

International Fact Finding and Advocacy Mission to Nepal: 23-27 February 2012

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

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INTRODUCTION

The International Fact Finding and Advocacy Media Mission to Nepal (also known as the International Media Mission) is comprised of fifteen international organisations, including global media associations, freedom of expression groups, media development organisations and UNESCO. The International Mission visited Nepal from 23 to 27 February 2012 to assess the media freedom situation in the country, at the invitation of the Federation of Nepali Journalists (FNJ).¹ That was the seventh visit of the International Mission to Nepal, the previous trips being in July 2005, March 2006, September 2006, January 2008, April 2008 and February 2009.

The International Mission originally came together to advocate for respect for freedom of expression and of the media in Nepal in response to the repressive measures put in place during the period of the Royal Coup, and to express solidarity with local media and media and freedom of expression groups during this period. With the restoration of democracy, and the opening up of opportunities for positive reform, the Mission shifted its focus to include providing support for reform efforts. Since its inauguration, the Mission, and its members, have undertaken a wide range of activities to promote greater respect for freedom of expression and of the media, and the right to information.

Since the last International Mission, in February 2009, the Constituent Assembly has moved forward with the preparation of new constitutional proposals for Nepal, based on the 2006 Comprehensive Peace Agreement, and the process and developments that have flowed from that. Ten thematic committees were established to develop constitutional proposals on different issues, which are to be developed into a full draft Constitution by the Constitutional Committee. The Committee on Fundamental Rights and Directive Principles was responsible for drafting provisions on human rights, and it has submitted draft proposals on this to the Constituent Assembly. At this point, agreement in principle has been reached on most of the text of the new constitution, including in relation to human rights. A Dispute Resolution Sub-committee of the Constitutional Committee has been set up with a specific mandate to deal with a number of outstanding issues. Although the Sub-committee's mandate is limited to the unresolved issues referred to it, discussion on other issues has not formally been brought to a close, and amendments may still be introduced either by the Constitutional Committee or, ultimately, by the Constituent Assembly itself, which will vote separately on each constitutional provision as the final step of approving them.

Three of the new constitutional proposals on human rights are of particular interest and concern to the International Mission, namely those relating to freedom of expression, protection of the media and the right to information. During its February visit, the International Mission had the opportunity to discuss these constitutional proposals with several key actors, including the Prime Minister, the Chairperson and other Members of the Constituent Assembly, and the leaders of the main political party. We raised concerns with these actors that the new constitutional proposals did not conform to international standards and that, in fact, they were weaker than the guarantees currently found in the 2007 Interim Constitution, as well as those in the former 1990 Constitution. An English translation of these proposals, along with their commentaries, is attached in the Annex.²

Based on our concerns, and the foundational importance of freedom of expression, of the media and of information in a democracy, these local actors agreed to reconsider the draft proposals regarding these

1 On this visit, the International Mission was represented by AMARC, ARTICLE 19, Centre for Law and Democracy (CLD), Committee to Protect Journalists (CPJ), International Federation of Journalists (IFJ), International News Safety Institute (INSI), International Media Support (IMS), International Press Institute (IPI), Internews, Open Society Foundations (OSF), Reporters sans Frontières (RSF), South Asia Free Media Association (SAFMA), South Asia Media Solidarity Network (SAMSAN) and UNESCO.

2 The International Mission has relied on an unofficial English translation of the constitutional proposals on human rights prepared by the Nepal Constitution Foundation, available at: http://www.ncf.org.np/ca-archives/fundamental_rights.htm.

rights. They also agreed, as necessary, to engage in further discussion about these proposals through the appropriate mechanisms, i.e. the Constitutional Committee and Constituent Assembly, with a view to bringing them into line with international standards.

For its part, and to support this process, the International Mission agreed to provide these actors, and other interested stakeholders, with this Analysis of the constitutional proposals regarding the rights to freedom of expression, of the media and of information. This Analysis describes key international standards relating to these rights and the ways in which the constitutional proposals fail to meet these standards. It also provides concrete suggestions on how the proposals could be adapted to bring them more closely into line with international standards.

