

ILF-Nepal

The International Legal Foundation

CASE NOTES – FALL 2011

Editor's notes: This edition of the Case Notes will focus again on quasi-judicial proceedings. In the Summer 2010 edition, we discussed the decision of the Supreme Court finding that the Warden of Chitwan National Park had violated the speedy trial rights of many accused persons and ordering that all detainees be tried within three months. In a Public Interest Litigation (PIL) brought by Advocacy Forum, a Nepali NGO, the Supreme Court went further, declaring that quasi-judicial authorities lack the independence and competence to render trustworthy judgments in criminal cases. ILF-Nepal has represented more than 500 indigent accused persons before quasi-judicial authorities and experienced these realities daily.

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In *Government of Nepal v. Ambar Bahadur Raut*, the petitioner challenged the jurisdiction of quasi-judicial authorities to adjudicate criminal cases on the theory that they are neither politically independent nor adequately trained to make such decisions. In a lengthy and thorough opinion, a three-judge bench of the Supreme Court examined the development of quasi-judicial bodies in the context of Nepali history and compared the current state of quasi-judicial jurisdiction over criminal cases to counterparts in other common law countries.

The Court recognized the practical need for delegation of lesser, or quasi-judicial matters, to tribunals or magistrates and examined the development of similar systems of quasi-judicial administrative authorities in England, the United States and India. The Court noted that each of these examples differs from the Nepali system in crucial ways. In England, quasi-judicial bodies have no authority to impose punishment involving imprisonment, and simple criminal cases are delegated to magistrate courts, which are overseen by the judiciary, not the executive branch of government. In the United States, judicial authority is only delegated to administrative officers within the context of a complex system that effectively controls quality and provides for judicial review of the administrative decisions. Moreover, administrative officers in the United States cannot adjudicate serious criminal cases. In India, judicial authority may be delegated to magistrates, but magistrates are required to obtain substantial training on legal and judicial issues, and are also supervised by the higher courts. These magistrates also lack the authority to adjudicate criminal cases where imprisonment may be imposed.

In stark contrast, the quasi-judicial authorities in Nepal are appointed and supervised by the executive branch; have no minimum training requirements in legal or judicial matters; and are vested with the power to adjudicate a wide variety of criminal offences, the most serious of which carry a penalty of life imprisonment. The criminal proceedings and decisions over which quasi-judicial authorities preside take place behind closed doors and generally without defense lawyers,¹ standardized procedures, public hearings, witness examinations, or the other recognizable fair trial protections. The Court observed that the quasi-judicial authorities are a vestige of Nepal's age-old authoritarian regime, when the monarchy controlled all judicial decisions. All of this exposes the system to possible abuses of authority and violates the rights of the accused to a fair trial before an independent and competent court under the Interim

¹ ILF-Nepal advocates rarely run into other lawyers at hearings before quasi-judicial authorities such as the Chief District Officer.

Constitution of 2063 and the International Convention on Civil and Political Rights. The Court reasoned that:

“handing over unlimited or vague judicial authority to an officer, who conducts absolutely administrative works, to resolve issues unrelated to the nature of his work, expertise and departmental accountability, as a substitute to the regular courts or tribunals with similar authority is inconsistent with the well-accepted principle of justice, constitutional provisions, international standards, and common sense.”

Recognizing that the judicial authority of the Chief District Officers (CDO) in particular “cannot be perceived as consistent with the recognized standards of the constitution and human rights laws,” the Court nevertheless declined to invalidate the laws granting judicial authority to the CDO or other quasi-judicial bodies, or divest them of those powers, deciding that the “legal vacuum [created] cannot be filled by judicial decision or order.” The Court ordered the respondents to convene a committee of experts to research comparative practice of other nations, recommend a course of action for Nepal, and implement changes consistent with the Court’s opinion. As an interim measure, the Court took the rather extraordinary step of issuing a writ of mandamus directing the government to “create infrastructure for administering justice practically in an effective, impartial and competent way.” Specifically, the Court ordered the appointment of a legally trained and experienced person to implement changes to the infrastructure of the quasi-judicial proceedings within one year.

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Illegal detention is common in quasi-judicial proceedings.

