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NEUTRALITY, PARTY POLITICS AND COMMUNITY MEDIATION IN THE CENTRAL AND WEST TERAII, NEPAL

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Abstract

This paper examines the relationship between the concept of neutrality in community mediation and the inherently partisan nature of politics. Mediation theory often highlights the central importance of mediator neutrality in mediation practice. We examine the interplay between these two fields through an analysis of a donor-supported community mediation program in the Central and Western Terai, the belt of lowland plains in the south of Nepal. This paper tries to understand why, in areas where politician's role in dispute settlement is considered highly biased, neutrality in mediation can still be an option for these politicians. This paper argues that, despite clear reasons for mediators to act in a biased way, there are also incentives for them to act neutrally. These incentives stem primarily from political concerns as related to authority and standing in the community. In a context where both disputants and politicians 'shop' between different dispute settlement mechanisms, this paper finds that these incentives influence where these groups choose to adjudicate cases. In this wider dispute settlement context, where politicians have incentives to be neutral in mediation, but partisan in other dispute settlement settings, there is a danger that while the 'internal' neutrality of community mediation might be upheld, this goes at the detriment of neutrality in justice delivery as a whole.

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Neutrality, party politics and community mediation in the Central and West Terai, Nepal

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Introduction

This paper examines the relationship between the concept of neutrality in community mediation and the inherently partisan nature of politics. Mediation theory often highlights the central importance of mediator neutrality in mediation practice. We examine the interplay between these two fields through an analysis of a donor-supported community mediation programme in the Central and Western Terai, the belt of lowland plains in the south of Nepal, bordering India. In this case, community members, including many in local political leadership positions, also serve as trained community mediators. This paper tries to understand why, in areas where a politician's role in dispute settlement is considered highly biased, neutrality in mediation can still be an option for these politicians. This paper argues that, despite clear reasons for mediators to act in a biased way, there are also incentives for them to act neutrally. These incentives stem primarily from political concerns related to authority and standing in the community. In a context where both disputants and politicians 'shop' between different dispute settlement mechanisms, this paper finds that these incentives influence where these groups choose to adjudicate cases. In this wider dispute settlement context, where politicians have incentives to be neutral in mediation, but partisan in other dispute settlement settings, there is a danger that while the 'internal' neutrality of community mediation might be upheld, this is to the detriment of neutrality in justice delivery as a whole.

This paper refers to early debates on the paradoxical role of neutrality in mediation, for example in the work of Sally Engle Merry, Christine Harrington, Sara Cobb and Janet Rifkin (Harrington and Merry 1988; Rifkin, Millen, and Cobb 1991; Cobb and Rifkin 1991). In common with these authors, we are interested in the multiple ways in which neutrality is understood and expressed in mediation. Much of this previous work has focused on mediation in the United States. As a departure from this past research, our focus on mediation in Nepal allows us to understand the meaning of neutrality in a highly politicised context where, unlike in the US, politically affiliated people have shown great interest in being involved in mediation. This is warranted and timely as community mediation is being implemented in different (politically sensitive) contexts around the globe as part of international development, human rights, and rule of law initiatives. As such, it may be necessary to adapt the standard US community mediation model, to function in these widely divergent and highly politicised contexts.

Joining a political party is both a route to power as well as a typical outcome of a successful career in Nepal. At the same time, dispute settlement and authority are often considered to be mutually constitutive (see for example Ramirez 2000). As

such, the role of political party affiliation and the way in which it affects neutrality within a mediation context is of crucial importance. Despite this, the role of party politics in mediation (and wider dispute settlement) in Nepal and beyond is not well understood (see for example Ollieuz 2011). This may be partially explained by what donors and practitioners perceive as political parties' negative impact on Nepal's public sector and formal justice system.¹ This has resulted in a practitioner hesitance to allow politically active individuals to become too closely involved in mediation, as well as a larger reluctance to assess the potential ways in which this may already be occurring.

This paper begins with a discussion of the methodology used for this study and an introduction to the justice delivery context of Nepal and the role of mediation therein. The paper then focuses on neutrality in mediation, showing how neutrality as a concept has been critically examined in the literature and how it is conceptualised more specifically in the programme under study and in our field sites. Beginning to unravel the complex relationship between neutrality and partisan politics in mediation, we then show how the close relationship between dispute settlement and authority provides an incentive for (aspiring) politicians to become active in the field of dispute settlement. As neutrality has been traditionally understood as a crucial factor of authority in dispute settlement, the entry of politicians in this field has been criticised in the mediation literature. Indeed, there are many incentives for politicians to act in a partisan way. In the final section of the paper, we argue that notwithstanding these incentives, when understood in a wider context of forum shopping between different dispute settlement mechanisms, there are incentives for politicians to act neutrally in mediation. While this provides opportunities for mediation itself, neutrality in the wider context of dispute settlement might be hampered, as partisan dispute settlement continues to operate to the detriment of the most disadvantaged communities.