OUTLINE OF INTERNATIONAL STANDARDS

The main international human rights treaty guaranteeing the rights to freedom of expression, of the media and of information is the *International Covenant on Civil and Political Rights* (ICCPR).³ The ICCPR, which Nepal ratified in May 1991, is a binding treaty creating formal legal obligations which States Parties are bound to respect. Article 19 guarantees the rights to freedom of expression and opinion in the following terms:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

These guarantees have been the subject of extensive interpretation by authoritative international bodies. It is beyond the scope of this Analysis to describe this body of interpretation in detail, but a few key points are of particular relevance. First, under international law, the right to freedom of opinion is absolute. While one may not always voice one's opinions, the right to hold them may not be abridged. Second, although the term 'media' is mentioned only once in Article 19, it is beyond question that the right to freedom of expression applies to all means by which information and ideas may be disseminated, which clearly includes the mass media.

Third, Article 19 refers explicitly to a number of important characteristics of the right to freedom of expression. It protects information and ideas of all kinds, including those which the majority may find unpleasant or even offensive. Thus, the UN Human Rights Committee, which is tasked with interpreting and applying the ICCPR, has stated: "The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive ...".⁴ It protects not only the rights of the speaker (the right to impart), but

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

⁴ In September 2011, the UN Human Rights Committee adopted General Comment No. 34, providing a comprehensive and authoritative interpretation of Article 19 of the ICCPR. See General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 11.

also those of the listener and investigator (the rights to seek and receive). This is extremely important and underpins key elements of the right, such as the right to receive a diversity of information and ideas (media pluralism) and the right to access information held by public bodies (right to information). The Human Rights Committee has specifically recognised the latter, stating: “Article 19, paragraph 2 embraces a right of access to information held by public bodies.”⁵ Pursuant to the ICCPR, States are not only required not to interfere unduly with the right to freedom of expression, but are also required to take positive steps to ensure its realisation.⁶ An example of this is the (positive) obligation on States to adopt and implement legislation to give effect to the right to information.

Fourth, the right to freedom of expression is not absolute. International law recognises that, in very limited circumstances, the need to protect overriding public or private interests may justify restrictions on freedom of expression. Article 19(3) lays down a strict test for assessing the legitimacy of such restrictions, to ensure that they are kept within appropriate bounds. The Human Rights Committee has described this test as follows:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.⁷

THE PROPOSED CONSTITUTIONAL GUARANTEES

Article 2(2)(a) of the constitutional proposals on fundamental rights guarantees every citizen the right to freedom of opinion and expression. It goes on to state that this does not prevent the adoption of laws which impose “reasonable restrictions” on these rights to prevent acts which undermine various interests. Those acts are described as follows:

- acts which “may undermine the nationality, sovereignty, independence and integrity of Nepal”;
- acts which may undermine “the harmonious relations subsisting among the federal units”;
- acts which “may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities”;
- acts of “defamation, contempt of court or incitement to an offence”; and
- any act which “may be contrary to decent public behaviour or morality”.

Article 4 of the constitutional proposals provides for various special guarantees for the mass media. Article 4(1) prohibits prior censorship of a wide range of media, including the print and broadcast media. It allows for this to be overridden on very much the same basis as the primary guarantees of freedom of expression found in Article 2(2)(a). Instead of ‘defamation’, it refers to the narrower idea of harm to the “social prestige of an individual through publication or transmission of false (fake) materials”. It also includes a number of additional acts which might justify censorship, such as treason, acts that “may be contrary to public health”, as well as censorship “to discourage untouchability and racial and gender discrimination”.

⁵ *Ibid.*, para. 18.

⁶ Article 19 in conjunction with Article 2(2).

⁷ General Comment No. 34, note 4, para. 22.

Articles 4(2) and (3) prohibit the “closure, seizure or cancellation of registration” of, respectively, broadcasters and print media outlets, on the basis of the material they have disseminated. Article 4(4) prohibits any ‘obstruction’ of the media, except in accordance with the law.

