



Center for Media Research - Nepal

Press Freedom in Constitution of Nepal 2015

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Introduction

On September 20, 2015, the Constituent Assembly promulgated the Constitution of Nepal 2015. The new constitution replaced the Interim Constitution, in effect since January 15, 2007. The Constituent Assembly was instituted as the result of the popular movement, also known as Jana Andolan II, and was one of the demands of the decade-long Maoist conflict.

The Constitution of Nepal 2015, in principle, is the outcome of the Maoist conflict, people's movements, the Madhesh Uprising and other political movements to establish an inclusive democracy. Press freedom, and the underlying principles of it including the freedom of expression and opinion, is important ingredients of democracy. The freedom of expression and mass media are most important freedoms for political freedom, which is the basic foundation of democracy... in modern world, the freedom of expression is considered the oxygen of democracy (*Dahal, 2008*). The constitutional guarantee of the press freedom is an indicator towards the system of governance. In absence of the constitutional guarantee of press freedom, no government in the world could be considered democratic.

Nepal's first constitution, the Government of Nepal Act 1948, which was never implemented, has also mentioned about fundamental rights including freedom of speech and liberty of the press in Article 4 (*Dahal, 2008*). Democracy was introduced in Nepal in 1951 ending 104-year autocratic rule-by-heredity Rana Regime. The democracy brought political and media freedoms, which was institutionalized in the Interim Government of Nepal Act 1951 (*UNESCO, 2013*). Article 17(2)(a) of it mentioned the freedom of speech and expression.

King Mahendra Shah promulgated the Constitution of Nepal 1962 after dismissing popularly elected government that led to 30-year of autocratic Panchayat regime. Although the press was tightly controlled during the Panchayat regime, the Constitution, in Article 11, had guaranteed the freedom of speech and expression under the fundamental rights. The 1990 Popular Movement restored the multi-party democracy and the constitutional monarchy. The promulgation of the Constitution of Nepal 1990 ushered a new era of liberal democracy and press freedom (*UNESCO, 2013*). The Constitution guaranteed freedom of expression and opinion in Article 12, press and publication rights in Article 13 and right to information in Article 16 under the fundamental rights.

Despite the constitutional guarantees, the press freedom, including other civil liberties, were suspended when the state of emergency was imposed in 2001 and 2005. On both occasion, the government issued directives to media restricting reporting and publication of certain issues. On November 25, 2001, Nepal was declared in state of emergency after more than 280 people were killed in clashes between Maoists and security forces. The emergency order suspended at least seven constitutional articles and clauses guaranteeing civil liberties, including the freedom of opinion and expression (*Bhattarai, 2004*).

On February 1, 2005, King Gyanendra Shah dismissed the popularly elected government and imposed Royal Rule under the state of emergency suspending civil liberties. Before the emergency was declared, the army had already reached newsroom... and on next two days, the government issued two directives restricting media (*Dhungel, 2007*). On both occasions, the media came under immense pressure and unprecedented direct restriction. Those experiences led to media rights

organizations to demand ‘complete press freedom’ in the preamble of the constitution, which was included in the Interim Constitution 2007, promulgated after overthrowing of the monarchy by popular movement. The 2007 Constitution guaranteed free expression, right to information and equal freedoms to the press, broadcasting and online media (*UNESCO, 2013*). It’s a step ahead than earlier constitution in a provision that constitutionally prohibits obstruction to any print or broadcasting or television medium.

The Constitution of Nepal 2015

Fundamental Rights relating to Press Freedom and Media Rights

The Preamble of the constitution mentions that the constitution is promulgated ‘expressing commitment to create the bases of socialism by adopting democratic norms and values, including... civil liberty, fundamental rights... complete press freedom’. **Paragraph 6 of the Preamble** of the Constitution of Nepal 2015 states:

Expressing commitment to create the bases of socialism by adopting democratic norms and values, including peoples' competitive multi-party democratic governance system, civil liberty, fundamental rights, human rights, adult franchise, periodic elections, complete press freedom and an independent, impartial and competent judiciary, and the concept of rule of law,

The inclusion of ‘complete press freedom’ in the preamble of the Constitution has been one of the key demands by the media rights organizations including the Federation of Nepali Journalists (FNJ) because the absence of it theoretically could play detrimental role in the interpretations of provisions of the Constitution and other laws which relates to the press freedom. The State’s commitment to the ‘complete press freedom’ should, in theory, guide the Parliament and the government while drafting and discussing new laws, policies and guidelines.

