



Comment on the Freedom of Expression and Information Provisions in the 2007 Interim Constitution of Nepal

February 2007

This Comment is based on an English translation of the 2007 Interim Constitution of Nepal received by ARTICLE 19 in February 2007.¹ A copy of the relevant provisions of the Interim Constitution is appended to this Comment. The Comment is intended as input to the process of preparing a final Constitution, as well as to any reworking of the freedom of expression and information provisions of the Interim Constitution. The goal is to promote constitutional documents for Nepal which, while tailored to local circumstances, are also in accordance with international standards and comparative national best practice in the area of freedom of expression and information.

1. General Guarantee

Article 12(3)(a) of the Interim Constitution guarantees every citizen the right to freedom of opinion and expression. However, the same article goes on to provide that this shall not prevent the making of laws to impose “reasonable restrictions” on any act which “may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion 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.”

This is very similar to Article 12(2)(a) of the 1990 constitution. The only differences are the addition of religion as a protected form of harmonious relation and the removal of sedition as a ground for restricting freedom of expression.

Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),² a formally binding legal treaty which Nepal ratified in May 1991, guarantees these rights in the following terms:

¹ ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

² UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976.

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.

We note the following differences between the positive guarantee in the Interim Constitution and the international guarantee noted above. First, under international law the right to hold opinions is absolute, whereas under the Interim Constitution it, like the right to freedom of expression, may be restricted. Second, international law guarantees the rights to freedom of opinion and expression to everyone, whereas under the Interim Constitution they are extended only to citizens. Third, international law elaborates on the meaning of the right to freedom of expression, clarifying that it includes the right to “seek, receive and impart” information and ideas, that this applies “regardless of frontiers” and that it applies to any form of communication. In contrast, the Interim Constitution simply sets out the right to freedom of expression. While it is certainly open to courts to interpret the constitutional guarantee to include the various aspects elaborated under international law, they might also interpret it more narrowly. It is, therefore, important to clarify in the text of the constitution, as far as possible, the extent of the right.

Even more important, however, are the differences between the scope of restrictions on this fundamental right recognised by the Interim Constitution, and the scope of restriction permitted under international law.

Both international law and the Interim Constitution require any restriction to be provided by law. In terms of grounds for restricting freedom of expression, the Interim Constitution recognises the following: sovereignty and integrity of Nepal; harmonious relations subsisting among the peoples of various castes, tribes, religion or communities; defamation; contempt of court; incitement to an offence; and acts contrary to public decency or morality. In general, these are also found under international law, albeit in a slightly different list. The reference to harmonious relations, however, is problematical from the perspective of freedom of expression. While promoting harmonious relations is an important goal, much legitimate expression may undermine such relations. This might be the case, for example, for a frank discussion about the problem of caste or community discrimination. Instead, only incitement to hatred, discrimination or violence against groups should be prohibited, in accordance with Article 20(2) of the ICCPR.³

³ This states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Furthermore, three of the grounds under the Interim Constitution – defamation, contempt of court and incitement to an offence – are not actually interests at all but, rather, 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. In other words, the present formulation may lead courts to approve any defamation, contempt of court or incitement to an offence law, whereas such laws should be subject to close scrutiny to ensure that they are in fact “reasonable”.

The most serious problem with the scope of restrictions on freedom of expression under the Interim Constitution is the low standard such restrictions are required to meet. In particular, restrictions are only required to be ‘reasonable’ to prevent speech which ‘may undermine’, ‘may jeopardize’ or ‘may be contrary to’ various interests. This is self-evidently a much lower standard than that imposed by international law, which requires any restriction to be necessary. Necessity encompasses not only reasonableness, but also sufficiency and proportionality, and the notions of least restrictive means available and an absence of overbreadth.⁴

Furthermore, under international law, a mere risk of harm to the protected interest, as signalled by the term ‘may’ in the Interim Constitution, is not sufficient. International courts have made it clear that the restriction must respond to a “pressing social need”, not simply a vague risk.⁵

These concerns with standards for restrictions are far from mere semantic details. The vast majority of cases involving freedom of expression before international courts and tribunals are decided on the necessity part of the test. These international bodies have spent considerable time and effort elaborating on the precise meaning of the notion of necessity. The precise term used has very important implications in terms of the sufficiency of the guarantee of freedom of expression.

