute significantly to the success of Nepal's multi-faceted transition to a more stable, safe, just, and prosperous society.

RULE OF LAW AND HUMAN RIGHTS ASSESSMENT SCOPE OF WORK

Purpose of Assessment

The purpose of this assessment is to assist USAID/Nepal to conduct a targeted analysis of the status of the rule of law and human rights in Nepal, and identify the primary opportunities and constraints to developing and strengthening of the rule of law, improving the administration of justice, and protecting human rights in Nepal. The assessment will lead directly into a strategy for assistance toward these ends in the priority areas that could benefit from USAID intervention, and prioritized recommendations for programming.

Background and Context

Following a decade-long insurgency, Nepal has sustained a Comprehensive Peace Agreement (CPA) for almost three years and has taken major steps toward instituting democratic constitutional rule. The monarchy has been abolished, a representative Constituent Assembly (CA) has been elected, and a government was formed which collapsed in May 2009. A new coalition government that excludes the Maoist, the largest party in the CA is being formed. There is a broad national consensus on the need to address critical development challenges and on the necessity for political reform, although progress has been hampered by a lack of agreement about how to carry out reform. The CA is an elected, temporary structure responsible for drafting a new constitution (to be completed by May 2010 although there are already serious doubts that the target date will be met) and for serving as a transitional legislative body. The CA may become a permanent body and a majority of its members may continue to hold their positions or different ones.

Nepal's principal political challenges are to consolidate the current peace process; draft a new, more inclusive constitution; and build a functioning federal government with sufficiently broad legitimacy and authority to be able to carry out a national development effort in the years ahead. It must accomplish all of this in an environment of political and social divisions; high and often-unrealistic expectations on the part of the public; fragile and politicized state institutions; severely limited resources; chronic unrest and physical insecurity; and extreme poverty. The new constitution will direct how local government is structured thereby influencing local governance practices. The new constitution will also establish judicial structures for the administration of justice and for protection of human rights. The independence of the judiciary is a sine qua non for a democratic society and to guarantee universal human rights.

Despite some progress made over the recent years, there remain significant challenges to one vital component of Nepal's transition to peace and democracy, namely, the rule of law.²⁷ Since

²⁷ The Rule of Law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. Source: UN Secretary-General, "Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict States," paragraph 6.

the signing of the CPA, there has been a steady increase in crime and the use of violence to meet political, economic, and social objectives. The causes and contributors to the increase in violence have gone unaddressed, leading to a potential for increased violence and instability.

The justice system remains weak and incapable of addressing the range of challenges that continue to emerge, including violence and extortion carried out by various political entities, the development of numerous armed and violent groups, an increasing number of criminal elements, and the marginalization of certain groups based on their ethnicity, caste, and other factors. The criminal justice system in Nepal is presently based on four pillars: law enforcement (police and prosecutors), courts, defense attorneys (private and public), and the prison system.

There exist systemic challenges within the judiciary due to many factors, including a lack of judicial integrity, inefficient management, insufficient judicial capacity, and unenforced judgments. These factors have led to a general sense of lawlessness and powerlessness and have exacerbated the political and security situation. The lack of judicial integrity is largely based on the perception – and often the reality – that the judiciary is not an independent, autonomous, and co-equal branch of the GON; as such, the judiciary is often subjected to political pressure or ambivalence from the executive and legislative branches.

In addition, the inability of the courts to operate efficiently and dispense justice quickly contributes to the perception that pursuing justice through the formal court system is not worth the time or costs involved in doing so. Likewise, effective alternatives to the formal justice system – such as alternative dispute resolution mechanisms – are frequently lacking. This has led many citizens to seek justice through parallel institutions, such as the Maoist-operated “People’s Courts.” One of the key contributing factors to the judiciary’s inability to operate efficiently is insufficient judicial capacity. In many areas of the country, particularly in rural areas, formal legal institutions do not exist. In areas where institutions do exist, there are significant challenges, including the lack of qualified judges and court personnel, backlogs of cases, insufficient court administration procedures, and virtually no enforcement of decisions.

