

ATTACKS ON JUSTICE – NEPAL

Highlights

Judges face considerable pressure from the executive and the military and have received threats for making unfavourable decisions. There are also credible accounts of both assassination attempts and actual murder of judges in areas under Maoist control. The ordinary court system has been destabilized by the creation of special courts beyond its supervision, including military tribunals and Maoist “peoples courts”. The competence and integrity of the judiciary is questionable, particularly in subordinate courts, and there are high levels of corruption. The legal profession is unable to function independently and lawyers face persecution and physical danger. Due process and fair trial rights are severely undermined by anti-terrorist legislation.

BACKGROUND

Nepal, a constitutional monarchy, continues to experience a Maoist rebel insurgency that has been going on since 1996, although ceasefires were reached in 2001 and 2003. In **November 2001**, following the collapse of peace talks, a nationwide emergency was declared and the Army was called up to confront the insurgency. **King Gyanendra**, who assumed the throne in **June 2001**, promulgated in **November 2001** an ordinance (*TADO*) giving the Government expanded powers of arrest and detention, which was subsequently adopted by Parliament as the *Terrorism and Disruptive Activities Act (TADA)*.

The King seized power in **October 2002** after the elected Parliament was dissolved by **Prime Minister Sher Bahadur Deuba**, who was then unable to successfully conduct new parliamentary elections due to the insurgency. The King unconstitutionally dismissed in **October 2002** Prime Minister Sher Bahadur Deuba, replacing him with **Lokendra Bahadur Chand**. Since then he has appointed three prime ministers, the most recent being again Sher Bahadur Deuba, who was re-appointed to the position in **mid-2004** in the wake of widespread popular protests calling for the return of an elected government. However, **Parliament** was not re-established. In **June 2004** the King instructed Prime Minister Deuba to form an all-party government, to begin peace talks with Maoist insurgents and to schedule elections within a year. Apart from the **Nepali Congress**, the largest party, the other four parties represented in Parliament agreed to join the government following further palace concessions.

According to its section 1(3), the *TADA* was to be applied for two years from its date of commencement. Thus, after the end of *TADA*, the King has been promulgating new *TADOs* every six months. On **1 February 2005**, **King Gyanendra** declared a state of emergency, dismissed the government and assumed direct rule. The King has reportedly suspended many of the provisions of the *Constitution* that protect fundamental human rights and freedoms, including the right to privacy and freedoms of expression, the press, assembly and association. It is also reported that *habeas corpus* has been suspended, although under both the Nepali Constitution and

international law this vital safeguard for all detainees can never be suspended even during a state of emergency (see ICJ press release at http://www.icj.org/news.php?id_article=3633&lang=en).

Popular support for a **new constitution** is widespread, largely as a consequence of increasing public disillusionment with the existing power structure, and it is considered that such a constitution would significantly reduce the King's powers, conferring greater responsibility for executive action and law-making upon the **constituent assembly**.

Overall, this period has been characterized by a serious deterioration in the rule of law, accompanied by increased violations of human rights. In particular, there have been widespread instances of illegal, arbitrary and incommunicado detention by the **Joint Security Forces** led by the **Royal Nepalese Army** (See ICJ: http://www.icj.org/news.php?id_article=3191&lang=en, http://www.icj.org/news.php?id_article=3110&lang=en) and numerous cases of extra-judicial killings, torture and enforced disappearances. This is despite the establishment by the government of a "human rights cell" within the armed forces in **July 2002** in order to monitor and prevent human rights abuses (see ICJ report from a **2003** fact-finding mission to Nepal: http://www.icj.org/news.php?id_article=2951&lang=en, http://www.icj.org/news.php?id_article=2950&lang=en, http://www.icj.org/news.php?id_article=2952&lang=en).