Recommendations:

- The right to freedom of opinion should be absolutely guaranteed.
- The right to freedom of opinion and expression should be guaranteed to *everyone*, not just citizens.
- The nature of the right to freedom of expression should be spelt out more clearly, in particular to make it clear that it covers the right to seek, receive and impart ideas, that it applies regardless of frontiers and that it protects all forms of communication.
- Restrictions to protect harmonious relations should be limited to cases of incitement to hatred, discrimination or violence.

⁴ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

⁵ *Ibid.*

- Only actual interests, and not types of laws, should be recognised as possible grounds for restricting freedom of expression. Specifically, defamation, contempt of court and incitement to an offence should be removed and replaced by the relevant interest (for example, protection of reputation in the case of defamation).
- The standard which restrictions on freedom of expression should be required to meet should be substantially strengthened. The standard of ‘may’ affect should be replaced by a need for a pressing social need for the restriction and the notion of a ‘reasonable restriction’ should be replaced by something closer to the necessity standard under international law. At a minimum, a requirement of proportionality should be added.

2. Protection for the Media

Article 15 of the Interim Constitution provides various protections for the media. Censorship of publications, broadcasters and printed news is not permitted. At the same time, as with freedom of expression, this does not prevent the making of reasonable restrictions to protect various interests. Both electronic media – defined to include radio, television, online media or any other type of digital or communication media – and print media are protected against closure, seizure or having their registration cancelled for their content. Finally, no communication medium shall be obstructed except in accordance with the law.

These guarantees are very similar to those found in the 1990 Constitution with two important additions, namely the protection of audiovisual media and the last provision, ruling out obstruction of the media except in accordance with the law. Unlike for freedom of expression, the grounds upon which censorship is allowed are identical to those found in the 1990 Constitution (in other words, sedition remains and religion has not been added to the protected forms of harmonious relations). This may well be an oversight.

While these provisions are welcome they do suffer from a number of defects. The criticisms of the scope of restrictions permitted under the general guarantee of freedom of expression apply equally to the prohibition on censorship. It is not clear from the provision what is meant by the term ‘censorship’ but 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 (even if it does not apply to the media) with the greatest suspicion. The *American Convention on Human Rights* (ACHR) rules out all forms of prior restraint except to protect children.⁶ In *Observer and Guardian v. the United Kingdom*, the European Court 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.⁷

⁶ Adopted at San José, Costa Rica, 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).

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

The prohibition on closing, seizing or cancelling the registration of any media for its content is welcome. The prohibition on obstruction of the media except in accordance with the law is also welcome, although it does not place any constraints on laws which do obstruct the media. In relation to the media, while certain forms of restriction are accepted – for example the licensing of broadcasters – others are clearly not, even if set out in law – such as control over newsprint. While the general guarantee of freedom of expression suggests that such laws must meet certain minimum standards, those standards should be incorporated into the specific rules on obstruction of the media, so as to prevent any possibility of confusion. The term ‘obstruction’, at least in translation, is also of some concern. While freedom of expression and of the media may be restricted under international law, it may not be obstructed.

These guarantees of media freedom could be substantially enhanced, in particular through the addition of guarantees for independent media. This could take two forms. First, the constitution could recognise the principle of independence in relation to any media that remain in public ownership, for example a public service broadcaster. Second, the constitution could require all bodies with regulatory powers over the media, such as a broadcast regulator, to be protected against political or commercial interference (i.e. to be independent).

Recommendations:

- All prior censorship of the media should be prohibited. The scope of permissible restrictions which do not constitute prior censorship should be limited to what is permitted under international law, as described above under the general guarantee of freedom of expression.
- Laws which obstruct the media should be subject to the same conditions or limitations as for laws which generally limit freedom of expression. Consideration should be given to defining or otherwise limiting the scope of what constitutes obstruction.
- Consideration should be given to guaranteeing the independence of both public media and any bodies with regulatory powers over the media.

3. Right to Information

Article 27 of the Interim Constitution guarantees the right to information. It provides that every citizen has the right to seek and receive information of a personal nature or relating to matters of public importance, provided that no one shall be required to provide information which has been declared secret by law. These provisions are identical to those found at Article 16 of the Interim Constitution.

Constitutional protection for the right to information, now widely recognised as a fundamental human right, is welcome. At the same time, the guarantee in the Interim Constitution could be substantially strengthened. First, the right to information, like the general guarantee of freedom of expression, should be enjoyed by everyone, not just citizens.

Second, the right should apply to all information, not just personal information or information deemed to be of public importance. It is not for the authorities to determine what is of public importance; the fact that someone is requesting the information is sufficient. Furthermore, such a limitation gives the authorities ample scope to illegitimately refuse to provide information, to the detriment of the right to information. It might also be useful to clarify that the right specifically applies to information held by public bodies.

