



# **INTERNATIONAL COMMISSION OF JURISTS**

Commission internationale de juristes - Comisión Internacional de Juristas

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## **Nepal - ICJ Commissioner, Param Kumaraswamy, speaks at Nepal Bar Association Triennial Conference**

**ICJ Commissioner, Param Kumaraswamy, today made a presentation at the 10th triennial Conference of the Nepal Bar Association in Kathmandu, Nepal.**

The International Commission of Jurists is honoured to have this opportunity to address the 10th triennial Conference of the Nepal Bar Association, particularly in this auspicious year of the golden jubilee. Some of you will recall that I addressed your 6th National Conference in 1994, just four years after democracy and the adoption of Nepal's new Constitution. During my visit to your country in 1994 I was inspired by the optimistic outlook people had for the future of democracy and constitutionalism in Nepal. I am sad to return now, at a time when democratic institutions and principles are so severely threatened not only by ten years of armed conflict but also by decisions of H.M King Gyanendra and his government to run roughshod over basic principles of human rights, the rule of law and constitutionalism, in the three and a half years since Parliament was dissolved in October 2002.

Developments in the past year have brought Nepal's lawyers centre stage in the struggle for human rights, rule of law and democracy. Since I arrived I have heard impressive stories of the bravery and professionalism of Nepal's lawyers. You have challenged ordinances that violate the Constitution and Nepal's international obligations. You have defended the rights of arbitrarily detained political leaders and cadres, students and peace activists through habeas corpus writ petitions. You have demanded an independent judiciary. You are playing an essential role - you must continue to do this with professionalism and in line with the rule of law.

The theme of this year's triennial, "Human rights, rule of law, comprehensive democracy and conflict resolution" encapsulates the elements necessary for peace in Nepal. Resolution of the struggle over governance and democracy in Nepal is now one precondition for any sustainable resolution of the conflict. This can not take place without restoring respect for human rights and the rule of law. Therefore every lawyer in Nepal - as defenders of the rule of law - has an important role to play in resolving both the search for democracy and the armed conflict.

The International Commission of Jurists is a worldwide network of judges, lawyers, prosecutors and human rights defenders. It was founded in Berlin in 1952 and is dedicated to international law and rule of law principles that advance human rights. Through a series of highly influential international gatherings in the 1950s and 1960s - in Athens, New Delhi, Lagos, Rio De Janeiro, Bangkok and Colombo - the ICJ helped to elaborate the rule of law for the modern world. Nepal's 1990 Constitution and subsequent ratification of all core human rights treaties reflected at the time the country's commitment to the rule of law. Nepal stands out in having adopted the 1990 Treaties Act, which provides that international treaty obligations take precedence over domestic law and apply directly. As the human rights achievements of the last century come under increasing threat in Nepal and elsewhere, the ICJ's role as an advocate for the rule of law is again underscored.

The ICJ has a vision of the world in which, through the rule of law, we achieve a just, democratic and peaceful society. A vision based on the rule of law, not as a static set of rules but as a dynamic concept that protects against arbitrary government, expands freedoms and embraces justice. A rule of law under which everyone is entitled to claim their civil, cultural, economic, political and social rights, without discrimination - regardless of social distinctions such as caste, whether they are born girl or boy, with property or without, regardless of what language they speak, religion they practice or political opinions they hold.

Our vision is one in which everyone in society is equal before the law and is protected from human rights violations by the law and in practice; in which those in power are held accountable and brought to justice if they violate human rights; where victims have access to remedies and justice and those who come before the courts receive a fair trial and never face the death penalty.

I am sure you all have the same vision for Nepal.

This vision requires judges, lawyers and prosecutors to be truly independent, enlightened and courageous and free to carry out their professional duties. It demands that international law, especially human rights and humanitarian law, be a powerful tool for protection and advocacy and should be implemented through effective national and international procedures.

The ICJ believes it should stand beside the judiciary and the legal community in times of crisis. The ICJ was present in Sri Lanka both before and after the armed conflict erupted in 1983. I, myself, representing the ICJ visited Thailand shortly after the upheaval and mass demonstrations in May 1992 that led to democracy and a new constitution.

In 2006 the ICJ will increase its focus on the judiciary and legal community in Nepal. We will work with the Nepal Bar Association to train lawyers in the districts and Kathmandu on international human rights law; to monitor the judiciary; to document how the courts deal with individual cases; to observe trials; to speak out when ordinances or their application violate Nepal's international obligations; and to assist in creating an environment in which lawyers can safely carry out their work. The ICJ looks forward to collaborating more closely with the NBA in these areas this year and in the future.