Article 12 of the constitutional proposals guarantees the right of citizens to “demand or obtain” information of concern to themselves or to the public generally. This does not, however, require anyone to provide information “on any matter about which confidentiality is to be maintained according to law”.

These guarantees are very similar to those found, respectively, at Articles 12(3)(a), 15 and 27 of the 2007 Interim Constitution which, in turn, are even more similar to those found at Articles 12(2)(a), 13 and 16 of the 1990 Constitution. A key difference between the previous guarantees and the constitutional proposals is the addition to the latter of additional grounds for restricting the right to freedom of expression and imposing censorship. The table below describes the key differences between these guarantees (with the 2007 Constitution being compared to the 1990 version and the proposals being compared to the 2007 version for ease of reference).

Issue	1990	2007	Proposals
Restrictions on FOE	<ul style="list-style-type: none"> - undermine sovereignty and integrity; - jeopardize harmonious relations among various castes, tribes or communities; - any act of sedition, defamation, contempt of court or incitement to an offence; - any act which may be contrary to decent public behaviour or morality 	<ul style="list-style-type: none"> - religion added to list for harmonious relations - sedition removed from the list 	<ul style="list-style-type: none"> - nationality and independence added - relations among federal units added
Media protection	<ul style="list-style-type: none"> - no news item may be censored - no closure or seizure of the print media for content (news) - no cancellation of registration of newspapers for content (news) 	<ul style="list-style-type: none"> - prohibitions extended to broadcast media - prohibition on obstruction of print, broadcast and telephone added 	<ul style="list-style-type: none"> - reference to ‘prior censorship’ (as opposed to just ‘censorship’) - rule on culpability under the law for breach of these rules added
Grounds for censorship	<ul style="list-style-type: none"> - same as above 	<ul style="list-style-type: none"> - same restrictions as in 1990 version (i.e. the changes for FOE were not introduced here) 	<ul style="list-style-type: none"> - nationality and relations among federal units added - ‘defamation’ changed to harm to social prestige due to false materials - sedition replaced by treason - public health and discouraging untouchability and racial and gender discrimination added
RTI	<ul style="list-style-type: none"> - citizens have right to information on matters of public importance, subject to matters about which a law calls for secrecy 	<ul style="list-style-type: none"> - right extended to cover information of importance to citizens themselves 	<ul style="list-style-type: none"> - same as in 2007 version

ASSESSMENT OF CONSTITUTIONAL PROPOSALS AGAINST INTERNATIONAL LAW

Positive Rules

The guarantee of freedom of expression and opinion in the constitutional proposals, as in the previous constitutional guarantees, is more limited than under international law in several ways. First, the former applies only to citizens, as opposed to everyone. This limit is unfortunate in any country, but is perhaps particularly

so in the context of Nepal, which hosts a large number of non-citizens, some of whom are stateless and many of whom effectively reside in the country. Second, the constitutional proposals do not provide absolute protection for opinions.

Third, the constitutional proposals do not elaborate on key characteristics of the right which are made explicit in Article 19, such as that the right includes the freedom to seek, receive and impart information and ideas, that it applies to expressions of all kinds and regardless of frontiers, and that it applies to all means of dissemination. At the same time, many constitutional guarantees do not include this level of detail. Also, any negative impact of this is at least partially mitigated by the fact that the constitutional proposals include explicit guarantees of media freedom and of the right to information.

The specific protections for the media in the constitutional proposals go beyond the explicit language of Article 19 of the ICCPR; to this extent, they are welcome. It is assumed that the term “prior censorship” should be given its plain language meaning, in other words, to connote actions by the authorities which prevent statements from being disseminated in advance.

The term ‘obstruction’ in Article 4(4) of the constitutional proposals, at least in its English translation, is perhaps unfortunate inasmuch as it is reminiscent of something beyond a restriction. On the other hand, the rule only permits ‘obstructions’ that are provided by law, while the commentary to this provision refers to obstructing “in an arbitrary or monopolized way”, suggesting the scope is limited.

The constitutional proposals on the right to information 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 concern 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, however, 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. There is no need to introduce this sort of interpretive risk into the constitutional guarantee, when it is uncontroversial to have it simply apply to all information.