Methodology

Field research was conducted between February and May 2013 in Nawalparasi, Dhanusha and Sarlahi districts in Nepal's Central (Dhanusha and Sarlahi) and Western (Nawalparasi) Terai. The overall goal of our study was to better understand the role of political party affiliation in local land dispute mediation in Nepal. Land was identified as the main source of disputes coming to the mediation programme that was the focus of this study, with 26 percent of cases classified as land disputes. However, this may be more accurately estimated at 45 percent when combined with separately classified disputes such as inheritance and irrigation, which also tend to be about land.² The districts were selected based on the large number of land disputes reported to the mediation programme. In each district, district mediator coordinators were asked for the names of the top five Village Development Committees (VDCs, the smallest administrative unit in Nepal) with the most land disputes reported to

¹ This point was confirmed in our research.

² TAF Reporting. When combined with irrigation, road and crop-related disputes, this proportion reaches 33 percent. If half of the reported transaction cases were also related to land, this total would equal 40 percent. Inheritance disputes are also commonly about land, but classified as family disputes. If one third of inheritance cases are counted as land disputes, this proportion may equal 45 percent.

mediation. While this strategy allowed us to focus on those areas where land disputes were very important, we were aware of potential biases. Yet, given the crucial role of land disputes in the overall mediation programme, we considered this focus warranted. From these ‘treated’ VDCs, the research team randomly chose two VDCs, keeping in mind that all had to have mediation programmes running for at least three years, with one VDC being more developed and one comparatively less developed (as indicated by local staff and substantiated in the field).³ In each district, an additional VDC was selected that had no mediation programme at the time of the research. These ‘untreated’ VDCs were selected randomly, but had to be within the same maximum distance from the district municipality as the furthest ‘treated’ VDC in which fieldwork was carried out.

As such, the research project took a middle-range approach to selecting the number of field sites, trying to balance the quantity of research sites necessary for generalisable findings with the realities of each site’s contextual richness. From this, the research team chose to take a relatively in-depth look into nine VDCs rather than attempting to cover more locations in less depth. Though this approach allowed the research team to gather comprehensive information about each VDC, it may have limited the potential generalisability of the findings of this study. Though many similarities exist between different parts of the Terai, as well as between the Hills and the Terai, land holding patterns, population movements and political activity also vary greatly between these areas.⁴ As such, the conclusions of this study should apply most directly to the Central and Western Terai, and serve as potential indications of trends affecting other areas of Nepal. Additionally, we were only able to collect limited material on the importance of violence in disputes and their settlement. Though violence was not a particular research focus, it was nevertheless a recurring theme in many interviews. Most respondents did note that land disputes sometimes became violent. However all respondents were generally hesitant to give further details about these and other security-related topics. More long-term ethnographic field research could help to overcome these silences.

Interviews were carried out with 382 respondents by the two authors and two local research assistants. These interviews were semi-structured and used a checklist to ensure that the same topics were discussed in all, but with enough liberty to ask follow-up questions as necessary. The checklist was regularly revised to enable the team to follow up on new information, both specific to the respective field sites and to the project as a whole. At the same time, a conscious effort was made to keep a clear focus in the research project as a whole, and to ensure comparability between the different research sites. The focus on land disputes was most crucial when selecting and targeting respondents who had had a dispute in mediation. In the other interviews

³ ‘Developed’ often translated to having a highway passing through the VDC, which led to the development of a small ‘urban’ centre with shops, restaurants, accommodation and transport facilities; or to being close to an important regional urban centre, like Janakpur. While no hard measures of ‘development’ were used, the assessment made by the local, district-based key informants, was supported by the research in the VDCs. Moreover, while it would be interesting to inquire specifically into the impact of different ethnic configurations in dispute settlement, this research project did not select its research sites on this basis. While it is difficult to assess the impact of ethnic composition on dispute settlement, the selected VDCs covered a broad range of different ‘compositions’ with Pahiri (hill) and Madhesi (plains), Muslim and Hindu, high caste, janjati and dalit populations.

⁴ One, crucial example is the diverging way in which the civil war affected different parts of the country.

land was of course discussed (partly because of its centrality in the rural economies studied), but broader questions were asked about the local political economy, the justice landscape and the role of political party activist and social workers.

This field study targeted a number of different groups of respondents. Respondents directly associated with the mediation programme included the local coordinators, at least five mediators per VDC, and five disputants involved in different land disputes per VDC. Local officials included the VDC secretary and, if available, a representative of the local police. Yet, the bulk of the respondents were randomly selected in at least two wards per VDC (each VDC consists of nine wards). From these randomly selected respondents the research team used a snowball approach to identify political leaders and social workers at the ward and VDC level. Most respondents were interviewed individually although a number of group discussions (often of an *ad hoc* nature) were also conducted. Given the *ad hoc* nature of mediation, the research team was only able to witness a limited number of mediation sessions.

This study also benefited from data collected during a previous phase of research on community mediation in Nepal, conducted by Danielle Stein from August to November 2012. This data provided basic information about community mediation and the overall social, political and dispute profiles of the Terai, and aided in the current site selection (Stein 2013).

