

# ILF-Nepal

The International Legal Foundation – Nepal

## CASE NOTES – JANUARY 2009

*Editor's notes: This issue of the Case Notes discusses further efforts by ILF-Nepal to obtain access to investigative materials pre-charge-sheet and describes an extraordinary day at the CDO's office in Lalitpur. Unfortunately, we cannot report that a decision has been reached in the case of our 15-year old client, Bipin Sutiari, discussed in the December notes. In that case, the Supreme Court ordered a hearing to determine whether the VDC birth certificate - superior as a matter of law to an age assessment under Juvenile Regulations Rule 15 – is superior to the age assessment as a matter of fact in this case.*

### **Prem Jirel v. Government of Nepal (ILF-Nepal 94) (Adv. Bimala Yadav)**

*Mr. Pirel was ILF-Nepal's first client before the Lalitpur CDO. The CDO seemed to be unaware of the constitutional right to counsel and the statute of limitations for public offense as set forth in Section 4 of the Public Offense Act. Our client was arrested for a simple public offense. When ILF-Nepal's lawyer appeared on his client's behalf on January 11, 2009 [9/27/2065], the CDO – in violation of the client's constitutional right to counsel – refused to allow ILF-Nepal to represent her client. The CDO stated that ILF-Nepal needed an agreement to provide representation. ILF-Nepal's lawyer, a licensed Nepali lawyer, argued that her client should not be denied his right to counsel and she should be allowed to argue. The CDO refused to hear her and remanded the client for 15 days in violation of the statute of limitations. ILF-Nepal's lawyer was also later denied access to her client held in police custody.*

### **Sagar Lama v. Government of Nepal, (ILF-Nepal 92) (Adv. Bimala Yadav)**

*In this case, ILF-Nepal made progress in obtaining information from the police at remand and successfully convinced the court to respect Mr. Lama's right to remain silent.*

Sagar Lama was arrested on December 27, 2008 [9/12/2065] and charged with the theft of a motorcycle. He faced a possible sentence of one month and a fine equivalent to the value of the stolen property. ILF-Nepal appeared on his behalf for the first time on January 8, after he had been detained for 12 days. Under section 15 of the State Cases Act a court may order judicial custody for up to 25 days but only if it finds reasons for investigative detention. ILF-Nepal's written petition for access to the investigative file to be able to oppose the police's request for

additional detention was denied (courts seem reluctant to include written applications in the file) but the court ordered the police to produce the investigating officer on the case at the next remand hearing to answer questions regarding the status of the investigation. At the next remand hearing, the Investigation Officer appeared and stated that the investigation had been concluded but the documents had to be prepared. The Court then adjourned the case for 5 additional days.

The charge sheet was filed on January 19 and the Jail/bail hearing held on January 20. On that day, our client successfully asserted his right to remain silent. Under Court Management Section 127, the first step to be taken on the day the charge sheet is filed is to have the defendant make a statement. Section 127 provides in part that when the defendant is taken to court “the entire file should be read to the defendant, and he [the defendant] should be asked whether he admits or denies the accusations.” This despite the constitutional right to remain silent provided by the interim constitution Art. 24 (7). In this case, ILF-Nepal lawyer successfully argued that her client did not have to make a statement. He wanted to exercise his right to remain silent. The court’s bench assistant, as is the practice, ignored the request, and began questioning the client. Mr. Lama told the court "I want to exercise my right to remain silent." The bench assistant then conferred with the court and they agreed that a defendant is guaranteed the right to silence under Nepal's Interim Constitution and did not insist on having our client make a statement.

**Gyanu Pokhrel v. Government of Nepal, (ILF-Nepal 59) (Advs. Surya Pandey and Mohan Sashankar)**

On December 5, 2008, two individuals from an anti-human trafficking group, arrested our client and two days later, turned her over to the police. She was charged with assisting two co-defendants, with selling the complainant to someone in India. Gyanu Pokhrel, a 17-year-old young woman was charged under the Human Trafficking and Transportation Act of 2064, sections 1(a), 3, 4(2)(b), 15(1)(a),(g), and 17. The charged offense is punishable up to 20 years in prison.

When ILF-Nepal first met her on December 16<sup>th</sup> [9/1/2065], Ms. Pokhrel had been repeatedly remanded at the request of the police. During the first meeting with our client, the police constable informed us that Ms. Pokhrel was not involved in the trafficking and that she was innocent. On her third remand hearing on December 22<sup>nd</sup> [9/7], we argued that she should not be held in custody since the police information indicated that she was not involved. The police said nothing, the court ignored the information that we had been provided, and remanded our client for 7 days until December 29, 2008 [9/14/2065].

In order to confirm the information informally given to us by the police, the office filed a petition on December 23<sup>rd</sup> [9/8], for pre-charge sheet discovery, requesting a copy of the investigation file. Pursuant to provisions of the interim constitution providing the right to counsel and ICCPR

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Art. 14(3)(b) guaranteeing counsel time to prepare, the District Court ordered access to the file. (The courts are ordering access to the investigative file but not as a matter of course). The police refused to turn over a copy of the investigation file. At the next remand, ILF-Nepal's lawyer convinced the police to show him a file where our lawyer found that the police report included clear exculpatory evidence. The information was brought to the attention of the court. Seemingly unaware of ICCPR Art. 9(3), providing that the general rule is NOT custody during pretrial proceedings, the Court remanded our client again and asked that the charge sheet be filed within 2 days. The charge sheet was filed and statements by our client and co-defendants taken over a period of days. When that evidence was presented, ILF-Nepal argued that given the lack of evidence showing any involvement of our client, the court ordered her release. Her two co-defendants are being held without bail. To date, our requests for the police report has been denied.

**Pradip Thapa v. Government of Nepal, (ILF-Nepal 68) (Adv. Achutam Acharya)**

*In this case, ILF-Nepal successfully challenged the common practice of having detention ordered by unauthorized officials and not the CDO himself. Of course, the case also involves the more-common untimely filing of the charges in public offense cases.*

As we have discussed in prior Case Notes, Section 4 of the Some Public Offense Act provides that the statute of limitations for filing the charge sheet is 7 days from the day of the incident if the case is brought by the police, and 14 days from the filing of the FIR in cases begun by an FIR complainant. In addition, in cases begun by an FIR, if the CDO finds "reasonable grounds," the filing of the indictment may be delayed for up to 35 days. This does not mean that detention can be ordered for 35 days. Once the charges are filed, only the CDO can conduct the jail/bail hearing. Indeed, some Public Offense Act section 5(1) states that the CDO has original jurisdiction to try and hear cases prescribed under the Act. The exceptional clause of Local Administration Act section 11(4) states that the CDO cannot delegate his case hearing authority.

Pradip Thapa was arrested on November 26, 2008 [8/11/2065] for allegedly creating a public disturbance and threatening individuals in public. He was arrested along with two co-defendants with a public offense. Since the case was not begun by an FIR, the charge sheet had to be filed within 7 days of the incident or by December 3<sup>rd</sup> [8/18]. The charge sheet was not filed until December 22<sup>nd</sup> [9/7], or 19 days late. In a common procedure, the CDO was not present at the Jail/Bail hearing and the hearing was conducted by the Assistant CDO who set bail at 9000 NPR. Our client cannot pay the bail and is detained.

ILF-Nepal's lawyer filed a *habeas corpus* petition in the Supreme Court challenging the illegal detention. He argued that a person has a right to a fair trial by a judicial body or a competent court of law under Nepal's Interim Constitution section 24(9). Some Public Offense Act section 5(1) states that the CDO has original jurisdiction to try and hear cases prescribed under the Act and under Local Administration Act section 11(4), the CDO cannot delegate his case hearing

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authority. Interim Constitution section 24(3) and Some Public Offense Act section 3(2), read together, state that a person shall not be held in detention beyond a twenty-four hour period without an order from the case hearing authority. Thus, it is illegal for an official *other* than the CDO, who has the case hearing authority, to order a defendant's detention beyond the twenty-four hour period. In the petition, ILF-Nepal also argued that the detention was illegal because the charge sheet was filed untimely in violation of the statute of limitations.