There is general concern among the international community regarding the impact of political instability in Nepal and the violence associated with the Maoist insurgency. At the **United Nations Human Rights Commission's 60th session** in **March 2004**, several international human rights organizations, including the ICJ, recommended the creation of an office of the **High Commissioner for Human Rights** (HCHR) in Nepal. (http://www.icj.org/news.php?id_article=3190&lang=en; <http://hrw.org/english/docs/2005/03/10/nepal10297.htm>).

On **26 March 2004**, the **Nepalese government** released a 25-point "Commitment" document in which it pledged to protect its people from abuses by the army and the police. The **ICJ** has urged the government to finalize the memorandum of understanding with the United Nations (http://www.icj.org/news.php?id_article=3320&lang=en), which will see human rights advisers sent to assist Nepal's national human rights monitoring body to record human rights violations and implement measures to stop abuses. An **Office of the High Commissioner for Human Rights** (HCHR) was set up in Nepal in **April 2005** "to monitor the situation of human rights and observance of international humanitarian law with a view to preventative or remedial action by national authorities" (<http://nepal.ohchr.org/en/index.html>).

JUDICIARY

Judicial reform

In **May 2004**, the **Supreme Court** completed its first five-year judiciary **reform plan** and was in the process of submitting its proposal to the government to obtain the

necessary funding for its implementation. The plan is intended to create trust in the legal system and strengthen the institutional capacity of the judiciary. It aims to improve the delivery of justice in Nepal by ensuring that courts have the necessary infrastructure, physical resources and qualified personnel to undertake their duties efficiently. It also includes proposals for judges to have increased autonomy in running individual courts and empowers them to deal with financial administration, human resources and procedural matters. Other organizations involved in the promotion of judicial reform in Nepal include the **Nepal Bar Association**, **Kathmandu School of Law** and the **Advocacy Forum**. Input is also received from international schemes such as the **United Nations Development Programme (UNDP)**.

Anti-corruption legislation

The *Corruption Elimination Act 1960* was replaced by new legislation in **June 2002**, which provides for the prosecution of public officials who are found to have engaged in corrupt practices. This statute was followed by the introduction of additional significant pieces of legislation in **2002** and **2003** dealing with public awareness and prosecution of corruption (see http://www.tinepal.org/contents/countryreport_nepal.pdf). However, the scope of the act is limited to those public authorities that were in office, or came into office, after the time of the introduction of the legislation.

Independence of the judiciary

The judiciary in Nepal is neither impartial nor independent. Judges are reliant on the executive branch of government to maintain their positions and are reluctant to make decisions that have unfavourable implications for the government for fear of adverse consequences. Judges face considerable pressure from the executive and the military and have received threats for making unfavourable decisions in cases concerning arbitrary detention. There are also credible accounts of both assassination attempts and actual murder of judges in areas under Maoist control.

Although the **Supreme Court** is the court of last resort, under Article 122 of the Constitution, the **King** retains the right on the recommendation of the government, to grant pardon and to suspend, commute or remit any sentence levied by any court. There are instances where the government has failed to implement Supreme Court rulings, or has been slow to respond to their dictates.

The Human Rights Commission

There are serious concerns regarding the functioning and practical independence of Nepal's domestic **Human Rights Commission (NHRC)**, a statutory body established in accordance with the *United Nations Paris Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights* (<http://www.unhchr.ch/html/menu6/2/fs19.htm#annex>) to protect and promote the human rights of the Nepalese people. The government should take steps to increase the competence of the NHRC and to enhance the public's perception of its efficiency, including the establishment of an international monitoring mechanism under the auspices of the **United Nations Office of the High Commissioner on Human Rights** to assist with the monitoring process (see ICJ: http://www.icj.org/news.php?id_article=2951&lang=en,

http://www.icj.org/news.php3?id_article=2950&lang=en,
http://www.icj.org/news.php3?id_article=2952&lang=en).