Nepal's Justice Landscape

As the types of informal and semi-formal dispute resolution vary greatly in Nepal by region and ethnicity, this section focuses on the examples offered in our fieldwork sites in the Western and Central Terai. However, our findings appear to be broadly consistent with previous studies from other areas of Nepal (see for example Ollieuz 2012; Upreti 2004; Caplan 1995). This section briefly describes the options for dispute settlement at the district, VDC and ward (sub-VDC) levels. These options begin with informal or semi-formal mechanisms at the ward and VDC level, and are complemented by the police, who often have a multi-VDC jurisdiction, as well as by district-level courts

In areas with and without a mediation programme, the first layer of dispute settlement mechanisms was found at the ward level. There, what was for instance called a *gāun panchayat*, consisting of 'socially active' individuals or *bhaladmi* – elders, social workers and political activists – would settle disputes, largely in an open setting. Many people would also contact these same people for more regular advice on any number of issues. Many people preferred this form of settlement to more formal avenues because of its low cost and close proximity to their homes. Given that having a dispute can often brand someone as a difficult person in the community, resolving disputes at the ward level was also viewed as the most discreet, least stigmatising option. Many authors have discussed the disappearance of these ward-level institutions (see for example Upreti 2008) - and mediation was put up partially as a response to this impending disappearance (see for example The Asia Foundation 2012a:220). However, these ward-level dispute settlement mechanisms were very active in our field sites. This can potentially be understood in the context of Nepal's

conflict (1996-2006), which in many places reduced the number of people actively willing to engage in public life, particularly in village-level dispute resolution. In some field sites these mechanisms were reportedly replaced by Maoist *jan adalats* (people's courts), which have faded since the end of the conflict. Nevertheless, in the post-conflict period it is now possible for local figures of power and authority to operate (again) openly.

A number of authors note that the role of party politics in dispute mediation significantly increased after the restoration of multi-party democracy in Nepal in 1990. 'It became common all over the country that a politician holding a strategic post appeared to have replaced the role of the traditional elite, known as *pancha bhaladami*, in managing local disputes and problems' (Hachhethu 2008:61) and in giving more general advice to people in their ward or VDC. Locally elected ward members seems to have been the first people since 2002 to turn to settling disputes locally (Ollieuz 2012:91). Though their terms in office largely expired in 2002 and have yet to be renewed, former elected individuals and ward and VDC chairpersons continue to play a crucial role in local dispute settlement.

The second layer of dispute resolution is based at the VDC level. Here, most dispute resolution centres around the VDC secretary who may resolve disputes himself or call on a number of influential individuals, including political leaders, to assist in the resolution.⁵ In VDCs with community mediation programmes, VDC secretaries generally refer cases to the mediation panel. Cases that cannot be solved at the ward level will often go to the VDC, though many people also take their disputes there directly.

If matters could not be settled at the ward or the VDC level, or if the cases simply could not be handled at the local level (e.g. murder, violent assault, sometimes rape), the police would be the next step. In our research sites, respondents noted that some people, often the wealthier or more powerful individuals, prefer to go directly to the police with their cases. Despite the fact that the police have no legal permit for resolving disputes, sometimes the local head of the police would also settle cases himself. Depending on the nature of the case, the police would sometimes send cases back to the VDC level, for example to mediation, or if they were more serious, to the district court.

The district court is the highest level in the tiered system of dispute resolution. As with the police, respondents noted that the courts were often directly addressed by the more wealthy and powerful members of society. Cases that could not be solved in mediation are also sometimes referred to court. Consistent with many appraisals by respondents in our field sites, Upreti notes that 'existing formal conflict resolution practices are expensive, inaccessible, and biased in favour of the powerful.' (Upreti 2004:64).

Although we have presented this as a tiered and rather flat system, we have found instances of people first trying to get justice through the court and, when

⁵ As no local elections were held after the term of the last post-holders ended in 2002, the VDC secretaries were able to cope with their responsibilities by careful negotiations with the different party leaders, e.g. in the all-party mechanism3/27/2014 11:10:00 AM.

unsuccessful, trying to get a better settlement at the local level, either through the VDC, mediation or ward bodies.

Community Mediation in Nepal

Community mediation in Nepal is a semi-formal justice mechanism that draws on both international donor support and informal practice but also enjoys legal legitimacy. This legitimacy stems from the 1999 Local Self-Government Act (LGSA), which permits mediation panels, or three person arbitration boards, to 'hear and decide cases' at the VDC level. In addition, community mediation relies on VDC officials for case referrals and agreement certification as well as on community volunteers to serve as mediators. In the programme we focussed on, each location maintains a panel of 27 to 30 volunteer mediators. These individuals receive general, advanced, and periodic refresher mediation training, along with additional specific training.⁶

According to the LGSA, community mediation is legally permitted to hear a wide variety of local disputes and family cases, but cannot adjudicate cases involving serious abuse, rape or murder. There are currently a number of forms of donor-supported community mediation programmes in Nepal supported by a range of INGOs and local partners. In the programme considered for this study, each disputant chooses one mediator who, combined with an additional mediator selected by the VDC, facilitates a closed mediation session. Case resolution culminates when disputants reach an agreement. Both disputants then sign a document declaring the terms of their resolution, which is stamped and kept on file at the local VDC office. Though this process is sanctioned by the VDC under the LGSA, the agreements reached in mediation are non-binding and carry no legal penalty for non-compliance.