After a number of adjournments, a hearing was held in Supreme Court where Justices Min Bahadur Rayamajhi and Kalyan Shrestha, found the detention of each client to be illegal and ordered their immediate release. While the final decision has not be issued, it appears that the court will be focusing on the unlawful delegation of power to the Assistant CDO. ILF-Nepal is still hoping for a ruling regarding the statute of limitations in cases before the CDO.

**Natalie Rea, ILF-Nepal Director**  
**ILF-Nepal**  
**January 31, 2009**

*As of January 30, 2009, Ken Plotz, a judge from Colorado, will be replacing Bejal Shah, and joining Dan Alterman as an International Fellows at ILF-Nepal.*

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# ILF-Nepal

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## CASE NOTES – FEBRUARY 2009

*Editors Notes: This issue illustrates the reluctance of the courts to take any action without a specific statutory provision specifically permitting it. As a result, the constitutional rights to counsel and a fair trial are limited by statute. Troubling.*

### **Nepal Government v. Gyanu Pokharel (ILF-Nepal 59) (Adv. Surya Bahadur Pandey)**

This human trafficking case was discussed in the January Case Notes. Our client was released because there was no evidence against her and in fact, the police had evidence showing she had nothing to do with the crime. The Police, however, refused to turn over the exculpatory evidence and our office filed a writ of mandamus seeking an order the police to turn over the evidence. The registrar refused the petition on the grounds that it had been signed by the lawyer and not the client. ILF-Nepal appealed the rejection by the registrar to the Supreme Court on the grounds that it violated our client's right to counsel under the Interim Constitution section 24(2), (7), (8), and (10). Unfortunately, the Supreme Court ruled that there was no authority in the law requiring the registrar to allow an attorney to file a pleading on behalf of his/her client and affirmed the registrar's decision. A new application was filed signed by our client.

### **Dhawa Lama v. Government of Nepal (ILF-Nepal No. 139) (Adv. Mohan Shashanker)**

Our client is being detained for allegedly committing the crime of theft and burglary as set forth in the Crimes against Property Statute, Country Code, Chapter on Theft No. 12 and No. 14 . At the time of remand, ILF-Nepal sought access to the file in possession of the investigative authorities pursuant to the provisions of the Interim Constitution which provide for the right to be defended by counsel and the right to a fair trial. For illustrative purposes, ILF-Nepal cited the Rules of Criminal Procedure of the state of Massachusetts, which provides for early discovery. The district court denied our request.

On appeal, ILF-Nepal- argued again that the right to a fair trial provided for in the Interim Constitution, Section 24, and the International Covenant on Civil and Political Rights, Article 14 require prompt discovery of the “nature and cause of the charge against him.” In addition, we cited to Court Management Rule 211 which provides that “the duplicate copy of the documents enclosed in the file which is at the office which hears the cases must be given to any concerned people if they ask for it.”

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The appeal is pending. A positive ruling from the Appellate Court would certainly represent a major step forward in giving meaning to the right to counsel and a fair trial.

**Bishnu Century v. Nepal Government (ILF Nepal 120) (Adv. Shyam Kumar Bishwokarma)**

Bishnu Century was arrested on January 15, 2009 (2065/10/02) and charged with drug possession. ILF-Nepal appeared on his behalf for the first time in Lalitpur District Court after a second remand hearing on February 9, 2009. Under Section 22(c) of the Drugs Act 2033, the police have up to 3 months to file the charge sheet and can detain a suspect during that time.

ILF-Nepal filed a written application seeking access to the investigative file in order to be able to oppose the police request for additional detention. The court denied the application on the grounds that since “there is no clear legal provision that a copy of the investigation file must be handed over to the defendant by the police, . . . the Court cannot issue such a directive according to the law.” After ILF-Nepal filed an appeal to the Appeals Court challenging the district court's order, the police immediately filed the charge sheet.

*While our discovery applications have been denied, they have had the practical effect of speeding up the filing of the charge sheet and theoretically, limiting arbitrary baseless detentions.*

*ILF-Nepal has obtained a few good results for three juveniles.*

**Nepal Government v. Raju Tamang a/k/a Thulo Bhai, et. al., (ILF-Nepal 108) (Adv. Ajay Shankar Jha) (Theft); Nepal Government v. Raj Kumar Nepali, (ILF-Nepal 122) (Adv. Mohan Sashankar) (attempted murder); Nepal Government v. Anisha Lama, (ILF-Nepal 100) (Adv. Neelam Poudel) (counterfeiting).**

These three cases involved juvenile clients who were released to the custody of their families during the investigation. Section 50 of the Children Act gives the court specific authority to place a juvenile in the custody of his/her family during the investigation of a case and Court Management Section 47 provides that “Except in those cases in which the Act says that the defendant is to be detained, the defendant must be kept on court date immediately after he appears before the court.” Nevertheless, because defendants are rarely represented at remand, these children are often remanded during the investigation period. In these three cases, the court ordered that our clients be handed over to the custody of their families based on CM 47.

*Finally, this Arms and Ammunition case raises an interesting issue.*

**Prabesh Rai A/k/a Sagun Rai v. Kathmandu Central District Officer (ILF Case 19) (Adv. Pawan Kumar Jaisawal)**

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*The question is whether charges brought under the arms and ammunition Act are bailable or not.*

The Arms and Ammunition Act, as amended, Section 20(1) provides for punishment of a fine of 3-5 years imprisonment **or** a fine. In turn, Court Management Section 118(2)(b) provides that an offense is not bailable if the offense carries a sentence of imprisonment of three years or more. Charges under the Arms and Ammunitions Act are under the jurisdiction of the CDO. ILF-Nepal argued that bail should be set because our client faces the possibility of no imprisonment and simply a fine but the CDO rejected the argument. On appeal, we argued again that the offense was bailable because there was a possibility that our client would not serve any time in detention in the event of a conviction. The Appellate Court disagreed, ruling that since the Arms and Ammunition Act (2019) Section 20 (a), as amended, provided for a possible sentence of three years or more, our client could not be admitted to bail.

**Natalie Rea, ILF-Nepal Director**  
**February 28, 2009**

*We remain unable to announce a decision in the previously-discussed case of Bipin Sutya, our 15 year old client in adult custody. ILF-Nepal wants to thank its current Fellows, Daniel Alterman and Kenneth Plotz for their contribution.*

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# ILF-Nepal

## The International Legal Foundation – Nepal

CASE NOTES – March 2009

Editor's note: ILF-Nepal has been challenging illegal detention orders by the CDO since it opened in August 2008. In this edition of the Case Notes, ILF-Nepal is happy to report that the Supreme Court is showing a willingness to order the CDO to follow the rules. Unfortunately our juvenile client, Bipen Sutiari, remains in adult custody. His case illustrates the tragic consequences of the absence of internationally recognized standards to determine age in countries where birth records are not readily available

### **Government of Nepal v. Bipen Sutiari (ILF-Nepal 7) (Adv. Bimala Yadav)**

ILF-Nepal has been discussing this case since its December Case Notes. Our client worked for his uncle in a carpentry shop. One evening, he got into a dispute with his cousin over a DVD. The dispute escalated; our client allegedly grabbed a piece of wood and hit his cousin who died a few days later. Our client was arrested in August and accused of murder. He has been in adult custody ever since. ILF-Nepal appeared on his behalf for the first time, at the second remand hearing, and provided the court with a VDC age certificate showing that he is 15. The District Court put the certificate in the file without considering the evidence.

ILF-Nepal filed a habeas corpus petition seeking our client's release. While the case was pending and endless adjournments granted, the prosecutor filed a charge sheet. The habeas corpus petition was then denied due to "changed circumstances." In the meantime, on the day of the charge sheet, the prosecution filed an age assessment by an expert opining that our client was between 16 and 18 and in all likelihood 17. Although Juvenile Regulations Rule 15 makes it clear that the VDC certificate trumps such an age assessment, the district court, the Patan appellate court and the Supreme Court have ignored the rule, left our client in adult custody, and ordered different proceedings that are endlessly adjourned.

