



***Freedom of Expression Course
For Nepal
Participants' Manual***

June 2008

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INTRODUCTION

Purpose

Freedom of expression is widely recognised as a framework right, one which is important in its own right but which also serves to underpin respect for all other rights. When respect for the right to freedom of expression comes under attack, all rights are at risk. As a result of its role in ensuring protection for all rights and, indeed, democracy itself, freedom of expression is widely recognised as one of the most fundamental of human rights.

Although international guarantees of the right to freedom of expression are brief in nature – just a few lines – and local constitutional guarantees only a bit longer, the right itself is very complex. This is the case for a number of reasons. Freedom of expression is one of those rights which in relation to which restrictions are permitted in certain limited circumstances to protect overriding public and private interests. Protection of defamation, for example, is universally recognised as a legitimate reason to restrict freedom of expression, given the importance of reputation and the potential harm expression can do to reputation.

Freedom of expression is also a positive right, in the sense that States must not only refrain from interfering with it, but they must also put in place positive systems to ensure that it may be fully exercised. The need to adopt and implement legislation on the right to information, giving individuals a right to access information held by public bodies, is an example of the positive nature of the right to freedom of expression. Finally, freedom of expression has important implications in relation to regulation of the media. It is accepted that some regulation of the media is necessary, to promote a free flow of information to the public but also to ensure that the media can fulfil its potential as a means of communication.

This Manual aims to provide a course framework for those interested in the right to freedom of expression – whether they are journalists, NGO activists, officials or others – with an understanding of the main implications of the right to freedom of expression, as protected under international law. Different actors will have different reasons for wishing to understand the scope of this right. Journalists may wish to understand what limits may legitimately be put on their trade, among other things so as to avoid falling foul of the rules. NGO activists may wish to use their understanding of freedom of expression to push for reform. Officials may need to understand international standards so as to be able to bring national law and practice into line with those standards. Regardless of the aim, the Manual should help foster a better understanding of international standards relating to freedom of expression.

How to Use This Manual

This Manual is primarily designed to be used as a resource for a training course for laypersons on the basics of freedom of expression. It is intended to be used course participants, as well as by the trainers delivering it. While it is largely self-explanatory, at the same time training will work better if delivered by trainers who

have been provided with inputs from freedom of expression experts, so that they have a broader set of resources to draw upon than are set out in the Manual itself. As a result, it is idea if the trainers have undergone a training of trainers session on how to use the Manual.

Individuals can also use the Manual by themselves as a self-study course. As noted, it is largely self-explanatory. In this case, it is best to use it along with the accompanying trainers notes, which, among other things, elaborating on the proper answers to many of the questions. Most of the group exercises can also be done by individuals on their own.

Finally, the Manual can be used as a reference tool. This will work best for individuals who have taken the course, but it can also be used on its own. The table of contents can serve as a reference guide, taking readers directly to the topic which concerns them.

Objectives

At the end of the training course set out in this Manual, participants should have learned the following:

1. why freedom of expression is important
2. how is freedom of expression guaranteed under international law and the Nepali Constitution and what are the general implications of the guarantee
3. under what conditions may freedom of expression be restricted
4. what is the legitimate scope of defamation laws and how do freedom of expression guarantees limit their scope
5. to what extent States may legitimately limit freedom of expression to protect national security
6. what basic outline does international law and the Nepali Constitution prescribe for hate speech, blasphemy laws and privacy rules
7. what is the right to information and what are its key characteristics
8. what justifications are their for regulating the media
9. why are different regulatory approaches mandated for different media sectors (journalists, print media, broadcasters)
10. what regulatory regimes may legitimately be applied to journalists, the print media and broadcasters
11. what are the outlines of an appropriate regulatory regime for public service broadcasters

The Contents of This Manual

This Manual is divided into four main sections. The first section – Freedom of Expression: An Overview? – aims to provide a grounding in international and constitutional guarantees of freedom of expression. It outlines why freedom of expression is important, the key characteristics of freedom of expression as guaranteed by the Nepali Constitution and under international law, and the three-part test for restrictions on freedom of expression.

The second section – Content Restrictions – outlines some key and difficult restrictions on freedom of expression, namely defamation, national security, hate speech, blasphemy and privacy. All of these are in principle legitimate reasons to restrict freedom of expression and most States have laws to this effect. At the same time, these grounds for restricting freedom of expression are widely abused in countries around the world. This section seeks to give participants a sense of how to achieve an appropriate balance between protecting these legitimate interest and yet respecting freedom of expression.

The third section – The Right to Information – describes the scope and nature of the right to information, which imposes an obligation on States to provide access to the information held by public bodies. This right has in recent years come to be seen as an increasingly important part of a democratic system of government and the number of States which have adopted right to information legislation has increased dramatically in recent years. This section describes the key characteristics of a right to information system in accordance with international and constitutional guarantees.

The fourth and final section – Regulation of the Media – addresses the complex question of media regulation. International standards prescribe very different regulatory approaches for journalists, the print media and broadcasters. Whereas even registration is not legitimate for journalists, in most countries broadcasters need to obtain a licence to operate. Specific regulatory issues pertain to each of these different media sectors. This section describes international and constitutional standards relating to media regulation, as well as public service broadcasting.

AGENDA: FREEDOM OF EXPRESSION TRAINING COURSE

Registration

Introductions and course overview

Session 1: Freedom of Expression: An Overview

- Group Discussion: Why is freedom of expression important
- Presentation: Nature of right and guarantees
- Individual Exercise: What is an interference
- Presentation: Restrictions
- Question and Answer Session

Session 2: Content Restrictions

- Presentation: What is defamation
- Group Exercise: Defamation
- Presentation: National Security, Hate Speech, Blasphemy
- Group Discussion: Danish cartoons
- Presentation: Privacy
- Question and Answer Session

Session 3: The Right to Information

- Presentation: The right to information
- Question and Answer Session
- Group Exercise: Various situations

Session 4: Regulation of the Media

- Presentation: Key Principles and Journalists
- Individual Exercise
- Presentation: Print Media
- Group Discussion
- Presentation: Broadcasting and Public Service Broadcasting
- Individual Exercise
- Question and Answer Session

Final Comments and Evaluation

- Final Comments by Participants and Review by Trainer
- Evaluation

Session 1: Freedom of Expression: An Overview?

References

1. *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000, available at: <http://www.iachr.org/declaration.htm>
2. *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html
3. The ARTICLE 19 Handbook, an online database containing international and national court decisions in freedom of expression cases as well as a number of papers and other documents on key freedom of expression issues. Available at: <http://www.article19.org/publications/law/the-handbook.html>
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Why is it Important?

On 14 December 1946, at its very first session, the United Nations General Assembly passed resolution 59(I) stating:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

MODERATOR FACILITATED GROUP DISCUSSION

Why is freedom of expression important?

International and Constitutional Standards

General Nature of the Right

PRESENTATION BY MODERATOR

1. Freedom of expression is a fundamental human right which imposes obligations on the State

Like all human rights, the right to freedom of expression is a right which binds the State, not citizens or individuals. The State is required under international law to respect freedom of expression.

State responsibility extends to all public bodies, whether local or national, whether legislative, executive or judicial. It also covers officials acting on behalf of the State, as well as acts by bodies created by law or which have an official public mandate.

Note: we refer in this section to interferences with the right to freedom of expression but not all interferences or restrictions are illegitimate. We will return to this later.

Examples:

- A local council adopts a law prohibiting demonstrations. There is an interference with freedom of expression. Demonstrations are a way of expressing views collectively and are thus protected by the right to freedom of expression. A local council is an official actor, part of the State, which has an obligation to respect freedom of expression.
- A mother tells her child to shut up. There is no interference with the right to freedom of expression since the mother is not a State actor.
- An on-duty policeman seizes copies of a newspaper on grounds that it undermines national security. There is an interference with freedom of expression. Newspapers are important vehicles for promoting the free flow of information and ideas in society and a policeman, at least while on duty, is a representative of the State.

2. Freedom of expression is a negative right

The State must refrain from interfering with freedom of expression. Subject to certain exceptions (we will discuss this later), individuals are free to express themselves without fear or risk that the State will sanction them for this.

Both of the examples of interference above are examples of the negative aspect of the right.

3. Freedom of expression is also a positive right

The State must take certain positive steps to ensure that citizens are able to exercise the right without interference from other citizens.

Examples:

- The State must allocate adequate resources to the prevention and investigation of attacks on journalists.
- The State must put in place measures to prevent undue concentration of media ownership by one person.
- The State must adopt right to information legislation.
- The State must put in place a legal framework ensuring the right to information, so that individuals can request and receive information from public bodies.

International and Constitutional Guarantees

PRESENTATION BY MODERATOR

Article 19(2) of the *International Covenant on Civil and Political Rights* (ICCPR):

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.

Article 12(3) of the 2007 Interim Constitution of Nepal:

Every citizen shall have the following freedoms:
(a) freedom of opinion and expression;

Article 19(2) of the ICCPR has 5 main elements:

- 1. “Everyone”:** the right to freedom of expression belongs to everyone.

Note: The Interim Constitution only protects citizens.

Example: Prisoners, young children and non-citizens are also protected by the right.

- 2. “Seek, receive and impart”:** the right to freedom of expression does not just protect the right of speakers. It also protects the right of listeners to

receive the information that others are trying to impart to them, as well as the right to investigate and to seek information from public bodies.

Note: The Interim Constitution is not clear on this point.

Examples:

- The government prohibits journalists from entering public buildings. There is an interference with the right to ‘seek’ information, and therefore also an interference with freedom of expression.
- The government closes down a private media outlet. There is an interference not only with the right of those working at the outlet to express themselves but also with the population’s right to ‘receive’ information.
- A public body refuses to provide access to the information it holds. There is an interference with the right to seek and receive information.

3. “Information and ideas of all kinds”: the right to freedom of expression protects any activity which communicates information or ideas, whether they are important or not, right or wrong, controversial, popular or offensive.

Note: The Interim Constitution is not clear on this point.

Examples:

- The government prohibits the publication of comic books. There is an interference with freedom of expression.
- Advertising is also protected by the right. It communicates commercial information. The same is true of artistic expression.
- The local council prohibits people from painting their houses bright pink. There is probably no interference with freedom of expression. If the goal behind painting the houses pink is to highlight oppression of gays, then the rule would be an interference with the right to freedom of expression.
- Freedom of expression also protects offensive ideas; what is offensive to some may not be to others and no one should judge whether ideas are right or wrong (remember Galileo).

4. “Regardless of frontiers”: the right to freedom of expression applies across borders.

Note: The Interim Constitution is not clear on this point.

Examples:

- The government prohibits the importation of newspapers from Turkey. There is a violation of freedom of expression.

- Freedom of expression also applies to cross-border broadcast transmissions.

5. “Through any media”: the right to freedom of expression protects communications through any media, whether traditional or modern.

Note: Once again, the Interim Constitution is not clear on this point.

