

**NEPAL'S CRIMINAL LEGAL AID SYSTEM:  
AN OVERVIEW OF DELIVERY SYSTEMS  
AND RECOMMENDATIONS FOR REFORM**

**BY THE INTERNATIONAL LEGAL FOUNDATION**

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## I. Executive Summary

The right to free legal assistance for criminal defendants who are unable to afford a lawyer is a widely accepted principle of law and an essential component of the right to a fair trial. It provides a foundation for a fair and effective criminal justice system. Recognizing that all persons – whether rich or poor – are entitled to equal access to justice, Nepal’s Interim Constitution guarantees the right to a fair trial,<sup>1</sup> the right to counsel to all persons from the time of arrest,<sup>2</sup> and the right to be provided counsel at State expense for those who cannot afford an attorney.<sup>3</sup> However, these rights are not being implemented consistently, equitably, or effectively across the country.

Despite the constitutional guarantee of a right to counsel in criminal proceedings, indigent accused persons regularly appeared in Nepal’s courts and quasi-judicial bodies without effective legal representation. This report outlines the following key concerns about access to counsel in Nepal:

- Most poor people charged with criminal offenses lack access to counsel. Courts often fail to appoint *Baitanik Wakil* for indigent defendants and the *Baitanik Wakil* program does not extend to quasi-judicial bodies where many minor criminal cases are tried.
- Even when indigent accused are appointed *Baitanik Wakil*, counsel is not appointed early enough in the criminal process, thereby rendering the appointment ineffective.
- The *Baitanik Wakil* program lacks qualifications or standards, accountability mechanisms, transparency, and continuity resulting in substandard representation.

As a result of these systemic deficiencies, each year, thousands of indigent accused men, women and children across the country either go unrepresented or receive only minimal representation that is not of sufficient quality to be considered meaningful access to counsel. These accused are then vulnerable to myriad abuses, including arbitrary arrest, extended pretrial detention, mental and physical mistreatment, forced confessions, wrongful convictions, and torture. The impact of these abuses is not only felt by the accused; rather, it ripples out into his or her family and community when, for example, a family loses their primary breadwinner to extended pretrial detention—before any crime has been proven—and as a result slips further into poverty.

To address these deficiencies, this report recommends the following:

- (1) The Government of Nepal should encourage the establishment of a comprehensive data collection system designed to accurately measure provision of criminal legal aid services throughout the country, so that plans for improvement can be founded in accurate data.
- (2) Nepal should consider alternate legal aid models, including the public defender model, and collaborate with civil society to meet the needs of indigent accused.
- (3) The Government of Nepal should provide funding for criminal legal aid services for indigent accused persons facing prosecution in both judicial and quasi-judicial venues,

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<sup>1</sup> “Every person shall be entitled to a fair trial by a competent court or judicial authority.” Interim Constitution of Nepal, 2063 (2007), Art. 24(9), available at: [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

<sup>2</sup> “The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.” *Id.* at Art. 24(2).

<sup>3</sup> “The indigent person shall have the right to free legal aid in accordance with law.” *Id.* at Art. 24(10).

including by increasing the number of *Baitanik Wakil* where necessary, extending their jurisdiction to quasi-judicial bodies, and requiring that they take cases up on appeal.

- (4) Nepal should work to improve the quality of legal representation provided to the indigent accused by (a) increasing the tenure of *Baitanik Wakil* to allow for increased effectiveness and continuity, (b) supporting the adoption of performance and qualification standards for all legal aid providers, and (c) instituting monitoring and oversight of legal aid providers by establishing an independent, nationwide legal aid oversight board.

## **II. Introduction**

This report contains findings and recommendations from the International Legal Foundation's (ILF) evaluation of the criminal legal aid system in Nepal. Previous research and surveys by others have demonstrated that there are serious gaps in the current legal aid system, and that many poor persons accused of criminal offenses in Nepal are being systematically deprived of their right to effective legal representation. Recognizing these problems, the Government of Nepal has taken steps to address deficiencies in the current legal aid system. With support from the United Nations Development Programme, Nepal's Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs is working to establish an integrated legal aid system aimed at strengthening access to justice to vulnerable groups. Additionally, the Supreme Court of Nepal recognized in its Third Five-Year Strategic Plan of the Nepali Judiciary (2014-2019) that reforms must be made to the *Baitanik Wakil* (court paid lawyer) program to ensure its effectiveness.

The Government of Nepal's interest in strengthening the right to counsel provides a strong foundation for building a more effective criminal legal aid system. The goal of this report is to support the reform process by highlighting deficiencies in the current legal aid system and offering recommendations for change. By comparing and evaluating the different legal aid programs found in Nepal, the ILF has identified many problems. Just as important, the ILF has been able to identify strengths within Nepal's legal aid system. These strengths can serve as the basis for building a more accessible, effective, sustainable and credible legal aid system.

The ILF's recommendations are drawn from its experience providing criminal legal aid services in Nepal's courts and various quasi-judicial bodies, and its global expertise and experience in promoting good practices in indigent defense representation. In this report, the ILF highlights some international practices and models for legal aid delivery. These examples inform the report's recommendations and can provide guidance to Nepal as it reforms its legal aid system.

## **III. Background**

### **A. The Scope of the Right to Counsel in Nepal**

The right to free legal assistance for criminal defendants who are unable to afford a lawyer is a widely accepted principle of law and an essential component of the right to a fair trial.<sup>4</sup> In 1948,

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<sup>4</sup> See: UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), annex, Art. 10-11; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United

the right to fair trial was affirmed as a basic human right by the Universal Declaration of Human Rights.<sup>5</sup> The Universal Declaration of Human Rights sets forth that anyone charged with a crime is entitled to a “fair and public hearing” with “all the guarantees necessary for his defense.”<sup>6</sup> Subsequently, the International Covenant on Civil and Political Rights (ICCPR) made clear that the right of the accused to the assistance of counsel is fundamental to the right to a fair trial.<sup>7</sup> The ICCPR provides that everyone charged with a criminal offense shall have the right “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.<sup>8</sup>

Consistent with Article 14 of the ICCPR,<sup>9</sup> Nepal’s Interim Constitution provides that, “[t]he person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest...such a person shall not be denied the right to be defended by his/her legal practitioner,”<sup>10</sup> and “[a]ny indigent person shall have the right to free legal aid in accordance with law.”<sup>11</sup> The Civil Rights Act 2012 (1955) further provides that an arrestee “shall not be deprived of the right to consultation and defense by a legal practitioner or an attorney, pursuant to the law.”<sup>12</sup> In 2007, the Supreme Court of Nepal upheld the right to counsel at the time of arrest for all persons accused of a crime in the Public Interest Litigation case of *Som Luitel v. Nepal Government, Prime Minister and Ministry of Council*.<sup>13</sup> Citing Article 14 of the Interim Constitution, Article 14 of the ICCPR, and a range of other regional and international instruments, the Supreme Court found that:

When a person is taken into custody he is deprived of his right to liberty. This deprivation of liberty shall last from the time of arrest until his release on bail or general release. If any person under arrest for a crime is deprived of legal counsel

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Nations, Treaty Series, vol. 999, p. 171, Art. 14(3)(d); and UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly , 28 March 2013, A/RES/67/187, Principle 3, Para. 21.

<sup>5</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), annex, Art. 10-11.

<sup>6</sup> *Id.*

<sup>7</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 14(3)(d).

<sup>8</sup> *Id.*

<sup>9</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 14(3)(d); Nepal ratified the ICCPR in 1991, and the Interim Constitution provides that it is an obligation of the State to effectively implement the international treaties and agreements to which the State is a party. *Interim Constitution of Nepal*, 2063 (2007), art. 33(m).

<sup>10</sup> *Interim Constitution of Nepal*, 2063 (2007), art. 24(2).

<sup>11</sup> *Id.* at 24(10).

<sup>12</sup> Civil Rights Act of Nepal 2012 (1955), Art. 15(1)(b).

<sup>13</sup> *Som Luitel v. Nepal Government*, Prime Minister and Ministry of council (Writ no. 3275 of Year 2062, decision date Magh 23, 2063 (Feb 6, 2007)

from a defense lawyer, this action is contrary to the Constitution...In order to prevent illegal and arbitrary detention from the State, this right is available not only to a citizen but also to every person residing throughout the country.<sup>14</sup>

Though the new Constitution and a Criminal Code are still in the drafting stage, the ILF hopes that any new legislation will not diminish the rights of the accused to legal representation.

#### A. Structure of Nepal's Criminal Legal Aid System

The Government of Nepal has a mixed system of legal aid delivery. It provides counsel to the indigent accused through both a contract system (the *Baitanik Wakil* program run by the Supreme Court) and an appointed counsel system (the Central and District Legal Aid Committees, managed by the Nepal Bar Association). The government legal aid system is supplemented by nongovernmental legal aid organizations that employ full-time salaried lawyers. Many legal aid providers handle both criminal and civil cases. See section IV, below, for a description of the three basic methods that States utilize to deliver indigent defense services: assigned counsel (also called *judicare* or *ex officio* systems, depending on the jurisdiction), public defender (or institutional defender systems), and contract defense providers, as well as the mixed model approach, in which a combination or some variation of these delivery systems are used.

Since 1958, the Government of Nepal has relied primarily on the Supreme Court's *Baitanik Wakil*, or court-paid lawyer program, to meet its constitutional obligation to provide legal aid services. By design, one *Baitanik Wakil* lawyer serves in each of Nepal's 75 district courts and 16 appellate courts, and generally two serve in the Supreme Court. A court is at liberty to assign the *Baitanik Wakil* lawyer to a case at any point during the lawyer's tenure as the *Baitanik Wakil* for that court, and the lawyer will be paid a monthly salary by the court for their service.

*Baitanik Wakil* are contracted by Nepal's judicial courts (district courts, appellate courts, and the Supreme Court of Nepal) for a period of one year. During their tenure, they are responsible for representing any legal aid case referred by the court, both civil and criminal (and both victims and defendants in criminal cases). District Legal Aid Committees (DLAC) were established by the Legal Aid Act (1997) and were intended to deliver legal aid services nationwide, but actual offices have only been opened in 34 of Nepal's 75 districts. In those districts, the DLAC is established as a single-room office, often within the courthouse and with one government staff member (who is not a lawyer) who assigns cases to members of the Nepal Bar Association (NBA). Though the Legal Aid Act mandates provision of legal aid to any "helpless persons,"<sup>15</sup> lawyers appointed by the DLACs generally do not provide any indigent criminal defense services.