The freedom of opinion and expression is guaranteed on **Article 17 (2) (a)** under the **Fundamental Rights and Duties** in Part 3 of the Constitution. Article 17 states:

17. Right to Freedom:

- (1) Except as provided for by law no person shall be deprived of her/his personal liberty.
- (2) Every citizen shall have the following freedoms:
 - (a) freedom of opinion and expression...

However, the freedom of opinion and expression is not absolute and is governed by the ‘reasonable restrictions’ in the explanatory clause:

Provided that, nothing in shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the nationality, sovereignty, independence and indivisibility of Nepal, or federal units, or jeopardizes the harmonious relations subsisting among the people of various caste, ethnicity, religion, or communities, or incites racial discrimination, or untouchability, or disrespects labor, or any act of defamation, or contempt of court, or an incitement of offence, or is contrary to decent public behavior or morality.

It is important to note that nationality, sovereignty, independence, and indivisibility (or territorial integrity) are also stated as fundamental subjects of Nepal’s national interest in Article 5 of Part 1 of the Constitution which also states ‘act and conduct against national interest shall be punishable by Federal law’. Besides that, to protect nationality, sovereignty and integrity of Nepal by pledging

allegiance to the nation, abide by the constitution and law, compulsorily enlist when the state needs the service and to protect and conserve public property are listed as duties of each citizen in Article 48.

Freedom of opinion and expression is not an absolute right and it's the global practice to 'reasonably restrict' the rights to ensure that the rights do not contradict with other fundamental rights and also to safeguard the State's existence. In this regard, the list of possible restrictions provided by the Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR) is the guiding principle for any member state in formulating restriction on freedom of expression and opinion. Under this provision, the ICCPR allows member states to restrict freedom of expression for respect of the rights or reputations of others; and for the protection of national security or of public order, or of public health or morals. Further, such restriction shall have to be provided by law and must be necessary. However, the reasonable restrictions in the Constitution of Nepal 2015 is vague in nature, beyond what is permitted in the ICCPR and open to the arbitrary interpretations. Whereas the restrictions attempt to address the issue of national security, hate speech and human rights, the wordings are such that they leave a lot of blank spaces for interpretations thus pose multiple threats to the press freedom.

Nepal as a member of the international community has assessed and ratified a number of international instruments, including the Universal Declaration of Human Rights (UDHR) and the ICCPR. As a state party to international conventions, Nepal has specific international obligations. Article 2 of the ICCPR requires state party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Pursuant to this provision, Nepal is obliged to ensure the rights protected under the ICCPR to everyone within the territory of Nepal. However, the right to freedom of expression and opinion under the new Constitution is guaranteed only to its citizen.

In **Article 19**, the Constitution has provided for **the right to communication**. The guarantees provided under right to communication were guaranteed under the right to press and publication (Article 15) in the Interim Constitution. Under this provision the constitution guarantees no prior censorship, no closure/seizure or cancellation of registration for contents and no obstruction in the means of communication, which states:

- (1) There shall be no prior censorship of publications and broadcasting, or information dissemination, or printing of any news item, editorial, article, feature, or other reading material, or the use of audio-visual material by any medium, including electronic publication, broadcasting and printing.
- (2) If there is any broadcasting, publishing or printing, or dissemination of news, article, editorial, feature, or other material through the medium of electronic equipment or the use of visuals or audio-visuals, no radio, television, online publication or any kind of digital or electronic equipment, or press, or other kind of media outlet, shall be closed, seized, or their registration cancelled for publishing, or transmitting, or broadcasting such material.
Provided that nothing in this clause shall be deemed to prevent the making of Acts to regulate radio, television, online or the use of any other kind of digital or electronic equipment, printing press or other medium of communication.
- (3) No means of communication including the press, electronic broadcasting and telephone shall be obstructed except in accordance with law.