In Nepal, the programme in question has overseen community mediation programmes in 104 of Nepal's total 3,754 VDCs, and in 10 of its 99 municipalities. In this programme each mediation location is established and administered through one of five local implementing partner-NGOs. Three to five years after establishing a programme site, the supporting donor organisation creates an endowment fund and transfers financial and administrative control to the VDC, retaining responsibility only for (limited) monitoring, practice-sharing and training. Transferring the programme in this way aims to ensure mediation's future sustainability. Control of all of the research locations considered for this study has been handed over to the respective VDCs.

Neutrality

Neutrality in community mediation as a global practice

Neutrality is one of the core values of mediation as a global practice. As Hedeem (2004:107) has argued: 'Mediation practitioners across almost every context jealously protect their neutrality and independence (as perceived by clients), as these qualities

⁶ These trainings vary, and aim to address legal and social changes that may impact dispute resolution. In the past, these have included training on how to balance power and support justice in mediation, as well as how to mediate issues related to domestic violence and group disputes.

provide mediators their credibility'. Indeed, neutrality as such has been regarded as a 'symbolic resource' for mediation programmes (Harrington and Merry 1988:729). This quality is considered both 'the necessary step toward problem resolution' and 'the necessary quality that the mediator must possess to ensure a fair and just process' (Rifkin, Millen, and Cobb 1991:152). In the context of mediation, neutrality is commonly understood as a composite of two elements: impartiality and equidistance. Impartiality denotes the 'absence of values, feelings and agendas,' while equidistance indicates 'a context where neither side is favoured or disfavoured' (Cobb and Rifkin 1991:42). This might make the mediators seem to favour first one and then the other party, but yet ultimately result in an unbiased settlement (Cobb and Rifkin 1991:43–44). Yet, as these authors also note, 'the practice of neutrality is fraught with paradox, raising dilemmas for mediators' (Cobb and Rifkin 1991:48).

The potential for mediators to act neutrally has also been challenged on practical grounds. Using work from Greatbatch and Dingwall on divorce mediation in the UK, Mulcahy argues that 'mediation as a purely neutral activity could not be sustained as a general proposition. Mediators [...] were "selective" facilitators' (Mulcahy 2000:141). Ensuring neutrality, she argues, might go against other programme imperatives, like community participation. In an early study based on community mediation in the US, Harrington and Merry (1988:730) found that people who tended to make judgements, and thus not operate in a neutral way, also held values and standards more closely associated with the communities in which the programme operated. This lack of neutrality, it was argued, led the mediation coordinators to sideline these individuals from mediation, thus sacrificing community embeddedness and knowledge for neutrality. Other authors have found that mediator assertiveness was 'positively associated with settlements' (Kessel & Pruitt in Cobb and Rifkin 1991:49). Finally, it has been argued that while '[v]alues and principles such as impartiality and neutrality are imparted in training, [...] this is difficult to monitor in practice' (Tan 2002:296).

A number of authors also offer theoretical critiques of the possibilities for neutrality in mediation. A first set of authors, often starting from a post-structuralist background, argue that the concept of neutrality hides processes of domination and the creation of hegemonic discourses (Harrington and Merry 1988; Cobb and Rifkin 1991; Rifkin, Millen, and Cobb 1991). A second line of critics of neutrality have argued that 'impartiality too often leaves existing power imbalances unchallenged and thus provides nothing better than second-class justice for the less powerful' (McCormick 1997:293). Against the backdrop of these criticisms, the ability of mediation to bring about social change has been questioned (Davidheiser 2006:283), as less powerful and marginalised groups may require more 'activist' mediators to achieve justice (Li-on 2009:476).

Most of the authors criticise an emphasis on neutrality as an attempt to hide the politics of mediation, whether present in hegemonic discourses or in the negation of power imbalances. As such, some argue that the goal of neutrality in mediation is to 'neutralize power' (Li-on 2009:476). While broader mediation literature has seldom discussed power (im)balances in mediation, there is comparatively little discussion about the role of open political activity within mediation, and more specifically, on the active engagement of local political party activists and leaders in the mediation process. This might stem from the fact that the large bulk of the research and literature still focuses on the Western – mostly US – cases in which community

mediation was first developed and refined. Yet as community mediation is increasingly implemented beyond Europe and North America - contexts in which it is often difficult simply to sideline local political party interests - closer attention to the impact of partisan politics on the concept of neutrality within community mediation is warranted. As such, this paper does not seek to simply critique the concept of neutrality (for an overview see: Li-on 2009), but rather aims to understand better the relationship between partisan party politics and neutrality in the specific context of community mediation in Nepal.

Neutrality in community mediation in Nepal

Consistent with broader mediation theory, neutrality is considered to be a crucial element of the community mediation programme considered in this study. Reflecting on the mediator training process, a member of the supporting organisation notes:

Maintaining the neutrality of mediators was critical to the quality of services, because it affected not only the disputants' satisfaction with the service but also the durability of the settlements. During training, mediators were taught to be neutral and not to impose their decisions upon the disputants (Thapa 2007:244).