The armed conflict in Nepal and so many social and economic grievances, will be very difficult to resolve unless the country has a participatory and inclusive democracy guided by the rule of law, human rights and unambiguous principles of constitutionalism.

In practice constitutionalism means that the Constitution and laws will always be interpreted in a way that favours the rule of law and underlying democratic values, in line with Nepal's international human rights obligations.

Constitutionalism favours predictability and clarity. It rejects laws that are vague and can be applied arbitrarily by the executive.

With constitutionalism the powers of the executive, judiciary and legislature are kept separate, with mutual respect for each other's authority and role as a check and balance on the other two branches.

With constitutionalism comes the need for an open society, in which there is free legal and political debate.

I am saddened that Nepal currently lacks these fundamental elements of constitutionalism and therefore of democracy.

In my speech to you in 1994 I quoted Abraham Lincoln's famous phrase that there must be 'Government of the people by the people for the people'. I did not expect to be here 12 years later recalling the same principle. And yet, I must again recall that the essence of constitutionalism is accountability. When the Government remains at all times accountable to the law and to the people, then democracy is firmly in place. When there is no accountability, the government is unrestrained and will seek more and more unchecked power. Abuse and misuse of power, nepotism, corruption and the like rapidly erodes society. It is significant to note that in 2005 Nepal has fallen from 90th to 117th on Transparency International's corruption index - now falling behind both India and Sri Lanka.

In 1994 I warned that even the most noble constitution can be defaced and defiled in the wrong hands - ultimately it is not so much what is written that counts but what is written in the hearts and minds of the custodians entrusted with that sacred document. As lawyers, I know that you are doing everything in your power to preserve, defend and protect your Constitution.

But lawyers alone should not bear full responsibility for ensuring accountability. There should be sufficient checks and balances - normally the legislature and the judiciary. In Nepal one pillar of democracy and therefore one major check and balance is missing - as the legislature was dissolved in October 2002 and H.M King Gyanendra decided to assume direct control of the executive on 1 February 2005.

This situation has placed immense pressure on the judiciary. A strong, independent and impartial judiciary is absolutely critical to protect human rights, as an essential check and balance in the short term and in the long term to help re-establish democracy in Nepal. The judiciary has become the only source of objective reasoned decisions that uphold the rule of law. The judiciary

must be both supported and monitored to ensure it does not become politicised or polarised in political turmoil in Nepal. Experience has shown that when this has happened in other countries it has taken generations to undo the damage.

I will speak in greater detail on the independence of the judiciary in tomorrow's session. For now I would like to emphasize two points. Firstly, the importance of respect for the judiciary by other branches of the state. Judicial rulings, including in habeas corpus cases, must be respected and acted upon - if they are not then a government cannot claim to be upholding the constitution and rule of law. A government cannot pick and choose which court rulings it will respect. That would be the opposite of constitutionalism. Secondly, it is imperative an independent commission or council is free to recommend or select new judges based solely on their competence to act as judges.

The media and civil society also form an essential check and balance in a democratic system. They help to hold a government accountable. Press freedom is an essential element of any functioning democracy. The ICJ is dismayed to see the Government has not only passed a media ordinance that violates international human rights obligations but that it is reportedly considering further stringent controls on the media in the form of a new media council. Freedom of expression is not absolute. But the Media Ordinance does not satisfy the strict three-part test under international law for any limitation on free speech. At the same time I must applaud the brave journalists who are continuing to uphold freedom of expression and the right to information by reporting the news despite the restrictions. The ICJ is following closely the constitutional challenge of the media ordinance in the Supreme Court. Freedom of expression is a right and is always vital, but perhaps especially now in Nepal, at a time of crisis, to allow critical reflection about how to address the conflict and underlying political, constitutional, economic and social issues.

A vibrant and free civil society is also essential to democracy. Like the media ordinance the NGO Code of Conduct promulgated by the Government infringes upon civil society's ability to carry out its legitimate activities. I encourage the legal community in their efforts to challenge this Code in the courts.

This brings me to the role of the legal community both in the crisis and in a future Nepal. It is your duty to protect and support institutions, such as the judiciary, the media and civil society, whenever their independence or functioning is challenged. It is also your duty to challenge through legal means ordinances that threaten constitutionalism and rule of law.