On January 6, 2009, the Supreme Court sent the case back to the District Court for a hearing on the validity of the expert's age assessment despite the clear language of Rule 15. At the hearing, the expert testified that our client was over 16 based on X-Rays. His testimony was legally, under Rule 15, and factually insufficient to rebut the presumption of the VDC birth certificate. Indeed, medical age assessments are particularly unreliable since they vary considerably between different ethnic groups, nutrition, childhood diseases etc... Nevertheless, the court delayed adjudication yet again and asked for a verification of the validity of the VDC certificate. Instead

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of presuming that our client is a juvenile and placing him in juvenile custody, the court remanded him to adult custody again.

**Government of Nepal v. Ajay Sharma, (ILF-Nepal 135) (Adv. Ajay Shankar Jha)**

Our client was in detention and charged with a public offense. The case was before the KTM CDO. As mentioned in prior Case Notes, Section 4 of the Public Offense Act requires the CDO to issue a charge sheet within seven days of the incident in non-FIR cases, and 14 days from the incident in cases started by an FIR. In FIR cases, the time can be extended to 35 days but only if reasonable grounds are shown to necessitate additional time. When ILF-Nepal met our client, he had been incarcerated for 13 days and the office filed a habeas corpus petition in the Supreme Court. The office had raised this issue repeatedly and unsuccessfully since it opened in August 2008.

This time, the Supreme Court granted the writ, ordering the CDO to provide reasonable grounds for additional time to complete the investigation and charge our client. The Court asked for the reasons why our client was "remanded for seven days with the order" and why the investigation extended for 35 days in this simple case. The court added that "what is clearly specified in the law should be properly followed." "Anything that has not been followed accordingly cannot be interpreted as being legal."

**Government of Nepal v. Rudra Bahadur Magar, (ILF-Nepal 138) (Adv. Ajay Shankar Jha)**

The Supreme Court granted another writ of habeas corpus in a case pending before the CDO. Section 5(1) of the Public Offense Act provides in pertinent part that: "The CDO shall have original jurisdiction to try and hear cases prescribed by this Act." The CDO often allows his assistant to preside over jail/bail hearings in violation of the Local Administration Act, Article 11, Section 4. That section allows the CDO to delegate his power of authority in a certain instances but specifically prohibits the CDO from delegating hearing authority. ILF-Nepal has been challenging this practice repeatedly. The Supreme Court finally held that the detention was illegal because the assistant CDO had not been given the authority to act under SPO Section 5(1) and the Local Administration Act.

**Government of Nepal v. Mithun Yadav, (ILF-Nepal 155) (Adv. Shyam Bishwakarma)**

Our client, a nine-year-old child, was charged with simple theft, based on a police report. No FIR was ever filed. He had been detained for 8 days when ILF-Nepal first appeared on his behalf. Under the Child Act Section 11 (1) a child under the age of ten (10) cannot be charged with a crime. ILF-Nepal informed the public prosecutor's office and CDO that it was filing a

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writ of habeas corpus in the Supreme Court. After the writ was filed, the public prosecutor decided not to prosecute the case. Our client was released from custody and the Supreme Court ordered that the child be placed in the custody of the Nepal Ministry of Women, Children, and Social Welfare for transportation to his native India. A division of that Ministry placed the child in the National Center for Children at Risk and the child was returned to his home.

**Jiwan Rae v. CDO (Lalitpur) (ILF-Nepal 168) (Adv. Ajay Shankar Jha); Ajay Sharma v. CDO (KTM) (ILF-Nepal 135) (Adv. Ajay Shankar Jha); Bikki Das v. CDO (KTM) (ILF-Nepal 167) (Adv. Surya Pandey)**

In these three cases, the charge sheets were not filed within the statute of limitations. As mentioned above, under the Public Offense Act, the charge sheet must be filed within 7 days of the incident or 14 days from the time of the incident in cases begun with an FIR. Furthermore, in cases begun by an FIR, the statute of limitations may be extended up to thirty-five days for **reasonable cause**.

In these cases the charge sheets were not filed on time and there was no finding of reasonable cause for the delay. ILF-Nepal filed writs of habeas corpus in the Supreme Court. The Court found that since the statute had been violated and no reasonable cause was found the cases had to be dismissed and the defendants must be released.

**Natalie Rea, Executive Director**  
**ILF-Nepal**  
**April 10, 2009**

*The ILF wants to thank Dan Alterman, International Fellow from January to March, for his contribution to the office. Dan is being replaced by Roxanne Vachon, a public defender from Vancouver, British Columbia, who has volunteered for the ILF every year since 2005, and who will be in Nepal until July.*

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# ILF-Nepal

The International Legal Foundation – Nepal

## CASE NOTES – APRIL 2009

*Editor's notes: This issue of the Case Notes is limited to cases showing significant progress in the areas of juvenile justice and pretrial discovery of investigative materials.*

### **Government of Nepal v. Deepak Magar (ILF No. 195) (Adv. Pawan Kumar Jaisawal and Shyam Bishwakarma)**

*The Supreme Court of Nepal recognized that juveniles should not be detained with adults even when the juvenile center is full.*

A 14 year-old client was charged with theft of property with a value of 81,000 rupees. Bail was set at 20,000 rupees which he could not pay and he was remanded to the juvenile correction center. Because there was no space at the juvenile center, the district judge remanded him to adult custody. A habeas petition was filed in Supreme Court. The Court found that Section 15 of the Children's Act – stating that no child should be confined with an adult – was unequivocal and ordered that our client be released and handed over to the custody of his father, mother, or guardian. The child had other relatives and the court deferred his release for seven days so his uncle could come to Kathmandu and take charge of the child. In its oral decision, the court stated that it was in the interest of justice that the matter proceed expeditiously. The ILF-Nepal paralegal contacted the client's uncle in the Bara District and he was able to take custody of our client 48 hours later.

### **Government of Nepal v. Rupar Magar et. al. ((ILF Case No. 173) (Adv. Bimala Yadav)**

*The Lalitpur District Court is following the lead, recognizing that juveniles should be treated differently and should not be held in detention when they can safely be released to a guardian.*

Our client, along with five other girls, was charged with theft. One of the co-defendants was actually living in the house where the incident took place. All the girls were arrested and detained. At a remand hearing, ILF-Nepal argued that the girl should be released and the court agreed, finding that the girls "...had taken the property because of their immature mental situation as they are young and not aware of its consequence."

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**Bishnu Century v. Lalitpur District Court (ILF No. 170) (Adv. Pawan Kumar Jaisawal and Shyam Kumar Bishwokarma)**

*This is the first statement by an appellate court recognizing a defendant's right to have access to documents in the investigative file before the charge sheet is filed.*

Our client was charged with possession of a controlled substance. ILF-Nepal entered the case before the charge sheet was filed and moved immediately for disclosure of the investigative documents. The request was denied and ILF-Nepal appealed. In a brief ruling the Court stated the following:

A petition was filed to gain access to the documents that were prepared during the investigation of the charges filed against the accused. Even though it is the legal right of the concerned person to gain access to a copy of the files, since the charge-sheet has already been filed at the court, there is no need to deliberate regarding this petition.

In so stating, however, the Court recognized a defendant's right to pre-charge sheet discovery.

**Government of Nepal v. Raj Kumar Karki (ILF No. 180) (Adv. Bimala Yadav)**

*After months of arguing for access to information in the investigative file before the filing of the charge sheet, ILF-Nepal is seeing results in court but also with law enforcement authorities.*

In this case, two ILF advocates went to the Police station in Balaju in order to meet prospective clients. The police officer in charge allowed the advocates to review the police investigation file.