Third, Article 27 allows for any restrictions on the right to information that are established by law. It may thus be starkly contrasted with the right to freedom of expression, in relation to which restrictions are strictly circumscribed. There is no warrant for treating the right to information any differently in this regard. Strict limits on any restrictions on access to information should be set out explicitly, essentially conforming to those applicable to freedom expression.

Recommendations:

- The right to information should apply to everyone, not just to citizens.
- The right should apply to all information held by public bodies, not just personal information or information deemed to be of public importance.
- Strict limits on restrictions on the right to information, along the lines recommended for the right to freedom of expression, should be set out explicitly. In particular, the right of access may should be able to be refused only where this is necessary to protect an overriding public or private interest.

4. Parliament and Freedom of Expression

A number of provisions in the Interim Constitution are relevant to free speech and parliament. Article 56(1) provides for full free speech at meetings of the legislature and/or parliament and, similarly, no proceedings lie against anyone for the publication of any “document, report, vote or proceeding” under the authority of parliament (Article 56(4)).

There are, however, also restrictions. No one may question the good faith of any proceedings of the legislature and/or parliament, and the media may not carry material which “intentionally distorts or misinterprets the meaning” of any statement by a member of parliament (Article 56(3)). Pursuant to Articles 56(6)-(7), parliament has the exclusive power to determine whether or not a breach of these rules has taken place and to impose a sentence of up to three months’ imprisonment or a fine of up to ten thousand rupees. Very similar rules apply to the Constituent Assembly, pursuant to Article 77 of the Interim Constitution. Pursuant to Article 60, neither the parliament (or legislature) nor the Constituent Assembly may discuss anything under judicial scrutiny or relating to the conduct of a judge in relation to his or her judicial activities, except in the context of a judicial impeachment motion.

These rules are very similar to Articles 62 and 56 respectively of the 1990 Constitution. One important difference is the removal, in the Interim Constitution, of prohibitions found in Article 56(1) of the 1990 Constitution restricting criticism of His Majesty.

The protections for free speech of parliamentarians are welcome and parallel similar protections in other countries. The restrictions, however, are a matter of serious concern and signally fail to conform to international standards relating to freedom of expression. It is central to the working of the democratic system that everyone be free to criticise parliamentarians. Indeed, elected officials should be required to tolerate a greater degree of criticism than ordinary citizens.⁸ Giving parliament itself the power effectively to prosecute the 'offence' of criticism significantly exacerbates this problem. It is well-established that no one should be able to stand as judge in his or her own case.

The provisions limiting parliamentary discussion of judges are equally problematical. While certain restrictions on free speech may be needed to protect the fair administration of justice, the restrictions in the Interim Constitution are far too broad. Judges are, like parliamentarians, public officials and they should, subject to laws of general application, such as defamation laws, be expected to tolerate criticism. The experience of other countries amply demonstrates that such criticism does not undermine the authority of the judicial institution or, outside perhaps of very extreme cases, the fairness and impartiality of the judicial process. It is a matter of particular concern that such restrictions are being imposed on parliamentarians, who have an obligation to discuss these matters. Furthermore, even to the extent that restrictions on free speech to this end are legitimate, it is unnecessary (and uncommon in other countries) to find them in the constitution.

Recommendation:

- Rules such as those found at Articles 56(3), (6)-(7), 77(3), (6)-(7) and 60 unduly restrict freedom of expression and have no place in a constitution.

5. Suspension of Rights During Emergencies

Article 143 provides for the declaration of a state of emergency by the government or council of ministers in case of a grave crisis regarding the sovereignty or integrity of the country. Such a declaration must be laid before the legislature within a month, and the legislature may approve it, by a two-thirds majority, for a duration of up to three months which may, by a similar vote, be extended for one more period of three months. Pursuant to Article 143(7), rights may be suspended, apparently completely, during an emergency.

International law does recognise that during emergencies States may need to derogate from human rights for the greater common good. Article 4 of the ICCPR provides for emergency derogations from rights but places a number of conditions, both substantive and procedural, on such derogations, as follows:

- derogations may only be imposed where the emergency threatens the life of the nation;

⁸ See *Lingens v. Austria*, note 4.

- derogations must be officially proclaimed;
- derogations may only limit rights to the extent strictly required and may never lead to discrimination;
- no derogation is possible from certain key rights;
- States imposing derogations must inform other States Parties of the rights to be limited and the reasons for such limitation; and
- derogating States must inform other States Parties of the termination of any derogations.