In another regard, the constitutional proposals might be said to be overly broad. International law and the vast majority of the approximately 90 national right to information laws that have been adopted by countries around the world only apply to information held by public authorities. On their face, the constitutional proposals appear to guarantee a right to access any information of concern, regardless of who holds it. This could prove to be problematical, for example if a citizen were to rely on it to claim a right to access information not otherwise rendered confidential by law and held by a private body. It is true that the commentary to this provision refers to “information prevalent basically in the state mechanism”, but this limitation is not found in the plain language of the provision.

Restrictions

Far more important than these positive guarantee issues is the fact that the constitutional proposals allow for far greater restrictions on these rights than is permitted under international law. For the most part, this is also a problem with the 1990 and 2007 Constitutions, although, as noted above, new grounds for restricting rights have been added in the constitutional proposals.

The test for restrictions on freedom of expression under international law is a three-part test – restrictions must be a) provided by law; b) protect one of the interests listed in Article 19(3); and c) be necessary for the protection of that interest. The restrictions envisaged by the constitutional proposals meet the first part of this test, since only restrictions set out in law are permitted.

The most important area of difference between international law and the constitutional proposals is in relation to the grounds for restrictions. Under international law, restrictions on freedom of expression are allowed where this is necessary to protect national security. The constitutional proposals essentially replace this with references to “nationality, sovereignty, independence and integrity”. It is not clear in this context what the meaning of the reference to ‘nationality’ is, 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’. It goes without saying that debates about nationality and criticism of existing rules on nationality fall within the scope of protected speech, as long as they do not incite others to violence (or hatred or discrimination).

The terms ‘sovereignty’ and ‘independence’ could be considered to be covered by the notion of national security. This is less appropriate for the term ‘integrity’. Under international law, it is legitimate to advocate in favour of separation, as long as one does not incite to violence as part of this. The European Court of Human Rights, for example, has frequently found Turkey to be in breach of its obligation to respect freedom of expression for convictions of Kurds for “disseminating separatist propaganda”. The following is a typical quotation from the Court in such cases:

The Court notes in addition that although certain particularly acerbic passages in the book paint an extremely negative picture of the population of Turkish origin and give the narrative a hostile tone, they do not constitute an incitement to violence, armed resistance or an uprising; in the Court’s view this is a factor which it is essential to take into consideration.⁸

The quotation demonstrates that States must tolerate a wide range of speech falling short of actual incitement to crime or violence.⁹ Furthermore, the experience of other countries suggests that banning such speech fuels, rather than controls, separatist sentiment. Put differently, it is better to allow those who support separatism to voice their views, and to contest them in an open, democratic manner, than to criminalise such views, and thereby drive their proponents underground. The history of Nepal itself demonstrates this.

International law also does not permit restrictions on freedom of expression which aim to promote “the harmonious relations subsisting among the federal units”. Tension between different parts of federal States is inevitable and is simply part of the normal interaction between them. Indeed, it is hardly possible to imagine a federal system of government which was able to exist in a constant state of harmonious relations. Such speech is core political speech, which benefits from the highest degree of protection under international law, given its centrality to democracy. As with separatist tendencies, the best way to resolve tensions between federal units is to discuss them openly; attempting to ban them will almost inevitably lead to unfortunate consequences.

International law requires States to ban ‘hate speech’ in the following terms:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. (Article 20(2) of the ICCPR)

The aims of this article are primarily to protect the equality of disadvantaged groups and to some extent also public order. International courts have made it clear that there is very little scope for prohibiting speech beyond the parameters of this provision. The UN Human Rights Committee has accepted that it

⁸ *Arslan v. Turkey*, 8 July 1999, Application No. 23462/94, para. 48.

⁹ The decisions of the European Court of Human Rights are not binding on Nepal but they provide an authoritative interpretation of the scope of the right to freedom of expression, including as guaranteed by Article 19 of the ICCPR, which is binding on Nepal.

may be legitimate in some cases to prohibit speech which does “not meet the strict legal criteria of incitement [where it] can be shown to constitute part of a pattern of incitement against a given racial, religious or national group”.¹⁰ Here, we see the insistence of the Committee on a requirement of incitement.