Finally, domestic and international nongovernmental organizations provide legal aid services in many districts, the four major providers are ILF-Nepal, the Center for Legal Research and Resource Development (CeLRRd), Advocacy Forum, and the Terai Human Rights Defenders

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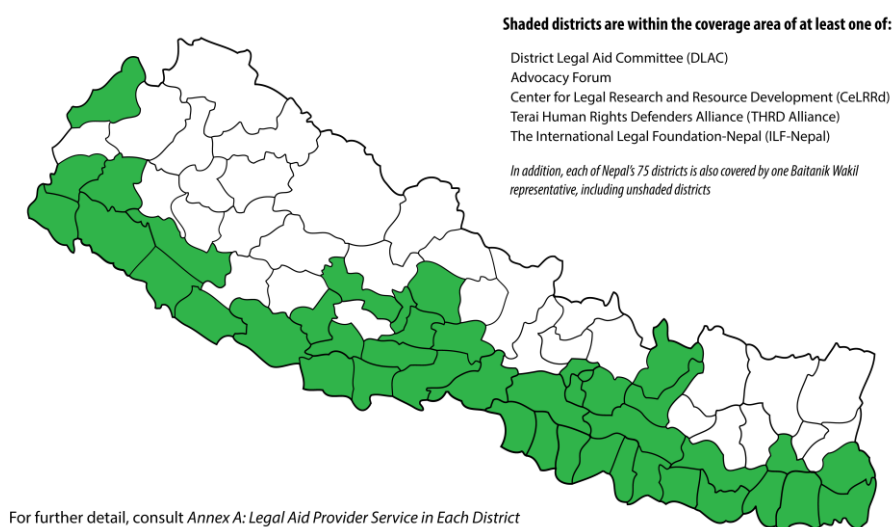
<sup>14</sup> *Id.*

<sup>15</sup> Legal Aid Act, 1997, Section 2(a).

Alliance (THRD Alliance). ILF-Nepal has offices in 5 districts, and from those offices serves a total of 12 districts. In 2014, ILF-Nepal’s 17 lawyers represented 1,240<sup>16</sup> indigent accused men, women and children in cases before judicial and quasi-judicial bodies. ILF-Nepal is the only nongovernmental organization set up as a traditional public defender office, representing the indigent accused. CeLLRd is one of the oldest organizations providing legal aid in Nepal. It has several programs, including mediation, legal aid, criminal defense, gender justice, legal education, and juvenile justice. CeLLRd operates in many districts, and at one point ran a Prisoner Legal Aid (PLA) Programme in 28 districts through 5 regional legal aid clinics. Advocacy Forum focuses on a broad number of topics under its overall mission to “combat the culture of impunity by promoting the rule of law,”<sup>17</sup> including some representation of indigent accused through its criminal justice department.<sup>18</sup> The THRD Alliance began as an informal rights group in Terai in 2006, and in 2011 was officially registered as a nongovernmental organization in Mahottari. The main objectives of the THRD Alliance are to strengthen the voice of Madhes and to promote equity and justice by addressing the issues faced by the people of Terai. It operates out of its Liaison Office in Kathmandu, two regional offices in Janakpur (for the Eastern and Central Terai regions) and Bhairahawa (for the Western and Far Western Terai regions), a sub-regional office in Nepalgunj (for the Mid-Western Terai region), and two contact offices in Biratnagar and Dhangadhi.<sup>19</sup> THRD Alliance’s website notes that it has “15 Human Rights Defenders and 15 lawyers.”

*See Annex A for a table showing the legal aid providers serving each Nepal district.*

### Map: Legal Aid in the Districts of Nepal



<sup>16</sup> This includes 754 new clients in 2014, and 486 carry-over cases from earlier years.

<sup>17</sup> See Advocacy Forum, “About Us,” at <http://advocacyforum.org/about-us/index.php>.

<sup>18</sup> See Advocacy Forum, “Criminal Justice Department,” at <http://advocacyforum.org/what-we-do/criminal-justice-department/index.php>.

<sup>19</sup> See Terai Human Rights Defenders Alliance, “About Us,” <http://www.taraihumanrights.org/pages.php>.

## I. Assessment of Criminal Legal Aid Services in Nepal

In December of 2012, The UN General Assembly unanimously adopted the *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*, the first international instrument dedicated to the right to legal aid. The Principles and Guidelines “are drawn from international standards and recognized good practices, [and] aim to provide guidance to States on the fundamental principles of which a legal aid system in criminal justice should be based and to outline the specific elements required for an effective and sustainable national legal aid system, in order to strengthen access to legal aid.”<sup>20</sup> The Principles and Guidelines provide a comprehensive reference point for evaluation of Nepal’s criminal legal aid system.

Principle 1 of the Principles and Guidelines makes clear that “legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process”.<sup>21</sup> Accordingly, it encourages States to “guarantee the right to legal aid in their national legal systems at the highest possible level, including ... in the constitution.”<sup>22</sup> Consistent with the Principles and Guidelines, the Interim Constitution of Nepal, 2063 (2007)<sup>23</sup> guarantees the right to a fair trial<sup>24</sup>, the right to counsel from the time of arrest<sup>25</sup>, and the right to free legal aid for indigent accused.<sup>26</sup> According to the Interim Constitution, no one shall be deprived of liberty without the protection of these rights.<sup>27</sup>

Principle 2 of the Principles and Guidelines provides that the responsibility of providing legal aid falls to the State. More specifically, the Principles and Guidelines make clear that “States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should

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<sup>20</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*: resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187, para. 6.

<sup>21</sup> *Id.* at Principle 1, para. 14.

<sup>22</sup> *Id.*

<sup>23</sup> Interim Constitution of Nepal, 2063 (2007), available at [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf)

<sup>24</sup> *Id.*, art. 24(9): “Every person shall be entitled to a fair trial by a competent court or judicial authority.”

<sup>25</sup> *Id.*, art. 24(2): “The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.”

<sup>26</sup> *Id.*, art. 24(10): “The indigent person shall have the right to free legal aid in accordance with law.”

<sup>27</sup> *Id.*, art. 12(2): “No person shall be deprived of his/her personal liberty save in accordance with law.”



allocate the necessary human and financial resources to legal aid.”<sup>28</sup>

As described in this report, despite Nepal’s clear constitutional commitment to the right to counsel, few poor people in Nepal accused of crimes have access to legal representation and even fewer receive any meaningful representation. As is the case in many developing criminal justice systems, the necessary laws are substantially in place: however, these laws are not being implemented in practice because of a lack of implementing legislation and regulations; a dearth of mechanisms to ensure access to counsel, particularly early access; the failure to establish a comprehensive, coordinated and independent legal aid system; a lack of the necessary human and financial resources; and systemic shortcomings in the qualifications, training, and standards of performance amongst legal aid providers. Each of these issues is explored in further detail below.

#### A. Government Funding and Coordination of the Criminal Legal Aid System

##### *i. Lack of Coordination among Criminal Legal Aid Providers*

Coordination of the delivery of legal aid services is necessary to guarantee that all indigent accused have access to counsel and ensure the efficiency and effectiveness of the criminal legal aid system. Principle 2 of the Principles and Guidelines provides that “States should ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible.”<sup>29</sup> Guideline 11 expands on this principle, encouraging States to “consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services.”<sup>30</sup>

Nepal lacks a coordinated legal aid system under a central administrator. At present, the government’s schemes for providing legal aid—the *Baitanik Wakil* program and DLACs—are run by separate branches of government that do not coordinate provision of services or expenditure of resources. This makes it difficult for the government to effectively and efficiently meet requirements related to the provision of criminal defense services to the poor.

Nepal also lacks a comprehensive method to track expenditures or attorney caseloads or to document compliance. No adjustments are made for legal aid expenditures across the country, though there is a significant variation in the indigent defense service needs from one district to another. For example, Kathmandu is a populous urban area, and the District Court of Kathmandu has a high volume of cases—15,788 cases in the year 2012/13<sup>31</sup>. By contrast, the District Court of Rasuwa had 42 total cases in 2012/13<sup>32</sup>. Despite this vast difference, district courts in both areas have just one *Baitanik Wakil*. Further, there is no provision for replacing *Baitanik Wakil* if they

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<sup>28</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly , 28 March 2013, A/RES/67/187, Principle 2, Para. 15.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at Guideline 11, para. 59.

<sup>31</sup> Supreme Court Annual Report 2069/070 (2012/13).

<sup>32</sup> Supreme Court Annual Report 2069/070 (2012/13).

are not willing or able to provide legal aid services. In one extreme example, a court registrar in western Nepal reported to the ILF in 2010 that the *Baitanik Wakil* lawyer had gone out on maternity leave shortly after being assigned, leaving the court with no legal aid lawyer—with sufficient oversight, a lapse like that would never occur. As with the *Baitanik Wakil*, there is no oversight of DLAC lawyers, accountability for expenditures, or monitoring of caseloads. These factors create the circumstances in which DLACs provide representation in very few criminal cases.

Through the Rule of Law and Human Rights Programme, UNDP is working with the Ministry of Law and Justice, Constituent Assembly and Parliamentary Affairs to coordinate the legal aid system under the Ministry’s authority;<sup>[33]</sup><sup>[34]</sup> however, it is unclear how this will work in practice, as the *Baitanik Wakil* program is currently managed by the Supreme Court, a separate and autonomous branch of the government. The Supreme Court’s third “Five Year Strategic Plan (2014-2019)” does not contemplate any change in administration of the *Baitanik Wakil* program, though it does highlight the need to improve coordination of legal aid at the local level.

Further, there is no official coordination between governmental and non-governmental legal aid providers, despite the fact that non-government organizations provide a substantial portion of the available criminal legal aid in Nepal. Consistent with Principle 14 of the Principles and Guidelines, Nepal recognizes and encourages the contribution of the Nepal Bar Association and civil society organizations in providing legal aid.<sup>35</sup> In so doing, Nepal recognizes that nongovernmental legal

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<sup>33</sup> Under the Ministry of Law and Justice’s plan, both civil and criminal legal aid would be administered by a single central institution with satellite offices or Legal Aid Centers throughout Nepal’s 75 districts. These Legal Aid Centers would provide a comprehensive package of socio-legal services which vulnerable groups need to access justice, such as legal advice on all their formal and non-formal dispute resolution options; representation; shelter; counseling; and accompaniment throughout the legal processes. The envisaged integrated legal aid scheme would provide support to enable women and other vulnerable groups to obtain their rights in criminal, civil, and administrative cases, including poverty-reducing entitlements such as education allowances, pensions, property inheritance, and child maintenance.

<sup>34</sup> United Nations Development Project, “Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013 – 2017),” pp. 14, fn. 25; *available at* [http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP\\_NP\\_RoLHR\\_Project-Document.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Document.pdf).

<sup>35</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*: adopted by the General Assembly, 28 March 2013, A/RES/67/187, Principle 14, para. 39. Additionally, note that the UN Principles and Guidelines expand on these principles in Guidelines 11 and 16, which state:

55. In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures:

[...]

(d) To establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process.

[...]

70. States should, where appropriate, engage in partnerships with non-State legal aid service providers, including non-governmental organizations and other service providers.

aid providers can and do alleviate the pressure on the government's still developing legal aid system to provide services. However, though Nepal encourages the contribution of nongovernmental providers, it does not attempt to coordinate with civil society efforts, or enter into partnerships with civil society to extend the reach of legal aid in underserved areas.<sup>36</sup>

Most critically, there is no legal aid body or authority that collects and analyzes data on access to justice and that uses its findings to create a responsive legal aid scheme that ensures that all indigent accused have access to criminal defense services at the time of arrest. No data is gathered about the number of accused who may qualify for legal aid but go unrepresented, making it difficult to accurately predict or budget the resources necessary for Nepal to meet its constitutional obligation to provide access to counsel to all indigent accused.