Examples:

- Newspapers, magazines, pamphlets, radio, television, internet, mobile telephones, public meetings, house-to-house canvassing, paintings, sculptures, cartoons, smoke signals, Morse code, face-to-face conversations.
- The government imposes a 500% tax on SMS text messages. There is an interference with freedom of expression.

INDIVIDUAL EXERCISE

Instruct individuals to consider, for each of the following situations, whether the right to freedom of expression, as defined under international law, has been limited by the State. They should not look at whether or not the restriction is justified. We will do that later. The individual exercise should be followed by a group discussion.

Situation 1: A large shopping centre prohibits individuals from handing out leaflets or organising demonstrations on its premises.

Situation 2: The government adopts a law saying that journalists must be at least 19 years old.

Situation 3: Someone is charged with punching someone else to express their anger at that other person calling them an idiot.

Situation 4: The government adopts a law saying television stations may not broadcast more than 25% foreign programmes.

Situation 5: The police arrest a teenager for vandalism after he has painted his name on a public wall.

Restrictions on Freedom of Expression

PRESENTATION BY MODERATOR

Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR):

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.*

Article 12(3) of the 2007 Interim Constitution of Nepal:

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.*

The approach under both documents is to define freedom of expression very widely to include any activity by which an individual exchanges information or ideas with one or more others. This encompasses all sorts of activities which few societies would tolerate, such as incitement to murder, spraying graffiti on public walls, spreading false accusations. However, limited restrictions on the right are then allowed to protect certain overriding social interests, such as personal security, public order and reputation.

The challenge is to achieve an appropriate balance between the right to freedom of expression and these other interests. Both the ICCPR and the Interim Constitution do this by establishing a three-part test to assess whether restrictions are legitimate. The presumption is always in favour of freedom of expression and it is only where a restriction passes all three parts of the test that it will be deemed legitimate.

Three-Part Test

1. Provided by law/making of laws

It is only where restrictions are set out in law that they may be legitimate. This implies not only that there is a law or legal rule (such as a regulation or common law rules) but that it is accessible and sufficiently clear to be able to be understood by an informed person. The European Court of Human Rights has said it will only regard a rule as a 'law' if it is sufficiently clear so that someone who reads it can understand the consequences of his/her actions. Actions which restrict freedom of expression that are not set out in law are not legitimate. A policeman can only stop you spraying graffiti if there is a clear law prohibiting it. Furthermore, rules which grant excessive discretion to officials will also fail this part of the test since it will not be possible to determine in advance what is prohibited.

Why is this important?

- a. Fairness: should not punish without warning

- b. Importance of freedom of expression in a democracy: only elected representatives should have the power to limit such a fundamental right, not policemen or other officials
- c. Chilling effect: if you don't know what's allowed, you will be excessively careful about what you say
- d. Abuse: if officials can make up the rules as they go along, restrictions can be applied selectively for political reasons

Examples:

- A law which says "it shall be forbidden to publish books which violate Nepali values" would not be clear enough because the content of Nepali values is simply not defined.
- A law which says "it shall be forbidden to publish information which is likely to seriously undermine a criminal investigation by the police" would be acceptably clear.

2. Protect a listed interest

Any law restricting freedom of expression must have the purpose of protecting one of the aims set out in the ICCPR or the Constitution. These lists are exclusive; governments may not add to it. This serves to limit the grounds on which States can restrict freedom of expression. Freedom of expression is a very important right and only a very serious interest can override it. Otherwise, governments will start adopting laws with the goal of preventing criticism and holding on to power.

The only legitimate interests recognised in international law (with their constitutional equivalents in brackets afterwards) are:

- ensuring respect of the rights or reputations of others (*any act of defamation; jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities*)
- protecting national security (*undermine the sovereignty and integrity of Nepal*)
- protecting public order (*contempt of court or incitement to an offence*)
- protecting public health
- protecting public morals (*act which may be contrary to decent public behaviour or morality*)

Example: You cannot ban speech on the grounds that it is critical of the country and will harm tourism and therefore the economy. While a very serious shock to the economy might pose a threat to public order, ordinary economic ups and downs are not sufficient to warrant restricting freedom of expression.

There are some differences between the interests protected under international law and under the Interim Constitution. The latter is in some cases more specific and hence arguably narrower.

3. Necessary/reasonable

Restrictions must not just relate to a legitimate interest; they have to be *necessary* for the protection of that interest. This sounds reasonable: if a measure is not necessary, why impose it? Nevertheless, this part of the test is the most difficult to pass and the majority of legal cases focus on this part of the test. The word ‘necessary’ is given a number of very specific meanings, as follows:

a. *Restrictions should not be disproportionate*

The government should choose the measures that are most friendly to freedom of expression to achieve its goals.

Example: A newspaper publishes an article which endangers national security. The government may seize this issue of the newspaper or pursue criminal proceedings which lead to the imposition of a fine. It may not immediately close down the newspaper.

b. *Restrictions should not be too broad*

They should not affect a wider range of expressions than is necessary.

Example: A law which says “it is forbidden to publish articles relating to nuclear weapons” is overbroad and therefore unnecessary. The law might be permissible if it said: “it is forbidden to reveal information which is not already public, and which would enable the development of nuclear weapons.”

c. *Restrictions should not cause more harm than good*

Sometimes discussion of a certain subject poses risks to society, but the discussion is so important that it should take place anyway.

Example: A journalist reveals that the police are using very ineffective communication technology and weapons. As a result, clever criminals are able to hack into the police communications system and avoid getting caught. Although this information may help criminals and so damage public order, it should be publicised, so that the public can criticise the government and demand better support for the police which, in the longer term, will promote public order.

Examples from actual cases of how the test as a whole is applied:

- a. ***Svetik v. Belarus:*** Mr. Svetik signed a pamphlet calling on people not to vote in local elections. This act was intended as a protest against the electoral law, which Svetik believed was incompatible with the Belarusian Constitution and with international standards. But, Article 167 of the Belarusian Code on Administrative Offences “prohibited public appeals to boycott elections” and the applicant was consequently fined one million Belarusian Rubles.

What do you think?

- b. *Hak-Chul Shin v. South Korea*: Mr. Shin made a painting which showed a map of the Korean peninsula. In the southern half of the peninsula, a bull was ploughing a rice field and, while ploughing, was trampling on symbols of capitalism, of Japan and of the United States like coca-cola, E.T., a samurai warrior and American weapons. In the northern half of the peninsula, things looked very idyllic, with flowers blooming and farmers celebrating their harvest. The painting was seized by the South Korean authorities on the grounds that it constituted an “enemy-benefiting expression”.

What do you think?

- c. Nepal: In Nepal, the government has on a number of occasions attempted to restrict the fundamental right to freedom of expression and opinion guaranteed by the constitution in the name of protecting national security and public order. In the case of *Madhav Kumar Basnet v. His Majesty’s Government*, the Ministry had issued directives to be followed by FM radio stations when broadcasting. Among other things, the directives required radio stations to put in place a board comprising not more than three members including the managing chairman of the radio station and one member representing the Ministry, whose presence was required before any programme could be approved. Details of the programmes to be broadcast should be presented to the Ministry one week in advance and the Ministry could veto any programme as it saw fit. The directive prohibited the broadcasting of news collected by radios themselves, although they were allowed to rebroadcast news from the government controlled media and distributed by official governmental news agencies.

The Supreme Court declared the directives void on the basis that they imposed unreasonable restrictions in the absence of a proper legal foundation, and that they were contrary to the spirit of the Constitution and laws that provide for freedom of opinion and expression and the right to information.

QUESTION AND ANSWER SESSION

Session 2: Content Restrictions

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This section deals with content restrictions on freedom of expression, or restrictions on the content of what may be broadcast, written or otherwise disseminated.

Defamation

PRESENTATION BY MODERATOR

What is Defamation?

It is where someone's reputation – in the sense of the esteem in which others hold him or her – is harmed by a statement made by another person. Defamation laws allow those whose reputation has been harmed to bring a case against the person who made the statement to gain compensation and to have the statement corrected.

International law and the Interim Constitution permit the State to adopt defamation laws. Protection of the 'reputations of others' is explicitly recognised as a legitimate interest which may justify a restriction on freedom of expression. In practice, all countries have some form of defamation law. Often, this is not a separate law but a few articles in the civil code or the criminal code, or both.

Although some form of defamation law is permitted, at the same time many defamation laws do not provide an appropriate balance between freedom of expression and protection of reputation, instead providing overly strong protection of reputation.

Many freedom of expression organisations have identified overly broad defamation laws as one of the biggest threats worldwide to freedom of expression. International courts have decided many dozens of cases on defamation, and in the vast majority, the State was found to have been in breach of its obligation to respect freedom of expression.

The following appeals have been launched by freedom of expression groups in relation to defamation cases over the last few weeks:

Examples:

Situation in Nepal

In Nepal, a specific Defamation Act 1959 was enacted on 29 June 1959. The Nepalese law does not distinguish between criminal defamation and civil defamation, providing for both the pecuniary and non-pecuniary sanctions. However, defamation cases are not categorized under the State Cases Act so that the State is not a claimant in defamation cases.

Section 5 of the Defamation Act provides for a fine up to Rs. 5,000 or imprisonment for up to 2 years or both for dishonoring someone, or for printing or writing something deliberately, or with adequate reasons to believe it is not true, to dishonor

someone. Similarly, Section 6 provides fine of up to Rs. 100 and/or imprisonment for up to six months for selling or displaying for sell printed materials with knowledge that they contain news dishonoring someone. Section 12 of the Act provides for compensation, taking into account the public reputation and prestige of the plaintiff, where the claim of defamation is upheld. In this case the defendant must also pay the claimant's legal costs. The practice shows that the law on defamation is used relatively rarely in Nepal.

What Defamation is Not

a. Privacy

Privacy laws are used to prevent the dissemination of private information which should not be in the public domain, such as photos taken surreptitiously of someone in their private home. They derive from the idea that everyone should be able to enjoy their privacy. It does not matter from the perspective of a privacy law whether or not the information is *truthful* or *accurate*, or what effect the information has on the reputation of the person concerned. The deciding factor is whether the plaintiff has proven wrongful intrusion into his or her privacy.

b. Blasphemy

Blasphemy laws are laws which prohibit the denial or mockery of religion(s). Unlike defamation laws, blasphemy laws do not specifically protect individuals or even the reputation of the religion. Rather, they protect the sensitivities of adherents to the religion.

c. Hate speech

Hate speech laws prohibit statements which incite to discrimination, hostility or violence against a group with a shared identity, for example based on nationality, race or religion. In some cases, the term 'group defamation' is used in this context. There are, however, three important differences between hate speech and defamation laws. First, hate speech laws are intended to protect the safety and social equality of vulnerable groups, rather than their reputation. Second, hate speech laws protect groups of people, identified by certain shared characteristics, rather than individuals or legal persons. Third, hate speech laws only apply where there is created in the mind of the listener a feeling of hatred towards members of the group, rather than just a lowering of respect towards the group (in other words, a much higher threshold is required to engage a hate speech law).