**Natalie Rea, ILF-Nepal Director**  
**ILF-Nepal**  
**April 2009**

*ILF-Nepal wants to welcome Kesha Louis, a public defender from New York City, who will be in KTM until August. The ILF also wants to thank Kenneth Plotz, who has returned to Colorado, for his great contribution to the office.*

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# ILF-Nepal

The International Legal Foundation – Nepal

## CASE NOTES – MAY 2009

*Editor's notes: This issue is limited to the translation of one important decision by the Patan appellate court holding that a defendant has a right to the investigative file before the charge sheet is filed under the Interim Constitution and the ICCPR. For the past six months, ILF-Nepal has been filing, and losing, innumerable applications seeking this information. Finally, the Supreme Court agreed. ILF-Nepal also wants announce that after nine months in adult custody, , our juvenile client, Bipin Sutiari, discussed in virtually every prior Case Note, has finally been placed in juvenile custody.*

### **Yogesh Pun v. Government of Nepal (ILF-Nepal 209)(Adv. Surya Pandey)**

Honorable Justices Shree Gopal Parajuli, Shree Ishwor Prasad Khatiwada

“A petition was filed seeking the dismissal of the Lalitpur District Court's order, where the petitioner stated that the court's order not to handover a copy of the files prepared during investigation of the case and to hold him in custody during trial, which violated his right to individual liberty, was improper and therefore, must be dismissed. Learned Advocate Shree **Surya Bahadur Pandey** argued on behalf of the petitioner and Learned Section Officer Shree **Achyut Mani Neupane** argued on behalf of the Nepal Government.

The main request here is that a copy of the investigation file wasn't handed over to the defence and must be done so. Nepal's Interim Constitution 2063, Article 24 (2) states that an arrested person has a right to counsel. Sub-article 8 states that every person has a right to information about the charges against him. Sub-article 9 has the provision for a right to fair trial. ICCPR 1966, including human rights related treaties ratified by Nepal, has the provision for right to information of the charges against oneself, right to defense and right to fair trial. **In this case, since the defendant has been mentioned as being a 15-year-old juvenile**, Child Rights Treaty 1989's article 37 and 40 should also be considered. It is obvious that meaningful defence is not possible without factual information. When the written documents prepared during the investigation are not handed over to the defence, it creates an obstacle to meaningful defence during investigation period, and fair hearing will not be guaranteed. As a result, when written documents prepared during investigation are not disclosed to the defence, it will create an

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obstacle to the implementation of the provisions guaranteed by the constitution's Article 24 (2), (8), (9) including others. Therefore, the defence should get the written documents prepared during investigation within a proper and reasonable period of time and at the same time, it is important to manage this so that this process will not unnecessarily hamper the investigation work. Deliberating on this regard, the Lalitpur District Court's 2066/1/15 order stating that "there is no specific legal basis to handover a copy of the documents prepared during investigation of the case" is seen as improper and must be dismissed. Do according to law.

Order: 2066 Jestha 8 (May 22, 2009) Report No. 564

**Natalie Rea, ILF-Nepal Director**  
**June 15, 2009**

For a scanned copy of the decision please contact Pawan Jaisawal, Deputy Director,  
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The International Legal Foundation – Nepal

## CASE NOTES – JUNE 2009

*Editor's Notes: This edition of the Case Notes shows the remarkable improvements in the quality of judicial opinions issued in KTM but also, demonstrate the need for a functioning public defender system so that individuals, like Mr. Raj Kumar Rai, are not forgotten in prison for ten months*

### **Government of Nepal v. Bhim Bahadur Thapa (ILF-Nepal 82) (Adv. Surya Bhadur Pandey)**

*Courts in Nepal have been reluctant to acquit defendants in cases where there was no evidence to support a conviction. Instead, they often find a person “guilty” and impose a symbolic fine. In this case, however, the KTM District Court acquitted our client in view of the lack of evidence.*

Our client, a Rickshaw driver in the tourist sector of KTM, was charged with “dacoit” (a robbery involving more than 4co-accused). If found guilty, he faced up to six year in prison. The prosecutor alleged that several co-accused entered the hotel room where the complainant and his family were sleeping and robbed them at knifepoint. On December 18, 2008, our client was arrested in the vicinity of the crime without any stolen property. The other co-accused were never arrested. Our client was released on bail January 15, 2009. He told the police and later the court, that he had nothing to do with this robbery and the complainants never testified. ILF-Nepal argued that there was no evidence to support a conviction and in the absence of other co accused, there was no evidence allowing the court to find that “dacoit” had been committed. The KTM District Court acquitted our client, finding insufficient evidence to convict.

### **Government of Nepal v Raj Kumar Rai (ILF Case\*\*\*) (Adv.Bimala Yadav)**

*This case illustrates the need for an effective public defender in Nepal. Our client had been detained for over 10 months illegally.*

During a client visit at the central jail, a prisoner approached the ILF advocate requesting information regarding his case. He had been in custody for several months but had no lawyer. He had been told that ILF-Nepal provides representation in Public Offense cases before the CDO. ILF-Nepal advocate made a number of inquiries at the KTM CDO before she was able to gain access to the file. When she finally saw the file, she found that the man had been sentenced in absentia to a simple fine of 1250 npr, in August 2008. In other words, he had been detained illegally for 10 months. The ILF advocate asked the KTM CDO to issue a letter to the central jail

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for the person's immediate release. The judicial system had completely forgotten about this man. Had a lawyer been assigned by the court at the first remand, this would never have happened.

**Government of Nepal v. Ram Bahadur Balami (ILF-Nepal No. 237) (Adv. Pawan Kumar Jaisawal)**

*The appellate court is finally recognizing that the CDO does not actually hear or review bail applications. This decision may convince the CDO to change his practices.*

Our client was charged under the Public Offense Act, section 2, for coming home drunk and assaulting members of his family. The CDO set 8000 npr bail. ILF-Nepal filed a No. 17 petition in the appellate court arguing that our client should be released because in this case, as in many others before the CDO, there is no basis for the bail order. The order was set forth on a boilerplate template form. The Appellate Court agreed with the ILF advocate and ordered our client released. In its decision, the Court stated: "There is no reasonable ground to find the defendant Ram Bahadur Balami guilty of charges from the immediate evidence in the file, including the FIR (complainants statement). It is clear that the CDO only put the bail amount on the template of a decision prepared by someone else and the CDO hasn't deliberated over the reasons and grounds for setting bail."

*The next two cases illustrate the need for a defense investigation Had ILF-Nepal advocates not located the families of these clients, they would probably have been detained pursuant to a high bail and possibly never reconnected with their families.*

**Government of Nepal v. Manju Majhi (ILF-Nepal No.258) (Adv. Shyam Kumar Bishwakarma)**

According to an age assessment expert, our client, Manju, was 12 years. She had been living and working in the house of the complainant who now accused her of stealing jewelry. The child was unable to provide ILF-Nepal with contact information for her family other than to say that her aunt and uncle worked in a glue factory in Naikap, an area of KTM. ILF-Nepal advocate contacted the complainant who insisted that Manju had no relatives and that the complainant was all she had. After a diligent investigation, ILF-Nepal advocate located the aunt and uncle in the industrial adhesive factory. They said that Manju had been working in the complainant's home for 3 years, and during that time, her family had not been allowed to visit her. Indeed, a few days before, Manju's mother had attempted to get her back and had been told by the complainant that Manju was not there and would not return for a month. It seems that Manju had been held captive in the complainant's house. The aunt was present at the jail/bail hearing. The court imposed a small bail of 4000 npr – the alleged stolen property was valued at 229,500 npr, the family paid the bail and the child was released.

**Government of Nepal v. Madan Pariyar (ILF-Nepal No. 115) (Adv. Achutam Kumar Acharya)**

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In the case, ILF-Nepal managed to reconnect a father with his son after 7 years. Our client, a 13-year-old child, was charged along with a friend with burglarizing a house and stealing silver, gold, jewelry and approximately 22 lakhs. ILF-Nepal successfully argued to have the child removed from adult detention to a juvenile facility. Bail was set at 10,000 npr. Our client had run away from home in a remote village of Nepal six to seven years earlier. After diligent investigation, the ILF-Nepal advocate managed to ascertain the client's father's phone number. Fortunately, he lived in KTM. As soon as he was contacted, he came to the office of ILF-Nepal. He was overwhelmed with joy. He told us how he had tried in vain to find his lost son. He was convinced that his son was dead. He told us that he was illiterate and worked very hard. Though he survived day-to-day, he would be able to save the bail money in approximately one week. The father has paid his son's bail and father and son are now living together.