This lack of coordination of the legal aid system leads to a lack of oversight and mismanagement of resources, which results in ineffective and inefficient representation for indigent accused persons throughout Nepal. This lack of coordination also extends to other actors within the criminal justice system. Because there is no formal coordination between legal aid and the police, prosecution or courts, there is no effective mechanism for assignment and appointment of counsel during the early stages of the case. The overall result is that many *Baitanik Wakil* and other providers have low caseloads and indigent accused are not receiving access to counsel.

ii. *Nepal's Failure to Adequately Fund Criminal Legal Aid Services*

Nepal needs to adequately fund the government legal aid system in order to ensure that the indigent accused receive prompt and effective legal representation. Without sufficient resources, even the most diligent lawyers cannot engage in the representation required by Nepal's Interim Constitution. Principle 2 of the Principles and Guidelines states, in part, that "States should allocate the necessary human and financial resources to the legal aid system."<sup>37</sup> The Principles and

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71. To this end, States should take measures, in consultation with civil society and justice agencies and professional associations:

(a) To recognize in their legal systems the role to be played by non-State actors in providing legal aid services to meet the needs of the population;

[...]

(d) To work with all legal aid service providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural and economically and socially disadvantaged areas and among minority groups;

(e) To diversify legal aid service providers by adopting a comprehensive approach, for example, by encouraging establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics and non-governmental and other organizations to provide legal aid services.

<sup>36</sup> United Nations Development Project, "Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013 – 2017)," pp. 12; available at [http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP\\_NP\\_RoLHR\\_Project-Document.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Document.pdf)

<sup>37</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly , 28 March 2013, A/RES/67/187, Principle 2, Para. 15.

Guidelines further elaborate on this issue in Guidelines 12 and 13:

*Guideline 12. Funding the nationwide legal aid system*

60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.

61. To this end, States could take measures:

(a) To establish a legal aid fund to finance legal aid schemes...

(b) To identify fiscal mechanisms for channeling funds to legal aid...

(c) To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.

62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offense, and to victims. Adequate special funding should be dedicated to defense expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.<sup>38</sup>

*Guideline 13. Human resources*

63. States should, where appropriate, make adequate and specific provisions for staffing the nationwide legal aid system that are commensurate with their needs.

In 2013, in recognition that low salaries were resulting in substandard legal aid representation, the Government of Nepal significantly increased the pay for *Baitanik Wakil*.<sup>1</sup> Prior to 2013, *Baitanik Wakil* at the district and appellate court levels were paid NRs 7,000 per month (and just a few years before that only NRs 2,000 per month), and at the Supreme Court level were paid Nrs. 7,500. Currently, the *Baitanik Wakil* are paid NRs 24,900 per month at the district and appellate court levels, and the two *Baitanik Wakil* at the Supreme Court are paid NRs 27,610 per month. The salary of *Baitanik Wakil* is now attached to the salaries of Government of Nepal employees: *Baitanik Wakil* at the Supreme Court level will receive the salary of an undersecretary (a 2<sup>nd</sup> Class Officer), and *Baitanik Wakil* at the Appellate and District Court levels will receive the salary of a section officer (a 3<sup>rd</sup> Class Officer). Thus, their salaries will increase anytime the official salaries of employees at those levels are increased. This was a significant, positive step forward in the

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<sup>38</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly , 28 March 2013, A/RES/67/187, Guideline 12, Paras. 60-62.

reform of the legal aid system, showing that the Government of Nepal recognized a major issue—that low salaries were making it difficult to attract qualified attorneys to *Baitanik Wakil* service—and then were able to take a proactive step to address the problem.

While the government of Nepal has recently increased the pay for *Baitanik Wakil*, so that their monthly salary matches that of prosecutors, Nepal's legal aid system still does not have the resources necessary to provide effective representation to all indigent accused. The Nepal Government would need to increase substantially the number of *Baitanik Wakil* in order to meet the need of all indigent accused throughout Nepal. The problem is particularly acute in areas where there are high caseloads, and high numbers of indigent accused in need of a legal aid lawyer.

Moreover, the compensation scheme for *Baitanik Wakil* remains problematic because they are not reimbursed for the expenses associated with representing their clients. Instead, they are paid a fixed monthly stipend to handle all cases in their assigned court, regardless of number of cases, their complexity, or how much or how little work they put into each case. Further, while the right to counsel extends to quasi-judicial bodies that have authority to try criminal cases, Nepal does not provide any funding for legal aid services in quasi-judicial bodies.

When defense lawyers do not have the necessary resources, they will be unable or may be unwilling to provide adequate representation to their clients. It is impossible to provide a client with adequate representation without incurring expenses such as travel, filing fees and or costs of copying case files and documents, and expenses related to expert witnesses or collection of evidence.<sup>39</sup> The *Baitanik Wakil* program's flat fee pay structure creates a clear disincentive to expend the resources necessary to provide an adequate defense, and places the interests of defense lawyers in direct conflict with those of their clients. Any money *Baitanik Wakil* may spend investigating or preparing their cases directly reduces their compensation. Essentially, *Baitanik Wakil* must choose between earning a living or effectively representing their clients. Also of concern, *Baitanik Wakil* are paid the same flat fee for services regardless of caseload; they are paid the same amount whether they represent 1 client or 100 clients during their tenure.

Finally, a significant reason for the inability of the DLAC's to provide criminal legal aid services, is that the system is insufficiently funded. When DLACs were first established, the government provided funds sufficient for hiring at least one full time attorney and necessary office support staff, and for paying fees to outside attorneys who were assigned cases. Unfortunately, funding to DLACs was cut, such that only the single staff attorney could be retained; this person is paid a very low annual salary (NRs 40,000, at the non-gazette first class level), and is expected to provide representation in most or all of the cases submitted to the DLAC.

Contributing to Nepal's failure to adequately fund the legal aid system is the government's failure to conduct a comprehensive assessment of the amount of money it would need to allocate to ensure that all of its defender systems are capable of providing constitutionally adequate legal representation. Such an assessment would require a full accounting of the money spent in past

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<sup>39</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly , 28 March 2013, A/RES/67/187, Guideline 12, Paras. 62.

years by legal aid providers and an understanding of how these funds were disbursed. This type of accounting is made more difficult by the fact that there is no uniform countrywide legal aid system or uniform countrywide records of the necessary information.

*iii. Lack of Parity Between Prosecution and Indigent Defense Lawyers*

Neither has Nepal fully addressed the necessity for parity between legal aid resources and those of the prosecution, which, as noted above, is specifically called for in Guideline 12 of the UN Principles and Guidelines (61. “States could take measures [...] (d) to ensure fair and proportional distribution of funds between prosecution and legal aid agencies”). There should be parity between defense counsel and the prosecution with respect to resources as defense counsel is an equal partner in the justice system; providing more extensive resources to prosecutors unfairly favors the State in criminal proceedings against the accused, and fundamentally undermines the right to a fair trial. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and legal aid lawyers.

In the DLACs that have a salaried attorney, that person is paid NRs 40,000 per year, which is significantly below the salary of prosecutors at all court levels. In the case of the *Baitanik Wakil*, they are paid at the same salary levels as the prosecutors, i.e. both prosecutors and *Baitanik Wakil* at the district and appellate court levels are paid the salary of a 3<sup>rd</sup> Class Officer (currently NRs 24,900 per month), while prosecutors and *Baitanik Wakil* at the Supreme Court are paid the salary of a 2<sup>nd</sup> Class Officer (currently NRs 27,610 per month). However, beyond salary there are troubling and unfair disparities. Prosecutors are given the benefit of separate office space, dedicated phone lines, per diem expenses for travel, logistical support, a clothing bonus, overtime pay, hardship bonuses, and more significant leave benefits. Things like this not only give prosecutors an advantage in terms of preparing their cases, they also will attract better quality legal professionals and increase staff retention, giving prosecutors an advantage over *Baitanik Wakil*.

*iv. Independence from Undue Political Influence*

The ethical imperative of providing quality representation to clients should not be compromised by outside interference or political attacks. Principle 12 of the UN Principles and Guidelines addresses the necessity of independence and protection for legal aid providers:

States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

The independence of Nepal’s *Baitanik Wakil* program is compromised, as there is no uniform appointment process that ensures the independence of the lawyer from the Court or Bar

Association that may appoint him. As noted above, the appointment process for *Baitanik Wakil* varies significantly between courts and districts—in some courts they are appointed on the recommendation of the Nepal Bar Association, in some there is open competition with a written exam and interview process, and in some they are simply appointed on the unexamined decision of the relevant court authority.<sup>40</sup> The lack of uniform procedures for appointing *Baitanik Wakil* leaves room for political or other inappropriate influences, including corruption.

The *Baitanik Wakils'* independence is also compromised by the flat fee contract payment system, which pays the same monthly salary to all *Baitanik Wakil*, regardless of how many cases the lawyer handles, the types of cases or how much work the lawyer does in each individual case. This creates a direct conflict of interest with the client, in the sense that any work that the lawyer does in the case may reduce the amount of take-home compensation. This same conflict exists with any program that pays a flat fee, including the DLACs assigned counsel program.

## B. Qualifications, Training and Performance of Criminal Legal Aid Providers

The right to counsel means little if lawyers who defend the indigent accused in criminal cases lack the time, resources, or skills to be effective advocates. Across the country, *Baitanik Wakil* and other legal aid providers are providing ineffective legal representation, giving short shrift to investigation, case preparation, and legal research; they often meet their clients for the first time minutes before critical proceedings. The right to counsel is the right to the effective assistance of counsel.<sup>41</sup> The simple presence of a lawyer in criminal court proceedings does not fulfill a State's responsibility to provide criminal defense services to the indigent accused. The range of issues involved in criminal cases is so complex that the defense lawyer must have a certain requisite level of education, training, skills and experience to effectively represent the accused. Those lawyers who handle the most serious criminal cases should be even more experienced and capable.

Principle 13(37) of the Principles and Guidelines provides that:

States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.

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<sup>40</sup> *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (as a contractor of USAID), September 2005, Pp. 24, available at [http://pdf.usaid.gov/pdf\\_docs/PNADJ826.pdf](http://pdf.usaid.gov/pdf_docs/PNADJ826.pdf).

<sup>41</sup> *Strickland v. Washington*, 466 U. S. 668 (1984) at 466 (“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that the right to counsel is the right to the effective assistance of counsel.”)

Guidelines 13,<sup>42</sup> 15,<sup>43</sup> and 17,<sup>44</sup> further provide that States have the responsibility to ensure legal aid providers have appropriate qualifications and training, to set forth criteria for their accreditation, to make them subject to codes of conduct and sanctions for violations of code provisions, to establish oversight mechanisms (particularly to curtail corruption), and to proactively introduce measures to facilitate sharing of good practices amongst legal aid providers.