It is, therefore, clear that, under international law, statements which merely ‘jeopardize harmonious relations’ cannot be prohibited, as long as they do not constitute incitement. One problem with laws which go beyond the scope of incitement to hatred is that they may be used to prohibit legitimate public debate about the complex and often difficult issue of racism. Thus, frank discussion about the problem of caste or discrimination against a particular community may often strain harmonious relations, and yet it is important to have such discussions. Another problem with such rules is their potential to be abused for political reasons. Once again, Turkey provides a good example, with many cases of Kurds being convicted under hate speech laws for distributing nationalist materials. When these cases go before the European Court of Human Rights, Turkey is inevitably found to have breached its obligation to respect freedom of expression.¹¹

Three of the grounds for restrictions on freedom of expression under the Interim Constitution – namely acts of defamation, contempt of court and incitement to an offence – do not actually protect legitimate interests but, instead, types of laws. The interest protected by defamation laws, for example, is the reputation of others, whereas laws on contempt of court and incitement to an offence are designed to protect public order and, to some extent, the rights of others. The danger in listing types of laws is that it suggests that such laws are themselves legitimate, whereas they should in fact be subjected to a full analysis of whether or not they meet the constitutional standard for restrictions on freedom of expression. Thus, a statement might breach the defamation laws of Nepal and yet be protected under international law, for example if those laws are overly broad. Since that statement would, despite this, constitute an act of defamation, it would appear to lack protection under the Interim Constitution. It is true that Nepalese courts have found interpretive ways of getting around this problem, but it would be preferable to have greater clarity in the primary text of the constitution.

‘Public morality’ is explicitly listed as a ground for restricting freedom of expression under international law. However, the UN Human Rights Committee has made it quite clear that this term must be interpreted narrowly. It has, for example, stated:

[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination. [references omitted]¹²

The term ‘decent public behaviour’ is a much wider concept than public morals, at least as defined by the UN Human Rights Committee. It is unlikely that restrictions on freedom of expression which aimed to protect interests beyond the scope of public morals would be accepted under international law.

These concerns with the grounds for restrictions apply, for the most part, equally to the issue of prior censorship (although there is a more fundamental concern here; see below). Two differences are that ‘independence’ is not listed as a justification for prior censorship and, instead of ‘defamation’, the phrase used is “harm to social prestige due to false materials”. Inasmuch as the latter describes an interest, rather

¹⁰ *Faurisson v. France*, 8 November 1986, Communication No. 550/1993, individual opinion of Evatt and Kretzmer, para. 4.

¹¹ See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93.

¹² General Comment No. 34, note 4, para. 32.

than a type of law, it is preferable and is in fact similar to the notion of 'reputation', which is a recognised ground for restrictions under international law.

At the same time, the list of grounds justifying prior censorship is broader than the list for general restrictions on freedom of expression, inasmuch as it includes 'treason' and protecting public health and discouraging untouchability and racial and gender discrimination. Treason has historically been roundly abused as a ground for limiting freedom of expression. It is a term which is almost inevitably susceptible of unduly broad interpretation and which, to the extent that it is legitimate, is already captured by the notion of sovereignty. Public health, and the various forms of discrimination, on the other hand, do fall within the scope of the grounds for restrictions on freedom of expression found under international law.

The approach to restrictions on the right to information is quite problematical. According to the constitutional proposals, this right does not extend to "any matter about which confidentiality is to be maintained according to law". This effectively recognises any ground for limiting the right, as long as it is found in a law. The commentary to the constitutional proposals does list a number of possible grounds for restricting the right to information, including "national security, personal privacy, business, monetary secrecy, crime investigation, immature information in the process of action and other information of national importance that has to be kept confidential in accordance with law". However, there is nothing in the main constitutional proposals to rule out restrictions based on grounds outside of this closed list and, in any case, it is by terms very broad to begin with.

