

Submission to the High Level Media Council

by the

International Press Freedom and Freedom of Expression Mission to Nepal

September 2006

This Submission sets out the observations and recommendations of The International Press Freedom and Freedom of Expression Mission to Nepal to the High Level Media Commission. The Mission's third visit to Nepal took place on 3-7 September 2006, the two previous visits having taken place in July 2005 and March 2006. We understand that the Commission, which was appointed recently by the government, will report very shortly on a wide range of issues relating to the media. This Submission is intended to assist the Commission in making recommendations which will promote media freedom in Nepal, and which are consistent with international standards.

We wholeheartedly welcome the steps taken to restore democratic processes, peace and media freedom in Nepal since April 2006. We also applaud the key role played by the Nepalese media community in bringing about these seminal changes and its proactive efforts since then to contribute to the democratisation process.

At the same time, we note that much still needs to be done to ensure the institutionalisation of media freedom in Nepal. This Submission by the Mission to the High Level Media Commission sets out our recommendations in five priority areas for change. They are a subset of the comprehensive list of issues which the Nepalese media community identified as needing to be addressed to facilitate the development of an independent and pluralistic media in Nepal. The observations and recommendations articulated below are not comprehensive but are, rather, our key recommendations for change at this time. We are asking the High Level Media Commission to take them into account when considering its own recommendations.

1. The Interim Constitution

According to information received by the Mission, the draft Interim Constitution differs little from the 1990 Constitution in its provisions relating to freedom of expression and of the media. While it represented an important development at the time, the 1990 Constitution does not fully reflect international standards and the demands of Nepalese civil society in this area. It guarantees freedom of expression and of the media, but also allows for wide-ranging restrictions on those rights which go beyond what is permitted under international law. It guarantees the right to access information from public bodies, but this right applies only to citizens, is limited to information relating to matters of public importance and may be restricted by any law. Furthermore, it fails to include guarantees for the independence of the media, media regulatory bodies or State media.

We recommend that the provisions in the draft Interim Constitution relating to freedom of expression and of the media be comprehensively reviewed and amended to ensure that they provide strong protection for these fundamental rights.

In particular, we recommend the following:

- The provisions allowing for restrictions on the right to freedom of expression and of the media should be consistent with international law in this area. Such restrictions should, accordingly, be required to be provided by law and to be necessary to protect the rights or reputations of others, national security, public order, or public health or morals.
- The provisions in the 1990 Constitution prohibiting prior censorship, the closure or seizure of newspapers and the cancellation of the registration of newspapers should be retained. The rule against prior censorship should apply to all media.
- The right to information should be guaranteed. This should cover all information, not just information of public importance, and should apply to everyone, not just citizens. Restrictions on this right should be subject to the same limitations as apply to all restrictions on freedom of expression, in accordance with the first recommendation above. The Constitution should specifically require the adoption of legislation giving practical effect to this right, and should set out a clear timeframe for this.
- Provisions guaranteeing the independence of the media, of bodies which regulate the media and of all State media should be added.

2. Reform of the State Media

A number of media outlets – Radio Nepal, TV Nepal, Gorkhapatra Sansthan and RSS – remain subject to government control. Although these media have undergone significant changes since April 2006, their structural independence is not guaranteed. Indeed, these media are essentially run as government departments instead of under legislation specifically establishing them as independent public service media.

We recommend that measures be taken to protect these outlets from potential interference, particularly by government and all political parties. There are several ways of doing this, including through privatising them or transforming them into public service media. Most democracies do not run newspapers. The phenomenon of public news agencies is more common, although these are not found in many established democracies. On the other hand, the vast majority of democracies do have public service broadcasters.

It is not the role of the Mission to recommend particular approaches for the various Nepalese State media; this is something which needs to be decided locally. If these media remain under State control, however, they should be established pursuant to law and in a manner that protects them against both political and commercial interference.

In particular, we recommend the following for any media which remain under State control:

- They should be established by law as independent bodies, operating outside of the framework of government and having a mandate to serve the public interest.
- Oversight should be undertaken by a governing board and the independence of that board should be protected, among other things, through the appointments process, which should provide for public input, by protecting the tenure of members and by prohibiting individuals with strong political connections from being appointed as members.
- Any public funding should be provided in a manner that is protected against interference and in accordance with a clear and pre-established framework.
- Their mandate – including the public interest goals which they are expected to serve – should be clearly set out in law.
- Accountability should be achieved, among other things, through reporting to Parliament, not to a minister.

3. The Right to Know

The provisions in the 1990 Constitution guaranteeing the right to access information held by government and other public bodies have already been noted. Although constitutional guarantees of the right to know are important, legislation giving effect to this right is required to give practical effect to it. Such legislation, for example, needs to set out the manner in which requests for information shall be lodged and processed, the detailed exceptions to the right of access and the right to appeal from refusals to provide information. Right to know legislation has never been adopted in Nepal and the right remains elusive in practice.