*The following four cases are significant in that the appellate court granted the habeas corpus petitions filed by ILF-Nepal. Habeas Corpus relief is generally sought in Supreme Court but the process can be time consuming. The petitions filed in these cases, led to the release of two juveniles and two adults.*

**Government of Nepal v. Kaput Gurung (ILF Case259) (Adv. Shyam Kumar Bishwokarma)**  
**Government of Nepal v. Manoj Baraili ((ILF Case266) (Adv.Mohan Sashankar)**

In the first case, our client, 16 years old and homeless, was arrested at a guest house along with several adults involved in the sex trade. Our client was arrested for merely being present at the guest house and charged with misbehaving in a public place under sections of the Public Offense Act. He was held in adult custody on administrative charges. The court ordered the release of the client because he was improperly held in adult custody and the charges had not been filed timely as requested by section 4 of the Act.

In the second case, our client was 13 years old and charged with theft. The prosecution's theory was the following. In January 2009, the complainant told the police that he had been the victim of a theft without identifying the perpetrator. In May 2009, he identified our client as the perpetrator. He had seen our client with a fresh haircut and was convinced that this haircut could only have been performed with his stolen haircutter. The police conducted no investigation, believed the strange story, and arrested our client. He was held in custody for 11 days without charges being filed.

**Government of Nepal v. Bidur Thapa (ILF Case254) (Adv.Ajay Shankar Jha)**  
**Government of Nepal v. Man Bahadur Pariyar (ILF Case221) (Shyam Kumar Bishwokarma)**

These two cases involve a public offence. In the first case, the accused was charged with an administrative offence. Charges were not filed, as required by Public Offence Section 4, within

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7 days. This client was held in custody for 14 days before he was released as a result of the Habeas Corpus.

In the second case, the accused was charged with a public offence and held in custody pursuant to an order issued by the assistant CDO. In earlier cases brought by ILF-Nepal in Supreme Court, the Court held that the assistant CDO has no authority to order a person detained on bail. The order seems to have had little impact on the practices of the CDO. This client was held in custody for 37 days, pursuant to an order of the assistant CDO. He was released as a result of the Habeas Corpus.

**Natalie Rea, ILF-Nepal Director**

**July 15, 2009**

*ILF-Nepal is happy to announce the opening of its first district office, ILF-Nepal/Janakpur. The office has 2 lawyers, Achutam Kumar Acharya, office head, and Ajay Shankar Jha, staff advocate, who have been training in the KTM office for over six months. Our Janakpur office is located at Murali Chowk and can be reached at 977-41-527850*

*ILF-Nepal also wants to thank Roxanne Vachon for her contribution to the office and welcome Priya Lakhi, a public defender from Atlanta to the office.*

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# ILF-Nepal

The International Legal Foundation – Nepal

## CASE NOTES – JULY/AUGUST 2009

*Janakpur—ILF Nepal's first district office has been open for one month and we have already experienced great success.*

This was the first client of ILF-Nepal Janakpur. Mr. Das, a day laborer, was alleged to have stolen a bicycle. He was arrested and detained for 8 days without having talked to a lawyer. ILF having just opened its district office went to the detention center and came across Mr. Das. After discussion, the lawyers realized charges had not been timely filed pursuant to Some Public Offense Act 4 (1). Also, the lawyers were denied access to look at the investigation file that was in police headquarters.

This being our first case in Janakpur, the lawyers and International Fellow's agreed that filing a habeas corpus was the right course of action. We needed the Judges and the Police to know ILF was serious about protecting the rights of the client and for enforcing the rule of law.

Pursuant to the Habeas Corpus, our client was being held illegally since the charge sheet had not been filed within the prescribed timelines. ILF lawyers fearlessly argued the case and the writ was granted. Our client was released.

However, the CDO re-issued an arrest warrant for our client after the writ of Habeas Corpus was granted. ILF lawyers are currently litigating this issue, as our client's re-arrest is unconstitutional and an illegal assertion of power by the CDO and Prosecutor's Office.

### **Government of Nepal v Jajul Nadaf (Janakapur) (Adv. Achutam Kumar Acharya and Ajay Shankar Jha)**

Our client, Jajul Nadaf, is a juvenile. He was charged with petty theft, arrested and placed in adult custody. The police denied ILF lawyers access to the file stating the client had “confessed” and there was no reason for the lawyer to look at the file. ILF advocates brought this to the Judges’ attention and were allowed to review the file.

ILF-Nepal (Janakpur) lawyers further insisted our client should not be in adult custody since he is a juvenile. Consequently, the prosecution had the burden of proving the client was an adult and not a juvenile, since the defense had raised the issue. Per the request of ILF, an age assessment was conducted. The result was a medical opinion that the client is between the age of 14-17.

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Children's Act Section 2 (a) a child means “every human being who has not completed the age of 16 years.”

During the next remand hearing, the Judge was planning to send our client to the juvenile detention center. However, under Children's Act Section 50, the juvenile should not be housed with adults and the better practice is to release the juvenile to the custody of his/her parents. Due to the presentation of ILF Nepal-Janakpur lawyers, the client was released to the custody of his parents and was not sent to the detention center.

**Government of Nepal v. Sahidul Rain (Janakapur) (Adv. Achutam Kumar Acharya and Ajay Shankar Jha)**

ILF lawyers were being denied access to our clients in jail. The police investigators and detention officers were not allowing ILF lawyers to visit the clients to sign the wakalatnama (the attorney/client contract). ILF lawyers went back day after day to try to resolve the issue with the investigators. Finally, after meeting with the Superintendent of Police for Janakpur and explaining the constitutional right to counsel, we were able to change to normal practice. ILF lawyers are now able to enter the jail and freely speak with our clients without police intervention. Further, the police investigators are now calling ILF lawyers whenever they believe a new client is eligible for ILF services. By having a local presence in Janakpur, ILF has quickly established a reputation as a public defender office willing to work hard and fight for its clients.

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ILF NEPAL-JANAKPUR TEAM

*The following two cases illustrate the substantial gains ILF is making to hold accountable the Prosecution to the standard its burden of proof. Prior to the arrival of the ILF, few attorneys were demanding the Court to dismiss the case or reduce the bail amount if the prosecution could not meet its burden of proof.*

**Government of Nepal v Devi Prasad Dhungana (Adv. Neelam Poudel)**

Our client was accused attempted murder. According to the police report, our client and the complaining witness had an altercation. The complaining witness suffered a cut to his head that required five stitches. ILF also advised our client to not give a statement and utilize his right to

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remain silent. This is not the “practice” in Nepal, as defendants are routinely asked to give a statement and are rarely advised they have a constitutional right to remain silent.

At the Jail/Bail hearing the District Court continued the client's detention without bail based on the seriousness of the charge. To appeal the denial of bail, the ILF Advocate filed a No. 17 petition with the Appellate Court asking for the District Court's order to be reversed and bail to be granted. The ILF advocate argued that there was no proof of attempted murder and the prosecution had not met its burden of proof. Under Nepali Law, the Court during a Jail/Bail hearing may take into account the weight of the evidence against the accused, thereby effectively denying the presumption of innocence. The ILF Advocate raised three issues: 1) this is not attempted murder because there is no mens rea or intention to kill; 2) in order to be charged with attempted murder it is necessary that the murder did not take place because of a third party intervention; and 3) no weapon used and no life-threatening injuries, therefore this is a simple assault and not attempted murder. Our client was released on jail bail on April 13, 2009 – four months after his arrest.

Finally, on July 16, 2009, the Kathmandu District Court made a final decision of acquittal on the attempted murder charge. The ILF advocate raised the same issues as stated above and the client was found not guilty!