Key Defamation Issues

a. Excessive penalties

Excessive penalties, even where a statement is legitimately sanctioned, represent, of themselves, a breach of the right to freedom of expression. Excessive penalties create a chilling effect, whereby the media and others

will steer well clear of the prohibited zone, shying away from making even *legitimate* statements, for fear of sanction.

It is increasingly being recognised that criminal defamation laws are of themselves an unjustifiable restriction on freedom of expression and that defamation laws should be exclusively civil in nature. Inasmuch as civil laws provide adequate protection for reputations and yet are a less heavy-handed tool, it is hard to see how criminal defamation laws could be considered 'necessary'. Necessity implies that when restricting freedom of expression States should use the means which are least harmful to freedom of expression.

There are a number of reasons why criminal defamation laws are more intrusive than civil laws:

- i. They provide for more severe penalties: imprisonment, heavy fines, removal of the right to practice journalism
- ii. They are more intimidating: if accused of defamation, you can be arrested, kept in pre-trial detention and subjected to a criminal trial
- iii. They carry a social stigma: with a criminal record, it may be difficult to find a job, become a politician
- iv. By comparison, civil laws: do not provide for arrest; allow for compensation in proportion to the damage done; and do not result in a criminal record

There is, as a result, a trend to repeal criminal defamation laws and to replace them, where necessary, with civil laws.

Examples:

- The following countries are among those that have abolished their defamation laws entirely: Cyprus, Sri Lanka, Georgia, New Zealand, Ukraine, Ghana, Bosnia-Herzegovina, Mexico, Estonia and the United States.
- In other countries, the approach has been to do away with the most offensive aspect of criminal defamation laws, the possibility of imprisonment. This has been done, for example, in Cambodia, Macedonia, France, Croatia, Bulgaria, Montenegro and Serbia.

b. Public officials/matters of public concern

In a number of cases, international courts have held that statements about politicians and other public figures should benefit from a greater degree of protection. Or, to put it differently, public figures should be required to tolerate a higher degree of criticism than ordinary citizens. This higher degree of protection has been extended to statements on matters of public concern that do not involve public figures, as well as statements about large companies.

There are a number of reasons for this:

- i. Debate about politicians and matters of public concern is essential for democracy, so it should not be discouraged
- ii. By choosing to serve the public, or by benefiting from publicity, politicians and other public figures have accepted that they will be scrutinised actively by the public
- iii. Politicians and other public figures normally have easy access to the media, so they are more able than ordinary people to respond to accusations without having to go to court

Example: In some countries – such as India, South Africa and the United States – an additional distinction is made in relation to **public bodies**, which are absolutely prohibited from suing for defamation. There are three key reasons for this:

- i. Public bodies, unlike public officials, don't have a reputation to defend. They don't have emotions and they don't have a career which could be hurt by defamation.
- ii. In a democracy, public bodies, by their very nature, should be subject to open public criticism.
- iii. It is wasteful to spend public money suing for defamation. Public bodies have the power to 'set the record straight' without recourse to the courts.

c. Defences

One way of ensuring that defamation laws do not unduly restrict freedom of expression is by providing for defences in certain cases. Five defences are key to establishing an appropriate balance between protection of reputation and the right to freedom of expression:

i. Truth

- In many countries, it is recognised that individuals should never be found liable for defamation unless they are shown to have made a false assertion of fact. In other words, truth is a complete defence to an allegation of defamation.
- This is because the law of defamation should serve to protect individuals against unwarranted attacks on their reputation, rather than to protect their honour regardless of whether their good reputation is deserved.
- Where should the burden of proof lie? Where the statement relates to a matter of public concern, the plaintiff (the one bringing the case), should have to prove that the statements were false. He or she will usually have better access to the evidence required to prove this. Furthermore, if the media were prevented from publishing anything they could not prove, in a court of law, to be true, this would have a massive chilling effect, to the detriment of the public's right to know. In other cases, however, (i.e. in cases which do not relate to matters of public concern) it is appropriate to place

the burden on the defendant to prove the truth of his or her statement.

ii. Opinions

- Opinions are by definition not true or false but depend on one's point of view. The law should not decide which opinions are legitimate and which are not, but should allow individuals to make up their own minds. As a result, many freedom of expression advocates believe that opinions should be absolutely protected.

Example: The European Court of Human Rights does not provide absolute protection to opinions, but it does grant them substantial protection. In the case of *Dichand and others v. Austria*, the applicants were convicted of defamation by the national courts for publishing an article alleging that a national politician who also practiced as a lawyer had proposed legislation in parliament in order to serve the needs of his private clients. The European Court stressed that the statement constituted a value judgment rather than a factual allegation. While acknowledging the absence of hard proof for the allegations, as well as the strong language used, the Court stressed that the discussion was on a matter of important public concern. It recalled:

It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.

At the same time, the right to express value judgements is not entirely unfettered. The Court also noted:

Even where the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.

- Determining whether a statement is one of fact or of opinion can sometimes be difficult. A statement that someone is 'good' or 'bad' is clearly an opinion, but what about a remark that someone is a 'crook'? Courts should study the context of the statement to determine whether it should reasonably be interpreted as a factual allegation or as an opinion. Sometimes apparently factual statements are actually opinions (for example in the context of satire or sarcasm).

iii. 'Reasonable publication'

- Even if a statement of fact on a matter of public concern has been proven to be false, defamation defendants should benefit from a defence of 'reasonable publication'. This defence applies, as its name suggests, if it was reasonable in all of the circumstances for the defendant to have disseminated the impugned statements in the manner and form he or she did.
- When an important news story is developing, journalists cannot always wait until they are completely sure that every fact made available to them is correct before publishing or broadcasting the story. Even the best journalists make honest mistakes; to leave them open to punishment for every false allegation would make their work very risky and so discourage them from providing the public with timely information.

iv. Absolute and qualified protection

- Most democracies recognise that in certain circumstances there is a need to grant greater protection to statements so as to encourage people to speak freely. In many countries, this protection can be absolute or qualified.
- Absolute protection should apply to statements made in the course of legal proceedings and statements made by or before elected bodies, such as Parliament or a local authority. It is essential that individuals feel completely free to speak without restraint before these bodies.
- Qualified protection applies to render statements immune from defamation liability unless they were made with malice or spite. This should apply to statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police or giving a job reference.

v. Words of others

- This defence applies to render the repetition of statements made by others immune from defamation liability when:
 - The statements relate to a matter of public concern
 - The third party (normally a journalist) refrained from endorsing or supporting the statements
 - It is clear that the statements were originally made by someone else either from the context or because this is specifically stated
- The defence of 'words of others' recognises that the media have a responsibility to cover the news and that this may include reporting on remarks made by third parties which could themselves be defamatory.

- Journalists are not specifically required to distance themselves from the statements or to check their truthfulness, as long as they do not endorse them.

GROUP EXERCISE

Divide into three groups and analyse the following scenario. Each group should be prepared to report back to plenary, presenting arguments on both sides of the ledger, as well as the dominant consensus in their group regarding the matter.

Tom Hanks is convicted of armed robbery and sentenced to two years in prison. He is not happy with his conviction; he does not believe his lawyer had been very good and he thought the judge was biased against him. He wrote a letter to the judge calling him a “pig” and “son of a filthy dog”, and claimed that he had bought his law degree from an unaccredited university in the United States. He also sent this letter to local and national newspapers.

Unbeknownst to Tom, his second claim is actually true: the judge had never studied law and had a ‘fake’ degree. No-one knew this, including Tom: he was just an angry man trying to bring the judge into disrepute.

One city newspaper publishes the letter; the editor thinks it is funny and publishes it in a column in the newspaper with other “funny” everyday stories, designed to bring some entertainment into peoples lives. The judge reads the article – it is published in the local newspaper in the town where he lives – and he does not think it is very funny at all. He sues for defamation and insult, and the judge that hears the case – who is a friend of the first judge – adds two years to Tom’s prison sentence, in order to “teach him a lesson”. The sentence is upheld on appeal; the appeals court clarifies that since Tom cannot prove that the judge bought his law degree, and that it also cannot be proven that the judge is a “pig” or the “son of a filthy dog”, it has no choice but to uphold the sentence.

Tom Hanks appeals to an international human rights court, claiming that his right to freedom of expression has been violated. What do you think?

National Security

PRESENTATION BY MODERATOR

National security is universally recognised as a legitimate reason to restrict freedom of expression. Where national security really is at risk, all human rights, indeed democracy itself, are threatened.

At the same time, historic abuse of restrictions on freedom of expression and information in the name of national security has been, and remains, one of the most serious obstacles to respect for freedom of expression around the world. These problems manifest themselves in two related but different areas. First, many States impose criminal restrictions on the making of statements which allegedly undermine national security. These restrictions may be abused to suppress political opposition and critical reporting. Second, almost all States impose a regime of secrecy on information held by public bodies that relates to national security, which is often very broad in nature. Excessive secrecy in relation to national security is a widespread problem around the world, even in established democracies.

Laws which purportedly protect national security go by many different names in different countries. Some examples include:

- Criminal proscriptions on incitement to overthrow of the government
- Official secrets laws or other secrecy laws
- Sedition laws
- Laws proscribing statements which undermine the integrity of the State
- Laws proscribing statements which benefit enemy States

Situation in Nepal

National sovereignty and integrity is recognized under the Interim Constitution as grounds for restricting freedom of expression, although any such restrictions must be 'reasonable'.

Section 14(b) of the Press and Publication Act 1991 provides that nothing may be published that undermines national sovereignty and integrity. Similarly, Section 7 of the National Broadcasting Act provides that, taking into account the national interest, the Government may, by a notification published in the Nepal Gazette, prevent any program pertaining to any particular subject, event or area from being broadcast by a broadcasting institution, for a period not exceeding six months at a time. This provision has been invoked in the context of national security.

Governments often abuse 'national security' restrictions on freedom of expression as an excuse to do **2 illegitimate things**:

- To prohibit the publication of information which is embarrassing to them but not harmful
- To suppress unpopular ideas which are not really harmful to national security

Examples:

- Israel: A newspaper wanted to publish an article criticising the director of Mossad (the Israeli secret service) and speculating that he was about to be replaced. A military censor ordered certain parts of the article to be deleted on the grounds that it would undermine

Israel's defence. The High Court said that this was not legitimate and that no country would invade Israel simply because they read that the director of the secret service was not performing well. The main aim was to protect the director from embarrassment.

- Turkey: Arslan, a Kurdish author from Turkey, wrote a book in which he described the Turks as "barbaric nomads" which had invaded the territories of nations which were a "thousand times more civilised", citing as examples the Arabs, the Persians and the Kurds. He described the Kurds as the last of the oppressed peoples which had not yet won their freedom from Turkey. He was sentenced to 1 year, 8 months imprisonment for disseminating propaganda against "the indivisible unity of the State". The European Court of Human Rights held that while the book painted an extremely negative picture of the population of Turkish origin and had a hostile tone, it didn't incite to violence, armed resistance or an uprising against the government. Therefore, putting Arslan in jail had not been necessary for the protection of national security.

What should national security laws protect?