Corruption

Reportedly, there are **high levels of corruption** in the judiciary; with 42 per cent of court users surveyed in **2002** stating that they had experienced corrupt behaviour. In particular, endemic corruption is considered to exist within Nepal's **district courts**, posing a significant threat to independence. Judges have retorted that this culture is perpetuated by members of the legal profession and their own unethical conduct, which includes the acceptance of bribes and other financial incentives (see http://www.transparency.org/pressreleases_archive/2002/2002.12.17.south_asia_survey.html). While government ministers and officials, including judges, are required to declare their assets by law, this is not effectively monitored yet.

However, the integrity of judges sitting in superior courts has been boosted by measures taken by the **Chief Justice, Keshav Prasad Upadhyay**, and the level of corruption has been significantly reduced (see ICJ "January 2003 Mission Executive Summary, Report and Annexes": http://www.icj.org/news.php3?id_article=2951&lang=en, http://www.icj.org/news.php3?id_article=2950&lang=en, http://www.icj.org/news.php3?id_article=2952&lang=en)

Cases

There are instances where the government has failed to implement Supreme Court rulings, or has been slow to respond to their dictates. The Supreme Court ruled in **2002** that the government should establish juvenile reform agencies and juvenile reform centres to address the problems of youth delinquency in Nepal, and to transfer named offenders to these new institutions. This decision was ignored by the government until **August 2003**, when significant pressure from international and domestic human rights organizations prompted the government to establish a technical committee for the purpose of strengthening juvenile justice laws and institutions.

LEGAL PROFESSION

Lawyers suffer harassment by the government. During **2003** and **2004** there have been a large number of cases concerning government arrest and detention of lawyers without charge. Lawyers defending persons suspected of being terrorists under the *Terrorist and Disruptive Activities (Control and Punishment) Act 2002 (TADA)*, are themselves arrested and accused of terrorist activity. Lawyers who have been involved in left-wing political activity, or who are suspected by the authorities of having Maoist sympathies of some kind, have also been arrested. Reportedly lawyers are prime targets for enforced involuntary "disappearances" and extra-judicial killings once they have been arrested and detained by police and military authorities.

Lawyers are also rendered unable to perform their professional duties in areas under Maoist control. The **International Bar Association (IBA)** states (<http://www.ibanet.org/humanrights/Nepal.cfm>) that it has received credible reports of

Maoists threatening lawyers and of both assassination attempts and the murder of lawyers.

Lawyer-client confidentiality is not respected and the practice of seizing client files is utilized by both ends of the political spectrum. Lawyers are often interrogated concerning their clients' affairs by security forces. In addition, lawyers representing detainees are frequently denied access to information regarding the charges faced by their clients and may not consult with their clients in privacy so as to provide effective advice. This is contrary to the protection of confidentiality contained in Articles 8 and 22 of the *UN Basic Principles on the Role of Lawyers* (http://www.unhcr.ch/html/menu3/b/h_comp44.htm).

Corruption

A large proportion of **Nepalese Bar Association** members are committed and capable lawyers who act in accordance with internationally recognized professional standards. However, a substantial number of lawyers are involved in corrupt activity, including over-charging and the bribery of court officials and judges (see ICJ: http://www.icj.org/news.php3?id_article=2951&lang=en).

Cases

In **October 2003**, **Shyam Kumar Shrestha**, a lawyer and member of the Nepalese Bar Association, was arrested by security forces at his home in Bagbazar, Kathmandu. The security forces stated that they were taking Mr Shrestha for questioning. They then took him away without giving any further reasons for his arrest. His arrest and enforced disappearance violated his right to liberty and security. Calls from the Nepal Bar Association to the Home Ministry and the human rights investigation bodies within the army and the police have not been answered. To date, the reasons for Mr. Shrestha's abduction remain unknown. (See ICJ http://www.icj.org/news.php3?id_article=3115&lang=en). He was released on **5 October 2003** after 12 days of detention.

In **November 2003**, lawyer **Gopi Krishna Thapaliya** was arrested by security forces at his home in Koteshwar, Kathmandu. The security officers, who were in plain clothes, refused to let the lawyer's family know where they were taking him. The apparent reason for Mr Thapaliya's arrest and enforced and disappearance is his membership in the *Rastriya Janamorcha Nepal* (People's Front of Nepal) political party. (See ICJ http://www.icj.org/news.php3?id_article=3169&lang=en). He was released on **14 November 2003**.