The provision is identical to the provision on right to press and publication in the interim constitution. However, the new constitution has extended the ambit of the restriction by allowing the state to make law to impose restriction on any act that disrespects labor, or incites untouchability or gender discriminations, in addition to other existing restrictions. As mentioned above, such a provision is beyond the restriction provided by the Article 19, ICCPR. Further, the provision is ambiguous and open to interpretation. For example, it is wide open for interpretation to define what constitutes disrespect to labor.

In **Article 27, right to information** is guaranteed to every citizen who has the constitutional right to seek information on any matters of concern to her/him or the public provided that nothing shall be deemed to compel any person to provide information about which confidentiality is to be maintained according to law. This provision on right information is similar to the provision on right to information in the Interim Constitution. The right to information is part of the right to freedom of expression and opinion which includes the right to seek, receive and impart information. In this way, the ICCPR has guaranteed the right to information for everyone just like the the right to freedom of expression and opinion.

Limitation to a fundamental right should be clearly mentioned in the constitution itself. A legal provision cannot limit the constitutional protection. However, the provision under Article 27 provides that the constitutional guaranteed does not apply to the information about which confidentiality is to be maintained according to law. There are a number of statutory provisions under different Acts, which require the government official to maintain secrecy and keep the information confidential. In this way, the citizens have not been able to enjoy the constitutional guarantee provided by the constitution.

In **Article 28**, the constitution enlists **right to privacy** as a fundamental rights stating:

Except in circumstances provided by law, privacy in relation to the person, and their residence, property, documents, records, statistics and correspondence, and their reputation are inviolable.

The constitutional protection of the right to privacy is similar to the protection provided by the interim constitution. The provision under Article 28 has provided unrestricted power to the state to frame any kind of law on right to privacy. This constitutional provision has not been able to guide the state/legislature about its limitation while making law on privacy. As mentioned above, limitation to a constitutionally guaranteed right should be provided in the constitution itself.

In addition to the fundamental rights chapter, the constitution has a number of provisions relating to freedom of expression or press freedom. In Part 4 concerning the Directive Principles, Policies and Responsibilities of the State, the Constitution states that the State shall pursue the policies regarding political and governance system under which one of the duty of the state, Article 51 (b) (5), is 'making necessary provisions to make the mass media clean, healthy, impartial, dignified, responsible and professional'.

It may take up to three years for complete enforcement of the rights conferred under the fundamental rights. Article 47 on the implementation of fundamental rights states:

For the enforcement of the rights conferred in this Part, the State shall make legal provisions, as required, within three years of the commencement of this constitution.

Emergency Powers and the Press Freedom

In Article 273 of Part 30, the Constitution of Nepal 2015 empowers the President to declare a state of emergency in Nepal or any specified part thereof. It states:

Emergency Powers: (1) In case a grave emergency arises in relation to the sovereignty or territorial integrity of Nepal or the security of any part thereof, whether by war, external attack, armed revolt, extreme economic breakdown, natural calamity or epidemic outbreak, the President may, by Proclamation or Order, declare a state of emergency to be enforced in Nepal or any specified part thereof...

(10) While issuing the Proclamation or Order of state of emergency pursuant to clause (1), the President may suspend the fundamental rights provided in Part 3 so long as the Proclamation or Order is in operation. Provided that, Article 16, section (c) and (d) of Article 17(2), Article 18, 19 (2), 20, 21, 22, 24, 26 (1), 29, 30, 31, 32, 35, 36 (1) and (2), 38, 39, 40 (2) and (3), 41, 42, 43, 45 and the right to constitutional remedy and right to habeas corpus related to Article 46 shall not be suspended.

(11) In circumstances where any Article of this constitution is suspended pursuant to clause (10), 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.

