

Statement by the Nepal International Media Partnership

Analysis of Constitutional Proposals on Freedom of Expression, Media Freedom and the Right to Information

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prepared by the Centre for Law and Democracy

The government of Nepal has recently released a new version of the draft Constitution,¹ which is now being considered by Parliament. This Joint Statement by the Nepal International Media Partnership (NIMP) provides an analysis of the draft Constitution from the perspective of international guarantees of freedom of expression. It is intended to support the government and Parliament of Nepal, as well as other local stakeholders, with a view to ensuring that the final version of the Constitution is as fully in line with international standards as possible.

The international community has been supporting the promotion of freedom of expression in Nepal for more than ten years, including through eight International Missions to Nepal, the most recent of which took place from 19 to 23 April 2015. The NIMP is founded on a shared long-term objective of promoting freedom of expression in cooperation with local stakeholders, including public sector actors and civil society.

This Joint Statement focuses on three of the constitutional proposals on human rights, namely those relating to freedom of expression, media freedom and the right to information. It should be read in conjunction with the March 2012 International Fact Finding and Advocacy Media Mission to Nepal: 23-27 February 2012: Analysis of Constitutional Proposals on Freedom of Expression, Media Freedom and the Right to Information,² which it largely echoes, given that the constitutional proposals in these areas have hardly changed since that time.

The comments in this Joint Statement are based on the *International Covenant on Civil and Political Rights* (ICCPR)³ a legally binding international treaty which Nepal ratified in May 1991. The ICCPR is the main international human rights treaty guaranteeing the rights to freedom of expression, in particular in its Article 19. It is abundantly clear from authoritative interpretation of Article 19 that it embraces freedom of expression broadly, including media freedom and the right to access information held by public authorities (the right to information).

¹ An unofficial English version is available at: <http://constitution.org.np/constituents.php>.

² Available at: http://www.law-democracy.org/wp-content/uploads/2012/03/Analysis.Const-proposals.final_.English.pdf.

³ UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976.

It is also clear that the right to freedom of expression is not absolute; Article 19(3) of the ICCPR lays down a strict three-part test for assessing the legitimacy of any restrictions on freedom of expression. This test only recognises as legitimate restrictions which a) are provided by law; b) protect one of the interests listed in Article 19(3), namely the rights or reputations of others, national security, public order (*ordre public*), public health or public morals; and c) are necessary to protect that interest.

I. Guarantee of Freedom of Expression

Article 22 of the draft Constitution guarantees freedom of expression stating, simply: “Every citizen shall have the following freedoms: (a) Freedom of opinion and expression”. While this is useful, it lacks some of the positive attributes of international guarantees inasmuch as it only applies to citizens whereas international law and better comparative constitutional practice provides protection to everyone.

More important is the fact that Article 22 would allow for far greater restrictions on freedom of expression than is permitted under international law. The most important area of difference between international law and the draft Constitution in this regard is the grounds for restricting freedom of expression. Instead of simply protecting national security, the draft Constitution protects “nationality, sovereignty, independence and integrity”. It is not clear what exactly is meant by “nationality” but it is hard to see how a mere expression could harm nationality, or what sort of expression might legitimately be restricted to protect this ‘interest’. The term “integrity” is also problematical and international law protects as legitimate advocacy in favour of separation as long as it does not incite to violence as part of this. International law also does not permit restrictions on freedom of expression which protect “the harmonious relations subsisting among the federal units”, which would cover important political speech.

Article 20(2) of the ICCPR requires States to ban advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (“hate speech”). Article 22 of the draft Constitution goes far beyond this by prohibiting any statement which would “jeopardize the harmonious relations ... among peoples of various castes, tribes, religions or communities”. This fails to respect international standards in this area and could easily be abused for political reasons. It would, for example, prohibit legitimate public debate about the complex and often difficult issue of racism.

Three of the grounds for restrictions on freedom of expression in Article 22 – namely “any act of defamation, contempt of court or incitement to an offence” – do not protect legitimate interests but, instead, types of laws. The interest protected by defamation laws, for example, is the reputation of others. This is problematical because it suggests that these laws are themselves legitimate. Instead of referring to types of laws, the Constitution should refer to relevant interests, such as reputation, the independence and authority of the judiciary and public order.