The *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, were adopted by a group of experts on 1 October 1995. Their goal was to set authoritative standards clarifying the legitimate scope of restrictions on freedom of expression on grounds of protecting national security. Principle 4 of the Johannesburg Principles defines the legitimate scope of national security restrictions on freedom of expression as follows:

A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

National security is thus understood as a threat to a country's existence or territorial integrity or its capacity to respond to force, whether from an internal or external source.

Principle 6 of the Johannesburg Principles sets out the conditions under which speech may legitimately be proscribed on grounds of national security, which is when three conditions are met:

- i. the expression is intended to incite imminent violence;*
- ii. it is likely to incite such violence; and*
- iii. there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.*

This permits restrictions only where there is a very close link between the expression and the risk of violence.

States of emergency

The ICCPR allows governments to declare a state of emergency and suspend some of their human rights obligations, including the duty to respect freedom of expression.

Article 4 lays down conditions which the suspension of human rights during a state of emergency must meet:

- they may only be made in times of emergency which “threaten the life of the nation”;
- they must be officially proclaimed;
- they may only limit rights to the extent strictly required and may never be applied in a discriminatory way;
- the government must inform other States of the measures through the UN Secretary-General and explain the reasons for such limitation.

In practice, very few States of Emergency conform to these conditions.

Hate Speech

Hate speech laws are laws which prohibit the advocacy of hatred based on nationality, race or religion. In general, international law permits, but does not require States to limit freedom of expression. Hate speech is an exception and Article 20(2) of the ICCPR requires States to adopt laws to combat hate speech as follows:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This is not a carte blanche to adopt any kind of law on hate speech. According to the UN Human Rights Committee, laws adopted under Article 20 must still meet the three-part test for restrictions on freedom of expression. Individuals are permitted to criticise national, racial or religious groups, just not to incite others to hate or discriminate against them.

Situation in Nepal

The Interim Constitution provides for restrictions on anything which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities (Article 12(3)(a)). Similarly, Section 14(d) of the Press and Publication Act 1991 prohibits the publication of anything which creates discord among people of various castes, religion, class, area and community or which promotes communal animosity. Section 15 of the National Broadcasting Act 1993, prohibits the broadcasting of advertisements or materials misinterpreting, disregarding, insulting and devaluing any tribe, language, religion and culture.

Examples:

- Canada: A telephone service warned about “the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.” The Canadian courts ordered the phone service to be stopped and the operator complained to the UN Human Rights Committee. The Committee rejected the complaint because the statements were blatant lies which would incite those who heard them to hatred and possibly discrimination against the Jews.
- Denmark: A journalist made a documentary about a group of socially marginalised teenagers in Denmark who formed a gang called the ‘greenjackets’. During interviews, the teenagers made many racist remarks about black people, which were then broadcast on the radio. Both the teenagers and the journalist were convicted by the Danish for spreading hate speech. The journalists appealed to the European Court of Human Rights, which held that the documentary was a serious news programme whose purpose was to expose and analyse the views of the greenjackets for the benefit of the public. It was obvious that the programme did not intend to incite to hatred or discrimination and hence the conviction was a breach of the right to freedom of expression.

Blasphemy

Blasphemy laws are often confused with hate speech laws, but there are some important distinctions. Hate speech laws protect against discrimination of individuals on the basis of who they are (including their religion); blasphemy laws protect religious beliefs *per se*.

Examples:

- Someone says: “The story that Jesus was able to walk on water is obviously nonsense.” This would be considered by Christians to be blasphemous but it is not hate speech.
- Someone hands out leaflets which say: “Let’s boycott Hindus, let’s not rent out apartments to Hindus.” This is hate speech because it incites to discrimination against Hindus.
- Someone says: “Anyone who believes in the Scientology religion has got to be out of their mind.” This is probably neither. It does not incite to hatred against Scientologists and neither does it make a specific allegation which could be considered to be blasphemous.

Free speech campaigners are generally very suspicious of blasphemy laws and in a few countries – such as Norway, Spain and the US – these laws have been abolished. They were also abolished recently in the UK. In some other countries, these laws are rarely used. In many countries, they are seen as an historical oddity, a leftover from a period when the separation between religion and State was not as clear as it is today.

There are a number of reasons for this:

- Some blasphemy laws are discriminatory. In the UK, the blasphemy law only protected the Anglican religion and not other religions.
- Blasphemy laws are not necessary to protect freedom of religion because ridiculing someone else's belief doesn't prevent that person from continuing to practice it.
- Blasphemy laws discriminate against non-religious people. Why is it forbidden to ridicule a religious belief when it is permitted to ridicule a secular belief?

However, the vast majority of countries both have and apply blasphemy laws.

Article 23 of the Interim Constitution of Nepal guarantees the right to practice religion. However, it prohibits any person from acting or behaving in a manner which may infringe upon the religion of others. Despite this, Nepal does not have any specific blasphemy laws. The chapter on 'Adal' in the Civil Code prohibits forceful conversion. A conviction for conversion or proselytising can result in fines or imprisonment.

Example: Austria: A film depicted the God of Christianity as a senile old man, the Virgin Mary as an immoral woman and Jesus Christ as mentally deranged. It was shown only late at night to a paying audience which had been provided with prior warning about the film's content. The film was banned at the request of the Catholic Church. The European Court of Human Rights held that in principle believers must tolerate the denial of their beliefs by others and the propagation of different beliefs. But the State has a positive obligation to protect the right to freedom of religion. Believers should be free to practice their religion without interference from other citizens. This can include preventing provocative portrayals of religious symbols.

MODERATOR FACILITATED GROUP DISCUSSION

What do you think about the cartoons of the prophet Mohammed that were published by the Danish newspaper? Do you see them as hate speech? Blasphemy?

PRESENTATION BY MODERATOR

Privacy

International standards on privacy are very straightforward. In principle, States are permitted to adopt laws which protect individuals against intrusions into their private lives. However, when there is a conflict between the right to freedom of expression and the right to privacy, neither right should automatically prevail. A number of principles apply:

- i. European Court of Human Rights: “The decisive factor in balancing the protection of private life against freedom of expression is the contribution the photos or articles make to a debate of general interest.”
- ii. As in the case of defamation, public figures should be more tolerant than ordinary people. Public figures do have a right to a private life; however, the media should be permitted to report facts which concern their suitability to hold a public office.

Situations for discussion:

1. A suspected serial killer is arrested. A newspaper publishes a picture of the suspect with his family.
2. What if the picture is of the suspect alone?
3. A newspaper reveals that a politician is gay.
4. A politician’s wife checks into a clinic to rehabilitate her addiction to gambling and pictures of her entering the clinic are published in a newspaper.

QUESTION AND ANSWER SESSION

Session 3: The Right to Information

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PRESENTATION BY MODERATOR

One of the most important developments in the area of freedom of expression over the last 15 years has been the explosion in the number of right to information (RTI) laws worldwide. A right to information law is a law which grants citizens the right to access documents held by public bodies.

Examples: The first law was adopted in Sweden in 1766. Finland followed in 1919, then USA in 1966. By 1990, only 13 countries had right to information laws. By 2008, there were some 75 national RTI laws, including Nepal. Some international organisations (World Bank, Asian Development Bank) have also adopted access to information policies.

Rationale

The primary rationale for the right to information is that public bodies hold information not for themselves but as custodians of the public good. As such, this information must be accessible to members of the public in the absence of an overriding public interest in secrecy. In this respect, right to information laws reflect the fundamental premise that government is supposed to serve the people.

There are a number of more utilitarian goals underlying the right to information:

i. Democracy

ARTICLE 19 has described information as, “the oxygen of democracy”. Information is essential to democracy at number of levels. Fundamentally, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Effective participation at all levels depends, in fairly obvious ways, on information. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government” – the electorate must have access to information. The same is true of participation at all levels.

ii. Accountability/good governance

The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

iii. Corruption

The right to information is a key tool in combating corruption and wrongdoing. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. There are numerous examples of this working in practice.

iv. Dignity

Commentators often focus on the more political aspects of the right to information but it also serves a number of other important social goals. The right to access one’s personal information is part of basic human dignity but it can also be central to effective personal decision-making. Access to medical records, for example, often denied in the absence of a legal right, can help individuals make decisions about treatment, financial planning and so on.

v. Good business

An aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. This is an important benefit of right to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.

Legal Status

The right to information is clearly guaranteed by Article 27 of the Interim Constitution:

(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.

This is somewhat limited inasmuch as it is restricted to citizens (as opposed to everyone) and to information ‘of public importance’ (as opposed to all information). It also preserves any exception set out in law (regardless of how broad that law might be).

Until recently, the status of the right to information under international law was unclear. However, a very significant case decided in September 2006 by the Inter-American Court of Human Rights – *Claude Reyes et al. v. Chile* – held very clearly that access to public information was a fundamental right. In an unequivocal ruling, the Court held:

Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.

Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it.... The information should be provided without the need to prove direct interest or personal involvement in order to obtain it.

The Court recognised that the right to information, like all aspects of the right to freedom of expression, may be restricted. However, any restriction must be set out clearly in law and serve one of the limited set of legitimate aims recognised in Article 13 of the Convention (which are identical to those recognised under Article 19 of the ICCPR). Importantly, the Court also held the following in relation to any restrictions on the right to information:

Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.

The remedies imposed by the Court were also very significant. These included ‘normal’ remedies like providing the information to the victims, awarding costs to the applicants and requiring key parts of the judgment to be published in the official gazette and a national newspaper with wide circulation. But the Court also directed

the State to “adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information” and, even further, to provide training to public officials on the implementation of this right.

Key Aspects

There are five key aspects of a good right to information law:

- i. A broad presumption in favour of disclosure
- ii. Strong proactive disclosure requirements
- iii. Good procedural mechanisms for requesting information
- iv. A limited regime of exceptions
- v. The right to appeal refusals to an independent body

These are dealt with in turn below.

Presumption in favour of disclosure

The law should establish a wide presumption in favour of disclosure. This includes three main elements:

- i. Who may request?
 - under international law, anyone may request, including non-residents; businesses should also be able to request
- ii. What may they request?
 - any information, whatever form it is held

Examples:

- Sweden: There was a request to see the cookies on the Prime Minister’s computer. It was granted (there were no cookies on his computer at the time, showing he did not use the Internet).
 - Canada: There was a request for emails exchanged internally in a government department. The request was granted.
 - also any document (requester should not have to identify the document but if he or she can, then that should be permitted too)
- iii. From whom may they request?
 - any public body; local and national bodies; statutory and constitutional bodies; bodies operating with public funding; bodies undertaking public functions (e.g. even a privatised water company)

Example: In South Africa you even have a right to access information held by private bodies, as long as the information is needed for the exercise or protection of a right.

- all three branches of government (legislative and judicial as well as executive)

Proactive or routine disclosure

Although the core of an access system is request driven, the law should also place an obligation on public bodies to disclose, proactively or routinely, information of key importance. This ensures at least a minimum platform of information flow to the public and of openness in government.

There is a trend towards increasingly detailed proactive disclosure regimes.