Despite this, the precise meaning of the term neutrality was initially also the subject of some debate. Training materials initially used the term *tathastha* to denote neutrality, though this was eventually dropped in favour of explaining 'within a wider context the idea of not taking sides or having a bias' (Lederach and Thapa 2012:13). Recent action research by the supporting organisation found that, in practice, community mediators understand neutrality in a broad sense, as, 'the self-discipline of not judging or recommending a solution' (Lederach and Thapa 2012:13).

In community mediation, training is the primary avenue through which neutrality is understood to develop. Mediators, it is argued, begin mediation as naturally biased individuals, but leave transformed as neutral mediators with a new understanding. Based on the already mentioned action research, the supporting donor organisation argues that:

the mediators emerge from training with a capacity to suspend judgment, and the discipline to resist simply giving disputants a solution. This, they felt, was different than "neutrality," given that the mediators as individuals may often have social connections to the disputants. The key was whether, as a team of three, they could create a space for the participants to reach the solution, rather than having it imposed or suggested by the mediators. (Lederach and Thapa 2012:12)

As such, constructing a team of three mediators per case is also understood as crucial to maintaining neutrality, with the goal of balancing differences between disputants as well and guarding against the partiality of one mediator. (Lederach and Thapa 2012:12; Coyle and Dalrymple 2011). This was confirmed by some of our political respondents who argued that the presence of three individuals kept the tendency of one party leader or another to dominate a session at bay.

Though many mediators and local community members seemed to frame neutrality as an important facet of dispute resolution, respondents often differed in their understandings of neutrality. Many respondents discussed performative aspects of neutrality, such as mediators using respectful language with both disputants.⁷ Others referenced procedural aspects of neutrality, including allowing both disputants to give their opinions, discuss the case and select their own mediator.⁸ Additionally, many mediators noted that they maintain the neutrality of a session by ‘telling all to keep their party agendas aside and become neutral’.⁹ Others described neutrality as an effort by mediators to balance the interests of people or parties.¹⁰ These definitions combined with the essential difficulty of negotiating the inherent biases of each individual. This paper will understand neutrality in these procedural and performative terms.

Party politics and (im)partiality in dispute settlement in Nepal

Neutrality as impartiality is a crucial element in dispute settlement in Nepal, not only in mediation. Philippe Ramirez has argued extensively that authority, neutrality and the settlement of disputes are mutually constitutive. Although his fieldwork was conducted in a different part of Nepal and indeed under a different formal regime, his statements concur with our findings and as such remain highly relevant. Discussing the role of the ideal-type *bhaladmi* (good/honourable man who resolves disputes), Ramirez argues that ‘without the respect of authority, there is no arbitration possible, and thus no justice. And the respect of authority is directly inspired by the impartiality of its holder’ (Ramirez 2000:265, see also his discussion of the term *bhaladmi*, 256).¹¹ As such, the authority to settle disputes is, in its ideal type, inseparable from the ability to do so impartially. At the same time, authority - not simply power (Ramirez 2000:256) - can only be claimed through the respect one gains through settling disputes impartially: ‘Impartiality founds authority; here, it would be more precise to consider that legitimacy presupposes impartiality.’ (Ramirez 2000:288).¹²

When considering this ideal-type authority figure Bishnu Raj Upreti, one of the most vocal commentators on contemporary dispute settlement mechanisms in Nepal has also argued that

[t]he quality and fairness of dispute settlement often depends upon the flexibility, neutrality, and past history of the mediators. Some elderly people in each community act as mediators and advisors to community members. The

⁷ Research interaction #199 – in order to maintain anonymity of respondents, interviews and focus groups have been grouped and assigned a random identification number for the purposes of this publication. All numbers in subsequent footnotes further reference such research interactions.

⁸ #269, #247

⁹ #167, also #109

¹⁰ #249

¹¹ Translated by the authors. Original text reads: ‘‘sans le respect de l’authorité, pas d’arbitrage possible, donc pas de justice. Et le respect de l’authorité est directement inspiré par l’impartialité de son détenteur’.

¹² Translated by the authors. Original text reads: ‘[L]’impartialité fond l’authorité; ici il serait plus juste de considérer que la légitimité suppose l’impartialité.’

community accepts their advice because of the individual's credibility and past performance (Upreti 2008:165).

As such, the ability of local elders to dispense 'politically neutral' advice on disputes is seen as one of the main elements ensuring trust in local dispute settlers (Dahal and Bhatta 2008:18).

Just as neutrality and authority are mutually reinforcing, resolving disputes is also a way to demonstrate and gain authority. This, too, can be traced to the historical practices of dispute resolution by local leaders and tax collectors. More recent incarnations of *bhadbaladmis*, or respected individuals, echo this pattern, with members of the former *panchayat*¹³ and their kin charged with both local administration as well as dispute resolution. Against this backdrop, adjudicating disputes continues to be an important factor in shaping the public image and authority of Nepal's newly dominant authority figures: political parties.