Even where the judiciary functions well, many ordinary citizens cannot afford legal representation. The prohibitive costs of private legal representation has a disproportionate impact on historically excluded and disadvantaged groups including women, the poor, ethnic and religious minorities, children, and victims of human rights abuses. Compounding the problem is the lack of a professional, permanent, national, state-funded legal defense system, which has resulted in a state unable to guarantee fundamental rights to its citizens. The absence of state-funded organizations to provide for an adequate defense violates the Nepalese constitution and international conventions on human rights. Article 24(2) of the Interim Constitution guarantees the right to legal counsel of choice for persons accused of a crime. For those unable to afford paying their own legal defense, the judiciary funds a system of fewer than a hundred part-time court-contracted private legal assistance lawyers *de officio*. However, that system has been discredited and is described by reform oriented officials within the court as one that offers few protections for defendants in the pre-trial process (which may take years).

Recent USAID Support: With USAID support, promising reforms have been initiated under the Rule of Law programs implemented from 2004. The programs enabled selected courts to reduce case backlogs, improve case tracking and archiving, promote mediation, improve court administration, and increase access to justice. Some specific results of the activity at the Supreme Court included reduction of the back-log of cases from 17,000 in 2004 to 14,000 in 2006; an increased annual case disposal rate from 6,796 in 2004 to 8,153 in 2006; and reduced

old cases (cases more than five years old) from 2,000 in 2004 to 100 in 2006. Similarly, it helped to design and implement an improved case tracking and archiving system at the Special Anti-Corruption Court, Patan Appellate Court, and the Lalitpur and Parsa District Courts. This contributed to the reduced average time taken to dispose cases (22 months to 11 months) in the Special Anti-Corruption Court and facilitated access to and availability of court records to litigants (as well as improving the storage and retrieval of court records), which reduced the chances of petty corruption at the court staff level.

The training provided to judges, mediators, and business leaders on mediation skills resulted in the establishment of five court-referred Mediation Centers at the Supreme Court, Patan Appellate Court, and other district courts, the development of rules and regulations on court referred and commercial mediation, and the formation of a Mediator's Society. The program also helped to develop strategic and training plans for the National Judicial Academy and provided legal aid to over 1000 poor women and paralegal services for 234 prisoners.

For Nepal to become a full member of the international community, the judiciary needs to be perceived as an independent branch of government that is transparent and efficient. In addition, access to justice has to be guaranteed to all Nepalis. Given the long history of social exclusion and marginalization in Nepal, the administration of justice needs to become a significant vehicle of integration and inclusiveness. However, there has to be a recognized and declared political will to improve and strengthen the rule of law and protect human rights. Lastly, an improved and reliable administration of justice is essential for sustained economic growth. Without it, it is impossible to attract investment to Nepal and to have an atmosphere that is conducive to sound business development.

The decade long conflict (1996 to 2006) between the CPN-M and the then His Majesty's Government and later Government of Nepal witnessed arbitrary and unlawful deprivation of life, disappearance, torture and other cruel inhumane or degrading treatment or punishment, denial of fair public trial, and use of excessive force and other abuses. INSEC reports death of 13,256 individuals during the decade-long conflict. After November 2001, 8,000 civilian deaths were reported. The insurgency ended by signing of a comprehensive peace agreement (CPA) in November 2006, followed by a multi-party constituent assembly elections in April 2008. State of impunity and reported human rights violations remained a challenge even after the formation of a coalition government headed by the CPN-M. In 2008 alone, arbitrary killing amounted to 265 deaths. Fate of many of those (3,300 cases reported to NHRC as of August 2008) who disappeared during the decade-long insurgency remained unknown. According to National Human Rights Commission (NHRC) estimates, there are still 970 unresolved cases of disappearance.

International monitoring bodies such as the United Nation's Mission in Nepal (UNMIN) and the United Nations Office of the High Commissioner for Human Rights (UN OHCHR) played a crucial role to monitor human rights abuses in Nepal. However, the absence of Commissions on Truth and Reconciliation and Disappearances has made accountability questionable. Impunity abounds high in the absence of rule of law and justice.