There are also important differences between the standard of harm required to justify restrictions under international law and those found in Article 22. International law requires restrictions to be necessary, which is interpreted as imposing a high standard including that restrictions are clearly and narrowly defined, that they serve a pressing social need, that they

are the least intrusive measure which will be effective in protecting the legitimate interest, that they are not overbroad and that they are proportionate. In stark contrast, Article 22 uses the much more permissive terms of ‘may undermine’ or ‘may jeopardize’.

II. Guarantee of Media Freedom

Article 24 of the draft Constitution is welcome inasmuch as it explicitly rules out censorship of all types of media, as well as the closure, cancellation of registration or interruption of media outlets, although it does envisage the regulation of the media. However, it also suffers from imposing unduly broad restrictions on freedom. The criticisms above regarding Article 22 essentially apply in the same way to Article 24, which includes a very similar provision on restrictions.

III. The Right to Information

The guarantees for the right to information in Article 32 of the draft Constitution are unduly narrow. First, under international law this right, like the general right to freedom of expression, is enjoyed by everyone, not just citizens. Second, under international law the right applies to all information, not just information deemed to be of interest to the citizen or the general public. One might reasonably assume that if someone is seeking information, that information is of concern to him or her. More importantly, this limitation might be interpreted in an unduly restrictive manner by the authorities, for example to refuse access to information which they do not deem to be of concern to a citizen or the public.

The approach to restrictions on the right to information in Article 32 is very problematical inasmuch as the right does not extend to “any matter of which secrecy is to be maintained by law”. This effectively recognises limitation on the right, as long as it is found in a law, and effectively fails to place any limits or conditions on laws which restrict the right to information.

Recommendations:

To bring the provisions on freedom of expression, freedom of the media and the right to information in the draft Constitution into line with international law, we suggest the following:

- The rights to freedom of expression and information should apply to everyone, not just citizens.
- The terms “nationality”, “integrity” and “harmonious relations subsisting among federal units” should be removed as grounds justifying restrictions on freedom of expression.
- The references to “harmonious relations subsisting among ... peoples of various castes, tribes, religions or communities” should be replaced by the idea of incitement to violence, discrimination or hatred against these groups.
- The references to types of laws – namely defamation, contempt of court and incitement to an offence – should be replaced with references to types of interests, such as ‘reputation’, the ‘independence and authority of the judiciary’ and ‘public order’.

- The weak standards in Articles 22 and 24, such as “may undermine” or “may jeopardize”, should be replaced by stronger tests, such as “would be likely to undermine”.
- The right to information should cover all information, not just information deemed to be of concern to a citizen or the public.
- A test for restrictions on the right to information should be introduced into article 32, which should be modelled along the same lines as the test for restrictions on the general guarantee of freedom of expression.

Possible Constitutional Provisions

Based on these recommendations and other comments in this Analysis, the following is a possible form for the constitutional proposals on the rights to freedom of expression, media freedom, and the right to information:

22. Right to Freedom

(2) Everyone shall have the following freedoms:

a. Freedom of opinion and expression, which include the right to seek, receive and impart information and ideas through any media;

Provided that,

1. Nothing in sub-clause (a) shall be deemed to prevent the making of laws which impose reasonable restrictions on expressive activities which are likely to undermine the sovereignty or independence of Nepal, which incite to hatred, discrimination or violence against people based on their caste, tribe, religion or community, or which are likely to harm the rights or reputations of others, the independence or authority of the judiciary, public order or public morality.

24. Right to Mass Communication

(1) No publication, broadcasting or printing of any news item, editorial, feature, article or other written or audio-visual material through any means whatsoever including via electronic means, broadcasting or printing shall be subject to prior censorship.

(2) No radio, television, on-line or other form of digital or electronic equipment, press or other means of communicating, publishing, broadcasting or printing any material shall be closed nor shall registration thereof be canceled due to the content it has disseminated.

(3) No means of communication including via the press, electronic means, broadcasting or telephone shall be interrupted except in accordance with law.

Provided that nothing this Article shall be deemed to prevent the making of laws to regulate radio, television, online or any other type of digital or electronic equipment, press or any other means of communication which otherwise meet the conditions of Article 22.

32. Right to Information:

Everyone shall have the right to demand and receive any information from a public body.

Provided that this shall not be deemed to prevent the making of laws which impose reasonable restrictions on the disclosure of information where this is likely to undermine the sovereignty or independence of Nepal, to incite to hatred, discrimination or violence against

people based on their caste, tribe, religion or community, or to harm others' rights or reputations, the independence or authority of the judiciary, public order or public morality.

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