

ARTICLE 19



Joint Submission by ARTICLE 19 and Freedom Forum to the UN Universal Periodic Review of the Federal Democratic Republic of Nepal

**For consideration at the 23rd Session
of the Working Group to be held in October/November 2015**

23 March 2015

Executive summary

1. ARTICLE 19 and Freedom Forum welcome the opportunity to contribute to the second cycle of the Universal Periodic Review (UPR) of the Federal Democratic Republic of Nepal. This submission focuses on Nepal's compliance with its obligations under international human rights law to protect and promote the right to freedom of expression and information.
2. ARTICLE 19 and Freedom Forum observe that Nepal has made some progress towards implementing recommendations that it accepted during its first UPR to advance protections for the right to freedom of expression and information. In particular, there has been a marked reduction in the number of instances of attacks on journalists and human rights defenders. The establishment of the Commission for the Investigation of Disappeared Persons, Truth and Reconciliation is also a positive step forward.
3. However, Nepal has failed to implement several of the key recommendations accepted during its first UPR. This submission addresses the following concerns in detail:
 - Failure to reform the Constitution to bring it in line with international standards on freedom of expression;
 - Failure to fully protect human rights defenders and journalists, and to end impunity for violations against them;
 - Failure to bring the legal framework into conformity with international standards on freedom of expression
 - The continued use of the legal framework to harass and intimidate journalists and Internet users;
 - Failure to strengthen the National Human Rights Commission and restore its independence

Failure to reform the Constitution to bring it in line with international standards on freedom of expression

4. During its first UPR, Nepal accepted recommendations to accelerate steps towards a new Constitution, including to allow the Constituent Assembly to fulfil its mandate of drafting a new Constitution by May 2011. It also committed to ensuring that this process was participatory, inclusive of diverse ethnic groups and women.
5. The first Constituent Assembly was elected in May 2008 and the second on 19 November 2013. This assembly comprised of 114 candidates belonging to marginalised communities out of 240 directly elected seats. The statistics show that 61 of these candidates (47.5%) were from various ethnic groups (37 from the Madhesi community; 1 from the Dalit community; 5 from the Muslim community; and 18 from various other minority ethnic groups). However women's representation was considerably lower with only 10 women eventually elected to parliament.
6. Nepal failed to achieve its May 2011 target to draft a new constitution within a year. The second Constituent Assembly came into office on 22 January 2015. However, due to continued differences on key issues the constitution has yet to be finalised and promulgated.
7. The Interim Constitution of 2007 ("the Constitution") guarantees freedom opinion and expression under Article 12(3), but it fails to meet international freedom of expression standards. It guarantees the right only to citizens of Nepal, contrary to international standards that guarantee this right to everyone. In addition, restrictions are permitted to freedom of expression on a number of grounds that are too broad or are not recognised grounds for limiting speech under international law. Unfortunately, the proposed draft of a new constitution put forward by the Constituent Assembly in 2015, in particular Article 2(2)(a) on fundamental rights, suggests extending these limitations even further.
8. Taken together, there are serious concerns that protections for freedom of expression will be weaker under the new Constitution if the proposals are adopted:
 - **Restrictions permitted based on grounds of "national sovereignty and integrity"** would be extended by the proposals to an alternative formulation of "nationality, sovereignty, independence and integrity", introducing greater ambiguity that may be abused to suppress legitimate debate on issues in the public interest. Even before these proposals, and in particular during the extended period of conflict in Nepal, these grounds have been abused to justify a widespread clamp down on journalists, media workers and human rights defenders;
 - **Restrictions permitted on grounds of protecting "harmonious relations subsisting among the people of various castes, tribes, religions or communities"** would be extended by proposals to also include "federal units". While the promotion of "harmonious relations" between people may be an admirable policy objective, it is too broad and open to arbitrary interpretation to be grounds for restricting the right to freedom of expression. Too frequently, such provisions are abused to target minority groups that are voicing their discontent, rather than to protect such groups from actual harm. Similarly, tension between different Federal States should not be a basis for restricting expression, since such differences should be resolved through political channels and not censorship;
 - **The grounds for restricting freedom of expression under the Constitution of "defamation, contempt of court and incitement to an offence"** would remain unchanged under the proposals, but are nevertheless problematic. While the protection of reputation, the administration of justice, and public order are each legitimate aims for restricting expression, they are each distinct and should be dealt with separately, and only relied on to

the extent that they are necessary in a democratic society and any sanctions are proportionate. The Constitution should provide the proper framework for ensuring that laws in this area are properly drafted.

- **The ground of limiting acts “contrary to morality or decent public behaviour” for restricting expression** would also remain unchanged. While protecting “public morals” is a legitimate basis for restricting expression, the Human Rights Committee has made clear that public morals are diverse and change over time, and should not be used as a basis for discrimination. The concept of “decent public behaviour” is far too subjective to be included as a basis for limiting the right to freedom of expression, and does not exist in Article 19(3) of the International Covenant on Civil and Political Rights.