**Government of Nepal v. Radhika Pariyar (Adv. Neelam Poudel)**

Our client was charged with the murder of her daughter-in-law. The daughter-in-law lived with the son of the defendant in a separate house within the same compound as the defendant and her husband. In this case the deceased daughter-in-law belonged to an upper caste of the Dalits while the defendant and her family are lower caste Dalits. The daughter-in-law and son had lots of fights due to the fact that the daughter-in-law wanted greater freedom to do whatever it was she wanted. The daughter-in-law usually went into the family room and closed the shutters after a fight. On the day of the incident the daughter-in-law was taken to hospital suffering from poisoning – she later died in hospital. The allegation is that this poison was administered by the family including the defendant. The client's son took his wife to hospital and she told the doctors that she took poison and told them where it was. The client's son went to the house and brought the bottle of pesticide to the hospital.

Advocates Neelam Poudel, Bimala Yadav and International Fellow Kesha Louis visited the doctor for the purpose of investigation. The doctor informed them that the death was by suicide and that the deceased had told him she took the poison herself.

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At the Jail/Bail hearing the ILF advocate argued there was no prima face evidence against the defendant in accordance with Court Management Rule # 118(2) and that even on this murder charge she was entitled to general release. This argument relied upon the information obtained during the visit to the doctor as well as the general lack of evidence in the file. By investigating the case early, the ILF advocate was able to offer defense evidence at the Jail/Bail hearing – a rare practice here in Nepal.

It was also argued at the Jail/Bail that Court Management Rule #118(4) applied and her particular circumstances such as her social position, family background as a housewife and an elderly woman with no chance of escape should be taken into account. The fact that the deceased had left two children with no family to look after them as the other members were also in custody was relied upon.

The Court granted bail of 10,000Rs because it was held that there was no prima facie evidence against her. The Court stated it was fixing bail in accordance with No. 118(5) and 118(10) but in holding that there was no prima facie evidence the Court was referencing No. 118(2).

*ILF-Nepal has been making significant strides in reducing the amount of time our client's are spending in detention prior to an official charge sheet being filed. The practice in Nepal has been that lawyers do not attend remand hearings. However, at ILF, our advocates are trained to attend remand hearings (as they are adversarial procedures) and argue for short adjournments only if reasonable grounds exist for remanding the case.*

#### **Government of Nepal v. Jalan Karki (Adv. Bimala Yadav)**

Our client was arrested July 8, 2009 for Some Public Offense, essentially a misdemeanor of sorts. After pleading by the ILF- Advocate, the Kathmandu CDO originally remanded the client for six days. Again, after argument by the advocate, our client was remanded for five days. On July 21, the CDO ordered that the client be remanded only for an additional three days and that the charge sheet be filed in that time. On July 24 charge, per the order of the CDO, the charge sheet was filed. The significance of this is that the CDO has historically ordered remand for upwards of nine or 15 days at a time, totally up to 26 days that our client's are held in custody while the investigative authority “investigates.” However, the District Courts have been ordering prosecutors to file charge sheets within a certain timeframe. For the first time the CDO has followed the procedure of the District Court and ordered the Prosecution to file a charge sheet within a substantially reduced time frame.

#### **Government of Nepal vs. Shyam Shrestha (Adv. Pawan Kumar Jaisawal)**

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We took this case after the first remand date. Our client is charged with a drug case, which means the Investigation Authority has up to 90 days to investigate a case. At the second remand, the Prosecution wanted 30 additional days to investigate. The ILF Advocate filed a discovery petition and Judge Shrestha of the Katmandu District Court ordered that the police must “provide all of the necessary information except for the secret documents”. After looking at the police file, the ILF advocate argued that 30 days was not required, since this was a straightforward case which did not require an additional 30 days of investigation. The judge agreed and only gave a five day remand. At the third remand hearing, the Investigation Authority again requested 30 days on August 9, 2009. After hearing ILF pleading, the Chief Judge again only provided five days for the remand.

The time in which a case is remanded for investigation involves the continued detention of our client. The longer the remand, the longer the time before we can advocate for bail or general release for our client. In this case, the desire of the Investigative Authority to take all 90 days for unnecessary investigation was severely impacted by the forceful advocacy of the lawyer.

*ILF-Nepal lawyers are currently litigating a number of potentially ground-breaking legal issues. ILF advocates are continuing the often difficult task of forging ahead to create a rule of law in a newly established legal system, where the “practice” often dictates over the established precedents and the Constitution.*

1. The preparation of a Public Interest Litigation on the incarceration of indigent defendants for failure to pay fines is well under way. Fines are often set at the amount of property stolen or at other high rates. Defendants “pay off” the fine at a rate of 25Rs a day up to a maximum of 4 years. Many defendants can spend years in prison paying off these fines even in cases where the maximum sentence of imprisonment is 1 month. The PIL will reference the ICCPR, US law, Indian law and Irish law.
2. We have filed a habeas corpus of significance in circumstances where ILF Advocate Surya Pandy was kept waiting outside the CDO office while the consideration on Jail/Bail was taken place in his client's case. We are arguing that this is a denial of the constitutionally guaranteed right to counsel and also of the right to a fair trial.
3. Another habeas corpus on a major issue concerns the crucial issue of who is a juvenile for the purpose of detention with adults. We are arguing that the Children's Act itself when properly construed means that a juvenile is under the age of 17 years and not under the age of 16 years as is popularly perceived. We are combining this with an argument that in fact under the Convention on the Rights of the Child, which is part of Nepali law under the Treaty Act, the age of a juvenile means a person under the age of 18 years. This means arguing that Nepal has no

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fixed age of majority as the CRC allows for a child to be defined as below the age of majority. In Nepal you can only get married at 18 years if you have your guardians consent and at 20 years if you do not have such consent.

4. We are continuing to fight the jurisdiction of the CDO in juvenile cases. Of concern is the legal principle that the CDO has no authority to handle cases involving juvenile defendants. However, time and time again, the CDO is ignoring the statutory provision and adjudicating cases involving juveniles. Many times the CDO is detaining juveniles for their “own good” without any proper legal authority to do so. ILF is continuing to file habeas corpus actions demanding our clients release based on the illegal action by the CDO.

VICTORY! After serving a one year sentence for the “murder” of his cousin - our 15-year-old juvenile client, Bipen Sutiher was released from the Juvenile Detention Center! ILF lawyers fought to have Bipen declared a juvenile and went through 9 months of litigation to provide for his safety in adult detention while the Prosecutor argued his certified age assessment. ILF ultimately prevailed and the Court placed Bipen in juvenile custody.

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Bipen surrounded by his ILF advocates Surya Pandey and Bimala Yadav at the ILF-Nepal office the day after his release. He came to thank the ILF and his lawyers in person.

**Natalie Rea, ILF-Nepal Director**  
**ILF-Nepal**  
**August 2009**

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# ILF-Nepal

## The International Legal Foundation

### CASE NOTES – OCTOBER 2009

*Editor's Note: Two acquittals discussed in this edition suggest that trial courts have started to impose a heavier burden of proof on the prosecution though not yet the required burden of proof beyond a reasonable doubt. However, there seems to be little progress in getting courts consistently to recognize of a defendant's fundamental right to remain silent.*

#### **Government of Nepal v. Deepak Darji (ILF-Nepal 233) (Adv. Mohan Sashankar)**

Deepak Darji, a bus driver, was arrested on April 27, 2009, while returning from India, and charged with possession of explosives. The facts were simple. His bus was boarded by the police as he entered Kathmandu and a box allegedly containing mercury was found on the bus. Mercury can be used as an explosive. In an inadmissible statement made to the police, he admitted possessing the mercury.

At trial, the prosecution introduced the seizure report but did not call seizing officers to testify. A box labeled "mercury" was brought to court, but no scientific report identifying the content was presented. In fact, the box was never even opened. At the final hearing, the prosecution argued that the allegations were sufficient to convict; he never even acknowledged the lack of proof presented in court. ILF-Nepal carefully argued that the burden of proof was on the prosecution and that guilt had to be established beyond a reasonable doubt, citing the Interim Constitution Art. 24(5); Evidence Act Art. 24; and *Government of Nepal v Suresh Saha* Decision No. 7806, dated 1218/2063; 2064 (Nepal Law Reporter Vol. 49 No. 1). The court explicitly denied that that reasonable doubt was the basis for the decision. It acquitted because no scientific analysis of the "mercury" was presented by the prosecution. Indeed, there was virtually no evidence against our client and the prosecution had not met any burden of proof.