Further, Guideline 11 calls for specific codes of conduct, vetting procedures, and training courses for legal aid providers who will provide services to children, tailored to the special needs of juvenile offenders; and Guideline 16 specifically calls for quality standards, standardized training programs, and monitoring and evaluation mechanisms non-State legal aid service providers, in recognition of the State's responsibility to ensure the quality of all legal aid provision.

All of these guidelines recognize and support the fact that providing *effective* representation to indigent accused requires diligence on the part of the State; without adequate safeguards in place, States cannot fulfill their obligation to provide criminal legal aid.

*i. Qualification Standards and Performance Standards for Legal Aid Providers*

Whatever its structure, every criminal legal aid system must have qualifications requirements and performance standards for lawyers. Qualification requirements and performance standards are necessary to govern the conduct of lawyers working within the legal aid system and ensure lawyers provide a minimum level of quality defense services, whether their client is rich or poor. Standards help defense lawyers, criminal legal aid systems, and governments know what is required of them to provide the right to counsel. Once established, these can be used to guide lawyers' roles and responsibilities, by trainers in develop a training plan, and by supervisors and oversight bodies to monitor and evaluate the performance of an individual lawyer or legal aid office.

Currently, there are no specialized qualifications or uniform procedures for the appointment of

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<sup>42</sup> Guideline 13(64): States should ensure that professionals working for the national legal aid system possess qualifications and training appropriate for the services they provide.

<sup>43</sup> Guideline 15. Regulation and oversight of legal aid providers:

69. In adherence to principle 12, and subject to existing national legislation ensuring transparency and accountability, States, in cooperation with professional associations, should:

- (a) Ensure that criteria are set for the accreditation of legal aid providers;
- (b) Ensure that legal aid providers are subject to applicable professional codes of conduct, with appropriate sanctions for infractions;
- (c) Establish rules to ensure that legal aid providers are not allowed to request any payment from the beneficiaries of legal aid, except when authorized to do so;
- (d) Ensure that disciplinary complaints against legal aid providers are reviewed by impartial bodies;
- (e) Establish appropriate oversight mechanisms for legal aid providers, in particular with a view to preventing corruption.

<sup>44</sup> Guideline 17. Research and data

74. For this purpose, States could introduce measures:

- (b) To share good practices in the provision of legal aid;
- (d) To provide cross-cultural, culturally appropriate, gender-sensitive and age-appropriate training to legal aid providers.



*Baitanik Wakil*. The Supreme Court's rule<sup>45</sup> ostensibly requires an Advocate, not a Pleader, but the Appellate Court<sup>46</sup> and District Court rules only prefer an Advocate, and will take a Pleader if necessary. In practice, the process of appointing *Baitanik Wakil* varies widely from district to district.<sup>47</sup> In some courts they are appointed on the recommendation of the Bar Association, in some there is open competition with a written exam and interview process, and in some they are simply appointed on the unexamined decision of the relevant court authority.<sup>48</sup> In informal surveys given to *Baitanik Wakil* by the ILF in 2013, 7.5% had received their license to practice law less than a year before the survey was taken; 30% had five years or less of legal experience; and 12.5% had represented fewer than 10 criminal defendants in their entire career.

Neither the courts nor other government bodies provide official guidance on basic qualifications or mandate an official certification process for lawyers who provide legal aid through DLACs or non-government organizations. This lack of standardized, rigorous qualifications can lead to sub-par legal services that do not effectively fulfill the right to counsel for indigent accused.

There are also no performance standards to govern the practice of *Baitanik Wakil* or other legal aid providers in Nepal, and no external review of their performance. In order to ensure the effectiveness of Nepal's legal aid system, and ensure the poor are not wrongfully convicted, arbitrarily or illegally detained, or subjected to torture or other abuse, the Government of Nepal should develop performance standards for legal aid providers, in cooperation with the Nepal Bar Association, that outline the basic roles and responsibilities of defense lawyers.

ILF-Nepal has in place professional standards for its advocates that are used internally to train and monitor and evaluate its attorneys. These performance standards clearly cover, for example the role of defense counsel, the attorney's responsibilities and obligations at all stages of a case (client intake, pre-trial, trial, and sentencing), duties during initial consultation and subsequent client interviews, and the duty to investigate. All of ILF-Nepal's attorneys are provided training on these standards upon joining the organization, and on an ongoing basis thereafter. In order to

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<sup>45</sup> Rule 111(A) of the Supreme Court Rules, 1992, authorizes the Registrar of the Supreme Court to appoint a *Baitanik Wakil* from among "advocates" through a "fair competition." *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (a contractor of USAID), September 2005, Pp. 24.

<sup>46</sup> Rule 105(A) of the Appellate Court Rules, 1991, and Rule 95(A) of the District Court Rules, 1995, provide that *Baitanik Wakil* will be appointed from "among the applicant advocates available. If advocates are not available in such situation stipendiary lawyer will be appointed among the applicant pleaders." *Id.*

<sup>47</sup> Rule 111(A) of the Supreme Court Rules, 1992, authorizes the Registrar of the Supreme Court to appoint a *Baitanik Wakil* from among "advocates" through a "fair competition." Rule 105(A) of the Appellate Court Rules, 1991, and Rule 95(A) of the District Court Rules, 1995, provide that *Baitanik Wakil* will be appointed from "among the applicant advocates available. If advocates are not available in such situation stipendiary lawyer will be appointed among the applicant pleaders." In practice, though, there is no uniformity in the appointment of *Baitanik Wakil* —in some courts they are appointed on the recommendation of the Nepal Bar Association, in some there is open competition with a written exam and interview process, and in some they are simply appointed on the unexamined decision of the relevant court authority. *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (as a contractor of USAID), September 2005, Pp. 24, available at [http://pdf.usaid.gov/pdf\\_docs/PNADJ826.pdf](http://pdf.usaid.gov/pdf_docs/PNADJ826.pdf).

<sup>48</sup> *Id.*

operationalize these performance standards on an ongoing basis, ILF-Nepal follows targeted procedures for monitoring and evaluation that track their adherence to the standards. Every six months, every ILF-Nepal employee—both attorneys and support staff—goes through a complete evaluation process. Each person completes a self-evaluation, and then has a one-on-one meeting with their supervisor to compare that to their supervisor’s evaluation. For attorneys, this conversation is supplemented by review of data related to their representation in cases; ILF-Nepal maintains a comprehensive database that tracks data related to attorney compliance with performance standards—such as the number of times they visited a client, at what intervals, what motions they filed, etc. Having concrete data as part of the review process helps ensure that evaluations are fair, and not based solely on subjective perceptions by either the attorney or supervisor. Through this semi-annual review process, areas of strengths and weaknesses are identified, and the attorney and supervisor together devise a plan for ongoing improvement, which then becomes part of future evaluations. A monitoring and evaluation system like this—based on clear performance standards, and regularly engaged in in a collaborative way—is internationally recognized as the best way to promote and ensure the effectiveness of legal aid providers.

Drawing on the experience of ILF-Nepal, Nepal’s Bar Association has begun an initiative to develop performance standards and guidelines for legal aid providers. In coordination with ILF-Nepal, which is providing the NBA with examples of its standards and monitoring and evaluation systems, the goal is to create universal standards for legal aid providers that are enforceable nationwide. The NBA plans to roll the standards out with the assistance of ILF-Nepal through a series of workshops, roundtables and training sessions. ILF-Nepal is also working with the NBA to improve the NBA’s ability to monitor lawyers working under the developing standards.

#### *ii. Training for Legal Aid Providers*

*Baitanik Wakil* are not provided with any specialized training or any other support or oversight. There is no orientation program for *Baitanik Wakil*, no systematic and comprehensive training, and no technical assistance. In the ILF’s 2013 informal survey of *Baitanik Wakil*, only 7.5% reported having previously attended training related to criminal defense. Further, there are no government- or NBA-mandated training requirements for lawyers providing legal aid through DLACs. Without training, lawyers are left to determine on their own what constitutes competent representation and will often fall short of that mark. This is especially true as there are no practice guidelines in place and the performance of *Baitanik Wakil* is not monitored or evaluated.

As with performance standards, non-government organizations may have internal training requirements to which their staff are subject. For example, all of ILF-Nepal’s attorneys are required to attend monthly internal training workshops. The trainings are conducted by ILF-Nepal’s Country Director and Legal Director, but topics are decided upon collaboratively by asking the attorneys whether there are topics or key cases that they are particularly interested in learning more about. The training sessions themselves may include lectures by the Country Director and Legal Director, or presentations by the staff attorneys on topics they have been asked to research, or a combination of the two. As with monitoring and evaluation, keeping the training process collaborative and interactive is the best way to ensure its effectiveness.

In an effort to improve the quality of representation provided by *Baitanik Wakil* and other legal aid providers, over the last three-years ILF-Nepal has trained over 200 criminal legal aid providers,

43 of which were female attorneys, and 85 of which came from vulnerable castes.<sup>49</sup> The trainings are intensive, encompassing one-week of high quality, hands on defense trainings that introduce lawyers to basic concepts on providing meaningful representation to indigent accused from the earliest stage of the case through trial and appeal. In pre-training survey forms, a substantial number of lawyers revealed that they had never before received any training.

Participants stated that they were thoroughly satisfied with the training, and post-training surveys revealed positive changes in their defense practices:

Number of Trainees Using Defense Methods Before and After Training		
Detention Center Visits	46.60%	87.70%
Remand Representation	38.36%	57.70%
Client Meetings	46.60%	87.70%
Filing Petitions	39.73%	59.60%
Defense Investigation	45.20%	73.70%

In the future, ILF-Nepal intends to continue and expand its training program in order to serve more of Nepal’s current and potential legal aid providers. In order to make the training program sustainable, ILF-Nepal intends to eventually begin charging for the training sessions. Also, it will publish its training manual, making ILF-Nepal’s guidance on best practices for criminal legal aid broadly available to even to those lawyers who are unable to attend trainings in-person. Further, ILF-Nepal will strongly advocate for the NBA and the government to adopt minimum training requirements for legal aid providers; for example, attorneys in the U.S. are required to complete a certain number of hours of “Continuing Legal Education” in order to maintain their license to practice law, which encourages attorneys who might otherwise consider themselves too busy or too expert for trainings to nevertheless attend them and, most likely, benefit significantly.

*iii. Mechanisms for Early Appointment of Counsel*

The first minutes and hours immediately following arrest are among the most crucial for ensuring that the rights of the accused are protected. During this time, the accused are particularly vulnerable to mistreatment, coercion, and violations of their rights, and may unknowingly incriminate themselves or be compelled to confess by police or prosecutors. Mistakes and abuses during these early stages impact the entire case going forward, and it is difficult for a lawyer appointed in a later stage to effectively represent his or her client and protect all of their fair trial rights.

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<sup>49</sup> This includes Dalik, Janajati, Madhesi, Thakuri, and Muslim attorneys.

The Principles and Guidelines extensively address the importance of proactive mechanisms to appoint counsel, and access to counsel from the earliest stages of the criminal justice process, through both these principles and the more detailed guidelines.<sup>50</sup>

*Principle 3. Legal aid for persons suspected of or charged with a criminal offense.*

20. States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offense punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.