We recommend that comprehensive legislation giving full effect to the right to know be adopted as a matter of priority. Once adopted, the legislation should be implemented in practice, in line with international standards in this area.

In particular, we recommend that legislation on the right to know conform to the following:

- It should be based on the principle of maximum disclosure. This means, among other things, that it should cover all information and apply broadly to all public bodies.
- It should place an obligation on all public bodies to disseminate proactively key categories of information of significant public interest widely and in an accessible form. These categories should include, among other things, information about the public body and its activities such as operational information, budget and financial information, information on complaints, procedures for public input, and the content of decisions affecting the public.
- It should set out clear procedures for the processing of requests for information. These should include clear timelines for responding to requests, a right for requesters to stipulate the form in which they would like to receive the information (for example, a photocopy or electronic version), a clear fee structure and an obligation to provide notice where requests are refused.
- A detailed regime of exceptions should be provided for in the law. This should be based on a clear and narrow list of protected interests (such as privacy, commercial confidentiality, national security and so on) and access to

information should be refused only where disclosure would pose a clear risk of harm to the protected interest. It should also provide for a public interest override so that, even when the information falls within the scope of an exception, it should still be disclosed unless the harm to the protected interest would be greater than the public benefits of disclosure.

- There should be a right to appeal against any refusal to provide requested information to an independent administrative body – for example an information commissioner – and such appeal should be rapid and low-cost. Appeals from the decisions of this body should lie to the courts.
- Whistleblowers, individuals who disclose information about wrongdoing, should be protected against any legal, administrative or employment sanction, regardless of any breach of a legal or employment obligation, as long as they acted in good faith and in the reasonable belief that the information was true.

4. Conditions of Working Journalists

The Working Journalists Act 2051 (1995) fails to provide adequate protection for journalists. A large majority of working journalists are not covered by its provisions, it denies journalists their right to strike and provisions aiming to enhance the working conditions of journalists have not been implemented. Attacks on journalists and media houses, although significantly reduced since April 2006, are still occurring. Women and marginalized groups are significantly underrepresented in the media sector.

We recommend that the Act be comprehensively reviewed and amended to ensure that it can effectively achieve its objective of improving working conditions for journalists. Once amended, the Act should be implemented in accordance with its intentions.

In particular, we recommend the following:

- All working journalists, regardless of whether they work for the print or broadcast media, or for the private or State media, or of their employment status, should be covered by the Act.
- Repressive provisions in the Act, for example prohibiting journalists from going on strike or from making certain statements about their employers, should be repealed.
- Provisions in the Act aimed at enhancing the working conditions of journalists should be designed to be practical in nature and should, when they come into force, be implemented.
- Urgent attention should be given to addressing the climate of impunity for attacks on journalists. The Nepalese authorities should devote sufficient resources and attention to preventing attacks on journalists, to investigating such attacks when they do occur, to bringing those responsible to justice and to compensating victims and their families.
- Measures should be taken to address the issue of under-representation of women and marginalized groups in the media. Official media bodies, such as the Press Council, should include fair representation from such groups.

5. Comprehensive Reform of Media Law and Regulation

A number of provisions in Nepalese law are unduly restrictive of freedom of the media. For example, the Broadcasting Act was used during the royal regime to ban the broadcasting of news, it fails to provide for a three-tier system of broadcasting involving public, community and commercial broadcasters, and it does not ensure the independence of the regulator. Numerous restrictions on media content remain in place. For example, defamation is still a criminal offence and it is an offence to cause disrespect towards either members of the Royal Family or the government. At the same time, a variety of options relating to media regulation, both statutory and self-regulatory in nature, are being considered in Nepal.

We recommend that a comprehensive review of legislation which affects the media be undertaken with a view to bringing Nepalese law into line with international standards. The review should be conducted in a manner which is broadly consultative in nature.

This Submission does not provide detailed recommendations on the specific media law reform measures which are needed. Instead, international standards in different areas are outlined, with a view to assisting the High Level Media Commission in making its recommendations.

Content restrictions in the criminal or civil law

International law provides for restrictions on freedom of expression but only where these are provided by law and are necessary to serve a limited list of protected interests, namely the rights or reputations of others, national security, public order, or public health or morals (see above, under Interim Constitution). International courts and other authoritative bodies have outlined a number of the specific implications this has for restrictions on the content of what may be published or broadcast, as follows:

- Restrictions which protect interests other than those listed are not legitimate. Some restrictions in Nepalese law appear to be aimed at interests which are not recognised under international law, such as protection of the government and monarchy from criticism.
- The least intrusive, effective means of protecting an interest should be preferred. This suggests that where the civil law is effective, the criminal law should not be employed. On this basis, it is increasingly being recognised that criminal defamation laws, still in force in Nepal, are not legitimate.
- Restrictions should be carefully drafted so as not to go beyond what is necessary to protect the interest in question; overbroad restrictions cannot be justified. Vague restrictions may be interpreted in a manner that is overbroad and hence are also illegitimate. Many of the restrictions on content in Nepalese law are overbroad and/or unduly vague.
- Where a restriction is provided for in the general law – whether civil or criminal in nature – it is not necessary, and hence not legitimate, to repeat it in a media specific law, such as a press or broadcasting law. Both the Press and Publications Act and the National Broadcasting Act contain content restrictions which breach this principle.
- Political speech deserves particular protection. Enhanced protection for political figures or the monarchy, which are present in Nepalese law, run directly counter to this principle.