Government of Nepal v. Pankaj Khadka (ILF-Nepal/Kathmandu 1038)(Adv. Rajendra Prasad); Government of Nepal v. Bhakta Bahadur Bhandari (ILF-Nepal/Kathmandu 1039)(Adv. Rajendra Prasad); Government of Nepal v. Deepak Chhettri (ILF-Nepal/Kathmandu 1041)(Adv. Arti Nath Boki Shrestha); Government of Nepal v. Dipesh Lamsal (ILF-Nepal/Kathmandu 1042)(Adv. Arti Nath Boki Shrestha); Government of Nepal v. Sujan Tamang (ILF-Nepal/Kathmandu 1048)(Adv. Arti Nath Boki Shrestha); Government of Nepal v. Sunil K. (ILF-Nepal/Kathmandu 1047)(Adv. Sashi Basnet); Government of Nepal v. Pravin N. (ILF-Nepal/Kathmandu1053)(Adv. Sashi Basnet); Government of Nepal v. Prem Sarki (ILF-Nepal/Kathmandu 1054)(Adv. Sashi Basnet); Government of Nepal v. Dinesh Kadagi (ILF-Nepal/Kathmandu 1056)(Adv. Sashi Basnet); Government of Nepal v. Bikash L. (ILF-Nepal/Kathmandu 1057)(Adv. Sashi Basnet); Government of Nepal v. Jivan T. (ILF-Nepal/Kathmandu 1058)(Adv. Sashi Basnet)

In just two months, ILF-Nepal’s three newest advocates have represented 24 poor persons charged with violating the Some Public Offense Act. They have filed 16 petitions for writs of habeas corpus, resulting in the release of 11 clients from illegal detention. Four of the clients released from illegal detention were juveniles.

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The Janakpur District Court exercises its new jurisdiction to handle habeas corpus petitions.

Government of Nepal v. Akhilesh Mishra (ILF-Nepal/Janakpur166)(Adv. Ajay Shankar Jha)

Akhilesh Mishra was arrested for disorderly conduct and charged under the Some Public Offenses (SPO) Act, which falls under the jurisdiction of the Chief District Officer (CDO). Mishra was detained beyond the seven days legally permissible under SPO Act Section 4(1), and ILF-Nepal filed a petition for a writ

of habeas corpus in the district court. A charge sheet was immediately filed by the government attorney in an effort to remedy the illegal detention, and a jail/bail hearing was scheduled. Over the objections of the ILF-Nepal advocate, the CDO refused to allow any arguments, instead preparing a bail order that had been pre-filed by one of his clerks. The CDO then delayed the jail/bail hearing for two days to “punish” ILF-Nepal for its objection. Fortunately, the Janakpur District Court granted the writ of habeas corpus, and Mishra was released.

This writ was significant for two reasons. First, this was the first issuance of a writ of habeas corpus from the Janakpur District Court in an ILF-Nepal case. In April 2011, an amendment to Civil Rights Act Section 16(1) extended jurisdiction to grant writs of habeas corpus to the district courts. Although the district courts have been vested with the authority to issue the extraordinary writ for more than half a year, few judges at the district level have exercised this power. Second, the writ was granted even though the charge sheet had already been filed with the CDO. Typically, courts tolerate the late filing and refuse to grant writs of habeas corpus on the grounds that a late charge sheet somehow cures the illegal detention or renders the writ moot. The district court correctly recognized that the filing of the charge sheet did not render the continued detention legal.

Government of Nepal v. Pradeep Rai Majhi (ILF-Nepal/Janakpur159)(Adv. Ajay Shankar Jha)

When ILF-Nepal first met Majhi in September 2011, he had been detained for three years on charges under the Arms and Ammunitions Act. Majhi had no idea what had happened in his case or what his sentence was, and asked ILF-Nepal to at least find that out for him. The advocate discovered that Majhi had been convicted more than a year before and had been sentenced to only pay a fine of 100,000 Rupees because of his minimal culpability in the offense.

Punishment Act 38(2) provides that where a person is sentenced to pay a fine, and is imprisoned for failure to pay, the maximum term of imprisonment cannot exceed half of the maximum term of imprisonment authorized by the charge. The maximum term of imprisonment allowed under the Arms and Ammunition Act was five years. Majhi’s imprisonment for failure to pay the fine had far exceeded half of that. ILF-Nepal immediately filed for a writ of habeas corpus, and the Appellate Court ordered his release.

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A prosecutor refuses to disclose to the court evidence clearly exculpating ILF-Nepal’s client.

Government of Nepal v. Gyanu P. (ILF-Nepal/Kathmandu 59)(Adv. Surya Bahadur Pandey)

In December 2008, 17-year-old P. was arrested and charged with human trafficking. During the investigation, it became clear to the investigating officer that P. was innocent. He memorialized his opinion and the basis for his opinion in a police report. The report was in the investigation file, and the ILF-Nepal advocate read it while reviewing the original file at the police station early in the case. Nevertheless, the case against P. and several co-defendants (against whom there was substantial evidence) was forwarded to the government attorney’s office, who filed a charge sheet against each of the individuals investigated.