In addition to State mechanisms, including the judiciary, designated line ministries, and security forces, which have an obligation to promote and protect human rights, a number of institutions with specific human rights mandates have been established in Nepal. The NHRC was established in 2000 and was elevated to a constitutional body by the Interim Constitution of 2007, which entrusted the NHRC with the duty to ensure respect, protection, and promotion of human rights and its effective implementation. The National Women's Commission, National

Dalit Commission, and National Foundation for the Development of Indigenous Nationalities have the mandate to protect the rights of the groups it is concerned with. But these Commissions do not have the capacity to specifically address the human right abuses within the specified target groups.

Recent USAID support and achievements: The collaboration between USAID and OHCHR in 2007 to monitor and investigate human rights in Nepal helped to improve the situation of human right violations in Nepal to some extent. Advocacy for monitoring, documenting, and investigating cases of violations and abuses of human rights in compliance with international humanitarian laws at all levels had some impact. Proposed legislations (such as the bill on disappearance commission) were analyzed to be in compliance with the international standards. By the end of 2005, forced disappearances reduced, including a decrease in long periods of detention and torture in army barracks. Conditions in police custody improved in some instances and OHCHR's presence at rallies and demonstrations became a decisive factor in deterring violence. A broad range of local actors came together to discuss human rights issues as well as their roles and responsibilities in the peace process. The issue of impunity was raised and demand was made for establishment of Commissions on Inquiry on Disappearance. Human rights networks at the local level received special training for sharpening evidence-based advocacy. The trafficking in women in Western Nepal study projected new dimensions to the trafficking-in-persons issue. There has been increased public awareness of human rights issues, monitoring, interventions, and analysis of cases of discrimination particularly with regard to justice. An anti-discrimination network has been active in monitoring and addressing caste-based discrimination in the Far West. Human rights violations have received broad media coverage.

Statement of Work

The purpose of this assessment is to provide USAID with an analysis of the primary challenges in advancing the rule of law (administration of justice) and protection of human rights in Nepal. It includes two main tasks:

- 1) An analysis of the primary challenges, and opportunities in advancing the rule of law and protection of human rights, including an analysis of the contributions of current and prior investment of USAID programs in Nepal.
- 2) A proposed strategy for programming, including prioritized areas of intervention and program recommendations.

The Contractor shall conduct a background review of key documents, as well as on-site research and interviews to develop a report that addresses these areas. The assessment will be consistent with the *Rule of Law Strategic Framework*, which is designed to synchronize with the Mission's broader DG strategy.

The report will include the following components:

1) Analysis of primary challenges and opportunities in advancing the rule of law and respect for human rights: This section of the report will analyze the current status of the justice sector and judicial position on improving the administration of justice and protection of human rights in Nepal as a basis for deriving strategic recommendations. Consistent with the draft *Rule of Law Strategic Framework*, the analysis will include the following five steps:

First, the assessment will take into account Nepal's current transition and political events. It will briefly outline the political and governance structure of the country as it relates to the current status of the legal framework and justice sector institutions, and identify rule of law problems to be addressed, particularly issues involving the administration of justice and the protection of human rights. This section is intended to situate the rule of law in the broader social, political, and economic spectrum of the country.

The second step will be to identify the positions of the major political and other actors for judicial reform as it relates to administration of justice in the courts and access to justice and protection of human rights. Identifying the pros and cons in light of their potential power will be instructive in terms of assessing the level of political will for various types of interventions.

Step three will examine program options beyond the justice sector that might have a bearing on the rule of law and human rights. Such considerations will include issues such as lack of consensus over governance, lack of competition in political processes, inadequate inclusion of members of society, and inability to govern effectively. The purpose of this section will be to identify other related impediments to a democratic transition outside the justice sector that condition potential progress in the justice sector and human rights.