Examples:

- Some of the recent right to information laws have very extensive proactive publication obligations. This is the case, for example, with Peru (2002), Azerbaijan (2005), India (2005) and Kyrgyzstan (2007).
- The Indian law, for example, requires every public body to publish, and to update annually, the following:
 - particulars of their organisation, functions and duties
 - the powers and duties of employees
 - the procedures followed in decision-making processes
 - any norms which it has adopted to undertake its functions
 - its rules, regulations, instructions and manuals
 - the categories of documents it holds and which are in electronic form
 - public consultation arrangements relating to the formulation or implementation of policy
 - a description of all boards, councils, committees and other bodies, and whether their meetings or minutes are open
 - a directory of all employees and their wages
 - the budget allocated to each of its agencies and particulars of all plans, proposed expenditures and reports on disbursements made
 - information about the execution of subsidy programmes and the beneficiaries
 - particulars of the recipients of concessions, permits or other authorisations
 - facilities for citizens to obtain information (including reading rooms)
 - the contact details of all information officers
 - all relevant facts when formulating policies or announcing decisions which affect the public, and reasons for administrative or quasi-judicial decisions, to those affected

These obligations should not be static but should increase as the capacity of the public body increases and as new technologies are integrated.

Examples:

- The Indian law required public bodies to make a ‘constant endeavour’ to provide as much information proactively as possible, so as to minimise the need for the public to have recourse to requests to obtain information.
- In the UK, public bodies must produce a publication scheme, which the Information Commissioner must approve. Approval may be limited or withdrawn, giving the public body six months to come up with a new, more disclosure-oriented, scheme.

Procedural rules

Some questions to be asked about the procedural rules:

- is it relatively simple to place requests? can they be made at different locations around the country? can they be made electronically, orally, etc.? is the form for filing requests simple or complex?
- are reasons required to be provided for requests?
- do public bodies have to provide assistance to requesters, for example in case of illiteracy or disability, or where they are having difficulty formulating their request?
- are clear procedures in place for transferring requests to other public bodies when the information is not held and/or for consulting with third parties where the information relates to them?
- are clear and appropriate timelines for responding to requests in place (normally about 15-20 working days)? are clear conditions placed when these timelines may be extended? are shorter timelines in place for urgent requests?
- can requesters specify the form in which they would like to receive the information (such as inspection of the record, getting or making a copy of the record, getting a transcript from the record, etc.)?
- where access is refused, is adequate notice provided, setting out the precise grounds for the refusal, including the exception relied upon, as well as the means of appealing such refusal?
- are clear and reasonable rules relating to fees in place? what costs are allowed to be billed (just for duplicating and communicating the information or also for searching for and assessing it)?
- are there central fee rules applicable to all public bodies or is each public body allowed to set its own rules? are standard rates for things like photocopying in place?
- are fee waivers in place, for example for impecunious requesters, or for requests in the public interest or for personal information?

Exceptions

The right to information is not absolute; it is obviously important that the law protect legitimate secrecy interests such as personal privacy. However, any exceptions to the right of access should be set out clearly in law. The regime of exceptions has proven to be the Achilles heel of many access to information laws.

Examples:

- United Kingdom: UK Freedom of Information Act 2000 is in many ways a very progressive piece of legislation. At the same time, it has a vastly overbroad regime of some 23 exceptions, which fundamentally undermines the whole access regime.
- In many countries, the RTI law leaves in place secrecy laws. This fundamentally undermines the RTI law, since it fails to change the basic rules of the game.

Three-part test:

As with all restrictions on freedom of expression, exceptions to the right to access information must meet a strict three-part test:

i. Clear list of overriding interests

The law should set out clearly the legitimate interests which might override the right of access. These should specify interests rather than categories. For example, they should refer to privacy rather than personal information and national security rather than the armed forces.

Example: A resolution of the Council of Europe recognises only the following overriding interests:

- i. national security, defence and international relations;*
- ii. public safety;*
- iii. the prevention, investigation and prosecution of criminal activities;*
- iv. privacy and other legitimate private interests;*
- v. commercial and other economic interests, be they private or public;*
- vi. the equality of parties concerning court proceedings;*
- vii. nature;*
- viii. inspection, control and supervision by public authorities;*
- ix. the economic, monetary and exchange rate policies of the state;*
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.*

ii. Harm-based

Access should be denied only where disclosure would pose a risk of harm to a legitimate interest. The harm should be as specific as possible. For example, rather than harm to internal decision-making, the law should refer to impeding the free and frank provision of advice.

Example: The ARTICLE 19 publication, *A Model Freedom of Information Law*, uses the following harm test: “would, or would be likely to, seriously prejudice” the legitimate interest. For private information, it uses the term: “unreasonable disclosure of personal information”.

iii. Public interest override

The law should provide for a public interest override in cases where the overall public interest would be served by disclosure, even though it might harm a legitimate interest. This might be the case, for example, where a document relating to national security disclosed evidence of corruption. In the long term, the benefit to society of disclosing this information would normally outweigh any short-term harm to national security.

Examples:

- India: The law includes a strong public interest override whereby, when the public interest in disclosure outweighs the harm to the protected interest, the information should be disclosed notwithstanding not only the exceptions in the RTI Law but also anything in the Official Secrets Act.
- Uganda: The law contains a public interest override whereby information must be disclosed even where it otherwise falls within the scope of an exception where the disclosure would reveal evidence of a substantial breach of the law or an imminent and serious public safety, public health or environmental risk, and the public interest in disclosure is greater than the likely harm to the protected interest.

Other considerations for exceptions:

- relationship with secrecy laws: does the RTI law override secrecy laws and classification labels? if not, secrecy practices may not change very much
- is there a severability clause, so that only that part of a record that is covered by an exception may be withheld, while the rest is disclosed?
- are there overall historical time limits beyond which exceptions either do not apply or apply only with special justification?
- are there any blanket exclusions from the law (for example for intelligence bodies, the cabinet, etc.)?
- does the exception for personal information apply to information about the functions of officials?
- can officials issue certificates designating information as secret and beyond review (for example for security or defence information)?

- if there is an exception in favour of internal deliberations, how broad is it? Are specific protected interests (such as the free and frank provision of advice) listed or is all internal advice covered? are background studies for decisions covered?

Appeals

It is essential that requesters may appeal refusals to grant access to an independent oversight body. In most countries, including Nepal, one can ultimately appeal to the courts but experience has shown that an independent administrative body is essential to providing requesters with an accessible, rapid and low-cost appeal. The courts are simply too expensive and complicated, and take too long, for most requesters. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of this aspect of the system.

Key considerations:

- is there an independent administrative oversight body with various powers relating to implementation of the right to information?
- how is the independence of that body protected: explicitly in the law; through the appointments process; by requiring the person to be politically impartial; in other ways?

Examples:

- India: Information commissioners are appointed by the President upon the recommendation of a committee consisting of the Prime Minister, Leader of the Opposition and a Cabinet Minister appointed by the Prime Minister.
 - Japan: The Prime Minister appoints the Commissioners upon the approval of both houses of parliament.
 - Mexico: Appointments are made by the executive branch, but are subject to veto by the Senate or Permanent Commission.
-
- does the body have the necessary powers to undertake its tasks: legal personality and the power to acquire and deal with property; to appoint staff; to review any record; to investigate matters fully, including by compelling witnesses; etc.?
 - is the mandate of the body broad: does it have a mandate to monitor and report on compliance by public bodies with their obligations; to make recommendations for reform; to adjudicate appeals regarding failures by public bodies to respect their obligations; to report to the legislature?
 - does it have broad and binding remedial powers to compel public bodies to take appropriate action to bring themselves into compliance with the law (including by disclosing information or taking such other action as may be required to this end)?

The Situation in Nepal

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. The constitutional guarantee is limited to citizens whereas the right to information, like the general guarantee of freedom of expression, should be enjoyed by everyone, not just citizens. Similarly, the right should apply to all information, not just personal information or information deemed to be of public importance.

The Nepali Right to Information Act came into force on 21 July 2007. Following the constitutional framework, the law also provides this right to citizens only. Article 2(a) defines which public bodies have a duty to provide information to people, including constitutional and statutory bodies, agencies established by law to render services to the public and agencies operating under a government grant, or owned or controlled by the government. It also covers political parties and organisations, and non-governmental organisations (NGOs) which operate with funds obtained directly or indirectly from the Nepali government, a foreign government or an international organisation.

Article 2(b) of the Act defines information as ‘any written document, material or information related to the functions, proceedings thereof or decision of public importance made or to be made by the public agencies’. The unfortunate qualification to information of public importance might create unnecessary limitations on the right to information.

The Act provides for the proactive or routine disclosure of information by public bodies. Article 4(2)(a) requires public bodies to “classify and update information and make them public, publish and broadcast”. Similarly, Article 5(3) sets out a list of categories of information which must be made available on a proactive basis, such as the structure and nature of the body, the duties, responsibilities and powers of the body, decision-making processes, a description of functions performed and so on.

A Nepali citizen who wishes to obtain information must submit an application to the relevant Information Officer, “mentioning the reason”. The Information Officer is obliged to provide the information immediately or, if that is not reasonably possible, within fifteen days, providing notice to the applicant of the reasons for any delay. The Act also provides that where requested information relates to the security or life of any person, the Information Officer shall provide it within 24 hours of the request. In cases where the requested information is not held, the applicant shall be notified immediately.

The obligation on applicants to ‘mention the reason’ for their requests appears to contradict the basic idea of a right to information law, namely that information belongs to the public, rather than the government, and should be accessible unless the public body has a good reason to withhold the information.

The Act lists five categories of exceptions whose protection could justify a refusal to disclose information, such as national security and privacy. A public body may only invoke these exceptions if there is an “appropriate and adequate reason”.

In terms of appeals, applicants have seven days from the moment the information is denied, in whole or in part, to complain to the head of the public body concerned. The head may decide to release the information or confirm the earlier decision, within an unspecified timeframe. If the requester disagrees with the decision of the head, he or she may file an appeal with the National Information Commission within 35 days. The Commission may then summon the concerned head or Information Officer and take their statement, as well as hearing witnesses, reviewing evidence and inspecting any document held by a public body. The Commission shall reach a decision within sixty days and this decision can be appealed to the Appellate Court within 35 days.

QUESTION AND ANSWER SESSION

GROUP EXERCISE

Divide the participants into three groups and ask them to discuss and answer the following questions. One member of each group should present back to the plenary. Time permitting, each group could be asked to sub-divide into two smaller groups, with one sub-group arguing that the restriction was legitimate and the other arguing it was a breach of the right to freedom of expression, as if they were presenting to a judge.

- 1) Someone requests the posts and ranks of a number of police officers. Should these be made public or is this private information?
- 2) A country declares war on another country. It has plans to send ships with troops to attack the other country. Should the times of the sailings of these ships be made public?
- 3) Someone requests the salaries of all of the teachers at a local school. Is this public or private information? What about the salaries of local elected officials? National elected officials?
- 4) Before declaring war on Iraq, US President Bush claimed he had good evidence that Iraq had weapons of mass destruction but that he could not provide the details for reasons of national security. Is this a legitimate claim?
- 5) Someone requests information about grants from an international donor in Nepal to local organisations. Should the amount granted to each organisation be made public? What about the detailed budget for each project?
- 6) The Ministry of Education is preparing a new policy on examination standards. It has released a discussion document for public consultation

and is now working on a draft policy. Someone requests the current version of the draft. Should it be made available? Later on, the Ministry abandons the project and returns to the old policy. Someone requests the latest version of the draft that was never finalised. Should it be made available?

