



Advocate Sapana Pradhan Malla v. Prime Minister

Writ No. 3561 of the year 2063 B. S (2006)

Country: Nepal

Region: Asia

Year: 2007

Court: Supreme Court

Health Topics: Child and adolescent health, HIV/AIDS, Sexual and reproductive health, Violence

Human Rights: Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right of access to information, Right to due process/fair trial, Right to education, Right to health, Right to life, Right to privacy, Right to property, Right to work

Facts

The Forum for Women, Law and Development, the Petitioner, was an organization working with vulnerable communities such as women, children and people living with HIV/AIDS (PLHIVA). Although the right to privacy was guaranteed under Article 28 of the Interim Constitution, 2007, there were no legal provisions safeguarding the privacy of women, children, or PLHIVA (the affected groups) during court proceedings.

The Petitioner filed a writ petition in the Supreme Court of Nepal contending that a law laying down guidelines for protecting the right to privacy during judicial proceedings was needed. The Petitioner contended that, because of social stigma and discrimination against the affected groups, the lack of privacy in court proceedings prevented them from accessing the justice system. The Petitioner sought gender and socially sensitive procedural formalities in the judicial process from the time of registration of a case to after its disposal. In particular, it sought for the introductory information of affected groups, such as their personal identity, to be kept confidential during judicial proceedings.

Decision and Reasoning

The Court considered the prejudice that women, children, and PLHIVA might suffer if their privacy was not protected during judicial proceedings. It emphasised the importance of the right to privacy, not only as a right itself protected by the constitution and international treaties, but also as an essential component of protecting the right to life, the right to freedom, the right to health, women's rights, children's rights, the right to property, the right to information, the right to justice and judicial remedy, the right to equality, and the right to freedom from torture or inhuman behavior for the affected groups.

The Court concluded that the disclosure of personal information interfered with the right to privacy of the affected groups. It held that disclosure of sensitive and personal information could affect the right of access to justice and judicial remedy. The affected groups, if not guaranteed their privacy by the State, would be apprehensive about approaching the judiciary in cases where they were the victims of crimes. In the case of juveniles in conflict with the law, any disclosure of identity or case proceedings would adversely affect the future of the child.

The Court considered that the present legal protections of the right to privacy were inadequate for addressing the concerns of the affected groups. While there were procedures for in-camera proceedings, restrictions on media publication of data, and gender-sensitive police procedures in certain categories of crime, there were insufficient guidelines for carrying out these policies, no protections for introductory information, and implementation was inconsistent.

The Court accepted that the victim's right to privacy needed to be balanced with a defendant's right to fair hearing. However, in the Court's opinion, a "public hearing" did not necessarily mean that the judicial proceeding must be open to all. The overriding consideration was whether or not a party would be treated fairly. The Court could therefore prevent disclosure of information in certain special circumstances if it would allow the defendant's right to a fair hearing to be balanced with the other party's right to privacy and right to judicial remedy.

The Court noted that there was a possibility of conflict between the right to privacy and the right to information, both of which were guaranteed under the Constitution. However, compulsory access to personal

information did not fall within the scope of the right to information, as the right to information was intended to ensure access to information of public importance. Additionally, as affected groups might only feel comfortable expressing themselves if their privacy was protected, the right to privacy did not necessarily lead to the obstruction of information. Further, the right to information and expression were not absolute, and were subject to necessary and desirable limits so as also to ensure the rights to access to justice and judicial remedy.

The Court held that it had the power to issue an order protecting information relating to the identity of the affected groups. The Court ordered the Executive and the Legislature to make laws that protect the introductory information of the affected groups. It held that this protection must be provided both before and after the judicial process and that any breach of these guidelines or laws must be punished. As an interim measure, until a comprehensive law in this regard had been drafted by the Legislature, the Court issued Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases 2064 (2007).

Decision Excerpts

“If any person has filed a lawsuit asking for expenses or his/her share of property or compensation for medical treatment for having been infected with HIV/AIDS, information regarding such a situation, too, cannot be allowed for unrestricted dissemination.” [Writ No. 3561 of the year 2063 B. S (2006) Para 28]

“It is the belief of this Bench that if in the eyes of the incapacitated sections of the society our services lose attraction or do not carry conviction it shall have to be treated as an indication of the gradual end of the social utility of our services.” [Writ No. 3561 of the year 2063 B. S (2006) Para 30]

“It is necessary to, by ensuring an individual’s right to judicial remedy, grant him/her effective and easy access to justice and to guarantee privacy of the personal identity of the parties involved in the judicial process through the protection of the right to privacy.” [Writ No. 3561 of the year 2063 B. S (2006) Para 30]

“As victim women and children exposed to risk and HIV/AIDS infected persons can express themselves or explore judicial remedies for their judicial needs only if the privacy of their personal introductory information or other information is guaranteed, it is also the duty of the State and society to provide a guarantee for this.” [Writ No. 3561 of the year 2063 B. S (2006) Para 46]