Under international law, the same grounds apply to restrictions on the right to information as apply to freedom of expression generally. It is not clear why the constitutional proposals do not place limits or conditions on the types of laws that may restrict the right to information, in the same way as they impose such limits on laws restricting freedom of expression.

Standards of Harm

There are also important differences between the standard of harm required to justify restrictions under international law and under the constitutional proposals. International law requires restrictions to be necessary, which is interpreted as imposing a high standard. The necessity requirement involves various elements, 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.

The tests for restrictions on both freedom of expression generally and on prior censorship, on the other hand, are conditioned by the need for the law containing them "to impose reasonable restrictions". Although the terms used are different, this phrase is used in many jurisdictions and has often been interpreted as incorporating the same types of requirements as 'necessity' does under international law.

More problematical are the standards used to describe the grounds for restricting these rights, which use much more permissive terms such as 'may undermine', 'may jeopardize', 'may harm', 'may be contrary to' or 'discourage'. In practice, Nepalese courts have often largely ignored these low standards, but their presence in the constitutional guarantees is unfortunate.

The issue of prior censorship deserves special mention. It is now well established in democracies that there should be no prior censorship of the media. International law regards *any* form of prior censorship with the greatest suspicion. The *American Convention on Human Rights (ACHR)* rules out all forms of prior restraint except to protect children.¹³ In *Observer and Guardian v. the United Kingdom*, the European Court

¹³ Adopted 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978, Article 13(2).

of Human Rights stated:

[T]he dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.¹⁴

For its part, the UN Human Rights Committee has stated, with specific reference to the media:

A free, *uncensored* and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. ... This implies a free press and other media able to comment on public issues *without censorship* or restraint and to inform public opinion.¹⁵ [emphasis added]

It is, therefore, a matter of some concern that the constitutional proposals not only envisage prior censorship of the media, but that they actually posit a less rigorous test for justifying this than would apply to ‘ordinary’ restrictions on freedom of expression.

Once again, the standards applicable to the right to information are very problematic. Here, as with grounds for restrictions, the constitutional proposals essentially fail to establish any standards to constrain laws which seek to limit this fundamental right. In essence, they appear to allow for any restriction on the right to information that is provided for by law. The language does allow some scope for interpretation, and the phrase “about which confidentiality is to be maintained” could be understood to mean that confidentiality is supposed to be maintained, although no point of reference for why this might be is given. Under international law, as noted above, the same test of necessity to protect a limited list of interests applies to restrictions on the right to information.

RECOMMENDATIONS

To address the concerns noted above, we make the following recommendations:

- The rights to freedom of expression and information should apply to everyone, not just citizens.
- The right to opinion should be absolute.
- The right to information should cover all information, not just information deemed to be of concern.
- Consideration should be given to making it clear in the main body of the constitutional guarantee that the right to information applies to *all information* held by *public bodies*, not to *certain information* held by *all bodies*.
- The terms ‘nationality’, ‘integrity’, ‘harmonious relations subsiding among federal units’ and ‘decent public behaviour’ should be removed as grounds justifying restrictions on freedom of expression.
- Consideration should be given to adding a reference to ‘incitement’ and to various negative outcomes – such as discrimination, hostility and violence – to the rules on protecting harmonious relations between different groups.
- Consideration should be given to replacing references to types of laws – namely defamation, contempt of court and incitement to an offence – with references to types of interests, namely ‘reputation’, the ‘independence and authority of the judiciary’ and ‘public order’.
- The references in the constitutional proposals to weak standards such as ‘may undermine’ should be

¹⁴ 26 November 1991, Application No. 13585/88, para. 60.

¹⁵ General Comment No. 34, note 4, para. 13.

replaced by stronger references, such as 'would be likely to undermine'.

- Consideration should be given to banning all prior censorship of the media.
- A set of limitations on restrictions on the right to information should be introduced into the constitutional proposals, which should be modelled along the same lines as the test for restrictions on the general guarantee of freedom of expression.