When the charge sheet was filed and the police file turned over to the defense, the exculpatory police report was not included. When the ILF-Nepal advocate demanded a copy of the exculpatory police report, he was refused at every turn. In February 2009, the advocate filed for a writ of mandamus from the Supreme Court to order the disclosure of the exculpatory police report, citing Articles 24(8) and (9) of the Interim Constitution 2063, guaranteeing the right to a fair trial and to be informed about the trial

proceedings, as well as the seminal case about disclosure of exculpatory evidence in the United States, *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the U.S. Supreme Court declared that the prosecution violates constitutional due process when it withholds exculpatory evidence material to the guilt of the accused or the punishment he or she would receive.

While the petition for writ of mandamus was pending the trial continued, but there was simply no evidence that P. had ever been involved in trafficking and she was acquitted. Nevertheless, P. spent three years fighting a case in which the investigating officer never even believed she was involved. The petition for writ of mandamus for disclosure of the exculpatory evidence in P.'s case has still not been decided by the Supreme Court of Nepal.

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ILF-Nepal succeeds in getting a juvenile client to be legally treated as a juvenile and not an adult, and issues about the ages of juveniles play into other recent ILF-Nepal cases of interest.

Government of Nepal v. Yesu B. (ILF-Nepal/Kathmandu 452)(Adv. Bimala Yadav)

This is a happy update for a client previously discussed in the Winter 2011 Case Notes.

Yesu B. was arrested on January 18, 2010, and charged with possessing and selling heroin. At the time of his arrest, B. told police he was 18 years old, but his VDC birth certificate made clear that he was 15 years, 5 months and five days old. Though B. admitted to the court that he was 15 years old, the court ordered a medical age assessment. Based on a scientifically unreliable dental age assessment concluding that B. was 16 years old, the trial court convicted him and sentenced him as an adult to six years imprisonment in an adult facility and a 20,000 Rupee fine.

On appeal, ILF-Nepal's advocate argued, among other things, that the trial court should have treated B. as a juvenile, as required by the Convention on the Rights of the Child and the precedent set by the Supreme Court of Nepal in *Government of Nepal v. Rajesh L., a/k/a Raghu*. Those authorities impose on the government the burden of proving the age of a person accused of a crime, and require that where doubt exists, the person claiming to be a juvenile should be treated as a juvenile. The Appellate Court agreed, and while B.'s conviction was upheld, the Appellate Court resentenced him as a juvenile to half of the original term of imprisonment.

Government of Nepal v. Prakash M. (ILF-Nepal/Kanchanpur 25)(Adv. Dev Raj Pant and Pooja Bhandari)

Prakash M. was arrested following a fight at a raucous wedding party and was charged with violating the Some Public Offense Act. Although ILF-Nepal's advocates obtained official documents from the local municipality and his school that conclusively proved M. was 13 years and 10 months old, the Chief District Officer refused to release him to the custody of his family and sent him to detention with adults. ILF-Nepal's advocates immediately filed for a writ of habeas corpus with the Appellate Court. Bewilderingly, the Appellate Court dismissed the petition, but the local newspaper covered the story, laying out the violations of law, and published it on the front page the next day. The client was released to his family immediately after the article was published.

Government of Nepal v. Sharmila Gurung (ILF-Nepal/Kathmandu 885)(Adv. Kopila Shrestha)

Our client, Sharmila Gurung, was working in a small teashop in Chitwan when she met Raju Gurung for the first time. He was a frequent customer, a charming older man, and he regularly flirted with 21-year-old Gurung. Their relationship grew beyond mere flirting, and Raju asked Gurung to marry her. She

agreed, and they were married in Kathmandu in March 2011. A few days later, Gurung's life was shattered when she was arrested on charges of bigamy. Though he had never mentioned having had a wife, and Gurung had never met her or heard about Raju's prior relationships, the government alleged that she had knowingly married an already-married man.

In the course of investigation, ILF-Nepal's advocate discovered that the complainant, Raju's purported first wife, had been married off to Raju at the age of 13, which is illegal under Nepali law. Moreover, anyone marrying such a young girl was subject to criminal penalties. The original "marriage," then, was illegitimate. Nor could the government furnish any evidence to show that Gurung had any idea when she married Raju that he had previously been married to another person.

The trial court agreed, and eight months after Gurung's ill-fated marriage, she was acquitted of all charges.

The ILF is pleased to announce that Ajay Shankar Jha has been appointed country director for ILF-Nepal, and welcomes three new advocates: Sashi Basnet, Rajendra Prasad, and Arti Nath Boki Shrestha.

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