Step four will assess the justice sector itself particularly the administration of justice and protection of human rights through justice sector reform. This will include examination of the five key elements that comprise the rule of law, namely: 1) **order and security** (improving the capacity to protect persons, property, and democratic institutions against criminal and other extralegal elements), 2) **legitimacy** (developing constitutions, laws, and institutions derived from democratic processes and consistent with international human rights standards), 3) **checks and balances** (strengthening judicial independence and improving transparency in judicial decision-making and administration, ethics and discipline for all actors in the justice system, and public respect for judicial decision-making), 4) **fairness** (ensuring equal protection of the law, procedural fairness, and the protection of basic human rights and civil liberties, and improving both the quantity and quality of justice available to all citizens), 5) **effective application of the law** (improving the consistent enforcement and application of the law by strengthening administrative systems capacities to carry out core functions and coordination among justice sector actors). Each of these five elements must be present for rule of law and human rights to prevail. This section will focus on how these elements are embodied and enacted within the legal framework and justice sector institutions and actors. This section should outline the key features of the justice system, including the framework of laws and the justice sector institutions. The analysis should also address key challenges and opportunities for promoting the essential elements of the rule of law and human rights within the legal framework and justice sector institutions. The purpose of this section will be to identify potential points of intervention within the justice system itself that are in need of reform and amenable to change. This section should prioritize the different challenges.

The fifth and crucial step will be to assess USAID/Nepal's recent work on the rule of law and human rights. This should include an assessment of whether USAID's support is making any long-term contribution or not. In addition, the assessment will review other USG and other donor programs in the justice and human rights sectors, to determine what progress has been made so far, and where opportunities and entry points might exist for programming.

2) Programming Strategy: The assessment will define the parameters for a strategy and programmatic options for rule of law and human rights interventions. This will be based on the findings from the preceding sections as well as additional considerations such as Mission

priorities, USG policy, availability of resources, and activities of other donors. It will be designed to focus rule of law and human rights activities in light of the current state of political transition and opportunities and constraints for reform, including any past successes.

The strategy should include the following components:

- Key problem(s) framed in terms of the essential element(s) of the rule of law that are most critical to developing and strengthening the rule of law, improving the administration of justice, and protecting human rights in Nepal;
- Opportunities for intervention, including the specific institutions and laws for which opportunities exist for reform. The opportunities for intervention should be prioritized in order of importance.
- Program recommendations including intended results that should be achieved through follow-on programs to address the primary issues involved in developing and strengthening of the rule of law, improving the administration of justice, and protecting human rights in Nepal. Recommendations should be prioritized in order of importance.
- Opportunities for interventions that promote access to justice with particular emphasis on the inclusion of traditionally marginalized groups such as youth, women and other groups, especially in the Terai region.

Methodology

The contractor shall provide a three-person team to conduct the work in three stages.

Preparation phase: The first phase of the assessment will involve reviewing background materials and key documents; developing an assessment methodology that includes primary research questions and interview protocols; and preparing a schedule of interviews for the subsequent field work stage. A pre-trip meeting with relevant USAID/DCHA/DG in Washington staff is required during the preparation phase to review documents, discuss background reviews, and come to agreement on the primary research questions, interview protocols, and assessment schedule. A teleconference may be conducted with the USAID/DG&P office in Kathmandu if necessary. The team will also present to USAID during this phase an initial list of proposed interviews in Nepal and, subject to USAID approval, will initiate the scheduling of interviews to be conducted during the field-work phase of the assessment. Three working days per team-member are authorized for the preparation phase.

Field-work phase: The team will conduct 16 days of field research, not including travel time, including structured interviews with key informants (and focus groups, if appropriate) and beneficiaries such as members of the judiciary, Government of Nepal personnel, international donors, USAID partners, members of the Constituent Assembly, civil society organizations, and other relevant stakeholders. The Contractor will be responsible for the continued development and updating of the list of interviewees and arranging meetings, as well as transportation to the meetings. USAID/Nepal will arrange for its staff members to participate in the field-work phase of the assessment. USAID/Nepal retains the power to call any or all members of the team for consultations during the team's presence in Nepal.

Report-writing Phase: The Contractor will present to USAID/Nepal a detailed outline of the assessment report three days prior to leaving Nepal for an informal USAID review. This outline

of the report will address all of the components outlined above. The draft report shall be submitted for USAID review no later than August 10, 2009. USAID will then provide comments to the Contractor no later than August 31, 2009. The final report shall be submitted within ten calendar days of receipt of comments from USAID. A total of five working days per team member is authorized for the report-writing phase.

To summarize, the total amount of work days (excluding travel time), per team member, allowed for this assessment is 3 days of preparatory work prior to arrival in country, 16 days of work in Nepal, 2 travel days for expatriate team members, and 5 days for report writing and final editing (including responding to USAID comments).