The case law of the Human Rights Committee indicates a great reluctance to recognise as legitimate states of emergency which are declared in peacetime.⁹ As the Committee noted in its General Comment on Article 4:

If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.¹⁰

The Nepalese rules fail to meet these standards in several respects. They do not require the crisis to threaten the life of the nation, permitting emergencies to be declared in the context of a merely grave crisis. They also lack the procedural rules imposed by the ICCPR in terms of informing other States, although this is to be expected in a constitutional provision.

Most importantly, the Constitution does not require derogations from rights to be limited “to the extent strictly required by the exigencies of the situation” or to be imposed in a non-discriminatory manner, as required by Article 4 of the ICCPR. Indeed, as noted, it would appear that the Constitution allows for rights to be suspended altogether. This limitation is an extremely important part of the system for derogation recognised under international law and, furthermore, is obvious common sense. Emergencies may require some limitations on rights but they rarely, if ever, require rights to be suspended altogether. States should never be permitted to restrict rights beyond what is strictly necessary. To allow for the complete suspension of rights is to invite abuse.

Recommendations:

- The power to declare emergencies should be restricted to situations where there is a threat to the life of the nation.
- The power to limit rights during emergencies should be restricted to what is strictly necessary given the situation.

⁹ See, for example, *Ramirez v. Uruguay*, UN Doc. CCPR/C/10/D/4/1997, *Silva v. Uruguay*, UN Doc. CCPR/C/12/D/34/1978 and *Montejo v. Colombia*, UN Doc. CCPR/C/15/D/64/1979.

¹⁰ General Comment No. 29: States of Emergency (Article 4), 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3.

ANNEX: Relevant Provisions from the Interim Constitution

12. Right to Freedom

(3) Every citizen shall have the following freedoms:

- (a) freedom of opinion and expression;
- (b) freedom to assemble peaceably and without arms;
- (c) freedom to form political party or organisations;
- (d) freedom to form unions and associations;
- (e) freedom to move and reside in any part of Nepal; and
- (f) freedom to practice any profession, or to carry on any occupation, industry, or trade.

Provided that,

- (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 sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion 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.

15. Right Regarding Publication, Broadcasting and Press

(1) No publication and broadcasting or printing of any news items, editorial, article, writings or other readings, audio-visual materials, by any means including electronic publication, broadcasting and press, shall be censored.

Provided that nothing shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty or integrity of Nepal, or which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes or communities; or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality.

(2) No radio, television, online or any other types of digital or electronic means, press or any other communication media shall be closed, seized or be cancelled the registration because of publishing and broadcasting or printing any material by such means of audio, audio-visual or electronic equipments.

(3) No newspaper, periodical or press shall be closed, seized or be cancelled the registration for printing and publishing any news items, articles, editorial, writings or other reading materials.

(4) No communication means including press, electronic broadcasting and telephone shall be obstructed except in accordance with law.

27. Right to Information

(1) Every citizen shall have the right to demand or obtain information on any matters of his/her own or of public importance.

Provided that nothing shall compel any person to provide information on any matter about which secrecy is to be maintained by law.

56. Privileges

(1) There shall be full freedom of speech in the meeting of the Legislature-Parliament and no member shall be arrested, detained or prosecuted in any court for anything expressed or for any vote cast in that meeting.

(3) No comment shall be made about the good faith regarding any proceedings of the Legislature-Parliament and no publication and broadcasting of any kind shall be made about anything said by any member which intentionally distorts or misinterprets the meaning of the speech.

(4) No proceedings shall be initiated in any court against any person for publication of any document, report, vote or proceeding which is made under authority given by the Legislature-Parliament.

Explanation: For the purposes of clauses (1), (2), (3) and (4), the word "Legislature-Parliament" shall mean the Legislature-Parliament and any of its committee.

(6) Any breach of privilege provided for in this Article shall be deemed to constitute contempt of the Legislature-Parliament and the Legislature-Parliament shall have the exclusive right to decide whether or not any breach of privilege of legislature has taken place.

(7) If a person is in contempt of the Legislature-Parliament, the person who is chairing the meeting to that effect may, after a decision by the meeting, admonish, warn or impose a sentence of imprisonment not exceeding three months or impose a fine of up to ten thousand rupees on such a person. If the fine is not paid by such a person, it shall be recovered as government dues.

Provided that if such a person submits an apology to the satisfaction of the Legislature-Parliament, it may either pardon him/her or remit or commute the sentence imposed on him/her.