Session 4: Regulation of the Media

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PRESENTATION BY MODERATOR

Media regulation is a complex area and the following three issues are usually treated differently:

- journalists
- print media
- broadcasting
- now also Internet and other new communications platforms (mobile phones)

Why should these be treated differently?

- journalists are individuals whereas media outlets are usually legal entities; journalists have a direct/personal right to freedom of expression and are also more vulnerable
- different communications platforms affect the receiver differently (reading is quite different than watching television which is more immediate, more violent, comes right into your home, etc.)
- broadcasters still, for the most part, rely on a limited public resource – the airwaves – and it is legitimate to impose obligations on them in exchange for privileged access to this resource; this is not the case for newspapers
- there is a need to license broadcasters if only to avoid chaos in the airwaves
- it is much more difficult to limit access of children to broadcasting – which is available at the flick of a switch – than to print media
- high start-up costs for broadcasting result in limited fluidity and so it is important that broadcasters have a reasonable chance of business success
- broadcasting tends to be characterised by a small number of powerful big business actors who have less commitment to the foe/public interest role of media than is the case for the print sector

Key Principles

Independence

Regulatory bodies should be independent in the sense that they are protected against political or commercial interference. The reason for this is clear: if they are subject to political control, they will serve the government of the day to the detriment of the public.

The three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have stated:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.

How to promote independence:

i. Appointments

Appointments to the governing board should be made in a way that promotes independence. Appointments should be made by a multi-party body or by civil society groups. The process should be open and allow for public participation. There should be proscriptions on certain types of individuals – including those with strong political connections and/or vested interests in the industry – from being appointed. Once appointed, individuals should benefit from protection of tenure.

ii. Clear Mandate

The body should have a clear mandate set out in law. This is both a defence against interference – since the body can point to the mandate if it is asked to do something it should not – and an accountability mechanism, since the public can hold the body to its mandate.

iii. Legislative Guarantee

A strong legislative guarantee of independence is useful as a clear statement of legislative intent and it can also be relied upon in court if necessary.

iv. Funding

Funding is a key means by which regulatory bodies can be controlled. Whoever controls the purse strings also controls the organisation. The budget should be approved by a multi-party body, such as the legislature, rather than a ministry or the executive arm of government. Ideally, licence fees and other sector-specific sources should provide the revenue for the regulator.

v. Accountability

The body should be formally accountable to the public through a multi-party body such as parliament or a committee thereof, rather than through the executive arm of government. Other more direct forms of accountability, such as citizen surveys and direct public feedback opportunities are also useful.

Legitimate Regulatory Goals

i. Diversity

- the right to freedom of expression includes the right to seek and receive as well as to impart information and ideas
- as a result, diversity refers to the ability of readers/listeners/viewers to receive a wide range of information about matters of interest/concern to them, as well as the ability of all interests in society to have access to the media to express themselves
- there are three types of diversity: outlet, source and content
- outlet: different types of media (e.g. public service, commercial and community broadcasters, local and national newspapers, etc.)

- source: ownership is not unduly concentrated in the hands of a few
 - content: availability of a wide range of different perspectives, formats, topics, languages
- ii. Independence
- applies to individual outlets, including public media: it means they can operate free of interference from commercial/political interests
 - it also applies to regulatory bodies; the meaning is the same
 - does not mean regulators/public media should not be accountable but accountability should be to the public, not to the government or advertisers
- iii. Freedom
- constraints on what may be published or broadcast should not be unduly restrictive: do not inhibit open debate about matters of public concern
 - official restrictions are in line with the 3-part test
 - editorial independence is respected (by officials/government but also by owners); professional considerations – relevance, importance, media’s niche – rather than vested interests determine editorial output
- iv. Protection of Public
- media are often powerful social players who can cause harm
 - examples: ruin the reputation of people (e.g. by attacking competitors); create an uneven playing field politically (e.g. by supporting one political party); destroy private life (e.g. by exposing victims of sexual crimes); harm children (e.g. by carrying material they cannot deal with: violence, sexual material or mature themes)

Journalists

3 key issues:

- i. Licensing
- ii. Accreditation
- iii. Protection of sources

Licensing

- system where some kind of permission is required before one may practise as a journalist
- in some cases this is an explicit licence requirement; more often, measures of equivalent effect:
 - you need to be a member of an official association to which entry can be refused
 - conditions are placed on who may be a journalist (age, training)
 - you may be stripped of the right to practise journalism

- arguments used to justify licensing: to prevent incompetent or immoral journalists from holding powerful social positions
- risk: abused to prevent critical journalists from working

Example: Costa Rica: case before Inter-American Court of Human Rights where the issue was the legitimacy of compulsory membership of journalists in an association with conditions on members.

Arguments by Costa Rica and its supports:

- This is the normal way of doing things for professionals: doctors and lawyers are also universally required to be members.
- The system promotes the general welfare because it ensures the public receives complete and accurate information; promotes professionalism.
- Association would act as a trade union for journalists.
- Protect public order.

Court ruled:

- There is a fundamental difference between journalists and lawyers/doctors; there is a human right to practice journalism but not to be a lawyer or doctor.
- Access to full and accurate information benefits the general welfare and public order. But the chance that we will get such information is ultimately greater if everyone is allowed to practice journalism than if the authorities select for us who is qualified to provide it.
- The association could promote journalists' rights against employers, but this goal could also be achieved without excluding certain people from the profession.
- Public order is better protected by the free flow of information and ideas than by attempts to control it.

Accreditation

- system to ensure that journalists can get preferential access to limited access meetings of public bodies, like parliament or the courts, usually based on a press pass
- rationale is that journalists ensure that the subject of these meetings is carried to the public as a whole
- different from licensing – does not say who may be a member of the profession – although sometimes confused
- also used to refer to system for granting permission to foreign journalists to work in the country

- as always, danger of abuse: e.g. on political grounds where more critical or independent journalists are denied accreditation
- international standards require accreditation to conform, at a minimum, to the following:
 - i. be administered by a body which is independent from the government and applies in a fair and transparent procedure;
 - ii. be based on specific, non-discriminatory and reasonable criteria published in advance;
 - iii. only be applied to the extent justifiable by genuine space constraints; and
 - iv. not permit accreditation to be withdrawn based on the work of the journalist or media outlet concerned.

Example: United Kingdom: Accreditation applies only to Parliament but official press cards are issued to ‘newsgatherers’ by the Press Card Authority, made up of 16 “gatekeepers”, national trade unions and professional associations which represent journalists and other media personnel. The gatekeepers issue cards to their members and are responsible for ensuring that the conditions are adhered to. The Press Card Scheme Rules set out rules governing the scheme, as well as the cards themselves, and the criteria for new gatekeepers. The definition of who is eligible for a Press Card is as follows:

An Eligible Newsgatherer is anyone working in the UK whose employment or self-employment is wholly or significantly concerned with the gathering, transport or processing of information or images for publication in broadcast electronic or written media including TV, radio, internet-based services, newspapers and periodicals; and who needs in the course of those duties to identify themselves in public or other to official services.

The card is a standard format, bearing the word PRESS, and is formally recognised by all police forces in the UK, and *de facto* by other public bodies.

Situation in Nepal

There is no requirement for a license to practise journalism in Nepal and this is respected in practice. Reporters working for the numerous FM radio stations operating throughout Nepal, as well as local and national newspapers, are able to collect and report on news freely without being licensed or registered.

Despite this, there is a provision under the Press and Publication Act on ‘Press Representative Certificate’ which makes it compulsory for Nepali and foreign media organisations working in Nepal to send information about the name, qualifications and working area of their representatives to the Press Council. The Act also provides that the government may make arrangements to provide a Press Representative

Certificate or Temporary Press Representative Certificate to representatives of organisations who provide this information, after making the necessary investigations.

Journalists having a Certificate can collect news in their designated area in the manner provided for under the Press and Publication Act and other prevailing laws. The Department of Information is currently providing these Certificates, known as a PRESS CARD, to some journalists. At the same time, as noted above, many journalists in Nepal do not have this card but are allowed to practise journalism. However, in case a non-democratic government wanted to abuse the law, they could engage these provisions.

In addition to the PRESS CARD system, other institutions, such as the Supreme Court, have issued their own cards to reporters (in that case to legal reporters). They have issued permanent cards to a number of journalists regularly reporting on legal issues and temporary passes to journalists who just want to enter court premises for particular purposes.

Where a journalist has repeatedly breached the professional Code of Conduct adopted by the Press Council of Nepal, the Council may recommend that the government suspend, in whole or in part, any official privilege or facility provided to him.

Protection of sources

- the right of journalists to protect confidential sources of information is widely recognised

Examples:

- Regional human rights bodies: the European Court of Human Right has stated that protection of sources is ‘one of the basic conditions of press freedom’; the right has also been recognised by the Inter-American Commission on Human Rights, the African Commission on Human and Peoples’ Rights and the Council of Europe.
 - Nationally: the right is recognised in domestic law of States, even if implementation is sometimes weak; in some States, it is an absolute right but in most there are exceptions.
- Nepalese law is silent regarding the protection of confidential news sources. The Code of Conduct issued by the Press Council of Nepal states that journalists and media outlets shall not disclose their confidential sources. As a general rule, sources should be quoted in presenting the news, for the sake of the authenticity and reliability thereof. However, protecting a confidential source is a duty of journalists and, as a result, the name and identity of such a source should not be disclosed unless the source gives permission for this.
 - the rationale, as with accreditation, is that journalists need to be able to access confidential sources to ensure that important information reaches the public; once again, it is the right of the general public to receive information, rather than a special right of journalists, that is being protected

- some exceptions are recognised under international law but these are limited to the following cases:
 - i. disclosure of the source is necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime
 - ii. the interest in disclosure outweighs the harm to freedom of expression of ordering disclosure
 - iii. disclosure has been requested by an individual or body with a direct, legitimate interest in the information held by the source, and who has demonstrably exhausted all reasonable alternative measures to protect that interest
 - iv. the power to order disclosure is vested exclusively in courts of law
 - v. disclosure may not be ordered in the context of a defamation case although journalists may have to bear the consequences of refusing to disclose the source (which would normally be able to support their version of events)
 - vi. the extent of disclosure is limited as far as possible, for example just being provided to the persons seeking disclosure instead of the general public
 - vii. sanctions against a journalist for refusing to disclose the identity of a source may be imposed only by a court after a fair trial which is subject to appeal to a higher court

INDIVIDUAL EXERCISE

Comment on the following (fictional) fragments from a media law. Are there any inconsistencies with international law and standards?