In the state of emergency, the right of freedom of expression and opinion, right of information and right to privacy can be suspended and no question could be raised in any court of law. Article 19 (1) can be suspended whereas 19 (2) cannot be suspended. This means that during the emergency, the state can control the media by exercising prior-censorship and regulate them by deciding what can be printed and what cannot be printed (Sub-section 1), but it cannot close down or seize media or cancel registration thereof (Sub-section 2).

State of emergency is an exceptional situation when the existence of state itself is in crisis. Theoretically, the state is busy protecting itself in such a situation that it cannot protect the rights of the citizens. Thus, in such situation state is allowed to derogate itself from guaranteeing rights. However, even during emergency, the fundamental rights could be derogated only to the extent necessary. All the fundamental rights mentioned in the Clause 10 of Article 273 might not be necessary to suspend in all types of emergency. For example, freedom of expression and opinion need not be suspended during an emergency erupted due to the natural calamities. However, the constitutional has blocked the door to assess the necessity. Based on our experience in recent past, the power to state of emergency is susceptible to misuse.

Federal or Provincial Jurisdiction related to Media

In Article 57 on the Distribution of State power, the Constitution has specified power and jurisdiction of federal or provincial or local government. The federal powers/jurisdiction to be exercised by the federal government are listed in Schedule 5 of the Constitution, which include the monitoring, and regulation of telecommunication, central telecom, radio frequency distribution, television and postal service.

Schedule 6 of the Constitution empowers the provinces to operate radio, FM and television (Clause 3). Similarly, Schedule 8 has provided power and jurisdiction to the local level to operate FM radio (Clause 3).

Apart from these specific power and jurisdiction to specific level, the Constitution provides for some concurrent powers. Schedule 7 of the constitution provides a list of subjects the federal and provincial level have concurrent power/jurisdiction. Clause 14 of the Schedule 7 mentions “relating to mass communication” as one of the area federal and provincial level have the concurrent power. However, it is not clear what does the constitution mean by mass communication in this provision (in other provisions it has been categorically mentioned as radio, FM, Television or newspaper and magazine) and how the federal level and provincial level concurrently have power/jurisdiction over “mass communication”.

Similarly, Schedule 9 of the Constitution provides a list of concurrent powers and jurisdiction for federation, province and local level. Clause 2 of the list mentions Newspapers and Magazine. However, it is not clear what kind of power and jurisdiction federation, province and local level shall have over newspapers and magazine.

It is important that the constitution clarifies the power and jurisdiction of different level and avoids the competition between different level of government. However, the language used in the constitution is not clear and opens door for disputes in future.

Conclusion

The Constitution of Nepal 2015 should have been the documentation of hopes and dreams of aspiring new Nepal with all democratic principles integrated in it. While the Constitution is explicit in mentioning the rights – including the fundamental rights affecting the press freedom – the restrictions of the rights are vague in wording and open for misinterpretation. The restrictions, as well as provisions for state of emergency, also do not match the international standards, and leaves open space for wrong actions by the state.

Historically, the press freedom is protected by constitutions of Nepal, though the experiences proved that restrictions – including the tight censorship during 2004, were implemented using the loopholes or the misinterpretation of the provisions. The need therefore is not only to make the Constitution explicit and clear in terms and words but also have them explained in detail by court of law or the Parliament.

The country also needs a check and balance system strictly implemented while introducing new bills, regulations and directives to ensure that their provisions are concurrent with that of the Constitution. The government-approved Online Media Directives 2015, with the provisions to censor or shut-down online media for their contents, contradicts with the Constitution, yet the government had no hesitation to approve it.

If the reasonable restrictions of the rights related to the press freedom are made explicit and clearly interpreted, and some emergency provisions amended to match international standards, the Constitution of Nepal 2015 will become the most serene constitution on press freedom in the history of Nepal.

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About CMR-Nepal

Center for Media Research - Nepal is a media research institute. Formed in 2010, the group has conducted researches on social, digital and mainstream media. The group also aims to specialize on media monitoring, media content analysis, and capacity building of journalists. Based in Kathmandu, Nepal, CMR-Nepal can be reached at cmrnepal@butmedia.org or <http://research.butmedia.org>

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