This authority stems from a number of factors. The role of adjudicating disputes itself underlines the authority of an individual, denoting the importance of his opinion in the community. However, equally important is the individual's ability to influence a decision and act in favour of their supporters. This has led to the increased involvement of political actors in all areas of justice provision in Nepal, as well as an increasing importance of political allegiance in justice provision. This dynamic is often noted as having begun after Nepal's transition to multi-party democracy in 1990. Following this shift, Kaplan found that '[a]llegiance to political parties is increasingly intruding into conflict resolution' (Kaplan in: Bhatia 1996:15).

Though perhaps an unsurprising outcome in a new democracy, many have indeed lamented the impact of political involvement in justice, citing its detrimental effect on formal and informal justice delivery. Kaplan's early observation is consistent with more recent findings, including a report published by a number of Nepalese and international organisations active in the justice field:

Political interference damages the security and justice sectors. In all the districts assessed, the public and often representatives from the police and justice sectors complained of political parties or powerful people interfering in the free and fair workings of the security and justice sectors. This undermines trust in police and judges and causes people to turn instead to informal justice mechanisms (Antenna Foundation Nepal et al. 2010:i; see also: Upreti 2004:63).

Many researchers have highlighted the increasing politicisation of Nepal's justice sector at all levels, noting that the tendency of political allegiance to 'override other forms of allegiance' in the post-panchayat period has led to the increased importance of political interests in dispute resolution (Upreti 2008:170). Speaking too of the local level, Ollieuz (2012:92) reported that in the Eastern Terai, the police itself complained about politicians' interference making it difficult for them to resolve

¹³ The Panchayat Regime, or Panchayat Democracy (1960-1990) was a 'party-less democracy' with the king at its apex with directly elected village and town councils, electing district and, in turn, national legislature representatives. The Panchayat system, but not the king, was overthrown in 1990, with a return to multi-party elections (Whelpton 2005:99-121).

cases impartially: ‘We can’t work properly, freely, though because of political pressure. Politicians [...] work as mediators, so we can’t give justice’. Such politicisation seems to have negatively affected how Nepalis perceive the legitimacy of many forms of justice. ‘[T]he credibility of [...] informal mechanisms is eroding due to political interference and verdicts biased in favour of those with power’ (Upreti 2004:62). Indeed, political party influence has been seen as one of the main problems, of both formal and informal dispute settlement mechanism, and as one of the main drivers of bias, and thus neutrality in dispute settlement (Thapa 2007; Upreti 2004).

These negative perceptions of political actors in dispute resolution have made the role of politicians in community mediation a subject of debate. In the programme in question, many politically active individuals expressed an interest in becoming mediators, though they were not initially permitted (Thapa 2007:240). At this stage, programme staff understood the absence of overt politics to be essential to maintaining neutrality within mediation. Efforts to separate mediation from politics are also evidenced by the creation of separate mediation advisory committees as a way to involve local politicians while separating them from the direct resolution process. Interest in participating in this unpaid, largely nominal body on the part of politicians indicates the importance they place on justice provision. Over time many sites have relaxed their programming and allowed politically active mediators, largely for lack of other options.

However, community members and mediators themselves often had mixed views on the value of politically affiliated mediators. Many respondents noted that as long as individuals of all parties were allowed to become mediators, mediation committees would remain neutral. Other respondents, however, noted that a politically affiliated person would always naturally favour his own party. In fact, many mediators noted that they refused to join political parties, for fear of becoming biased. These conflicting views are complicated by the fluidity of political affiliation in Nepal. Indeed, many mediators that entered the programme without political party affiliation became more politically active after becoming mediators. This should not surprise us. As dispute settlement and authority in Nepal are very closely linked, individuals tended to gain respect and social prominence by virtue of their position as mediators. The programme in fact highlights the growing respect and social prominence of its mediators as a positive development (Thapa 2007:242). Yet, this same increase in status and respect also makes mediators more attractive to political parties looking for potential leaders. As a result, different mediators had not only become active in party politics, but a number of them also clearly stated they were willing to contest local elections. One local mediation coordinator even argued that this was positive, noting that if mediators do not run for office, then their training and experience as mediators is ‘a waste of time.’¹⁴

Incentives for neutral and biased behaviour

As discussed above, there are clear incentives for political actors to be biased in dispute resolution. Yet, there was little agreement about the extent of bias in mediation in interviews conducted for this paper. Indeed, in research locations where the mediation programme had some legitimacy and where mediation in fact was

¹⁴ #24

considered to be relatively unbiased, the role of politicians in dispute settlement was often still seen as negative and biased. As these politicians were also active as mediators, this provides a paradox. An answer to this paradox can be found when grounding mediation in the wider context of dispute settlement, and in the particular expectations of politicians' behaviour in different dispute settlement fora.