60. Restriction on discussion

(1) No discussion shall be held in the Legislature-Parliament on a matter which is under consideration in any court of Nepal, and about anything done by a Judge in course of performance of his or her judicial duties.

Provided that nothing in this Article shall be deemed to hinder the expression of opinion about the conduct of a Judge during deliberations on an impeachment motion.

(2) The provision made pursuant to clause (1) above, shall also be applicable to the Constituent Assembly.

77. Privileges

(1) There shall be full freedom of speech in the meeting of the Constituent Assembly and no member shall be arrested, detained or prosecuted in any court for anything expressed or for any vote cast in that meeting.

(3) No comment shall be made about the good faith regarding any proceedings of the Constituent Assembly and no publication of any kind shall be made about anything expressed by any member which intentionally distorts or misinterprets the meaning of the expression.

(4) No proceedings shall be initiated in any court against any person for publication of any document, report, vote or proceeding which is made under authority delegated by the Constituent Assembly.

Explanation: For the purposes of clauses (1), (2), (3) and (4) above, the words "meeting of the Constituent Assembly" shall mean the meeting of the Constituent Assembly and any of its committee.

(6) Any breach of privilege stated in this Article shall be deemed to constitute contempt of the Constituent Assembly and the breach of privilege of Constituent Assembly shall be considered as the contempt of the Constituent Assembly. The Constituent Assembly shall have the exclusive right to decide whether or not any breach of privilege has taken place.

(7) If a person is in contempt of the Constituent Assembly, the person who is chairing the meeting to that effect may, after a decision by the meeting, admonish, warn or impose a sentence of

imprisonment not exceeding three months or impose a fine of up to ten thousand rupees on such person. If the fine is not paid by such person, it shall be recovered as government dues.

Provided that if the person so accused submits an apology to the satisfaction of the Constituent Assembly, it may either pardon him/her or remit or commute the sentence imposed on him/her.

143. Emergency Power

(1) If a grave crisis arises in regard to the sovereignty or integrity of Nepal or the security of any part thereof, whether by war, external invasion, armed rebellion or extreme economic disarray, the Council of Minister of the Government of Nepal may, by Proclamation, declare or Order a state of emergency to be enforced in any specified part or the whole of Nepal.

(2) The Proclamation or the Order issued under clause (1) above shall be laid before the meeting of the Legislature-Parliament for approval within a month from the date of its issuance.

(3) If a Proclamation or Order laid for approval pursuant to clause (2) above is approved by a two-third majority of the Legislature-Parliament present at the meeting such proclamation or order shall continue in force for three months from the date of its issuance.

(4) If the Proclamation or the Order laid before the meeting of the Legislature-Parliament pursuant to clause (2) above is not approved pursuant to clause (3), the Proclamation or the Order shall be deemed, *ipso-facto* to cease to operate.

(5) Before the expiration of the period referred to in clause (3) above, if a meeting of the Legislature-Parliament, by a majority of two-thirds of the members present, passes a resolution to the effect that circumstances referred to in clause (1) above continue to exist, it may extend the period of the Proclamation or Order of State Emergency for another one period, not exceeding three months as specified in such resolution.

(6) After a state of Emergency has been declared pursuant to clause (1) above, the Council of Ministers of the Government of Nepal may issue necessary orders to meet the exigencies. The Orders so issued shall be operative with the same force and effect as law so long as the State of Emergency is in operation.

(7) During the time of the Proclamation or Order of the State of Emergency made by the Council of Ministers of the Government of Nepal, pursuant to clause (1), the fundamental rights provided in Part 3 may be suspended so long as the Proclamation or Order is in operation.

Provided that Articles 13, 14, 16, 17, 18, 20, 21, 22, 23, 26, 29, 30 and 31, and the rights to constitutional remedy and habeas corpus relating to such Articles shall not be suspended.

(8) In circumstances where any Article of this Constitution is suspended pursuant to clause (7) above, no petition may be made in any court of law, nor any question be raised for the enforcement of the fundamental rights conferred by such Article.

(9) If, during the continuance of a Proclamation or Order pursuant to clause (1), any damage is inflicted upon any person by an act of any official done in contravention of law or in bad faith, the affected person may, within three months from the date of termination of the Proclamation or Order, file a petition for compensation for the said damage, and if the court finds the claim valid, it shall cause the compensation to be delivered.

(10) The Council of Ministers of the Government of Nepal may, at any time during its continuance, revoke the Proclamation or Order relating to the State of Emergency pursuant to clause (1) above.