Failure to fully protect human rights defenders and journalists, and to end impunity for violations against them

9. During its first UPR, Nepal accepted recommendations to ensure the security of human rights defenders, including journalists, but did not accept recommendations to effectively investigate such violations and bring those responsible to justice. Nepal remains in transition after a long period of civil war and a continuing period of political instability, during which journalists, media workers, and other human rights defenders have faced threats, intimidation and attacks from both state and non-state actors. It is also among the top five target countries for the United Nations Action Plan for the Safety of Journalists.
10. A comparison of violations against journalists in the years 2011- 2014 indicates a gradual decrease in violations against journalists and human rights defenders in this period. However, violations remain serious, and include death threats, serious injury, obstruction to gathering information, harassment, and destruction of equipment and property. These incidents directly restrict journalists’ right to fear-free and independent reporting depriving individuals of access to information.
11. In 2011, Freedom Forum recorded a total of 101 violations.
 - On 6 February, a group of men seriously wounded journalist B.C. Durga, of *Radio Salyan*, on his way home. His attackers used knives to hack at his hands, legs and head.
 - On 7 February, journalist Baburam Raymajhi was attacked by four or five unidentified individuals who injured him and threatened to kill him.
 - On 11 August, Kishor Budhathoki, a journalist working for the *Himalayan Times* and the *Annapurna Post*, was brutally attacked at his home in the eastern district of *Sankhuwasabha* by armed assailants.
12. In 2012, the number of violations decreased slightly to 96. However, according to a report of the Federation of Nepali Journalists (FNJ), over 25 journalists were subjected to attacks in the month of May alone.
 - On 15 January, Himal Rai, a reporter with *Byline Weekly*, was beaten in Barahachhetra, in the eastern district of Sunsari, on his way home from a religious festival on which he was reporting.
 - On 3 April 2012, Yadab Poudel, a reporter, was murdered in Biramod, in the eastern district of Jhapa. He sustained fatal injuries to the head after being severely beaten and thrown from the third floor of a local hotel.
13. In 2013, the media in Nepal suffered a spate of intimidations from violent political activists, security bodies, government officials as well as from unknown persons. Violations surged on the eve of dissolution of the Constituent Assembly and run up to the elections to the second Constituent Assembly. Freedom Forum recorded a total of 131 violations. 22 journalists were forced to leave their districts in the month of January because of death threats made against

them by the political associates of the then ruling Unified Communist Party of Nepal (UCPN) in the western district of Dailekh.

14. In 2014, Freedom Forum recorded a total of 52 violations.
 - In February 2014, KP Dhungana, a correspondent with *Nagarik Daily*, received death threats as a result of writing articles regarding the illegal-running of children's care homes.
 - On 7 March, journalist, B.P. Shah, the Executive Editor of *Desiya Monthly*, was attacked by five unidentified assailants who openly declared that they wished to silence him from speaking out.
15. The Federation of Nepali Journalists (FNJ) has recorded a total of 36 murders of journalists between 2002 and 2012. Impunity continues to be a serious problem with regards to attacks on media workers.
 - Uma Singh was murdered in January 2009 when 15 assailants attacked her with knives in her home, in Janakpur. Two of the perpetrators were sentenced to life imprisonment in June 2011. Three others were acquitted. One of those suspected of masterminding the attack was arrested in 2013.
 - Yadab Poudel was murdered in April 2012. One of the perpetrators was sentenced to life imprisonment in February 2013.
 - Dekendra Thapa was murdered in August 2004. However, the five people were convicted of his murder and sentenced to only two years imprisonment, in December 2014. It took nearly ten years to bring to justice those responsible for his murder.
16. While some steps have been taken toward addressing the issue of impunity, to reverse a deep rooted culture of impunity the Nepalese authorities must make more robust effort to prosecute and ensure justice for victims and their families.
17. In June 2012, several national and international bodies together with the UN Special Rapporteur on Freedom of Expression and Opinion proposed the inclusion of a special mechanism for the protection of the journalists and Human Rights Defenders, within the framework of the NHRC Act 2012. This proposal remains unrealised and is currently under consideration of the newly appointed members of the NHRC who took office in November 2014.

Failure to bring legal framework into conformity with international standards on freedom of expression, and its continued use to harass and intimidate journalists and Internet users

18. During its first UPR, Nepal accepted a recommendation to continue the process of bringing its national legislation in line with international standards. However, the legal framework contains several laws with provisions that directly conflict with international guarantees for freedom of expression.