In our field-sites, the police station and the court were also the two areas where local respondents spoke most negatively about the role of politicians in dispute resolution. Many viewed these outlets as the most easily exploited by political leaders,¹⁵ who often favoured settling important cases there. Since courts and police generally see larger or more severe cases than VDC-level institutions, politicians would often try to stall agreements or exacerbate disputes with the hope of taking cases to these arenas.¹⁶ Their hope, it was commonly noted, was to use their connections or influence to sway the length and outcome of the case, and reap the political benefit.¹⁷ In general, the involvement of political parties was considered to make the dispute bigger and more intense.¹⁸

There are indeed many potential benefits by a politician acting in this, biased, way. First, influencing the outcome of a case is one way for politicians to demonstrate their power and connections. Resolving disputes in this way, it is argued, allows politicians to gain the support of the disputants on whose behalf they are working, as well as potentially in the community more broadly. As one respondent notes,

politicians get political benefits from politicising a dispute – resolving disputes in this way strengthens the vote banks for when there are elections. If a politician does a favour for you, you will support them in elections.¹⁹

Second, and even more widespread, was the perception that politicians tried to benefit financially from lending their support to cases,²⁰ since prolonged deliberations appeared to be a money-making machine for politicians, also at the local level, but much more so in courts at the district and even national level, earning a fee for their work on behalf of one of the disputing parties.

This kind of behaviour was expected. Yet, importantly, in these cases, politicians do not resolve disputes themselves but simply use their connections to impact how court and police officials resolve cases. This, combined with the fact that these processes take place outside the community, means that these actions, though not neutral and generating a lot of rumour, do not harm the image of the politician locally too much. Rather, they can return to their community having facilitated a favourable outcome for their supporters and reap the benefits accordingly.

¹⁵ The individuals in these formal dispute settlement mechanisms already hold significant authority by way of official dictum, rather than engagement, actions or image in local communities. As such, the benefit to be gained from acting as an ideal-type, neutral *bhadbaladmi* may be significantly lower for this group. However, the benefits offered by politicians – money, food/alcohol, and political favours – are more attractive. Politicians may provide connections to political parties in the district and beyond, which could positively impact the careers of those in the police and court.

¹⁶ #33

¹⁷ #30

¹⁸ #32

¹⁹ #220

²⁰ #21; #33

As mediators operating at the local level, however, they face a different set of incentives. As we have shown, impartiality in settling disputes is regarded as a criterion distinguishing a good leader and helping secure authority in the community. Indeed, there is a significant value placed on the performance and image of neutrality, particularly when interacting directly with community members. As one mediator noted ‘politicians get a good name in society for being neutral’.²¹ Another mediator articulated this dynamic more specifically, ‘in mediation there is a benefit to being neutral as this sends a good message in society. We want to be seen as unbiased, unlike politicians’.²² These benefits may be amplified by the fact that politically affiliated individuals themselves are responsible for the resolution of a dispute embedded more deeply in the community. As their bias is widely expected, acting unbiased – ‘unlike politicians’ - in mediation offers a particularly strong signal.²³

Shopping forums and neutrality in mediation

There is a clear tension in our field sites between the incentives to act partially or impartially in justice delivery. This leads politicians to make calculations about how and when to settle disputes in which way.²⁴ One district level political leader and chief of a mediation advisory committee was very vocal about this calculation.²⁵ We interviewed him at the VDC office during a mediation session, after he had brought both disputants for mediation himself. As a respected and powerful politician, many people came to ask for his advice or support in resolving disputes, or to resolve the dispute for them together, notwithstanding his role on the advisory committee and involvement with the mediation programme. He explained that settling a dispute like this, on his own, was risky: if something goes wrong, he would be blamed. As all the other parties were always on the lookout for opportunities to defame him and reduce his standing in the community, he had to be always careful in calculating the potential of this occurring before agreeing to settle any dispute. If there was even a small chance of this occurring, he would direct the disputants to mediation. This way he could still help people get their dispute solved but would not risk his decision being used against him. Regarding a field site in the Terai, Ollieuz finds similar dynamics, with politicians active in dispute resolution facing a social and political backlash from making unpopular decisions (Ollieuz 2012:93).

²¹ #248

²² #237

²³ These incentives, however, may shift depending on the disputants. If the disputants are of two different political parties, mediators will often favour the disputant from their own party (#278). This is a way to show power in the community, as well as their loyalty to party members. However, if both disputants are of the same political party – either theirs or another, mediators are likely to act neutrally. This serves to underscore their authority by demonstrating their neutrality, and has no political downside for them (#219).

²⁴ Some disputants also discussed this dynamic as it pertains to mediation itself. In some cases, mediators here too act to protect the institution of mediation from political interference by maintaining the performance of neutrality. Only after the mediation concludes, do they seek a new venue in which to “make deals” with one side of the other. One respondent describes this scenario, ‘people would listen to each other in mediation, but later would make all sorts of deals with politicians outside. Then things would later come back to mediation and be back to square one’ (#5).

²⁵ #91

Moreover, those politicians engaging in dispute settlement have to negotiate between serving individual versus collective political interests. Hachhetu notes this phenomenon is not new in Nepal, and finds that '[m]any local NC leaders of Dhanusha district said they were under pressure to involve themselves with the individual interests of the voters rather than to work for the collective interest of the society' (Hachhethu 2008:61). This might lead politicians to be unwilling to enforce decisions against perpetrators who are well connected²⁶ or to be scared to make decisions against the rich²⁷ who they might later need for financial support in election campaigns.