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:

2. Right to Freedom (Independence):

(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,

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

4. Rights Regarding Mass Communications:

- 1) There shall be no prior censorship of publication, transmission (broadcasting) or information flow or printing of any news item, editorial, article, feature or any other reading, audio, audiovisual materials by any means including electronic publication, transmission (broadcasting) and the press.
- 2) There shall be no closure, seizure or cancellation of registration of radio, television, online or any other types of digital or electronic, print or other media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audiovisual or electronic equipment.
- 3) There shall be no closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing any news item, article, editorial, feature, information or any other materials. Such act will be culpable in accordance with law and the victim of such act shall have a right to receive proper compensation.
- 4) Except in accordance with law, no press, electronic transmission and telephone and other means of communications shall be restricted.

12. Right to Information:

Every citizen shall have the right to demand and obtain information from public bodies.

Provided that this shall not be deemed to prevent the making of laws to impose reasonable restrictions on the disclosure of information where this is likely to undermine the sovereignty and 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.

ANNEX

Relevant Provisions from the Constitutional Proposals

S.N.	Proposed Provision for the Constitution	Rationale Behind Making the Provision
	<p>Every citizen shall have the following freedoms:</p> <p>a. Freedom of opinion and expression,</p> <p>Provided that,</p> <p>1. Nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and integrity of Nepal, or the harmonious relations subsisting among the federal units,¹ or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or Communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behaviour or morality.</p> <p>Rights Regarding Mass Communications:</p> <p>1. There shall be no prior censorship of publication, transmission broadcasting) or information flow or printing of any news item, editorial, article, feature or any other reading, audio, audiovisual materials by any means including electronic publication, transmission (broadcasting) and the press.</p>	<p>Right to freedom is a fundamental right guaranteed to citizens. Different freedoms of the individuals are provided to them prior to the existence of the State. It is imperative to prevent the State from impose injustice over minority through majority and protect the freedoms of the citizens also in order to maintain individual and social progress and prosperity. Independence is also a spring of rights. Therefore, following freedoms have been constitutionally guaranteed as the fundamental rights with the belief that independence is not absolute and unlimited and is subject to accepting proper sanction on the basis of just, proper and rightful laws, and that independence cannot be claimed against such sanctions, and in order to provide high quality;legal and political protection to different freedoms of the Nepalese citizens. The freedom of opinion and expression, which is the mother of freedoms, has been a freedom guaranteed to every Nepalese citizen. This freedom includes the right of every citizen of any age group, gender, class and region to receive information for creating thoughts, to create thoughts individually or collectively in writing, orally, through gesture and his or her wishes, to express, convey and flow his or her opinions, and to show dissension against the actions of the State. This provision has been made in order to constitutionally ascertain to every citizen the freedom of opinion and expression as subject to the prohibitory sentence of this section.</p> <p>It is made clear that unlimited freedom is not possible and desirable and the exercise of fundamental rights and freedom is possible only within the periphery of nation and constitution and national interest is always overriding to the individual liberty. Moreover, the policy-wise, theoretical and academic advocacy and comments on the issues related with judicial sector shall not be regarded as a contempt of court. However, this provision has been made in order to form an Act for the State to impose reasonable restrictions on the freedom of opinion and expression through just, fair and proper Act in order to discourage any act which may undermine the nationality, sovereignty, independence and integrity of Nepal, or the harmonious relations subsisting among the federal units, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behaviour or morality as well as to discourage racial discrimination.</p> <p>Since an open and transparent society, conscious and creative citizens, a healthy, fair and moral social system and an accountable government and disciplined, decent, professional and dynamic mass media are the pillars of democracy, this provision has been made in order to ascertain that there shall be no provision imposing full restriction in any form on the publication, broadcasting or information flow or printing of any news item, editorial, article, feature or any other reading, audiovisual materials through the means of all kinds of publication and broadcasting in order to make the activities of the government transparent and accountable, and to protect the people's right to get factual information, participate in decision-making process, add dynamism to the society, create fair and creative public opinion for the institutional development and consolidation of democracy.</p>

¹ The term Federal units used in this Part shall refer to states/provinces and local governments to be determined by the Constituent Assembly.