[...]

23. It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.

*Principle 7. Prompt and effective provision of legal aid*

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

Although Nepal's Interim Constitution guarantees the right to counsel from the time of arrest, there is no clear procedural mechanism for police, prosecutors, or judges to appoint *Baitanik Wakil* or other counsel—generally a judge or court registrar is the sole decider of whether an accused person will receive legal aid, and it is at their unquestioned discretion<sup>51</sup>— and few private lawyers or NGO lawyers seek to intervene in the early stages of a case. Because of this procedural gap, counsel is rarely present for police interrogations where torture, coerced confessions, arbitrary and prolonged detention, and other human rights abuses often occur and where accused persons are desperately in need of an advocate to protect and assert their rights. Neither are counsel available

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<sup>50</sup> Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offense  
43. States should introduce measures:

(a) To promptly inform every person detained arrested, suspected or accused of, or charged with a criminal offense of his or her right to remain silent, his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions.

[...]

(d) To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed

Guideline 4. Legal aid at the pretrial stage

44. To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:

(a) To ensure that police and judicial authorities do not arbitrarily restrict the right or access to legal aid for persons detained, arrested, suspected or accused of, or charged with a criminal offense, in particular in police stations;

(b) To facilitate access for legal aid providers assigned to provide assistance to detained persons in police stations and other places of detention for the purpose of providing that assistance;

(c) To ensure legal representation at all pretrial proceedings and hearings

<sup>51</sup> *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (as a contractor of USAID), September 2005, Pp. 24, available at [http://pdf.usaid.gov/pdf\\_docs/PNADJ826.pdf](http://pdf.usaid.gov/pdf_docs/PNADJ826.pdf).

at the defendant's first appearance in court when bail applications may be made.

Further impeding early access to counsel, many accused persons are unaware of, and not advised about their right to counsel by the police, prosecution or courts. In 2014, the ILF conducted a survey of detainees in prisons and detention centers around Nepal (the Access to Justice Survey report, forthcoming in 2015) and found that most respondents did not know of their constitutional right to counsel from the time of arrest, were not informed of that right or that free counsel could be appointed to indigent accused, and, thus, most did not exercise their right. Nearly three quarters of respondents—74.8%—were not aware at the time of their arrest that they have the right to have a lawyer defend their case. From the time of arrest, 63% were never informed by any party that they have this right. Of those respondents who were informed of their right following arrest, friends (either in prison with them or from outside of prison) and family, not the government or anyone in the justice sector, were the greatest resource for informing them of their right: 14.2% were told by friends that they have the right to counsel, and 6.3% were told by relatives. Of government officials, police were the most informative—5.4% learned of the right to counsel from the police—followed by court employees at 3.4%, Judges at 2.5%, and Prosecutors at 0.6%.

To address the lack of early access to counsel, ILF-Nepal organizes its case intake procedures to include lawyers appearing at police stations/detention centers on a daily basis requesting to speak to detainees. ILF-Nepal also mandates that its lawyers begin representation of clients prior to the first remand hearing, wherever possible. Additionally, ILF-Nepal currently has duty desks in courthouses in Lalitpur district to provide representation to accused at the first remand hearing and hopes to expand its duty desk project not only to more courthouse but also to detention centers. Finally, in its training sessions for members of the NBA as well as its work with NBA, ILF-Nepal highlights local laws as well as international instruments such as the Principles and Guidelines to teach and emphasize the importance of providing early access to counsel as well as effective representation during the police and prosecution stage as well as at the first remand hearing.

### C. The Impact of the Deficiencies in Nepal's Criminal Legal Aid System

#### *i. Lack of Access to Counsel Generally*

Official data reflects problematically low rates of actual representation by *Baitanik Wakil* in appellate and district court cases. As noted by the UNDP in its "Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013-2017)":

In 2010-2011, the Supreme Court reported that the 75 district courts handled a total of 34,986 criminal cases. *Baitanik Wakil* handled a total of 1,664 cases over this period: 4.8% total. The *Baitanik Wakil* did not support any of the 9,487 cases prosecuted before the Chief District Officer [CDO] over the same period, meaning that just 3.7% of those potentially in need received [criminal] legal aid services. The figures for the numbers of cases heard by other quasi-judicial bodies (e.g. Tax Revenue Office, Land Reform Office, Forestry Offices) are unknown, but it is clear that just a tiny proportion of the total number of criminal accused have access to the legal aid services they need to achieve a fair trial. Just .4% of the 8305 public

offence cases prosecuted before the CDO resulted in acquittal.<sup>52</sup>

The Supreme Court's annual report for 2069/070 (2012/13) showed small—though still insufficient—improvement over the 2010-2011 figures; over that period, the *Baitanik Wakil* provided representation in just 7.5% of district court cases.<sup>53</sup> Even without official statistics on the income levels of Nepal's accused, it can be assumed that in Nepal, as in most countries, most criminal defendants are poor and unable to hire private counsel. *Baitanik Wakil* representation in less than 8% of district court cases falls far short of the proportion of accused who both need and would reasonably qualify for government-provided criminal legal aid.

Neither are the DLACs providing any significant representation to the indigent accused. In a brief 2012 assessment of Nepal's legal aid providers, the Nepal Bar Association reported that the average number of legal aid cases in each DLAC was 25 per year (it did not specify what portion were civil versus criminal).<sup>54</sup> In the same assessment the NBA reported that in 2010 its central office in Kathmandu handled 36 cases total, 17 of which were criminal, and four of the Women's Law Centers provided legal services in 28 cases (the total across all four), of which 11 were criminal cases.<sup>55</sup> Some NBA lawyers report handling only one case per year.

Moreover, because the mandate of the *Baitanik Wakil* system is limited to representing defendants in judicial proceedings, the vast majority of criminally accused adjudicated before quasi-judicial bodies are not being represented, despite the fact that they have a constitutional right to counsel and they may be sentenced to many years in prison if convicted. A significant percentage of criminal cases in Nepal are handled in quasi-judicial proceedings before chief district officers (CDO), chief forest officers and even park wardens. There is insufficient official data on exactly how many cases are handled in quasi-judicial proceedings as only cases handled by Chief District Officers are recorded. In 2013-2014, nearly 18,000 criminal cases were filed before Chief District Officers. Without access to counsel, persons tried before quasi-judicial proceedings are more likely to be convicted than those tried in the court system. UNDP reports that in 2010-2011, 8,305 public offense cases were prosecuted by the Chief District Officer (CDO)—just one of multiple quasi-judicial bodies—and just 0.4%, or 33 cases, resulted in acquittal. Exacerbating this problem, most indigent accused are unaware of their right to counsel. ILF-Nepal's forthcoming Access to Justice Survey report which surveyed 373 detainees and prisoners and 24 legal aid providers in six districts on issues related to access to counsel found that, of the respondents who did not have a

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<sup>52</sup> United Nations Development Project, "Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013 – 2017)," pp. 14, fn. 25; available at [http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP\\_NP\\_RoLHR\\_Project-Document.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Document.pdf)

<sup>53</sup> Supreme Court of Nepal, Annual Statistics 2069/070, available at [http://www.lawcommission.gov.np/index.php?option=com\\_remository&Itemid=33&func=fileinfo&id=1736&lang=en](http://www.lawcommission.gov.np/index.php?option=com_remository&Itemid=33&func=fileinfo&id=1736&lang=en)

<sup>54</sup> "Information Sheet-Nepal Bar Association" (2012), pp. 8; available at [http://www.nichibenren.or.jp/library/ja/bar\\_association/word/data/Nepal.pdf](http://www.nichibenren.or.jp/library/ja/bar_association/word/data/Nepal.pdf).

<sup>55</sup> "Information Sheet-Nepal Bar Association" (2012), pp. 8; available at [http://www.nichibenren.or.jp/library/ja/bar\\_association/word/data/Nepal.pdf](http://www.nichibenren.or.jp/library/ja/bar_association/word/data/Nepal.pdf).

lawyer assigned at any point during their pre-trial or trial proceedings, 93.9% reported that they were ignorant of the need for and availability of a lawyer (40.8%), or because they lacked the financial resources to pay for one (53.1%).

Also contributing to a denial of access to counsel for the indigent accused, DLACs have established financial eligibility criteria that disqualify many poor people: only persons with annual household earnings of NRs. 40,000 or less are eligible to apply, but often families that make more than that on paper in fact divide the amount amongst a large extended family, leaving very poor individuals ineligible for a DLAC's services.<sup>56</sup> Further, in order to prove their eligibility to receive DLAC services, indigent accused must obtain documents proving their indigence and the recommendation of a local body,<sup>57</sup> which may be an insurmountable barrier for a detained individual, or for family members who may lack the understanding, language skills, or time to apply for these documents.

As there is not enough capacity within the government-sponsored services to meet the indigent defense needs in Nepal, a number of local and international non-governmental organizations supplement the services provided by the government; however, these civil society organizations are generally concentrated in metropolitan areas, leaving gaps in many smaller districts. As with the *Baitanik Wakil* and DLACs, many of these organizations also do not specialize in indigent defense. Instead, they provide a variety of legal aid services, including representation to both victims and those accused of crimes. Representing both victims and accused reduces the capacity of these organizations to provide indigent defense services, and creates the possibility of conflicts of interests when their mandate includes representing both defendants and victims.<sup>58</sup>

In the ILF's experience, many lawyers choose to prioritize representation of victims or providing services in civil cases over providing defense to indigent accused. When organizations elect which cases and clients they will represent, the inevitable result is that in difficult or sensitive cases—especially where there may be significant public outcry—they will choose to represent the victim over the accused. While providing legal services to victims is an important function, it is critical that Nepal's legal aid system provide legal representation to all persons accused of a crime, regardless of the circumstances. ILF-Nepal is the only organization in Nepal whose sole focus is on providing legal representation to indigent people accused of crimes.

ii. *Failure to Provide Early Access to Counsel*

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<sup>56</sup> United Nations Development Project, "Strengthening the Rule of Law and Human Rights Protection System in Nepal Programme (2013 – 2017)," pp. 14, fn. 24; available at [http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP\\_NP\\_RoLHR\\_Project-Document.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/RoLHR/UNDP_NP_RoLHR_Project-Document.pdf)

<sup>57</sup> Legal Aid rules, 1998, Rule 3; *Study of the Current Legal Aid System in Nepal*, Law Associates of Nepal (as a contractor of USAID), September 2005, Pp. 27, available at [http://pdf.usaid.gov/pdf\\_docs/PNADJ826.pdf](http://pdf.usaid.gov/pdf_docs/PNADJ826.pdf).

<sup>58</sup> In the ILF's experience, many lawyers choose to prioritize representation of victims or providing services in civil cases over providing defense to indigent accused. When organizations elect which cases and clients they will represent, the inevitable result is that in difficult or sensitive cases—especially where there may be significant public outcry—they will choose to represent the victim over the accused. While providing legal services to victims is an important function, it is critical that Nepal's legal aid system provide legal representation to all persons accused of a crime, regardless of the circumstances. ILF-Nepal is the only organization in Nepal whose sole focus is on providing legal representation to indigent people accused of crimes.