Article 1 - Definitions

'Journalist': A registered member of the Journalists' Association who adopts journalism as his/her profession.

'Journalism': The dissemination of information or ideas to the public through a means of mass communication.

Article 3 – Registration of journalists

1. Any person wishing to practise journalism must apply for membership of the Journalists' Association.
2. The Journalists' Association may prescribe an entry exam for membership. This exam shall be objective in nature.
3. Any person applying to the Journalists' Association shall be accepted as a member unless he/she fails the exam.
4. It is forbidden for non-members of the Journalists' Association to practice journalism.

Article 10 – Protection of sources

1. Journalists shall have the right to withhold the identity of sources for their stories. No court shall order a journalist to disclose a source's identity unless it is necessary in order to:
 - a. prevent the commission of a crime;
 - b. reveal who is responsible for a libel or slander;
 - c. enable the accused in a criminal trial to defend himself/herself effectively;
 - or
 - d. verify that the source genuinely exists.
2. A court shall not order the disclosure of a source if his/her identity can be uncovered through other means.

PRESENTATION BY MODERATOR

Regulation of the Print Media

- general principle: in the print media sector, freedom from regulatory constraint promotes innovation, growth, independence and diversity and so any impositions must be carefully justified
- 3 key issues:
 - i. licensing/registration
 - ii. content rules
 - iii. special remedies: right of reply/correction

Licensing/registration

- the difference between licensing and registration: the former may be refused whereas the latter is granted automatically upon the provision of the required information
- arguments in favour:
 - keep statistics of number of newspapers, etc.
 - can be used to enforce content rules/special remedies
 - promotes professionalism
- cons:
 - can lead to government control
 - unnecessary for statistical purposes
 - does not promote professionalism
- it is established that licensing is not acceptable for the print media for the following reasons:
 - it allows for too much government control

- there is no justification for a system that allows permission to publish to be refused; there are no material constraints on the number of newspapers so they should be allowed to compete in the market
 - it is not necessary by reference to any of the ‘pros’ above (since all can be achieved with the less intrusive approach of registration)
- registration is more controversial; as the special mandates on freedom of expression have noted:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.

- most established democracies no longer have registration schemes given that all major media are incorporated (in the UK, the law requires periodicals which are not incorporated to register) but it may still be legitimate if it meets certain conditions

Examples:

- ECHR Case: *Laptsevich v. Belarus*: Laptsevich was fined and had 200 pamphlets confiscated for not registering. The ECHR held that this was a breach of the right to freedom of expression because imposing a requirement of registration on the distribution of pamphlets could not be justified.
 - ECHR Case: *Gaweda v. Poland*: The authorities refused to register the periodicals on the basis that the proposed titles were misleading and would harm foreign relations. The Court held that this was a breach of the right to freedom of expression since requiring titles to conform to the truth was not necessary to protect any legitimate aim.
- In Nepal, District Administration Officers (DAO) have the authority to register newspapers and no newspaper may be published without such registration. The DAO issues a temporary certificate to the applicant and forwards the information to the Press Registrar. After ensuring that there is no other newspaper with the same name, the press registrar gives its consent for the registration and the DAO then issues a permanent registration certificate to the newspaper.
 - General principles:
 - should be imposed only on true mass media, i.e. those published regularly for the benefit of the general public, and with a mass circulation (i.e. not occasional publications as in Laptsevich)

- there is no discretion to refuse registration, once the requisite information has been provided
- the system does not impose substantive conditions upon the media (such as restrictions on the nature of titles, as in the Gaweda case)
- the system is not excessively onerous
- the system is administered by a body which is independent of government

Content rules

- widely accepted that there is a need to promote professionalism in the media, including the print media, to protect a range of interests such as:
 - privacy
 - children
 - accuracy
 - intrusion into grief/suffering
 - financial journalism
 - discrimination
- the rules are often complex since application depends on the context; it is accepted that for most content rules regarding the print media, the public interest may justify overriding the rule

Examples where the public interest overrides the protected interest:

- A minister of defence claims that his hotel bill in Paris is a private matter but it turns out that it was paid by a defence salesman
 - The need to get information about a series of gruesome crimes to the public requires some intrusion into grief
 - The urgency of a news story requires publication before all of the facts can be fully checked, with the result that some mistakes (inaccuracies) are made
- some of these interests are not protected by the general civil or criminal law (e.g. accuracy and intrusion into grief); at the same time, the civil or criminal law would be too heavy a rule for regulating these matters to be accepted as a restriction on freedom of expression (the imposition of such a heavy rule would be considered disproportionate because the harm to freedom of expression would be greater than any benefit the rule would deliver)
 - two types of systems for dealing with the print media:
 - i. self-regulatory systems whereby bodies are created by the profession – whether it be the newspapers, the editors or even the journalists – to receive and decide upon complaints
 - these systems normally depend on voluntary membership and impose only light sanctions such as a requirement to print a statement by the complaints body
 - pros: sensitive to needs of the media since created by the media, relatively protected against government control

- cons: these systems cannot bind the print media, who may choose not to join or to refuse to accept a ruling, sometimes seen as weak (sanctions may not be strong enough to deter the offending behaviour)
- ii. administrative law system whereby a complaints body is established by law and given the power to hear complaints and impose sanctions
 - the law defines which publications are covered and sanctions may range from light sanctions to suspension of the right to publish
 - pros: effective application of the rules
 - cons: may be subject to government control, sanctions may be excessive

The Press Council of Nepal

The Press Council of Nepal is a statutory body established by the Press Council Nepal Act to promote the standards of a free press. In the law, Council is an autonomous body having perpetual succession. However, appointments to the Council are largely controlled by the government, undermining its independence. The government nominates 10 of the 14 members of the Council, including the chairperson. The Speaker and the Chairperson of the National Assembly also have the right to nominate one member from each House of Parliament. In practice, if both the Speaker and the Chairperson are from the ruling party, 12 of the 14 members are nominated by the government.

One of the mandates of the Council is to take necessary action, upon receipt of any complaint regarding any news item published in any newspaper. The Act provides for the hearing and settlement of complaints against abuse of press freedom by media practitioners from any person or aggrieved party. Most of the complaints deal with alleged violations of the Code of Conduct prescribed by the Council for journalists.

- it is widely accepted that self-regulatory systems are preferable if they exist and are effective (e.g. Thai Press Council)
- concern has been expressed by leading bodies about legally-imposed regulatory approaches; as the African Commission on Human and Peoples' Rights noted in Principle IX(3) of the *Declaration of Principles on Freedom of Expression in Africa*

Effective self-regulation is the best system for promoting high standards in the media.

- administrative law systems are in place in a number of established democracies as well as in many transitional democracies; these may be justified on the basis that it is impossible to get an effective self-regulatory system going

- a number of generally accepted principles have been established under international law regarding these systems (many of these are also relevant for self-regulation):
 - where an effective self-regulatory system is in place, it is not legitimate to impose an administrative law system
 - any statutory body regulating the media should be independent, preferably with strong media representation along with representation from other social sectors
 - the rules (Code of Conduct) should be developed in close consultation with interested stakeholders, including media representatives
 - the aim should be to promote professionalism, not to punish
 - the processing of complaints should be fair and transparent
 - sanctions should be light, probably only a requirement to publish a statement

Example: The Indonesian Press Council is established by law but all of its members are nominated by media representatives, with one-third of the members coming from media owners, one-third from journalists and one-third from the general public. The only sanction is for the media to print or broadcast a statement by the Press Council.

MODERATOR FACILITATED GROUP DISCUSSION

What do you think of the idea of registration and a statutory content system for Nepal?

PRESENTATION BY MODERATOR

Special remedies: right of reply/correction

- in many countries, special remedies – namely a right of reply and/or correction – are available for those who feel they have been unfairly treated by the media (often both broadcasting and print)
- rationale:
 - the periodicity of the media make this an appropriate remedy (unlike for other forms of publication)
 - legal remedies are hard to access for ordinary people (expensive and time consuming)
 - these remedies represent the best way of redressing the wrong: fixing the mistake where it first occurred and enabling readers and viewers to hear both sides of the story

- they strike an appropriate balance between freedom of expression and the need to address harm since they are not very invasive of media freedom and yet help promote professionalism; basically, they represent a cheap alternative to defamation cases so that it can be less risky for journalists to be critical about others
- Two different special remedies are widely recognised:
 - i. Right of correction: the right to have the media correct any errors that are pointed out to them
 - this is minimally intrusive on freedom of expression since it only consists of correcting mistakes
 - on the other hand, it will not suffice to redress more complex situations where the problem is not a simple factual error but a distortion in the way facts are presented
 - ii. Right of reply: the claimant has a right to publish a reply to the offending statement (or to appear on air to redress it)
 - this is more intrusive from the perspective of freedom of expression and hence more controversial

Examples:

- US Supreme Court: A mandatory (i.e. legally required) right of reply is an impermissible interference with editorial freedom for newspapers. A newspaper is not just a pipeline for automatic transmission of news and opinions. The right to decide what to put in is part of freedom of expression: editors should be able to decide for themselves what is fair.
- UN Special Rapporteur on Freedom of Expression: The right of reply should be self-regulatory
- The American Convention on Human Rights: Article 14 requires States to adopt a right of reply (the United States did not ratify)
- Europe: The European Court of Human Rights has praised the benefits of the right of reply and the Council of Europe has adopted a Resolution on it

Situation in Nepal

One of the remedies available to the Press Council, upon deciding that a newspaper is in breach of the rules, is to require the newspaper to publish a statement by the aggrieved party or to make an apology to the aggrieved party. The Code of Conduct requires newspapers to rectify any error or mistake as soon as possible, and to give proper place to any refutation or response which is accompanied by appropriate evidence, publishing or broadcasting the same in clear language upon receiving information of any error or mistake in a publication or broadcast.

- A Council of Europe Resolution establishes certain conditions on the exercise of the right of reply so that an appropriate balance is struck between the benefits it provides and the need to respect editorial freedom:

- the right only applies where the original statements breached a legally protected interest of the claimant (e.g. by defaming him or her)
- the request must be addressed to the medium within a reasonably short time
- the length of the reply must not exceed what is necessary to correct the facts or impression claimed to be inaccurate or misleading
- the reply must be limited to correcting the facts challenged and may not be used to introduce new arguments
- the reply may not itself breach a legal rule

Regulation of Broadcasting

- the approach to broadcast regulation is very different from that applied in the context of the print sector and, as noted, you need licensing if only to avoid chaos in the airwaves
- key challenges:
 - regulation vs. commercial imperatives: can government ‘save the day’ or will commercial imperatives dominate (e.g. apparently unstoppable trend towards greater concentration of ownership)
 - independence of sector: as we grant regulators more powers to counteract commercial imperatives, we also open up opportunities for interference
 - technology is undermining the traditional justifications for licensing: scarcity has been vastly reduced by digital, satellite/cable and Internet transmission systems; start-up costs are much lower (so fluidity higher); the medium is far more interactive, user controlled possibilities
 - technology also makes it difficult to keep rules up-to-date and relevant
 - globalisation: can national systems deliver desired goods? are international/regional systems effective? relevant?
- 3 key issues:
 - i. licensing
 - ii. content rules
 - iii. ownership

Licensing

- need to apply for permission to broadcast (sometimes also to get access to a unique part of the radio frequency spectrum); applied universally
- can help to promote diversity and protection of the public (refer back to the legitimate goals for regulation of the media)

Situation in Nepal

In Nepal, the National Broadcasting Act 1993 regulates the broadcast media and licensing procedures. The Act provides that 'no one shall broadcast any program without obtaining license pursuant to this Act'. Any person or body corporate intending to broadcast any program by way of satellite, cable or other means of communication, or to establish a frequency modulation broadcasting system, shall submit an application the Government in the prescribed format and with the prescribed fee. The task of providing licences is undertaken directly by the Ministry of Information and Communication. There is no independent body, with members appointed in transparent manner with public participation. This opens up a clear possibility of political control, which was witnessed in practice during the period of the Royal regime.