On **6 February 2004**, reports of the arbitrary arrest and detention of three lawyers, **Basudev Sigdel**, **Gopi Bahadur Bhandari** and **Krishna Silwal** by security forces were received by the International Commission of Jurists. On **19 February 2004**, the ICJ issued an appeal for the release of two Nepalese lawyers, **Laxman Prasar Ayril** and **Jeetaman Basnet**, who had been arbitrarily arrested indefinitely without formal charge by the Nepalese army, denied legal counsel and "disappeared" by the security forces (http://www.icj.org/news.php3?id_article=3248&lang=en). Basudev Sigdel, Gopi Bahadur Bhandari and Krishna Silwal were released on **10 March 2004**, while Laxman Prasar Ayril and Jeetaman Basnet, were released on **21 January 2004** and **18 October 2004** respectively.

On **21 April 2004**, between **300 and 500 lawyers** were attacked by police and arrested at a peaceful demonstration organized by the **Nepal Bar Association**. The purpose of the demonstration was to protest against the government's decision to prohibit all demonstrations and to denounce what the lawyers saw as ongoing repression of human rights defenders and persons exercising their right to peaceful assembly. The detained lawyers were not allowed to contact their families or seek legal representation before being released (see ICJ http://www.icj.org/news.php3?id_article=3309&lang=en). These arrests followed the arrest and subsequent release of some **400 lawyers** on **9 April 2004** during a similar demonstration. The government's conduct is contrary to Article 23 of the *United Nations Basic Principles on the Role of Lawyers* (http://www.unhchr.ch/html/menu3/b/h_comp44.htm), which recognizes the right of lawyers to express their opinion, particularly on legal matters, and to partake in gatherings and demonstrations.

In the **first six months of 2004**, Nepal's **Advocacy Forum**, a local NGO, documented **14 cases** where lawyers had been taken into custody. Despite the efforts of human rights organizations and the Nepal Bar Association, four of those lawyers remain "disappeared" and five *habeas corpus* applications remain before the Supreme Court as a consequence of police obstruction and delay.

The former President of the Nepal Bar Association, along with hundreds of political and student leaders, was detained by the Nepali security forces. **Mr Sindhu Nath Pyakurel** was arrested at his office in Kathmandu on **1 February 2005**, and was held at Armed Police Force headquarters in Halchowk (see ICJ press release at http://www.icj.org/news.php3?id_article=3633&lang=en). On **7 February, 2005**, the **Supreme Court**, citing lack of time, was reported to have refused to accept a *habeas corpus* petition to release Mr Pyakurel. He was released on **14 February 2005**.

A number of lawyers were reportedly arrested and released afterwards: **lawyer Ujjwal Shukla** from the Patan Appellate Court Unit in the Lalitpur District was arrested on **22 September 2003** and released on **5 October 2003**; **lawyer Sujendra Maharjan** from the Lalitpur District Court Unit in Kathmandu was arrested on **15 November 2003** and released on **2 December 2004**; **lawyers Balkrishna Devkota and Dhananjaya Khanal** from the Patan Appellate Court Unit in Kathmandu were arrested on **21 February 2004** and released on **26 February 2004**; **lawyer Lok Krishna Bhattarai** from the Patan Appellate Court Unit in Kathmandu was arrested on **18 February 2004** and released on **28 February 2004**.

All of the lawyers were detained under preventive detention orders either issued under the *Public Security Act (PSA)* or a *TADO*. Some of them were reported to have been kept illegally in detention without any formal issuance of an order. None of the lawyers has been charged for any offence yet. The detention seems to be used as a means of threatening and deterring lawyers from performing their professional duties independently.