Early access to counsel—ideally, before police interrogation or other investigation takes place—is absolutely necessary to protect the accused’s rights to remain silent and to be presumed innocent, and to protect them from improper interrogation tactics, forced confessions, and torture, all of which are most likely to occur in the earliest stages of the case. Without early access to counsel, accused persons are also likely to face longer periods of pretrial detention, and not be released on bail. In 2012, 59% of those in detention in Nepal were pre-trial detainees.

When an accused person is represented by a lawyer in the courts of Nepal, the accused routinely meets the lawyer for the first time in court at the jail/bail hearing (in the event he is assigned a *Baitanik Wakil*) or, often, even later (in the event he is not assigned any counsel at the jail/bail hearing). In the ILF’s informal survey of *Baitanik Wakil* practices, conducted in 2013, none of the *Baitanik Wakil* surveyed reported beginning their representation of indigent accused within 24 hours of arrest, before the charge sheet is filed. Just 17.9% reported beginning representation after the charge sheet but before the client statement was taken. The majority—53.8%—reporting routinely starting representation immediately before the jail/bail hearing, and a further 5% began after the jail/bail hearing. At this late stage in the process, there is little opportunity for the lawyer to conduct an independent investigation or prepare a defense. This places the defendant at a sometimes-insurmountable disadvantage at trial by severely limiting the effectiveness of the representation a lawyer is able to provide. When a defense lawyer is not equipped to test the government’s case, he or she is unable to effectively protect the client’s right to a fair trial.

### *iii. Low Quality of Legal Aid Representation*

Few lawyers in Nepal are qualified to represent the indigent accused in criminal cases. The vast majority of lawyers lack any training in criminal defense representation, and Nepal does not currently have standards and guidelines governing the roles and responsibilities of criminal legal aid providers, rules for representation where there are conflict of interests, or training or continuing legal education requirements. As with the *Baitanik Wakil* program, private lawyers are not required to have any criminal defense experience or training to represent indigent accused persons. Neither are they required to attend trainings to improve their skills and learn about changes in the law.

All of these factors lead to indigent accused receiving low quality legal representation, when they receive representation at all. Without consistent and continued training, clear performance standards, and monitoring and oversight, some *Baitanik Wakil* still limit their defense representation to making a perfunctory argument for their clients’ release at the jail/bail hearing without having any familiarity with the facts of the case. Again at the final hearing, they will present an argument based on a cursory review of the information supplied by the prosecutor, having missed all of the witness examinations and other critical steps in the process. This level of representation is not of sufficient quality to make the constitutional right to counsel meaningful.

As noted above, the ILF’s *Baitanik Wakil* survey of 2013 showed that the majority of *Baitanik Wakil* began representation immediately before the jail/bail hearing, or later—far too late in the process to provide truly effective representation. Half of all respondents reported that they are “never,” “once,” or “sometimes” present during their clients’ court statement, despite the fact that an attorney’s presence at all official proceedings in a case is absolutely necessary for effective representation. Further, despite the fact that the other half of respondents claimed to be present



either “frequently” or “always” during their clients’ court statement,<sup>59</sup> only 12% of respondents reported their clients ever having invoked the right to remain silent. The right to remain silent is one of the strongest protections that an accused person has, and the failure of an attorney who is present at the court statement to advise or convince an accused to invoke that right is a strong signal that the representation being provided is not effective.

Regarding investigation practices, respondents revealed a failure by most to engage in even the most basic investigation activities. The most prevalent investigation activity was interviewing the complainant, and only 20% of the respondents had even done that; only 15% interviewed the government’s eyewitnesses; only 7.5% reviewed the police file before the charge sheet was filed; and only 5% interviewed the investigating officer. 62.5% of respondents reported never having conducted any investigation in their cases. It is simply not possible to provide quality, meaningful representation without at least some investigation into the issue at hand.

Finally, the survey revealed that most *Baitanik Wakil* are not filing even the most basic petitions that would protect their client’s liberty interest and other fundamental rights. Fully 80% of respondents had never filed any pre-trial petition for a *Baitanik Wakil* client. Only one respondent reported filing petitions for a writ of habeas corpus, for speedy trial dismissal of a case, or for release pursuant to CM 119 (which mandates release when a person’s time in detention exceeds the maximum sentence permitted for the charged offense). Only 12.5% of respondents reported ever having filed a petition requesting release of a client pending investigation. Given Nepal’s documented problems with extended pre-trial detention, petitions like those should be relatively routine. Only 35% of respondents had ever petitioned to obtain a copy of the police file, which is particularly alarming, given that an attorney is simply required to fill out a pre-printed form and submit it to the court clerk after the charge sheet is filed. Only 20% of respondents reported ever having challenged the jail/bail order issued by the district court through a No. 17 petition, which should also be a relatively routine practice to protect the accused’s liberty interest.

## **II. Overview of Models and Best Practices for Criminal Legal Aid Delivery**

There are three basic models that government use for delivering criminal defense services to the poor: (a) Assigned Counsel Systems (also called appointed counsel, *judicare* or *ex officio* systems depending on the jurisdiction), (b) Public Defender Systems, and (c) Contract Service Systems. Many jurisdictions use some combination or variation of these three models; called a mixed model system of legal aid delivery, to meet the criminal legal aid service needs of the poor. Below is an overview of the three systems individually, followed by examples of mixed model systems.

Nepal’s legal aid system is an uncoordinated mixed model system, consisting of a government-supported *Baitanik Wakil* program supported by the DLAC’s and several nongovernmental legal aid providers. One of the major issues that Nepal currently struggles with in making its mixed model system effective is the lack of a central yet independent government body that oversees and

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<sup>59</sup> Note that this percentage is probably, in reality, much higher. Given that 53.8% of respondents reported that they do not generally start representation until immediately before the jail/bail hearing, it is nearly impossible that only half of the respondents are frequently or always present for the court statement (which generally happens before the jail/bail hearing).

monitors the provision of criminal legal aid services throughout the country.

#### A. Assigned Counsel Systems

The assigned counsel model involves the assignment of criminal legal aid cases to private lawyers on either a systematic or an *ad hoc* basis. In an *ad hoc* assigned counsel program, the appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for lawyers.<sup>60</sup> In some jurisdictions, lawyers may be appointed by the police or prosecution rather than the court. More coordinated assigned counsel programs have an administrative or oversight body.<sup>61</sup> In the coordinated assigned counsel model, lawyers are often assigned on rotation, must meet minimum qualification standards and are provided with a greater degree of supervision, training and support.<sup>62</sup>

Lawyers assigned to legal aid cases may be paid on an hourly basis or at a flat rate per case or per hearing. In some jurisdictions, lawyers may also be reimbursed for certain eligible costs incurred during the representation, such as costs for experts, and investigation and travel expenses. The assigned counsel system is used in many jurisdictions, but can be especially useful in areas where there is not high demand for legal aid services (such as rural areas) and so no need for a full time public defenders' office or a system for bundling cases to be contracted out.<sup>63</sup>

Assigned counsel systems are often criticized for fostering patronage and lacking control over the experience level and qualifications of the appointed lawyer. In many countries, it is common for appointments to be taken by recent law school graduates looking for experience. Additionally, flat fee arrangements can create a disincentive for lawyers to devote time to a particular case. As a result, lawyers are not taking the time to visit clients in jail, file motions, conduct investigations, or adequately prepare a defense. Better assigned counsel systems offer (or mandate) training courses, require lawyers to meet certain qualifications for appointment to an assigned counsel list.

A common method of oversight in assigned counsel systems is peer review, i.e. having another private attorney review the work of a private attorney who takes on an assigned counsel case, and report back to the oversight body. This method is used in the United Kingdom, where their Legal Aid Agency uses a methodology they have developed through extensive consultation with legal experts to conduct Independent Peer Review. According to a 2013 report on the methodology and goals of this process, "Peer Review is a system in which a panel of independent experienced legal practitioners assesses the quality of work of other professionals against a set of criteria and levels of performance agreed with the professional community. The intention of Independent Peer

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<sup>60</sup> Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, 58 *Law and Contemporary Problems* 31-49 (winter 1995) at 33, available at <http://scholarship.law.duke.edu/lcp/vol58/iss1/3>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Ontario Ministry of the Attorney General, "Chapter 7: The Choice of Delivery Models for Legal Aid," (2010) at 5, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

Review... is to enhance the standards of legal work carried out under public funding.”<sup>64</sup> Different criteria are set out for reviewing civil and criminal cases, and reviewers provide ratings on a sliding scale that make it easier for an oversight panel to quickly go over the reviews given.

Another possible oversight method, and one designed to decrease the burden of oversight but maintain the incentive to do good work that oversight creates, is random case reviews. For example, if an oversight body has the authority to review any case represented by a legal aid provider, but chooses only 25% of cases—without revealing to the attorneys ahead of time which cases will be reviewed—the incentive to do good work in case your work is reviewed remains, but the burden on the oversight body is mitigated to a manageable level.

## B. Public Defender Systems

The public defender model involves a public or private nonprofit organization with full- or part-time salaried lawyers. Generally, public defender offices take one of two forms: (1) attorneys and staff are direct employees of the government, with the overall legal aid structure operating as its own government agency or as a subsidy of an existing government agency; or (2) attorneys and staff are employed by a nongovernmental organization that has partnered with the government, and received appropriate direct funding to support legal aid activities.<sup>65</sup> In addition to clerical staff, public defender offices may employ investigators, social workers, and forensic experts to aid in the lawyers’ work. These human resources may help public defenders provide more professional service than an appointed lawyer who does not have such staff or the resources to employ them.

A common criticism of the public defender system is that it offers lower quality representation than models that rely on private attorneys.<sup>66</sup> This perceived quality gap is generally thought to result from the higher case load that public defenders often carry (leaving them less time to devote to each case and more likely to suffer from “burn out” because of their high-stress work); the lower pay they receive as compared to private attorneys (which, the argument goes, may attract less qualified lawyers who could not find employment elsewhere, and may fail to incentivize even good lawyers to work as hard as better paid counterparts); and the fact that often young, fairly inexperienced lawyers are the ones staffing public defender offices.<sup>67</sup>

However, empirical evidence from multiple studies strongly and directly refutes this criticism,

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<sup>64</sup> Legal Aid Agency, *Independent Peer Review Of Legal Advice and Work Final Process Paper*, by the Legal Aid Agency (2013) 4, made available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/314274/independent-peer-review-process.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314274/independent-peer-review-process.pdf).

<sup>65</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 2, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>66</sup> Canada Department of Justice, “Legal Aid Delivery Models in Canada: Past Experience and Future Developments,” 33 U.B.C. L. Rev. 285 (2000) at 10.

<sup>67</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 7 and 18, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

showing that public defender attorneys perform as well as, or better than, private attorneys when assessing conviction rates, custodial sentences, and client satisfaction. In each of three large-scale studies of Canadian provinces using a Public Defender model, it was consistently found that the conviction rates of accused represented by public defenders and by private attorneys were roughly the same.<sup>68</sup> Further, in each study the private attorneys' convicted clients received custodial sentences roughly 10% more often than the public defenders' convicted clients.<sup>69</sup> The same results were found in comparative studies assessing Taiwan<sup>70</sup> as well as more than a dozen different jurisdictions in the United States.<sup>71</sup> These outcomes strongly suggest that there is no inherent drop in quality of representation when a client is served by a public defender instead of a private attorney; and in fact, public defenders can often outperform private attorneys.