- Excessively harsh sanctions are themselves problematical, even where some sanction is legitimate, due to the chilling effect they exert on freedom of expression. Imprisonment for media crimes – which has occurred in Nepal – is not legitimate.

Print media regulation

In many democracies, there are no special rules relating to the print media. They are not required to register – although the vast majority are registered as corporations under general corporations law – and regulation of professionalism and content is undertaken on an entirely self-regulatory basis. In other countries, a statutory body undertakes these tasks. Normally, this is a special body specifically for the print media, although some countries do have bodies which regulate both the print and broadcast media. The following recommendations concern the regulation of the print media:

- Technical registration of the print media, whereby registration is automatic upon submission of the required information, is not contrary to international law. At the same time, even technical registration systems may be abused and, as a result, authoritative international bodies have recommended doing away with them. Consideration should be given to removing the requirement under Nepalese law of print media registration.
- Where effective self-regulatory systems promoting media professionalism and providing for a complaints system are in place, statutory regulation should not be imposed. Taking into account the developed nature of Nepalese media bodies, consideration should be given to doing away with the Press Council and giving these bodies an opportunity to establish self-regulatory systems.
- If a statutory system for the regulation of print media output is retained, it should be adequately protected against interference. At present, the law lacks structural guarantees for the independence of the Press Council and this should be addressed.
- In principle, there is no reason why the print and broadcast media should not be subject to the same system of content regulation. At the same time, these types of media are fundamentally different in nature and, as a result, separate systems are normally employed. If a unified system for content regulation is adopted, it should at least be required to recognise the differences in these two types of media and to adopt different codes of conduct for each.
- As with civil and criminal law measures, excessive sanctions for breach of rules relating to print media content are not legitimate. In general, the sanction for breach of a code of conduct should be a warning or requirement to print a statement acknowledging the breach. Fines, if applied at all, should be modest.

Regulation of broadcasting

Unlike the print media, broadcasters rely on a scarce public resource, the airwaves, and this justifies licensing in this sector. In practice, all established democracies have statutory systems providing for the licensing of broadcasting. Most, but not all, also have statutory systems for promoting professional standards and for regulating content. Two key freedom of expression objectives of broadcast regulation have been recognised, namely the promotion of independence and of diversity. The following recommendations relate to regulation of broadcasting:

- Broadcast regulation should be undertaken by bodies which are protected against political and commercial interference (i.e. which are independent). At

present, broadcast licensing is undertaken directly by the Ministry of Information, in clear breach of this principle.

- To promote diversity, broadcast licensing rules should recognise three tiers of broadcasters: public, commercial and community. Frequencies should be reserved for each tier and licensing rules should be appropriate to the different needs of each type of broadcaster. Community broadcasters, in particular, taking into account their non-profit and often volunteer status, should benefit from simple licensing procedures and preferential fee structures. Licensing processes for all broadcasters should be transparent and fair. These standards are not presently implemented through the Broadcasting Act.
- As with the print media, statutory systems for regulating professional standards and broadcast content should not be imposed where effective self-regulatory systems are already in place. The existing self-regulatory systems for community broadcasters in Nepal should be respected by any statutory system, as should the potential for other broadcasting sectors to develop their own self-regulatory systems.
- If a statutory system for regulating professional standards and broadcast content is imposed, it should be required to be based on a pre-established code of conduct, developed in close consultation with broadcasters and other stakeholders.
- Rules relating to ownership issues – including foreign ownership, cross-media ownership and undue concentration of ownership – currently matters for discussion in Nepal, can have an important impact on the development of the broadcasting sector. Regulatory approaches on these issues should be designed, among other things, to promote diversity. Unduly stringent rules, for example on foreign ownership, can deprive the local broadcasting sector of funds and expertise, thereby reducing diversity. At the same time, unduly liberal rules may lead to foreign domination in this sector, also reducing diversity. The same is true of rules on cross-media ownership and concentration of ownership.

The seven international organisations which participated in the Mission and which are presenting this Submission to the High Level Media Commission are:

- ARTICLE 19, Global Campaign for Free Expression
- International Federation of Journalists (IFJ)
- International Media Support (IMS)
- International News Safety Institute (INSI)
- Open Society Institute (OSI)
- United Nations Educational, Scientific and Cultural Organisation (UNESCO)
- World Association of Community Radio Broadcasters (AMARC)