ACCESS TO JUSTICE

Human rights violations are rampant and the Nepalese people are poorly served by the administration of justice. The Army detains people secretly and without legal authority. Torture by the army and police is systematic. Impunity for human rights offenders is nearly absolute. Most criminal suspects lack access to justice and do not receive a fair trial (http://www.icj.org/news.php3?id_article=2951&lang=en).

Legal reforms

Terrorist and Disruptive Activities (Control and Punishment) Act

The *Terrorist and Disruptive Activities (Control and Punishment) Act (TADA)* of **April 2002** was introduced to replace a 2001 ordinance of the same name, instituted in response to the state of emergency declared on **26 November 2001**, and remains in force. The aim of the *TADA* is to control and punish acts of terrorism as well as other disruptive behaviour. The *TADA* affords wide powers to security officers, including the power to declare an area as “terrorist affected”, or to declare individuals or organizations as “terrorist” and to place a person under house arrest to prevent any terrorist or disruptive act. In addition, section 5 of the *TADA* allows the government or any security officer to arrest anyone “sufficiently and reasonably believed to be involved in terrorist or disruptive activities”; gives wide powers of search and seizure; and authorizes the use of necessary force to carry out these investigations or to prevent a terrorist act. It is an offence to intentionally interfere with a search being carried out by the security forces under the *TADA*.

In addition, Section 9 of the *TADA* provides that the security forces can impose preventive detention of up to 90 days where there are “reasonable grounds” to detain a person who might commit terrorist or disruptive acts. Alternatively, Section 12 provides that people can be held in detention for the purpose of investigation for 60 days. Any person charged under the *TADA* will usually be detained in judicial custody pending a hearing, although this will depend on the seriousness of the charges. Section 15 of the *TADA* provides that this preventative detention is allowed as an exception to *habeas corpus* under Article 14(7) the Constitution, provided that it can be shown that there is an immediate threat to the law and order of Nepal.

Further, section 17(5) of the *TADA* permits an accused person to be detained for the purpose of further investigation for up to 60 days by order of a judge. The power can be exercised “notwithstanding anything contained in the prevailing law” and has been interpreted as overriding the right to bring an application for *habeas corpus* under the Constitution on the basis that the continued detention is authorized by the *TADA* and is judicially determined. In addition to the *TADA*, the *Public Security Regulations of 2001* give police wide powers to detain individuals for up to 90 days. This period may be extended for an additional 90 days by the **Ministry of the Interior**, and then for a further 12 months from the original date of detention if approved by an advisory board established under the legislation.

The quality of evidence required to secure a detention order under the *TADA* is poor and there is reliance upon hearsay and circumstantial factors. Evidence is not subject to public or even, in some instances, judicial scrutiny and reasons for detention are not issued. The remedy of *habeas corpus* is not effective to address widespread instances of arbitrary detention, as on numerous occasions police and military authorities have disregarded judicial orders for release, refused to accept service of applications and summonses issued by the **Supreme Court** or simply re-arrested detainees

immediately following their release from custody (see ICJ, http://www.icj.org/news.php3?id_article=2951&lang=en). Reportedly, security forces often falsify records to indicate that detainees have been released and detained again under a fresh order when they have in fact remained in custody for the entire period. The fresh order is not subject to *habeas corpus* under the Constitution (see <http://www.ibanet.org/humanrights/Nepal.cfm>). In addition, detention and interrogation powers under the *TADA* are illegally used by the government to hold people for questioning who are not suspected of terrorism, but are considered to be potential sources of intelligence. These people are detained incommunicado and are not given reasons for their detention (see <http://www.ibanet.org/humanrights/Nepal.cfm>).

Impunity

The Nepal **Advocacy Forum** has monitored the experience of detainees over the past three years and has found that approximately 60 per cent are tortured while being interrogated for an ordinary crime. The forum estimates that 100 per cent of persons detained under the *TADA* (see above) are the victims of torture while in army custody. Although Nepal's *Torture Compensation Act 1996* provides for the courts to recommend disciplinary action against the perpetrators of torture, judges are reluctant to make such findings and penalties are rarely severe enough to deter future breaches by the police and members of the armed forces.