By specializing in criminal defense work, lawyers can provide high-quality, efficient, cost-effective legal representation to indigent clients. Programs centered on full-time staff attorneys have widely been found to be the most effective and economical means of delivering legal services to indigent populations on a large scale. They enjoy economies of scale that derive from the fact that the training, supervising, and monitoring of lawyers is generally centralized, as is the capacity to deliver administrative, paralegal, investigative, and technical support to the lawyers. They have had better success at maintaining high standards for recruitment and retention. The offices of these programs allow for a high level of peer-to-peer exchange of ideas and skills.

### C. Contract Services Systems

The contract service model involves a private bar contract with a lawyer, a group of lawyers, a bar association, or a private nonprofit organization that will provide representation in some or all of the criminal legal aid cases in a particular jurisdiction. Under this system, individuals or organizations enter into contracts to provide legal services to a defined class of indigent clients in a given geographic region. The best contract systems contain separate accounts or procedures for funding investigative and expert services and other litigation expenses, so that the attorney is not presented with a financial conflict of interest in choosing between paying for the services necessary

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<sup>68</sup> Canada Department of Justice, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments," 33 U.B.C. L. Rev. 285 (2000) at 10-11.

<sup>69</sup> Canada Department of Justice, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments," 33 U.B.C. L. Rev. 285 (2000) at 10-11. The first study, the "Burnaby Project," showed that private attorneys' and public defenders' clients were convicted in about 60% of cases, with 40% of private attorneys' clients sentenced to jail, and 30% of public defenders' clients sentenced to jail. The second study, of the British Columbia system, showed convictions at the same rates, with private attorneys' clients sentenced to jail in 42% of cases, and public defenders' clients sentenced to jail in 32% of cases. Finally, a third study of Legal Aid Manitoba showed 72% convictions for both private attorneys and public defenders, with private attorneys' clients sentenced to jail in 23% of cases, and public defenders' clients sentenced to jail in 12% of cases. *Id.*

<sup>70</sup> Kong-Pin Chen and Chang-Ching Lin, *Academia Sinica*: "Does the Type of Criminal Defense Counsel Affect Case Outcomes? – A Natural Experiment in Taiwan," (2008) available at <http://ssrn.com/abstract=1119787>

<sup>71</sup> See generally Thomas H. Cohen, "Who's Better at Defending Criminals?: Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?" available at <http://ssrn.com/abstract=1876474>.

to fully represent the client and his or her own compensation.

A concern about many contract systems is that governments may be incentivized to offer the lowest possible bids, they may fail to provide appropriate budgets for necessary support staff (e.g. paralegals, investigators, experts), and often have unrealistic or non-existent caseload limits.<sup>72</sup> Additionally, quality may suffer because once a firm has successfully obtained the contract for a bundle of cases, it has an incentive to treat every case as a simple one—the firm’s income for that bundle of cases is now fixed, and it can only increase its own profit margin by reducing its own operational costs for each case, which may lead to rushing or cutting corners.<sup>73</sup> Governments often fail to mitigate these negative incentives because they, in turn, are inclined to judge the contract bids primarily by their cost per case, ignoring that a bid may be lowest because the bidder is cutting corners that will hurt the quality of legal aid being provided to indigent accused.<sup>74</sup>

However, there are factors that mitigate these risks, and structures that may diminish negative impacts. Contracting entities have an incentive to maintain their reputation within the justice community and with their current clients.<sup>75</sup> Governments that create systems that recognize the best private legal aid providers—an award or an annually published list, for example—could capitalize on this incentive while minimizing a firm’s interest in cutting costs. Further, the American Bar Association and the National Legal Aid and Defender Association recommend that an independent organization such as a board of trustees be created to award and oversee contracts, in order to sidestep the government’s competing interests (costs vs. quality) in choosing bids.<sup>76</sup>

Finally, the government could specify in its calls for bids and in its contracts that all bidders must demonstrate that they meet certain quality-assurance conditions (for example, they must demonstrate that they have sufficient staff resources to handle the bundle of cases), and must agree to certain reporting requirements on metrics that will measure their quality of service.<sup>77</sup> A significant benefit of the Contract Services System is that the contracts can be long enough to allow for quality assessments, but the arrangement is not permanent, and so bidders that are found to provide sub-par service could be excluded from bidding on later bundles.<sup>78</sup> Eventually, only the

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<sup>72</sup> United States Department of Justice, Bureau of Justice Assistance, “Contracting for Indigent Defense Services: A Special Report,” (2000), at 13; available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

<sup>73</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 19, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>74</sup> United States Department of Justice, Bureau of Justice Assistance, “Contracting for Indigent Defense Services: A Special Report,” (2000), at 13; available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

<sup>75</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 19, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>76</sup> United States Department of Justice, Bureau of Justice Assistance, “Contracting for Indigent Defense Services: A Special Report,” (2000), at 14; available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

<sup>77</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 19, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>78</sup> Ontario Ministry of the Attorney General, “Chapter 7: The Choice of Delivery Models for Legal Aid,” (2010) at 18, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

providers that strike the correct balance between quality and cost-effectiveness will be left in the pool of possible bidders, saving money in the long-term.

#### D. Tailoring a Mixed Model System to a Country's Specific Needs

The "Mixed Model" of legal aid delivery is a mixture of delivery models, tailored to suit the circumstances of a given country or community. Governments are increasingly turning to mixed models as a means of maximizing the strengths and minimizing the weaknesses of the traditional models.<sup>79</sup> As a report from the Canadian Department of Justice explained:

"A delivery model must provide the best service possible, in the most cost-effective manner, and in ways that address a number of major aspects of service delivery. Legal aid service is provided in different areas of law, to diverse client groups, in different geographical areas, and involving cases that vary from the simple to the very complex. These and other factors make legal aid delivery a complex and multidimensional problem, not a simple and unidimensional one. It stands to reason, then, that neither private bar lawyers providing service on an individual fee-for-service basis nor staff lawyers providing a similar service as salaried employees will necessarily be the best solution to all delivery problems."<sup>80</sup>

Remarking on the trajectory of legal aid delivery in a variety of international jurisdictions, a 2009 report from The Asia Foundation noted that "Many developing and developed countries have shifted (or are shifting toward) 'mixed models' of legal aid service delivery. Acknowledging the limited nature of public resources, these models see governments take on a regulatory role to ensure high quality legal aid services," provided by a range of various legal and non-legal professionals.<sup>81</sup> Another commentator remarked that "The most striking finding from most of the studies is that no one delivery model exhibits performance characteristics that are systematically superior to those of other delivery models in all contexts,"<sup>82</sup> and "True access means that services will meet the varying needs of different legal aid clients [...] It is erroneous to assume that all legal aid clients will require or be able to use the same type of service."<sup>83</sup>

Mixed models offer an optimum level of flexibility, allowing governments to choose how legal aid can best be delivered from any combination of public defender staff attorneys; private lawyers

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<sup>79</sup>Ontario Ministry of the Attorney General, "Chapter 7: The Choice of Delivery Models for Legal Aid," (2010) at 2, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>80</sup> Canada Department of Justice, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments," 33 U.B.C. L. Rev. 285 (2000) at 15.

<sup>81</sup> The Asia Foundation, "The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions" (2009), at 10; available at <http://asiafoundation.org/resources/pdfs/SriLankaLegalAid.pdf>.

<sup>82</sup>Ontario Ministry of the Attorney General, "Chapter 7: The Choice of Delivery Models for Legal Aid," (2010) at 4, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

<sup>83</sup>Ontario Ministry of the Attorney General, "Chapter 7: The Choice of Delivery Models for Legal Aid," (2010) at 9, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.

individually assigned to cases; blocks of cases contracted out to firms or other nongovernmental organizations; paralegals and law students. South Africa offers one of the most well-known success stories for reforming its legal aid system into a mixed model system: an independent Legal Aid Board has established a network of more than 50 “justice centres” (public defender offices) and more than 40 satellite offices that are designed to provide “one stop service” and are staffed by “attorneys and advocates employed as principles, public defenders, law intern public defenders, paralegals, and administrative staff.”<sup>84</sup> Where there is a conflict of interest or a lack of capacity, such that a justice centre employee cannot take on a client’s case, private attorneys employed by firms or other cooperation partners are assigned to handle the case.<sup>85</sup> Through this mixed model system, South Africa has not been able to provide effective legal services to indigent accused on a relatively modest annual budget—in 2010, its operating costs for both criminal and civil legal aid were about USD \$1.20 per head of population, as compared with \$60 per head for the United Kingdom, \$30 per head for Canada, and \$15 per head for the United States.<sup>86</sup>

Another successful example is the Mixed Model Pilot Program, instituted in the early 2000s in New Zealand.<sup>87</sup> Historically, New Zealand used the appointed counsel system, under which legal aid clients were assigned counsel from a list of pre-approved attorneys; clients were permitted to choose their attorney from the list if they had a preference, and if not, were assigned to an attorney randomly. In 2002, Auckland (the most populous region in the country) opened two public defender offices. Under the new system, Public Defenders could be assigned up to one-third of all criminal legal aid cases from the region’s two criminal courts (this caveat was built in at the request of the private bar), and would also conduct “duty solicitor hours” whereby Public Defenders work from the courthouses to provide free legal advice to arrestees as they come in for their first appearance before a judge. Legal aid clients are still permitted to choose their lawyer from the list of private attorneys or from the public defender office. An assessment in 2005 found that feedback from judges, courts, and police was “positive and in some cases highly complementary.”<sup>88</sup>

These are just two examples of the mixed model approach. There are many options for structuring a mixed model legal aid system; for example, a country could choose to use public defender staff lawyers for one type of case—such as all misdemeanors or all felonies—and use private attorneys

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<sup>84</sup> Danish Institute for Human Rights, “A Human Right to Legal Aid” (2010), at 137; *available at* [http://www.humanrights.dk/files/pdf/Publikationer/LEGAL\\_AID.pdf](http://www.humanrights.dk/files/pdf/Publikationer/LEGAL_AID.pdf).

<sup>85</sup> Danish Institute for Human Rights, “A Human Right to Legal Aid” (2010), at 137; *available at* [http://www.humanrights.dk/files/pdf/Publikationer/LEGAL\\_AID.pdf](http://www.humanrights.dk/files/pdf/Publikationer/LEGAL_AID.pdf). *See also* Legal Aid South Africa, “Strategic Plan 2012 – 2017” (2012), at 20-21; *available at* <http://www.legal-aid.co.za/wp-content/uploads/2012/03/Legal-Aid-SA-Strategic-Plan-2012-2017.pdf>.