- ways of promoting diversity through the licensing process:
 - reserving part of the spectrum for different broadcasters: commercial, community and PSB (e.g. Thailand has reserved 20% of all broadcasting frequencies for non-profit broadcasters); for different types of broadcasters: radio and television (these tend to use different parts of the spectrum); and for broadcasters of different geographic reach: national, city, regional, local
 - banning political parties from holding broadcasting licences so as to prevent powerful parties from unbalancing elections
 - restrictions on foreign ownership levels so that some degree of local control is maintained (but a complete ban cannot be justified)
 - diversity as a condition for deciding between competing licence applications: look at what is being provided and whether anything new is being offered
 - use licensing process to prevent undue concentration of ownership (as a licence condition and also at the point of licensing)
 - imposing minimum local content quotas, minimum news and current affairs quotas, children's and educational programming, etc.

- other aspects of licensing:
 - i. process:
 - should be clearly set out in law
 - should be open and fair
 - should provide for an opportunity for public participation, at least for important licences (e.g. national ones)
 - should be subject to court review (i.e. to make sure fair)
 - where there is competition for scarce frequencies (e.g. in cities) a tender process should be used to promote fair competition

 - ii. licence conditions:
 - there are a number of conditions in all licences: e.g. technical (location and power of transmitters); schedule of fees; time limits for licence

- where special conditions are imposed, they should be relevant to the goals of regulation discussed above and as set out in the law
- standard items like fees and time limits should be according to a pre-determined schedule, not *ad hoc* (unless based on bidding)
- licensees should benefit from a general presumption in favour of licence renewal, although this may be defeated where this is in the overall public interest

Content rules

- justified on similar grounds as for print media: provides an accessible and cost-effective means for public complaints to redress harmful practices and yet is not as intrusive as civil or criminal law systems
- administrative (i.e. legally mandated) systems tend to be more accepted than for the print media, in part because broadcasters are already subject to fairly intrusive regulatory systems

Situation in Nepal

To date, there is no specific content regime for the broadcasting sector in Nepal. As the broadcasting sector of Nepal has seen rapid growth recently – especially in the FM radio and private television sectors – many stakeholders are calling for a content regulation system to be put into places.

Broadcasters do have to adhere to the Code of Conduct issued by the Press Council, since the Code describes ‘media’ as newspapers, radio and television broadcasters, news agencies, and organisations and services producing-disseminating Internet news and informative and thought-oriented on-line services and news-oriented programs. It also provides that the Code of Journalistic Ethics shall apply to all journalists engaged in their calling within Nepal, regardless of the sector they work in.

- systemic rules:
 - similar considerations as for print rules: code of conduct should be developed in close consultation with interested stakeholders; the goal should be to promote professional standards, not to punish
 - one difference is that the system is normally linked to the licence so that harsher penalties are possible; as a result, there should be a graduated system of sanctions with the lightest sanctions – warnings or requirements to carry a statement by the regulator – normally being applied and heavier sanctions – fines and licence suspension – being reserved for serious and repeated breaches
 - another difference is that most countries require broadcasters (but not the print media) to treat matters of public controversy/politics in a balanced and impartial manner

- different sets of rules are needed for different types of broadcasters: e.g. radio and TV; perhaps also for different communications platforms (e.g. free-to-air vs. pay-per-view)
- advertisements are often covered by separate sets of rules and may be subject to overall limits (e.g. of 12 minutes per hour)

Example: The United States used to have a rule on impartial treatment of matters of public controversy – known as the ‘fairness rule’ – but this was abolished during the Regan Presidency. This has given rise to the phenomenon of Fox News, which is unabashedly pro-Republican. This is just the tip of the iceberg; observers note, for example, that there is vastly more conservative than liberal talk radio on the airwaves. Critics suggest that this has led to a situation where powerful actors have unbalanced elections.

Ownership

- as we have discussed, ownership concentration undermines diversity and thereby the right of the public to receive a diversity of information and ideas
- rules to prevent undue concentration of ownership may apply to:
 - the number of broadcasting outlets controlled
 - overall market share (measured in different ways: advertising, circulation, capitalisation)
 - cross-ownership between different broadcasting sectors or between print and broadcasting
 - foreign ownership
- other approaches:
 - special rules within general anti-monopolies legislation
 - general public interest rules applied e.g. by regulator
 - requiring separation of editorial offices of different parts of media empire

Example: In the UK, the Secretary of State may intervene where a public interest consideration is raised in the context of a media merger situation. In this case, the Office of Communications (Ofcom), which regulates broadcasting, is required to report to the Secretary of State, who has the power to prohibit the merger where this is in the overall public interest. A similar process applies to special public interest cases, defined as situations where one-quarter or more of a newspaper or broadcasting market is controlled by one person. In relation to newspapers, the public interest considerations include accurate presentation of news, free expression of opinion and the need, to the extent that it is reasonable and practicable, for a sufficient plurality of views in each newspaper market in the United Kingdom.

Media concentration was a hot topic in Nepal when the Royal regime wanted to abolish particular media houses operating both print and broadcast media (both radio and television). The Government formed a commission to make recommendations on the issue and it also enacted a notorious media ordinance requiring media houses to close one media if they were operating three or more at one time. However, when the Royal regime fell, the ordinance also lost its validity, so there is presently no law dealing with media concentration.

Public Service Broadcasters

- 3 key issues:
 - i. independence
 - ii. funding
 - iii. accountability

Independence

- as with broadcast regulators
- additional protection is often provided by protecting editorial independence, which prohibits the Board from intervening in day-to-day editorial decision-making, while retaining responsibility for overall policy and direction
- this creates a 3-tier structure whereby the Board insulates the organisation from interference from the government while the organisation is itself insulated from interference by the Board

Funding

- there are a number of different ways to fund public broadcasting, all with their strengths and weaknesses
- user (television or radio) fee: is relatively highly protected against interference but is politically unpopular to impose where it does not exist, particularly where the public broadcaster has traditionally been under government control; modern alternatives are more likely to impose a fee on the electricity bill, so as to avoid setting up a new system, as well as the high collection costs associated with a separate system
- advertising/sponsorship: is a useful way of supplementing PSB income but if the level is too high then commercial, rather than public service, interests will dominate

- government subsidy: useful as an alternative to the user fee where this is not feasible but relatively susceptible to government control
- donor funding: useful to supplement core funding but unreliable and dominated by external rather than local public interest considerations so should be seen as an 'add-on' for special projects (e.g. infrastructure upgrading) rather than core funding
- cross-subsidies from commercial broadcasters: the core idea is that in exchange for the PSB not carrying advertising, the commercial broadcasters provide a portion of their advertising revenues to it; interesting innovation which has been piloted in a few countries but does not yet have a strong track record anywhere

Examples:

- United Kingdom: The BBC receives the vast bulk of its funding from the television licence fee which every home with a television must pay. This provides it with rich funding although, at the same time, there are heavy collection costs (at one point estimated to be 12% of the total). The BBC also raises substantial funding from its commercial spin-off activities, such as selling videos and books.
- Canada: The CBC, on the other hand, does not receive funding from a licence fee but relies primarily on a combination of a direct public subsidy (voted by parliament) and advertising revenues. Advertising, however, is capped at 25% of total revenues.

Accountability

- the law should set out a clear mandate for the PSB (i.e. what do you want them to do); examples include
 - a strong platform of news and current affairs programming
 - educational programming
 - cultural programming
 - programming which serves all of the people, including minorities, not just populist programming
 - ensuring universal access to its services
 - local programming
- formal reporting through the Board to a multi-party body such as parliament
- direct accountability mechanisms:
 - public review (public surveys, viewer and listener forums)
 - internal complaints procedure (in addition to any external system)
- accountability for content to regulator, as for all broadcasters

INDIVIDUAL EXERCISE

An aspirant radio station is refused a licence because the State broadcaster holds a monopoly on all broadcasting services. The radio station appeals to an international human rights court, arguing that this situation violates international human rights guarantees. It argues, in particular, that the public have a right to receive information from a variety of different sources, not just from the State broadcaster.

The State defends itself by pointing out that under the system in force, all groups and individuals may apply for airtime on any of the State's five national TV channels and six national radio stations. It points out that 60% of the airtime on its stations is filled with such broadcasts. Groups and individuals have to apply for airtime three months in advance. The ministry of information divides the airtime on the basis of internal regulations. The State argues that this system fulfils the State's obligation to provide the public with information from a variety of sources in a way that is far more efficient than through a formal licensing process.

What do you think?

QUESTION AND ANSWER SESSION

Final Comments and Evaluation

GROUP DISCUSSION

Give the group some time to give any final comments they may have and provide a summary of the main learning points.

EVALUATION FORM

For the following, please circle one number with 1 being the worst and 5 the best. Please give any comments in the space provided.

1. Logistical Arrangements

a) How were the course arrangements overall?

Comments 1 2 3 4 5

b) How were the accommodation and food?

Comments 1 2 3 4 5

d) How was the overall organisation?

Comments 1 2 3 4 5

2. Trainer

a) Did you find the trainer interesting and competent?

1 2 3 4 5

Comments

b) Did the trainer stick to the topic and cover it well?

1 2 3 4 5

Comments

c) Did the trainer keep to the timeframe?

1 2 3 4 5

Comments

3. The Manual

a) Were the assigned topics relevant and interesting and did they meet with your expectations? Were there other topics that might, given time constraints, have been included? Should some topics not have been included?

1 2 3 4 5

Comments

b) Was the programme well-designed (logical sequence, sessions leading well into the next one, duration of sessions, number of sessions)?

	1	2	3	4	5
Comments					

c) Was the material presented well (clear, understandable, comprehensive)?

	1	2	3	4	5
Comments					

d) Was there a good balance between international and national material?

	1	2	3	4	5
Comments					

e) Was there an appropriate balance between different kinds of activities (group discussions, group and individual exercises, presentations)? Where the different activities well designed and useful?

	1	2	3	4	5
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Comments

f) Do you have any comments for improving the Manual?

g) Will you use the Manual in your future work?

Yes

No

4. General

Do you have any suggestions for improving future workshops?

Any other comments:

Name (optional)