As such, power imbalances between disputants provide a challenge to mediation. This is widely recognised as a central struggle in mediation, both in academic research as well as by many implementing organisations. In a study that preceded the current community mediation programme's implementation, Kaplan argues:

power inevitably plays a major role in conflict resolution. Sometimes, in potential conflicts between the powerful and the powerless, the powerless cannot even raise the issue. In general, persons with power will take any case for resolution to a level where they believe their power will make the most difference in their favour (Kaplan in: Bhatia 1996:14).

Programme documents also show an awareness of the challenges of (political) power imbalances in mediation by arguing that:

[i]n cases where [...] the interests of the two parties are too far apart (including where the balance of political power or influence between disputants is too skewed), the formal system may be the better avenue for resolving disputes (The Asia Foundation 2012a:216).

This claim, if considered within the larger framework sketched in this paper, raises a number of questions. Our research suggests that politicians are making conscious decisions about their involvement in dispute settlement. They solve certain cases themselves, refer others to mediation, are sometimes active as mediators themselves, or act as brokers by taking cases to the police or courts. As such, political mediators also welcome neutrality in mediation, as it helps them gain stature as *bhaladmi*. Yet, as mediation is far from the only dispute settlement mechanism available, and when considering political engagements in the wider context of dispute settlement, mediation is unsuccessful in being a truly neutral dispute settlement mechanism. Mediators act impartially within mediation sessions not simply because they are persuaded by the training they receive, but because there are other dispute settlement mechanisms where their neutrality is less prized.

Indeed, courts or police, where access to (political) power is crucial, are used when wealthy or powerful individuals seek to influence dispute outcomes. Thus, what we see is not only 'forum shopping' used by disputants looking for the best method to get their way in a given dispute, but rather the presence of 'shopping forums' used by politicians engaged in dispute settlement (Benda-Beckmann 1981). In these shopping

²⁶ #219.

²⁷ #220.

forums, politicians can select the mode of dispute settlement that they believe best serves their interests – respect, legitimacy, political support, money. Their central position in the field of dispute settlement enables them to benefit from selectively using various dispute settlement mechanisms. Some cases can be settled individually or at the ward level, allowing the politician to resolve the case. Disputants can be referred to mediation in cases that may pose a political risk to the mediator or in cases that enable political mediators to prove their ability to act neutrally. Here, acting neutrally demonstrates or cements the authority of local political leaders, presenting them as impartial judges, *bhaladmi* and social workers. At the same time, police and court cases are available to provide support to wealthy and powerful individuals in the village, who may function as a future source of money and support.

As this last option is only available to the more well off individuals, for poorer sections of the community, it may continue to be difficult to overcome (power) imbalances with wealthier or better-connected opponents. As such, we heard of numerous cases in which a settlement had been reached in mediation, but where the stronger party did not implement the agreement reached; or examples where one of the parties tried to gain a better outcome in court, using political support. In this context, the lack of legal backing for mediation was often lamented, allowing individuals to make mediation agreements without the intention of executing them.

As such, the earlier quote in this section, that indicates that courts may be better able to settle disputes between those with significant (power) differences, may in fact be misleading. Though referring these cases to court protects mediation from the potential exposure they may bring, the courts may serve as an equally problematic place in which such disputants may seek justice. Indeed, the implementation of neutrality without full legal backing can undermine efforts to bring fair and equal justice to disadvantaged communities.

Since local politicians have an incentive to be neutral in a number of local justice mechanisms (including mediation), they have the option not to be neutral in others, most importantly the police and court. As poorer sections of society are not able to access the courts and police, they can still suffer injustice, regardless of neutrality in mediation. Thus, if mediation is seen as a stand-alone part of justice and the ways in which it is integrated into a wider arena of justice delivery is not taken into account, it can be internally neutral, but neutrality in the wider context of dispute settlement might be hampered, since partisan dispute settlement continues to operate to the detriment of the most disadvantaged communities.

Conclusion

This paper has analysed the relation between the concept of neutrality in mediation and partisan politics in the Terai in Nepal. Starting from the relation between dispute settlement, authority formation and the role of neutrality as impartiality in Nepal, we have analysed the way in which the growing role of political party leaders and activists in dispute settlement impacts on this concept of neutrality. As such, our research concurs with the literature that there are a number of incentives for politicians to act in a biased way, offering support and connections for those trying to balance a case in their favour. At the same time, the connection between authority and

impartiality in dispute settlement – epitomised in the ideal type *bhaladmi* – provides an incentive to balance their support to individuals with a more collective image as a *bhaladmi*. As our research shows, individual politicians are very aware of the need to calculate potential outcomes when involving themselves in specific cases. Politicians as such often welcome neutrality in mediation, as it allows them to settle disputes themselves in a neutral way, or divert cases which might otherwise bring them harm. At the same time, this does not prevent them acting in a partisan way in other dispute settlement settings, such as police or court, gratifying other incentives. Thus, the existence of these ‘shopping forums’ often enables mediation to remain neutral. Yet, as going to the police or court, and accessing the services of politicians in support there, is only available to the more affluent members of the community, neutrality in mediation, without the full legal backing of its outcomes, does not ensure justice for the most disadvantaged communities. Thus neutrality in mediation can go against neutral justice delivery.

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