

# ILF-Nepal

The International Legal Foundation

## CASE NOTES – Spring 2011

*Editor's notes: This edition will discuss ILF-Nepal's difficulties in ensuring that constitutional and statutory guarantees against arbitrary arrests and searches are implemented. On a more positive note, this edition will also report a few cases illustrating the rapid impact of quality indigent criminal defense services. The ILF is also happy to announce the opening of ILF-Nepal/Kanchanpur and ILF-Nepal/Hetauda.*

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Nepal, along with many other common law countries, guarantees the privacy of its citizens by imposing requirements to curb arbitrary police conduct.<sup>1</sup> Articles 12(2) and 28(1) of the Interim Constitution of Nepal guarantee individuals the right to privacy and personal liberty. The International Covenant on Civil and Political Rights (ICCPR) also includes these rights in Articles 9 and 17.

Section 10(1) of the State Cases Act provides, in essence, that the police may not arrest or stop a person without “reasonable grounds to believe” that a crime has been committed. Section 8 of the Narcotic Drugs Control Act uses the same language to limit the power of law enforcement to search or arrest a person. In other words, the police cannot arrest or search a person until they find evidence that constitutes reasonable grounds to believe that illegal activity is afoot. Absent reasonable grounds to believe criminal activity is afoot, a search or arrest is unlawful, and evidence obtained in violation of the Constitution is inadmissible. While Nepal does not have a statutory exclusionary rule, the Supreme Court has made it clear that a confession obtained in violation of the right to counsel, for example, is inadmissible (see *Government of Nepal v. Netra Bahadur Karki*, Nepal Law Reporter 2062, Vol. 47 No. 6, p. 742), and that one may not be convicted based on evidence obtained in violation of law (see *Government of Nepal v. Janak Tripathi*, Nepal Law Reporter 2062, Vol. 47, No. 3, p. 269).

Unfortunately, the meaning of “reasonable grounds” has not been defined. As a result, police routinely rely on the bare assertion that a person appeared “suspicious” as justification to conduct a search. Ordinary behavior, such as holding a bag or standing on the street, has been used to justify a search or arrest, without an explanation of how this behavior is suspicious. Nevertheless, courts in Kathmandu do not require the officers to present an articulable reason for the arrest or the search. As a result, it often appears that the result of the search justifies the original intrusion into the person’s right to privacy, as was the case in two previous ILF-Nepal cases [see

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<sup>1</sup> **India:** See Code of Criminal Procedure 1973, sec. 154; Narcotic Drugs and Psychotropic Substances Act of 1985 (NDPSA), Secs. 42, 43, 50; *State of Punjab v. Baldev Singh*, 6 SCC 172, (1999) (“[A]n illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the [NDPSA] cannot be used as evidence of proof of unlawful possession of the contraband on the accused...”). **Bangladesh:** See Constitution of 1972, Part III, Art. 43; Code of Criminal Procedure 1898, Part V, Ch. XIV, Sec. 165. **Canada:** Charter of Rights and Freedoms of 1982, Sec. 8. **United States:** U.S. Constitution, Amend IV; *Mapp v. Ohio*, 367 U.S. 643 (1961).

*Government of Nepal v. Dala Devi Chamar* (ILF-Nepal/Janakpur 85) (Advs Achutam Kumar Acharya and Ajay Shankar Jha); *Government of Nepal v. Saroj Purve* (ILF-Nepal/Janakpur 24) (Advs. Achutam Kumar Acharya and Ajay Shankar Jha)]. In each of those cases, ILF-Nepal filed unsuccessful applications arguing that the evidence obtained as a result of a baseless search or arrest must be excluded.

The courts have not shown a great understanding of such rights and violations, but on occasion, in response to ILF-Nepal's petitions, some courts have moved in the right direction, issuing orders directing the police to follow proper procedure [see *Government of Nepal v. Hari Om Shrestha* (ILF-Nepal 460) (Adv. Rakesh Sharma)].

*Government of Nepal v. Prakash K.C.* (ILF-Nepal/Hetauda 4) (Advs. Kamal Ghising and Chanchala Kaini)

Prakash K.C. and his friend were arrested for possession of a few dozen pills of Diazepam and other pharmaceutical narcotics. In the seizure report, the police indicated vaguely that they "found two persons in suspicious condition and upon search, recovered tablets from their pockets." At a remand hearing, ILF-Nepal filed a petition requesting the judge exclude any evidence obtained (i.e., the narcotic tablets) because they were obtained in violation of our client's right to liberty and privacy under the Interim Constitution, as well as various statutes governing search and seizure in the State Cases Act and Narcotic Drugs Control Act. Though the judge ordered oral argument on the petition, he ultimately refused to rule on it before the charge sheet is filed.