	<p>Provided that, nothing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine nationality, sovereignty or integrity or which may jeopardize the harmonious relations subsisting among federal units or the harmonious relations subsisting among the peoples of different castes, tribes or communities, an act of treason, any act that may harm the social prestige of an individual through publication or transmission of false (fake) materials, or that leads to a contempt of court, or to discourage crimes or an act that may be contrary to public health, decent behavior, or morality and to discourage untouchability and racial and gender discrimination.</p>	<p>Provided that, national interest and public interest are always overriding the citizens' rights, and national interest, public decency and morality should be protected and crimes should be controlled, and therefore, this provision has been made in order to enable the State to make preventive laws to impose reasonable restrictions on any act which may undermine nationality, sovereignty or integrity or which may jeopardize the harmonious relations subsisting among federal units or the harmonious relations subsisting among the peoples of different castes, tribes, religions or communities, an act of infecting hatred or treason, any act that leads to a contempt of court, while making it clear that policy-wise, theoretical and academic advocacy and comments shall not be regarded as a contempt of court, or any act that may harm the social prestige of an individual through publication or transmission of false (fake) materials, or to discourage crimes or an act that may be contrary to public health, decent behaviour, or morality and to discourage an act that may have detrimental effects on children or that make an obscene picture of them, or to discourage untouchability, racial and gender discrimination through just, fair and proper Act as deemed necessary.</p>
	<p>2. There shall be no closure, seizure or cancellation of registration of radio, television, online or any other types of digital or electronic, print or other media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audiovisual or electronic equipment.</p> <p>3. There shall be no closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing any news item, article, editorial, feature, information or any other materials. Such act will be culpable in accordance with law and the victim of such act shall have a right to receive proper compensation.</p> <p>4. Except in accordance with law, no press, electronic transmission and telephone and other means of communications shall be obstructed.</p>	<p>Since it is through impartial, independent, dauntless and safe media world alone that the citizens' right to express their opinions and get well informed is protected, this right has been provisioned in order to ascertain the condition preventing the State to close, seize or cancel the registration of radio, television, online or any other types of digital or electronic, print or other media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audiovisual or electronic equipment.</p> <p>This provision has been made in order to protect and safeguard the editorial independence of the publication medium that is a major medium of mass communications protecting and safeguarding the citizens' right to freedom of opinion and expression, and to ascertain that there shall be no closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing any news item, article, editorial, feature, information or any other materials. Such act will be culpable in accordance with law and the victim of such act shall have a right to receive proper compensation.</p> <p>This right has been provisioned in order to ensure that the press, medium of electronic transmission and means of telecommunications that are basic needs of people which are all mediums of receiving information in order to protect and safeguard the citizens' freedom of opinion and expression and no one can obstruct them in an arbitrary or monopolized way, and if necessary, can do so only in accordance with law.</p>

<p>Right to Information: 1. Every citizen shall have the right to demand or obtain information on any matters of concern to himself or herself or to the public.</p> <p>Provided that nothing in this Article shall be deemed to compel any person to provide information on any matter about which confidentiality is to be maintained according to law.</p>	<p>This right has been guaranteed to every citizen. This right is an extended form of the citizens' freedom of opinion and expression. This provision has been made in order to ensure the right of the citizen to access to information prevalent basically in the state mechanism for the all round national development while institutionalizing and consolidating democracy by creating an open and transparent society, ensuring meaningful participation of people in governance, making the state mechanism open, transparent and accountable, increasing people's participation in the process of public decision making, and creating an open and transparent culture. This provision has been made to ensure the right of every citizen to demand any printed, written or other forms or mediums of information and data available in the state mechanism or public agencies or demand information about the activities of such agencies as well as information available therein, and to obtain written, printed or audiovisual copy of such information, obtain information available in electronic or other forms or mediums, and also visit the location of such information.</p> <p>Provided that this right cannot be claimed in case of national security, personal privacy, business, monetary secrecy, crime investigation, immature information in the process of action and other information of national importance that has to be kept confidential in accordance with law and information on any matter about which confidentiality is to be maintained according to law since there can be no claim of the right to information on such information</p>
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