Terrorist and Disruptive Activities (Control and Punishment) Act

Section 13 of the *TADA* provides for the establishment of a "**Follow-Up Committee**" to investigate complaints concerning investigations conducted under the Act and to make recommendations to the government where any grievance against the security forces is found to be proven. However, no chair was appointed to the Follow-Up Committee as at **September 2002**, and the committee's powers had not been exercised (see <http://www.ibanet.org/humanrights/Nepal.cfm>).

Military Courts

Article 86 of the Constitution excludes the **Military Court** from the supervisory jurisdiction of the Supreme Court. This is of particular concern given the powers afforded to security forces under the current regime. There is a need for impartial and independent investigation of offences allegedly committed by members of the armed forces, and hearings must be conducted in a framework that ensures accountability and publicity. The establishment of special courts or military courts is contrary to Article 5 of the *UN Basic Principles on the Independence of Judges* (http://www.unhchr.ch/html/menu3/b/h_comp50.htm).

Fair trial

Cases brought under *TADA* (see Legal reforms above) are heard in a court constituted or designated by the government and are not subject to any statute of limitations. The procedures used to conduct these hearings are set out in the *Special Court Act* of **August 2002**. The special procedure includes the power of a judge to order detention under Section 17(5) of the *TADA*. An appeal from a decision of this court may be brought to the Supreme Court. The regime violates Article 5 of the *UN Basic Principles on the Independence of Judges* in that it deprives people of their right to be tried by ordinary courts or tribunals using established legal procedures.

Article 14(5) of the Constitution provides that an arrested person has the right to consult and be represented by a legal practitioner of his or her choice. However, in practice it is rare for a detainee to obtain access to a lawyer within the first 24 hours of his or her incarceration. Almost half of all detainees go unrepresented by counsel, even when charged with serious criminal offences, and there is, in practice, no right to a lawyer while on remand or under interrogation (see ICJ, http://www.icj.org/news.php3?id_article=2951&lang=en).

Maoist people's courts

The Maoists have established “**people's courts**” in those districts where they have seized control. These courts are presided over by the local **Maoist militia commander** and do not employ legal professionals. The procedures adopted are informal and do not adhere to international fair trial standards, nor do they comply with Article 5 of the *UN Basic Principles on the Independence of Judges* (http://www.unhcr.ch/html/menu3/b/h_comp50.htm). Citizens in areas under Maoist control are forced to abandon the constitutionally entrenched court system, and lawyers have been threatened with reprisals should they attend District Court hearings. Members of the Nepalese legal profession report that some lawyers may advise clients to go to a people's court, as they are more likely to obtain redress there than through the constitutional court system. This has led to a significant decrease in the number of cases brought before the District Courts, and a number have virtually ceased to function. An example is the **Bhojpur district court**, which has seen its caseload reduce from 250 to 48 over the past two years (see <http://www.ibanet.org/humanrights/Nepal.cfm>).

Legal aid

The **Central Legal Aid Committee**, a statutory body formed under the provisions of the *Legal Aid Act 1997*, is the entity responsible for providing free legal aid in Nepal. However, funds provided to the Central Legal Aid Committee by the Government have been reduced by more than 33 per cent in the **2004–5** fiscal year. The Government has stated that this reduction in funding is a consequence of the need for heavy military expenditure, caused by ongoing armed conflict in Nepal. A feature of the Nepal judiciary's reform plan (see above under Judiciary) is the provision of free legal support to the needy by court-appointed counsel.

LEGAL REFORMS DURING THE PERIOD

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| April 2002: | The <i>Terrorist and Disruptive Activities (Control and Punishment) Act (TADA)</i> . |
| June 2002: | The <i>Corruption Prevention Act</i> . |
| August 2002: | The <i>Special Court Act</i> . |
| August 2002: | <i>Amendment to the Commission for the Investigation of Abuse of Authority (CIAA) Act</i> . |
| August 2002: | The <i>Impeachment Act</i> . |