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*ILF-Nepal just opened an office in Hetauda and one in Kanchanpur and has already made progress in both of these locations.*

*Government of Nepal v. Jung Bahadur Pun Magar* (ILF-Nepal/Kanchanpur 2) (Advs. Dev Raj Pant and Pooja Bhandari)

Magar was arrested on September 19, 2010, and held for 13 days before a charge sheet was filed alleging a violation of the Some Public Offense (SPO) Act. He could not post bail and was detained. When ILF-Nepal/Kanchanpur met him for the first time on June 6, 2011, no hearing had been held and nothing had been done in his case. A petition for a writ of habeas corpus was immediately filed, arguing that the statute of limitations for prosecution of an offense under the SPO Act (90 days) had been exceeded. Though the Appellate Court dismissed the petition, the petition prompted the CDO to resolve the case, and on July 5, 2011, the client was released after being convicted and sentenced to time served (8 months, 20 days).

*Government of Nepal v. Ramesh Pandey* (ILF-Nepal/Kanchanpur 1) (Advs. Dev Raj Pant and Pooja Bhandari)

As in the previous case, Pandey was arrested February 3, 2011, charged with an SPO, and detained because he could not post bail. ILF-Nepal/Kanchanpur met him for the first time on June 6, 2011. Again, no hearing had taken place. A petition for a writ of habeas corpus was filed, arguing that the statute of limitations for prosecution of an offense under the SPO had been exceeded.

Unlike in the previous case, however, the two judges of the Appellate Court hearing arguments on this petition disagreed on the law, and as a result the petition was forwarded to the Chief Justice of the Appellate Court. He agreed with ILF-Nepal's petition, finding a violation of the petitioner's right to a speedy trial, and ordered the client released.

Government of Nepal v. Babu Nepali (ILF-Nepal/Kanchanpur 3) (Adv. Dev Raj Pant and Pooja Bhandari)

Babu Nepali was arrested for an SPO and held without a charge sheet for ten days. ILF-Nepal's advocates immediately filed a petition for a writ of habeas corpus, arguing that the seven-day limitation for filing charges had expired and that the last remand was granted without reasonable grounds. Prompted by the Appellate Court order to show cause, the CDO immediately filed a charge sheet, conducted a jail/bail hearing, and set bail. The client was able to post bail and was released.

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*Practicing before the Chief District Officer (CDO) remains a confounding experience, but ILF-Nepal's persistence pays off.*

Government of Nepal v. Sita Ram Yadav (ILF-Nepal/Janakpur 72)(Adv. Ajay Shankar Jha)

This case has been ongoing since 2008. On September 21, 2008, Sita Ram Yadav was leaving the courthouse after checking on the progress of a civil case when he was stopped and arrested. He was held for ten days before he was finally provided a detention letter indicating that he was charged with an SPO. On October 15, 2008 — three weeks after his arrest — he was formally charged under the Arms and Ammunitions Act for allegedly conspiring with his son-in-law to possess detonators found in the possession of his son-in-law in an unrelated arrest.

ILF-Nepal met the defendant for the first time in June 2010, and by then nothing had happened in his case. Since the matter was before the CDO, no lawyer had been assigned to his case. ILF-Nepal immediately filed a petition for a writ of habeas corpus claiming violations of his right to a speedy trial and to counsel. On July 27, the petition was denied. In August 2010, he was convicted as charged and sentenced to a term of three years in jail. On appeal, the Appellate Court reduced the sentence to two and half years. His release date was set for June 9, 2011.

On June 9, 2011, ILF-Nepal went to the jail to make sure that the client had been released and found that he was still incarcerated. He had been released but was immediately re-arrested for an SPO dating back to his original arrest and detention on September 21, 2008.

ILF-Nepal immediately filed a petition for a writ of habeas corpus on the grounds that both cases had to be tried at same time, and that Punishment Act 41 requires that jail sentences on multiple pending cases to be run concurrently so that the total sentence on multiple convictions does not exceed the longest jail term [see the case of Advocate Dinesh Prasad Sharma for *Iman Bahadur v. Chief District Officer Kathmandu*, Writ No. 0022 (2064), Supreme Court Law Bulletin 2065, Vol. 1, List 12.] The Appellate Court agreed and ordered our client released from court on June 21, 2011.

*The ILF wishes to congratulate Advocate Surya Bahadur Pandey, who has been appointed acting regional director of ILF-Nepal/Western Region and Advocate Ajay Shankar Jha, who has been appointed acting regional director of ILF-Nepal/Eastern Region. ILF-Nepal wants to welcome Advocate Abdul Aziz Alam, who joined the office at the end of June and will be based in Janakpur.*

Natalie Rea, Executive Director  
ILF-Nepal  
July 29, 2011