

Dispatch from Nepal

Dan Alterman, December 19, 2009

The last time I was in Kathmandu I was on a trek through Nepal, 32 years ago. This time, I'm there to begin a three-month stint as a Fellow of the International Legal Foundation-Nepal Project assisting local lawyers in forming a public defenders' organization to serve indigent criminal defendants. Although I no longer practice criminal law in New York, my extensive background can serve this extremely poor country where the average annual income is about \$250, meaning that everyone accused of a crime is indigent.

Only a few years ago civil war ended; the King resigned; a Maoist became Prime Minister; and the legal system is in shambles. There is no diplomatic way to say it: trials are a sham, the police are corrupt and a mere accusation means languishing in jail for at least 25 days before appearing in a courtroom. There's a lay court in each district, and a three-tier structure above it. A legislature is in place, there are codified statutes and deference is given to precedent, but there is nothing resembling due process. The 1993 interim Constitution, is just a piece of paper; our task is to make it real.

While I become accustomed to walking 5-7 miles a day, and become accustomed to the lack of heat and electricity in the courts and in my living accommodations, I can see that I will never get used to longer pre-bail detention, the informal presumption of guilt, and the lay judges who are powerful, but untrained in law or even literacy.

There are 90 castes and 70 dialects among the people of Nepal who are largely uneducated. Following arrest, they don't know the charges against them and are intimidated by anyone above them, especially a judge. They are afraid to follow a lawyer's advice to remain silent, because a judge is urging them to confess. Even with a right to counsel, only an extremely small percentage of defendants are actually represented. There are few private lawyers (educated either in Nepal or India) since there is almost no one who could pay attorney fees in criminal cases. But that was our mission: to create a public legal system.

Whatever the charge, minor or major, the accused is detained for 25 days before there is a bail hearing. That's when we get the file for the first time. Then, surrounded by armed soldiers, the accused, in chains, is brought from the jail into the courtroom - a small area in what was once part of a palace. Bail, which is sometimes as low as 500 Rupees or \$6.50 US, is too high for most defendants. Certain crimes are non-bailable: homicide, human trafficking, weapons, and drugs in any quantity. There is no plea bargaining no matter how minor or serious the case.

I sit in the back of the courtroom, listen, observe, encourage the lawyers in our project, help them prepare and give them the courage that is counter intuitive. Sometimes I am introduced to the judge who might later invite me to tea and I have learned to show respect with a slight bow.

The American habit of using first names in formal relationships is unfamiliar, and the Nepalese lawyers have taken to calling me, "Daniel, Sir," or "Dai" meaning older, wiser, respected one. It doesn't seem to fit; especially when I am in my usual non-court uniform of sweats, a "Che" tee shirt, and my Yankee cap. I think it's the Yankee logo that gets me thumbs up and high fives. Here's a note I received to "Dan, Sir, Thanks for providing ample legal guidelines and arguments for this attempt to murder and theft by force of SANTOSH KUMAR. I plead according to your guidelines and we welcome success in this case.

Theoretically, the burden of proof is on the prosecutor (who may or may not show up), and there is a presumption of innocence, but that is not the reality. For example, a charge of possession of stolen property, means that the defendant must prove that it was not stolen, or that he did not know it was stolen. The defendant makes a statement which is taken down in longhand and given to a judge-there are no juries-for a final decision-mostly Guilty. Unlike the system in much of Europe, the judge is not an investigator, asks no questions, hears no witnesses, but plays a passive role, usually until sentencing. When Ganesh Sherpa was arrested for theft of a motorcycle and possession of stolen property, his bail was 15,000 Rupees (about \$200 US). Once he was convicted, he was sentenced to 1-1/2 to 3 years plus a fine of two times the value of the motorcycle even though it had been returned to the owner. He will stay in jail until he pays off fine of 150,000 Rupees (about \$2,000 US), receiving credit for about 25 Rupees (\$3.00 US) per day.

It is heartbreaking to see how many juveniles are in the system. The charges might be a street fight, petty larceny or something more serious, like drugs. But these kids are as young as nine, and they don't necessarily want to be released because they may have nowhere else to go. It's that old "three hots and a cot" thing.

We're making use of habeas corpus, another one of those doctrines that has existed only in the abstract, and we're making progress, especially regarding juveniles. Eventually that will result in prohibiting the CDOs (local lay judges) from hearing cases with juvenile defendants, as a violation of law because Nepal is a signatory to the Child's Rights Convention (which the U.S. is not).

In the meantime, Deepak Lama is going to serve five years for possession of 80 kilos of hashish in a house belonging to an absentee foreign national for whom he was caretaker. The defendant "confessed" after being tortured, even though the drugs were in a locked room to which he did not have access. The torture part has been reported to the U.N., but I won't be here to see what happens.

Some days I feel as overwhelmed and frustrated as our Nepalese lawyers. I am isolated, and while the solitude is good at times, it is also difficult. But the view is always a thrill. I can see the big mountain range from our roof especially at dusk when the sun is setting in the west and we

are looking northeast toward Tibet and Mt. Everest. I e-mail and call family and friends daily on Skype, and watch DVDs - especially the series "House" - - on my laptop as long as the battery lasts (and then wait for the next surge of electricity). During the three months, I will see few Americans - some at the U.N. (there to monitor human rights abuses) and at the televised inauguration of Barack Obama which is filled with excited peace corps volunteers, wealthy Nepali citizens and U.S. embassy staff.

It was frustrating that by the time the project really took off, I'd be gone. But now that I'm home and six months have passed, friends ask me - and I ask myself - would I do it again? In a heartbeat.