#### **Government of Nepal v. Binod Dhakal (ILF- Nepal 234) (Adv. Mohan Sashankar)**

Binod Dhakal is a taxi driver. On April 22, 2009, he was arrested as he slept in his car. He was accused of being part of a group of people who jumped out of the cab and attempted to abduct the complainant. In court, Mr. Dhakal made a statement admitting that he had been present during the incident but had had nothing to do with the abduction, which had been committed by his customers. Although abduction is nominally a non-bailable offense, ILF-Nepal secured his release on 5,000 rupees bail. The FIR complainant never testified in court.

At the final hearing, the prosecutor sought a conviction based on non-admissible facts, without acknowledging that the initial FIR complaint was not sufficient to support a conviction. The court, a different one, rejected the reasonable doubt standard enunciated in *Government of Nepal v Suresh Saha*, (*see supra*), stating that "that [was] a murder case, this is an attempted abduction case: Why should the same principle apply?" Nevertheless, the court found the client not guilty.

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*ILF-Nepal lawyers have fought to inform clients of their rights, to convince them to remain silent, and to convince courts to respect the right. The following three cases illustrate the continued challenges.*

**Government of Nepal v. Prem Gurung (ILF-Nepal 369) (Adv. Mohan)**

Nepal recognizes a defendant's right to remain silent [*see* Interim Constitution Art. 24(7); *Chandra Bahadur v. Government of Nepal* Writ No. 1169 (2047), dated 3/24/2050; ICCPR Art., 14(3)(g).] This right, however, runs counter to practices and to Court Management Section 127, requiring a defendant to make a statement as the first step of the jail/bail hearing.

Prem Gurung was one of 15 people arrested for the killing of a police deputy inspector. The incident began as a bar dispute over a spilled beer, continued into the street, and ended with the beating and drowning of the decedent in the Bagmati River. Our client was arrested weeks later and beaten. He refused to make a statement to the police. In court, the other 14 defendants made statements denying any involvement (some after confessing to the police). Mr. Gurung was second to last to be called by the clerk to make a statement. The ILF-Nepal advocate orally interceded and asserted his client's right to remain silent. The court ordered that the examination proceed and that the clerk ask each question regardless. Mr. Gurung, seated next to his lawyer, was forced to assert his intent to remain silent more than 20 times. The clerk took an increasingly prosecutorial tone, asking "Don't you think whoever did this should be punished? [Yes.]. So should you be punished? [No.]." Mr. Gurung was ordered held without bail, and ILF-Nepal has filed an interlocutory appeal pursuant to Rule 17 of the Court Management Act.

**Government of Nepal v. Dan Bikram Thapa (ILF-Nepal 368) (Adv. Bimala Yadav)**

Dan Bikram Thapa was charged with murder after a dispute. He was also seriously injured and hospitalized for one month. At the bail/jail hearing, the ILF-Nepal advocate attempted to file a written application asserting her client's intention to remain silent. At first, neither the bench clerk nor the judge wanted to accept the application. They insisted that the application be filed with the Court Registry Office. That office refused the application and sent ILF-Nepal back to the court. The ILF-Nepal advocate argued that the petition was simply a written memorialization of her client's assertion of his right to remain silent and the court finally accepted it. It refused to rule on the issue, and the bench clerk, as in the above case, insisted on asking each and every question.

**Government of Nepal v. Santosh Bardeba (ILF-Nepal 363) (Adv. Bimala Yadav)**

Santosh Bardeba was accused of the murder of his neighbor, with whom he had a fight a few hours before the man's death. The autopsy report did not list a cause of death. Apparently, the decedent, a habitual drug user, was able to walk after the fight. Nonetheless, the complainant, his mother, alleges that he died from injuries suffered in the fight. Again, the ILF-Nepal advocate filed a written application asserting her client's right to remain silent. The application was finally accepted, but the bench clerk ignored the request and questioned Mr. Bardeba. When Mr. Bardeba then requested that he be allowed to provide information about defense witnesses (required at the bail/jail hearing to avoid having the witnesses later

precluded), the clerk refused, stating that the defendant could not both assert his right to remain silent and provide such information. ILF-Nepal was successful in distinguishing between the two acts, and the witness information was recorded. The client was remanded, and an appeal will be filed once the autopsy is complete.

**Government of Nepal v. Ram Kumar Dulal (ILF-Nepal 367), Government of Nepal v. Jeevan Lama (ILF-Nepal 373), Government of Nepal v. Ram Kuar Gharti (ILF-Nepal 376) (Adv. Rakesh Kumar Sharma); Government of Nepal v. Manoj Rai (ILF-Nepal 379) (Adv. Kalayan K.C); Government of Nepal v. Rabindra Thakur (ILF-Nepal 367(a)), Government of Nepal v. Nirmala Tamang (ILF-Nepal 377) (Adv. Bir Bahadur Khadka); Government of Nepal v. Suraj Khulal (ILF-Nepal 368), Government of Nepal v. Dk Lama (ILF-Nepal 374) (Adv. Sunil Kumar Karn); Government of Nepal v. Nirajan Aryal (ILF-Nepal 365), Government of Nepal v. Prakash Shahi (ILF-Nepal 349) (Adv. Kalayan K.C.); Government of Nepal v. Badri Thapa (ILF-Nepal 370); Government of Nepal v. Gelu Sherpa (ILF-Nepal 369), Government of Nepal v. Ajay Shrestha (ILF-Nepal 371) (Adv. Surya Pandey).**

In all these cases before the CDO, the charge sheet was not filed in a timely manner despite a recent Supreme Court decision making the rule clear. See *Ajay Sharma v. CDO, Writ No. 0039, dated 2065/11/21(March 4, 2009)*. As a result, all these clients were illegally detained. Fortunately, the Appeals Court has proven both receptive to the habeas corpus petitions filed by ILF-Nepal and impatient with the CDO and government attorney excuses for their failures to adhere to the law.

*ILF-Nepal would like to welcome four new lawyers to its staff: Bir Bahadur Khadka and Rakesh Kumar Sharma from Nepalgunj, and Kalayan K.C. and Sunil Kumar Karn from Biratnagar, where ILF-Nepal will be opening offices in 2010.*

**Natalie Rea  
Executive Director  
November 15, 2009**

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# ILF-Nepal

## The International Legal Foundation

### CASE NOTES – NOVEMBER 2009

*Editor's notes: The most important case in this issue is not a case of ILF-Nepal but a great victory in a Public Interest Litigation ("PIL") filed by Kathmandu Law School. KLS challenged the continued validity of Sections 38 and 53 of the Punishment Act, unchanged since 1986, setting the value of one day in detention at 25 rupees, which effectively criminalized poverty in Nepal.*

### **Government of Nepal v. Prakesh Lama (KLS case filed in 2007, decided in September 2009, and the written decision issued in October 2009) (writ petition 065-ws-0009 (2065))**

In Nepal, if an accused cannot afford to pay bail or a fine, he or she will be allowed to pay through days in detention at a rate of 25 rupees per day. The value, equivalent to the daily pay of an unskilled laborer, was established 23 years ago when the legislature enacted Punishment Act 38 and 53. The effect of the statute has been the practical criminalization of poverty: where a person is sentenced to one month jail plus a 50,000 rupee fine, for example, a person with financial means will only serve one month in jail, but an indigent could serve more than five years in jail. In 2007, KLS filed a PIL challenging the continued validity of the statutes. ILF-Nepal learned about the PIL only when it attempted to file its own PIL and the registrar informed it that KSL had filed a similar PIL and that it had been decided. It took two months to get the written decision.