Deliverables

The Contractor shall provide the following deliverables to USAID:

1. Literature Review and Assessment Methodology Prior to beginning the interview process, the Contractor shall prepare for the assessment by reviewing key documents on the justice sector and the present political situation in Nepal; and applicable sections of USAID and project documentation. The Contractor will also prepare a methodology plan including primary research questions, interview protocols to structure the interviews, and a list of proposed individuals/institutions to be interviewed or visited. The methodology plan, interview list, and interview protocol will be presented to USAID/DCHA/DG and USAID/Nepal staff for approval prior to departure for the field-research phase.

2. Oral Briefings (two) At a minimum, the Contractor will hold two briefings with USAID/Nepal staff, including an introductory briefing upon arrival in country and an exit briefing presenting to USAID the team's findings and recommendations to USAID and reviewing the draft report outline prior to departure. USAID will provide oral comments and guidance at the exit briefing.

3. Draft Report. The assessment team will present a draft outline report in English of its findings and recommendations to USAID in advance of the exit briefing before departure from Nepal. The contractor will submit the draft report for USAID review no later than August 10, 2009. The report will include all of the components outlined above, although not necessarily in the order specified above.

The Contractor should be aware throughout the assessment and report writing process that issues of the rule of law and human rights may be politically sensitive. The team should discuss this issue with USAID/Nepal at the introductory briefing upon arrival in country and seek guidance regarding sensitivities that will need to be taken into account during interviews and report writing. No member of the team will release at any time any part of the draft report without the prior approval and concurrence of USAID/Nepal.

4. Final Report. USAID will provide comments on the draft report by August 31, 2009, and the Final Report will be provided to USAID in electronic format in MS Word and Adobe PDF, within ten calendar days of receipt of comments from USAID. An electronic copy and 5 hard copies shall be provided to the Task Order COTR in USAID/DCHA/DG. The report shall include all of the components outlined above, although not necessarily in the order specified above. The report shall also include an executive summary and not exceed 35 pages (excluding covers, table of contents, list of acronyms, executive summary, and appendices). Appendices should at a minimum include the scope of work for the assessment; a list of individuals/institutions interviewed; a bibliography of principal sources; and any questionnaires used.

The report shall follow USAID branding procedures. The Contractor shall also submit a copy of the final report to PPC/CDIE/DI.

Team Composition and Qualifications

The assessment will be carried out by a three person team. The team shall include:

- A team leader (Expatriate) with a professional background in international development work, including rule of law/administration of justice development and strengthening. This person shall be responsible for coordinating and directing the overall assessment effort, including preparation and submission of the draft and final assessment reports. S/he should have a minimum of 10 years experience in the design, implementation, and/or evaluation of foreign assistance programs including USAID-related rule of law/administration of justice programs. As assessment team leader, the incumbent should be thoroughly familiar with techniques of program impact appraisals and possess good organization and team-building skills. The team leader should have excellent written and oral communication skills in English.
- A team member (Expatriate) with at least 5 years of relevant experience in rule of law/administration of justice development and strengthening and/or democracy and governance assistance, possessing strong background knowledge of the region and experience in the design, implementation and/or evaluation of foreign assistance programs. Strong writing and word processing skills are a requirement. Previous overseas experience in the region and knowledge of the language is desirable.
- A Team Member (local): A lawyer with minimum degree BA in Law or related field. Good understanding of political dynamics, rule of law/administration of justice members, and political actors is essential. At least three years' work experience required. Knowledge of USAID and other donors is highly desirable.

It is desirable that at least one of the two expatriate team members have previous overseas experience in the region.

USAID will appoint one USAID/DCHA/DG staff member to participate in the assessment, including the field research stage.

The Contractor will certify that there is no conflict of interest or potential conflict of interest with respect to the performance of this assessment on the part of the contractor and the contractor's team members. The Contractor will guarantee that substitutions will not be made for individuals proposed as team members without the approval of USAID/Nepal.

Period of Performance

The work called for in this scope will start on or about June 15, 2009 and will be completed by September 30, 2009. The work in Nepal will start on July 6, 2009. A 6-day work week is authorized in Nepal.