At all times, but especially at times of crisis, I encourage the legal community to provide legal aid to the least fortunate. While I have only been in your country this time for two days, I have already heard of excellent legal aid clinics established in ten districts of Nepal, in addition to 65 bar units providing legal aid. It should also be noted that the Legal Aid Act of 1997 has provided the Nepal Bar Association a special role in the delivery of state funded legal aid. Such an achievement should be applauded and supported by all. I have also been told of legal awareness activities carried out by the NBA. I am very encouraged to hear that both the NBA's legal

awareness programme and legal aid clinics are particularly focused on supporting the most disadvantaged including women and Dalits.

In a future democratic Nepal lawyers will be called on to assist in re-drafting old laws and drafting new laws that better protect the fundamental freedoms of all Nepalis.

To successfully fulfil their many duties lawyers must have adequate support. Investments should be made in continuing legal education of the legal community. The legal profession should be afforded the respect it deserves if young students are to continue to enter the profession. Most importantly lawyers need an environment in which they can safely carry out their work without fear. I am deeply concerned to hear that lawyers, particularly in the districts face threats, intimidation, beatings and arbitrary detention as a result of their work. Lawyers working on habeas corpus cases and cases under the Public Security Act and the Terrorism and Disruptive Activities Ordinance face serious threats from the security forces and the government officials. I call on the Government to immediately halt any targeting of lawyers and to order the security forces to desist from any form of harassment and intimidation of lawyers.

The ICJ has received many accounts of the difficult situation faced by lawyers in Nepal today. I will recall just two of them now:

In a case in June last year security personnel in civilian clothing entered a court and filmed lawyers who were pleading a case related to the arrest of six individuals following a demonstration. Two of the six were lawyers. The result of this intimidation was fear so great that six of the lawyers pleading the case did not attend the next hearing five days later.

More recently in February this year two lawyers from Nawalparashi district had their homes repeatedly searched and one was threatened with arrest by the police. The result of this intimidation was the movement of the lawyers out of their district to a safe place for a number of days.

Lawyers in Nepal not only face risk from the Government and its security forces. The Communist Party of Nepal (Maoist) regularly force lawyers, under threat of violence, to withdraw cases from the state justice system and instead file them in the CPN (Maoist) parallel system. This not only places lawyers in an impossible situation but greatly disturbs the functioning of the judiciary. I call on the CPN (Maoist) to immediately halt this harassment of lawyers.

It would be remiss of me as defender of human rights and an upholder of the rule of law to finish this address without mentioning my concern about misuse of the justice system in cases under the Terrorist and Disruptive Activities Ordinance. Not only are individuals held, sometimes for years, without access to the court but we are now seeing that in cases where the Government has been pressured to bring individuals before the courts international fair trial standards are being abandoned. TADO cases are being held in closed court that I have heard exclude entry of even the United Nations Office of the High Commissioner for Human Rights. Simultaneously, the defence is denied access to evidence submitted to the courts and the burden of proof regarding

possession of weapons, ammunition and explosives is shifted onto the accused. These changes to the usual trial procedures unnecessarily prejudice the right of the accused to a proper defence, in violation of Nepal's international legal obligations. These trials should be open to public scrutiny, the defence provided with access to evidence presented in the court and the burden of proof remain with the prosecution, reflecting that the accused is presumed innocent until proven otherwise.

I have said that accountability is at the heart of constitutionalism. Accountability is also at the heart of achieving justice and human rights. Those who are responsible for carrying out, ordering or acquiescing in human rights violations must always be brought to justice. The ICJ is concerned about the inadequate investigations into human rights violations by security forces and inadequate punishments for those found responsible. Last year, the RNA did carry out its first ever prosecution of soldiers for a major human rights violation for the extrajudicial execution of 19 unarmed persons in Doramba on 17 August 2003. However, following a closed-door court martial, one major was dismissed from service and imprisoned for two years and another junior commissioned officer was demoted one rank. Both sentences are inappropriately light and perpetuate impunity rather than end it. I am equally disturbed to hear that in the case of the interrogation and death of a young girl, Maina Sunuwar, after being in RNA custody for just three hours, those responsible have been found guilty only of not following standard procedures in reporting the death and disposal of her body. The court martial sentenced them to just 6 months imprisonment. Security forces accused of human rights violations should be tried in civilian courts, a principle enshrined in international law.

Let me close by congratulating the lawyers of Nepal on their fine work in upholding human rights principles and the rule of law and calling on the international community to take additional steps to support and protect the legal community through the Nepal Bar Association. I thank the Nepal Bar Association for their kind hospitality during my stay in Nepal and look forward to returning to your country soon.