Electronic Transactions Act 2006

19. The Electronic Transactions Act 2006 (ETA), which came into force in 2008, restricts the publishing, via electronic media, including online, of any material which is 'prohibited to publish or display', 'may be contrary to the public morality or decent behavior', or may 'jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities'. These restrictions are broadly similar to those provided under Article 12(3) proviso 1 of the interim constitution of the country, which as noted previously, does not conform to international standards.
20. These restrictions are too broad and require reform. The following examples indicate the arbitrary nature of the use of section 47 of the ETA:

- On 10 June 2013, Pushkar Nath Kandel was arrested for publishing an article on his online news portal *Extrakhobar*. It was alleged that the article tarnished the reputation of a local college. Following Kandel's arrest, on 20 June 2013, police arrested Sushil Pant and Santosh Bhattarai, of the *Nepali Headlines*, on the basis that Kandel had indicated that a web portal ran by Pant and Bhattarai was the information source;
- In May 2014, Raju Sah from Bara district was arrested for a Facebook post in which he joked that a member of the parliament should be given the death sentence because he had violated traffic rules. He was later released on bail upon signing an apology;
- On 1 June 2014, Businessman Mohammad Abdul Rahman was arrested in Portaha of Saptari, a district in the southern plain of Nepal, for allegedly violating Section 47 of the ETA. He had commented "How can one say the security is improving when I had to pay Rs 50,000 to get back my looted motorcycle?" on a news item entitled 'Improved Security in Saptari'. He was later released by the Kathmandu court after 20 days detention.

Right to information act

21. Section 3 of the Right to Information Act 2007 gives "every citizen" the right to information. However, Section 3 also embodies a long list of restrictions including sovereignty, integrity, and national security. As the law is only applicable to "citizens" it is overly restrictive: Nepal's population comprises of approximately 120,000 refugees. The Nepali government has not introduced any reforms which address these undue limitations to the right to information.

Press and Publication Act 1991 and National Broadcasting Act

22. Restrictions based on sovereignty, national integrity as provided in Section 14 of Press and Publication Act 1991 and Section 7 of the National Broadcasting Act are overly broad. This was pointed out in Nepal's first UPR. However, the provisions remain and the government is yet to take any steps to impose any obligation to establish close and causal links between banned statements and risk to national security, as is required under international law.

Media Policy

23. The Ministry of Information is poised to introduce a new media policy. Amongst concerns regarding the draft policy are the lack of wider consultation with stakeholders and its compliance with international standards.

Strengthening the National Human Rights Commission: international standards, independence, and adequate funding

24. The NHRC was established on paper and was assigned a formal office in the state mechanism but no commissioners were appointed until 14 November 2014, hence it was non-functioning until this date.

25. The NHRC is currently in the process of considering the creation of a "Mechanism for Promoting Free Expression", to prevent abuses of human rights of journalists and to end impunity for attacks on the media, in line with its plans to implement the UN Plan of Action on Safety of Journalists and the Issue of Impunity. As stated previously, the mechanism has not yet been adopted.

26. The Investigation of Enforced Disappeared Persons, Truth and Reconciliation Act 2014 mandated the formation of a Commission which was established in February 2015, after a significant delay. It is entrusted with the investigations of 10,530 cases of disappearances which took place between 1996 and 2006. The Commission has a range of powers at its disposal and can conduct investigations on its own initiative or on the basis of complaints

raised by the victim and/or their representatives (Section 13.2). The investigation powers include search operations of particular individual (Section 14.3) and suspension of government officials in case they suspect there is a risk of tampering with evidence (Section 14.4) All government and non-government officials are required to cooperate with the Commission (Section 15). The Commission can also seek necessary assistance from the government for ensuring the security of victims, their families and witnesses (Section 17.3). The Enabling Act of May 2014 incorporates a framework to ensure transparency and independence that includes documentation, complaint co-ordination, and reporting.

27. However to deliver this mandate the Commission requires adequate funding, facilities, and human resources, such as investigators, forensic experts, court officers, facilities for archiving, documentation and public hearing, etc. The Commission currently comprises of only five Commissioners.
28. Under Sections 23 and 24 the Commission was empowered to make recommendations to the government for providing amnesty and reparation with reasonable explanation. This is a cause of serious concern for victims, their representatives, and national and international human rights organisations. However, the Supreme Court of Nepal has declared these provisions unconstitutional, making them ineffective and they will subsequently need to be omitted in next CA session.

Recommendations

29. In light of these concerns, ARTICLE 19 and Freedom Forum call upon Member States to put forward clear and strong recommendations to the Government of the Federal Democratic Republic of Nepal:
 - Adopt a new Constitution, as early as possible, that fully protects the right to freedom of expression in line with international standards, in particular by defining restrictions and limitations as provided in Article 19(3) of the ICCPR;
 - Expedite the creation of a special mechanism within the National Human Rights Commission for the protection of journalists and human rights defenders, and increase resources for investigating and bringing to justice those responsible for violations;
 - Enact reforms to bring domestic legislation, including the Electronic Transaction Act 2007, Press and Publication Act 1991, Right to Information Act 2007 and the National Broadcasting Act 1993, in line with international standards on freedom of expression, in particular in relation to online speech;
 - Ensure that the Investigation of Disappeared Persons, Truth and Reconciliation Commission is adequately resourced to effectively deliver its mandate;
 - Ensure transparency and the broad participation of civil society and the media in the drafting of a new overarching media policy.