Logistical Support

All logistical support will be provided by the Contractor including US travel, travel to and from Nepal, local transportation, secretarial and office support, interpretation, report printing, and

communication. USAID can provide short list of potential interpreters with rule of law/administration of justice background.

Technical Direction

Technical direction during the performance of this assessment will be provided by David Billings, Bishnu Adhikari, and Madhuri Singh.

BIOGRAPHIC SUMMARIES OF ASSESSMENT TEAM MEMBERS

James Michel is Senior Counsel to DPK Consulting, a Division of ARD, Inc. that specializes in international cooperation in governance and the rule of law. He has performed consulting assignments for the United States Government, other governments, and international organizations, as well as for DPK Consulting and other private consulting organizations. He previously served as Principal Deputy Legal Adviser, US Department of State, and in other senior management positions in the United States Government, including as Principal Deputy Assistant Secretary of State for Inter-American Affairs, U.S. Ambassador to Guatemala, and in USAID as Assistant Administrator for Latin America and the Caribbean, Counselor, Acting Deputy Administrator, and Acting Administrator. From 1994 until 1999, he was Chair of the Development Assistance Committee of the Organization for Economic Cooperation and Development, the principal international forum for donor policy coordination. He received his J.D., *cum laude*, from Saint Louis University.

Barry Walsh is an international consultant specialising in the design, implementation, and evaluation of international development programs concerned with justice systems, court administration, anticorruption, and general governance improvement. He has experience in the Middle East, Africa, South Asia, Latin America, and the Asia Pacific region. His clients have included AusAID, USAID, the American Bar Association, the World Bank, the Asian Development Bank, DanIDA, and the United Kingdom Department for International Development. Mr. Walsh is a former senior civil servant, court administrator, lawyer, and public sector management specialist in Australia. He has university qualifications in law, public sector management, and change management and has published a number of papers on court management.

Mihir Thakur is a lawyer with specialized knowledge in Nepal's legal and constitutional history. He has served for 20 years as lecturer in law at Tribhuvan University and also has worked as a public interest lawyer in Nepal. Graduated in law in Nepal, he holds a Master of Comparative Law (MCL) degree from the University of Delhi, India. He has extensive expertise on issues of government accountability, law reform, rule of law, and the justice sector in Nepal. He has conducted research on constitutional politics, judiciary, democracy, and governance issues in Nepal. As a Senior Anti-Corruption Coordinator for USAID/Nepal's Rule of Law Project from 2004 to 2007, he planned and coordinated many activities with government agencies, courts, and civil society organizations of Nepal.

Louis-Alexandre Berg is a Rule of Law Advisor in the United States Agency for International Development's Office of Democracy and Governance, where he provides technical assistance and training on rule of law development issues including post-conflict rule of law, measurement and evaluation, civilian police assistance, access to justice, and legal empowerment of the poor. He has designed and managed justice sector and anti-corruption programs in Jordan, Pakistan, Yemen, Bosnia-Herzegovina, the Democratic Republic of Congo, El Salvador, and Haiti, and provided technical support to rule of law programs throughout the Middle East, Africa, and Latin America. He has also served in the State Department's Office of War Crimes Issues, conducted research for the U.S. National Security Council on security and rule of law in post-conflict environments, and worked with the United Nations Development Program in Sierra Leone on justice sector strengthening programs. He has worked on peace-building, conflict resolution,

and regional security initiatives in the Middle East with several non-governmental organizations, including Search for Common Ground and Seeds of Peace. Alex holds a B.A. from Brown University, an M.P.A in public policy and international affairs from Princeton University, and is pursuing a Ph.D. in political science at Georgetown University.

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PERSONS INTERVIEWED

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Khim Lal Devkota, Member, Constituent Assembly Constitutional Committee (Maoist Party)

Dina Nath Gautm, United Communist Party (Maoist) Deputy Leader, Bapena

Nabindra Raj Joshi, Member Constituent Assembly (Nepal Congress Party)

Binda Pandey, Chair, Fundamental Rights and Directive Principle Committee, Constituent Assembly, (United Marxist-Leninist Party),

Hridesh Tripathi, Member of Constituent Assembly (Terai Madesh Democratic Party)

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