<sup>86</sup> Danish Institute for Human Rights, “A Human Right to Legal Aid” (2010), at 136; *available at* [http://www.humanrights.dk/files/pdf/Publikationer/LEGAL\\_AID.pdf](http://www.humanrights.dk/files/pdf/Publikationer/LEGAL_AID.pdf).

<sup>87</sup>New Zealand Legal Services Agency, “Piloting the Mixed Model in New Zealand: Objectives, Design, Implementation, and Evaluation,” *available at* [http://www.ilagnet.org/jscripsts/tiny\\_mce/plugins/filemanager/files/Killarney\\_2005/Conference\\_Papers/Frances\\_Blyth\\_-\\_Piloting\\_the\\_mixed\\_model\\_in\\_New\\_Zealand.pdf](http://www.ilagnet.org/jscripsts/tiny_mce/plugins/filemanager/files/Killarney_2005/Conference_Papers/Frances_Blyth_-_Piloting_the_mixed_model_in_New_Zealand.pdf)

<sup>88</sup> *Id.* at 8.

for another type of case; a country could choose to have public defender staff attorneys take all cases that come in until a certain threshold is reached, at which point cases are assigned to individual private attorneys or contracted out to a firm to prevent case overload; a country could employ public defenders only in more populous areas with high criminal caseloads.<sup>89</sup>

### III. Recommendations

Nepal's legal aid system is not providing effective legal aid services to all indigent accused persons, as required by Nepal's Interim Constitution, because it is unorganized and underfunded, and legal aid providers are undertrained and unmonitored. Still, the government of Nepal has evidenced a willingness to develop a system that is responsive to the needs of its most vulnerable citizens. With the goal of assisting the government of Nepal as it works toward strengthening the right to counsel, the ILF makes the following recommendations for reform.

- (1) A comprehensive data collection system designed to provide an accurate picture of the provision of criminal legal aid services throughout Nepal should be established.
- (2) Nepal should examine the effectiveness and efficiency of the current legal aid delivery system in Nepal, and consider alternate models, including the public defender model utilized by nongovernmental organizations which could involve establishing a government public defender agency, or contracting NGO public defense offices.
- (3) Nepal should fund legal aid services in judicial and quasi-judicial venues at a level that assures that all indigent defendants receive effective and meaningful representation.
- (4) The *Baitanik Wakil* program should be expanded to quasi-judicial bodies and the number of *Baitanik Wakil* should be increased, where necessary to relative to caseloads.
- (5) Nepal should establish an independent nationwide legal aid oversight board to organize, supervise and assume overall responsibility of Nepal's criminal legal aid system.
- (6) The Nepal Bar Association and/or a legal aid oversight board should adopt performance and qualification standards for all legal aid providers. The standards should address qualifications and professional standards, training requirements, professional independence and other areas to ensure effective and meaningful representation.
- (7) Nepal should reform and standardize the process for appointment of *Baitanik Wakil* to ensure the selection procedure is based on merit, and is independent and transparent.
- (8) The tenure of *Baitanik Wakil* should be increased to allow for increased effectiveness and continuity, and *Baitanik Wakil* should be required to take cases up on appeal.
- (9) Nepal should collaborate with civil society to meet the criminal legal aid service needs

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<sup>89</sup>Ontario Ministry of the Attorney General, "Chapter 7: The Choice of Delivery Models for Legal Aid," (2010) at 7, available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.asp>.



of the poor, and consider partnering with civil society to extend the reach of legal aid.

- (10) A mechanism should be established for prompt appointment of counsel, so that all accused have representation at every stage of their case.

#### **IV. About the International Legal Foundation**

The International Legal Foundation (ILF), [www.theilf.org](http://www.theilf.org), is the leading global advocate for the right of the indigent accused to legal representation. Driven by the belief that every person accused of a crime deserves to be represented by a well-trained lawyer, no matter their ability to pay, the ILF assists countries emerging from conflict or in transition establish criminal legal aid systems that provide quality, effective criminal defense services to the poor. The ILF also engages in advocacy. It played an integral role in drafting and passing the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems in 2012, and in 2014 the ILF co-hosted the first ever international conference on criminal legal aid in Johannesburg, South Africa.

In 2008, the ILF opened the first public defender office in Nepal, ILF-Nepal with the mission to provide quality, effective criminal defense services to the poor. Today, ILF-Nepal has 13 lawyers staffing five offices throughout the country and has represented approximately 3,500 clients, more than 75% of whom are marginalized and at-risk because of poverty, caste, gender and/or age. ILF-Nepal provides early representation to indigent accused persons in both judicial and quasi-judicial proceedings, providing a vigorous defense to detainees who would otherwise go unrepresented. By doing so, it has had a direct impact on its clients' lives and Nepal's justice system; clients who had languished in detention for years have been released, the right to speedy trial is better enforced, and many innocent men, women and children have been acquitted.

ILF-Nepal has also strengthened the right to counsel through public interest litigation; notably, the case *Som Luitel v. Nepal Government, Prime Minister and Council of Ministries*,<sup>90</sup> in which the Supreme Court held that "In order to prevent illegal and arbitrary detention from the State, this right is available not only to a citizen but also to every person residing throughout the country."<sup>91</sup>

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<sup>90</sup> *Som Luitel v. Nepal Government, Prime Minister and Council of Ministries* (Writ no. 3275 of Year 2062, decision date Magh 23, 2063 (Feb 6, 2007))

<sup>91</sup> *Id.*

### Annex A: Legal Aid Provider Service in Each District of Nepal

S.N.	District	Prisoners (as of Sept. 16, 2014)	DLAC	BW	Advocacy Forum (through 2014)	Celrrd (through 2014)	THRD Alliance	ILF-N
1	Taplejung	89	No	Yes	No	No	No	No
2	Pachthar	153	No	Yes	No	No	No	No
3	Ilam	337	No	Yes	No	Yes	No	No
4	Jhapa	753	Yes	Yes	Yes	Yes	No	No
5	Morang	738	Yes	Yes	Yes	Yes	Yes	Proposed
6	Sunsari	1433	Yes	Yes	No	Yes	Yes	No
7	Dhankuta	63	Yes	Yes	No	No	No	No
8	Terhathum	53	No	Yes	No	No	No	No
9	Sankhuwasabha	129	No	Yes	No	No	No	No
10	Bhojpur	82	No	Yes	No	No	No	No
11	Solukhumbu	62	No	Yes	No	No	No	No
12	Okhaldhunga	49	No	Yes	No	No	No	No
13	Khotang	124	No	Yes	No	No	No	No
14	Udaypur	122	No	Yes	Yes	Yes	No	No
15	Saptari	268	Yes	Yes	No	Yes	Yes	Proposed
16	Siraha	255	Yes	Yes	Yes	No	Yes	No
17	Dhanusa	-	Yes	Yes	Yes	Yes	Yes	Yes
18	Mahottari	485	Yes	Yes	No	Yes	Yes	Yes
19	Sarlahi	0	Yes	Yes	No	Yes	Yes	No
20	Sindhuli	97	Yes	Yes	No	No	No	No
21	Ramechhap	242	No	Yes	Yes	No	No	No
22	Dolakha	72	Yes	Yes	Yes	No	No	No
23	Sindhupalchowk	188	No	Yes	No	No	No	No
24	Kavrepalangchowk	180	Yes	Yes	No	No	No	Yes
25	Lalitpur	546	No	Yes	Yes	Yes	No	Yes
26	Bhaktapur	-	No	Yes	No	Yes	No	Yes
27	Kathmandu	3474	Yes	Yes	Yes	Yes	No	Yes
28	Nuwakot	150	No	Yes	No	No	No	No
29	Rasuwa	72	No	Yes	No	No	No	No
30	Dhading	140	No	Yes	No	No	No	No
31	Makwanpur	531	No	Yes	No	Yes	No	Yes
32	Rautahat	158	Yes	Yes	No	Yes	No	No
33	Bara		Yes	Yes	No	Yes	No	No
34	Parsa	1414	Yes	Yes	No	Yes	No	Yes
35	Chitwan	535	Yes	Yes	No	Yes	No	Yes

36	<b>Gorkha</b>	110	No	Yes	No	No	No	No
37	<b>Lamjung</b>	72	No	Yes	No	No	No	No
38	<b>Tanahu</b>	104	Yes	Yes	No	No	No	No
39	<b>Syangja</b>	82	Yes	Yes	No	No	No	No
40	<b>Kaski</b>	508	Yes	Yes	Yes	No	No	No
41	<b>Manang</b>	11	No	Yes	No	No	No	No
42	<b>Mustang</b>	8	No	Yes	No	No	No	No
43	<b>Myagdi</b>	96	No	Yes	No	No	No	No
44	<b>Parbat</b>	77	Yes	Yes	No	No	No	No
45	<b>Baglung</b>	90	Yes	Yes	Yes	No	No	No
46	<b>Gulmi</b>	85	No	Yes	No	No	No	No
47	<b>Palpa</b>	402	Yes	Yes	No	Yes	No	No
48	<b>Nawalparasi</b>	98	No	Yes	No	Yes	Yes	No
49	<b>Rupandehi</b>	400	Yes	Yes	Yes	Yes	Yes	Proposed
50	<b>Kapilbastu</b>	209	Yes	Yes	Yes	Yes	No	No
51	<b>Arghankhanchi</b>	0	Yes	Yes	No	No	No	No
52	<b>Pyuthan</b>	56	Yes	Yes	No	No	No	No
53	<b>Rolpa</b>	85	No	Yes	No	No	No	No
54	<b>Rukum</b>	67	No	Yes	No	No	No	No
55	<b>Salyan</b>	65	No	Yes	No	No	No	No
56	<b>Dang</b>	326	Yes	Yes	No	Yes	Yes	No
57	<b>Banke</b>	530	Yes	Yes	Yes	Yes	Yes	Yes
58	<b>Bardiya</b>	216	Yes	Yes	Yes	Yes	No	Yes
59	<b>Surkhet</b>	130	No	Yes	Yes	Yes	No	No
60	<b>Dailekh</b>	70	No	Yes	No	No	No	No
61	<b>Jajarkot</b>	39	No	Yes	No	No	No	No
62	<b>Dolpa</b>	22	No	Yes	No	No	No	No
63	<b>Jumla</b>	23	No	Yes	No	No	No	No
64	<b>Kalikot</b>	54	No	Yes	No	No	No	No
65	<b>Mugu</b>	0	No	Yes	No	No	No	No
66	<b>Humla</b>	6	No	Yes	No	No	No	No
67	<b>Bajura</b>	25	No	Yes	No	No	No	No
68	<b>Bajhang</b>	43	No	Yes	No	No	No	No
69	<b>Achham</b>	39	No	Yes	No	No	No	No
70	<b>Doti</b>	42	No	Yes	No	Yes	No	No
71	<b>Kailali</b>	405	Yes	Yes	No	Yes	Yes	Proposed
72	<b>Kanchanpur</b>	184	Yes	Yes	Yes	Yes	No	Yes
73	<b>Dadeldhura</b>	44	Yes	Yes	No	No	No	No
74	<b>Baitadi</b>	48	No	Yes	No	No	No	No
75	<b>Darchula</b>	43	Yes	Yes	No	No	No	No