In essence, the PIL argued that: (1) the provisions violated the right to equal protection and the right to liberty guaranteed by the Interim Constitution (IC) and the International Covenant on Civil and Political Rights (ICCPR); and (2) at minimum, the present rate of 25 rupees per day should be modified to reflect inflation since the law was enacted 23 years earlier. The Supreme Court recognized that Punishment Act 38 and 53 resulted in the criminalization of poverty and suggested that they were inconsistent with the IC and international standards. The Court recognized the need for timely amendment of these provisions but stopped short of annulling the offending provisions. Instead, it directed the legislature to look into the issue and amend the statutes. The Court suggested that 190 rupees, the daily wage of an unskilled worker today, was probably a more accurate figure today.

*ILF-Nepal immediately sought to implement that decision.*

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**Government of Nepal v. Mitra Bahadur Karki (ILF-Nepal 201) (Adv. Pawan Kumar Jaisawal and Neelam Poudel)**

Mitra Bahadur Karki was arrested on April 13, 2009, for allegedly selling fake gold. Bail was set at 31,000 rupees. Mr. Karki could not pay and has been detained for seven months. ILF-Nepal filed a habeas corpus petition citing *Government of Nepal v. Prakesh Lama* and arguing that at 190 rupees per day, Mr. Karki should have been released after 163 days. To keep him in detention would violate the IC, ICCPR, and the precedent set by the Supreme Court in *Prakesh Lama*. The appellate court dismissed the petition and refused to recognize its own authority to implement measures to correct the unjust and unconstitutional effect of these laws.

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*Certain courts are showing a better understanding of the right to counsel and the right to remain silent.*

**Government of Nepal v. Nishant Thapa (ILF-Nepal 284) (Adv. Neelam Poudel)**

Nishant Thapa was arrested and charged with possessing drugs in a public area known for drug dealing after dark. After he posted bail and was released, he stopped returning to court despite ILF-Nepal's efforts to secure his appearance. In Nepal, when a defendant fails to appear for his court appearances, the prosecution proceeds in his absence. Generally, lawyers will also stop appearing on their client's behalf but the case will continue. Attorneys who attempt to persist in representing absconded clients are often prevented from doing so by the court.

In this case, when Mr. Thapa did not appear, the ILF-Nepal advocate sought to conduct cross-examination of the government's witnesses on behalf of her absent client. The judge questioned her presence, suggesting she should not be there since her client was not there. The ILF-Nepal advocate argued that she must be permitted to represent her client because: (1) her client would be tried in absentia, and to deny him representation would violate his right to counsel under the IC and ICCPR; and (2) the Wakalatnama is a contract that obligates the attorney's representation through the end of the case, and that is not conditioned upon the client's presence in court. This judge agreed and the government witnesses were cross-examined.

In contrast, the court in *Government of Nepal v. June Rai (ILF-Nepal 128)*(Adv. Mohan Sashankar), refused to allow the ILF-Nepal advocate to argue on behalf of his absent client. An interlocutory appeal was filed but dismissed but eventually, Mr. Rai was found not guilty of attempted murder, the charges converted to assault with no further punishment.

**Government of Nepal v. Yoman Bhattarai (ILF-Nepal 413 ) (Adv. Bir Bahadur Khadka)**

Yoman Bhattarai is 14 years old. On October 30, 2009, along with two other young men, Mr. Bhattarai was arrested for the attempted murder of three adult men in Thamel. The advocate met the client one day before the charge sheet was filed. He advised Mr. Bhattarai to exercise his right to remain silent, and he agreed to do so. The advocate prepared a petition to the court asserting his client's right to remain silent.

When Mr. Bhattarai was presented to the bench to make a statement, the judge reluctantly accepted the petition from the advocate. When the clerk then proceeded to question the client about the facts of the case, the advocate intervened, asking the judge to prevent the questioning. The judge responded by asking Mr. Bhattarai directly, over the objection of defense counsel, if he was afraid to tell the court what happened, to which Mr. Bhattarai replied, fearfully, that he didn't know anything. In spite of the bullying from the judge, Mr. Bhattarai did not make an inculpatory statement to the court. He answered all the clerk's questions with: "I don't know."

At the jail/bail hearing the ILF-Nepal advocate successfully argued that the evidence presented by the prosecution failed to make a prima facie case of attempted murder. The statements of the complainants were inconsistent with each other and with police reports, and the idea that the three small teenage defendants had successfully attacked and robbed three grown men was implausible. Mr. Bhattarai was released on general court date in the custody of his older brother.

**Government of Nepal v. Karan Shrestha (ILF-Nepal 395) (Adv. Kalayan KC)**

According to an "expert," Karan Shrestha is 15 years old. He was arrested for allegedly stealing a cell phone from someone during a fight involving multiple people. Before the charge sheet was filed, the ILF-Nepal advocate advised his client of his right to remain silent, and Mr. Shrestha agreed to exercise that right. ILF-Nepal filed a petition to assert its client's right to remain silent. The clerk ignored the petition and proceeded to question Mr. Shrestha about the facts of the case. The ILF-Nepal advocate intervened and asked that the questioning stop. The judge directed the clerk to continue, but Mr. Shrestha answered each question by saying, "I wish to exercise my right to remain silent."

At the jail/bail hearing, the ILF-N advocate argued for the client's release based on lack of evidence against him; the fact that even if he were convicted, as a juvenile, he would have served all the required jail time; and that as a juvenile, the court must release him. Initially, the court would not release Mr. Shrestha unless there was a guardian or social welfare organization present, and even asked ILF-N to take custody of the client upon his release. A social welfare organization was found, and the client was released on general court date.

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*Post-acquittal detention continues to be a common problem in Nepal, but interventions by ILF-Nepal advocates have been successful in securing release.*

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**Government of Nepal v. Jogindra Paswan (ILF-Nepal/Janakpur 13) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)**

Jogindra Paswan, a laborer, was arrested in May 2008 and charged with rape. He maintained his innocence and told the court that he had actually rescued the victim from a group of men who had attacked her. The police and prosecution nevertheless filed charges against him. When ILF-Nepal advocates first met with Mr. Paswan in the detention center, he had been detained for 18 months awaiting prosecution of his case, in violation of his rights to a fair and speedy trial. ILF-Nepal met Mr. Paswan on November 10 and was given access to the file. The advocates learned then that Mr. Paswan had been acquitted of all charges on November 8, 2009. ILF-N advocates immediately requested a letter from the court ordering Mr. Paswan's release, and took the letter themselves to the detention center to secure his release the same day.

**Government of Nepal v. Anil Kharel (ILF-Nepal 375) (Adv, Pawan Jaisawal)**

Any Kharel is a juvenile. He was arrested, along with others, on September 18, 2009, and charged with a Public Offense for damaging a taxi and beating up the driver. Mr. Kharel made a statement to the police that the driver had hit them. On October 20, the ILF-Nepal advocate met Mr. Kharel at the juvenile detention center and three days later filed an interlocutory appeal, arguing that: (1) neither his counsel nor guardian had been present when the statement was made in violation of the Children's Act Art. 19; and (2) the charge sheet had not been filed within seven days as required by Public Offense Act Art. 4. (Despite numerous habeas corpus petitions being filed based on this argument, charge sheets are still regularly not filed within the seven days by the CDO). The matter was heard for the first time on November 11 and rescheduled for November 20. That day, a Friday, the Appellate Court ordered Mr. Kharel released. This should have been the end of the case.

Effectuating the release of a client, however, is not easy. On Sunday, November 22, the ILF-Nepal advocate went to the court to make sure that the order had been sent to the CDO. The next day, he went to the CDO to make sure the release letter had been sent to the juvenile center where Mr. Kharel was being detained. The day after that, ILF-Nepal learned that the letter had been sent to the adult detention facility. Mr. Kharel was still incarcerated. On Wednesday, ILF-Nepal went back to the CDO, the letter was properly sent to the juvenile center and Mr. Kharel was released, almost one week after his release had been ordered.

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*The ILF wants to thank Jake Stevens for his contribution to ILF-Nepal during the past three months. At the same time, we want to welcome Lisa A. Polansky, a criminal defense lawyer from Boulder, Colorado, who will be joining ILF-Nepal January 1, 2010.*

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