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HUMAN RIGHTS WATCH

HRW.org

Honorable Prime Minister Khadga Prasad Sharma Oli
Office of the Prime Minister and Council of Ministers
Kathmandu 44600, Nepal

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Re: Amending proposed legislation to uphold international standards on free speech

Dear Prime Minister Oli,

We write to you to express our concerns about recent steps by your government which could curtail or threaten to curtail the right of Nepali citizens to freedom of expression.

Human Rights Watch is a nongovernmental organization that monitors and reports on human rights in over 90 countries around the world. We have documented the human rights situation and advocated for the promotion and protection of human rights in Nepal for over three decades.
We are particularly concerned about the 2017 amendments to the Penal Code as well as the draft Media Council, Mass Communications, and Information Technology Bills currently before parliament.

All of these laws and draft laws contain provisions criminalizing speech including overly broad, ill-defined, or inappropriate standards, including but not limited to “teasing,” “demeaning,” “insulting,” or “scolding” a person, harming an individual’s “image or prestige,” or damaging the nation’s “self-pride.” Provisions criminalizing speech in the contexts of “cyberbullying,” “cyberterrorism,” and national security are extremely broad, unacceptably vague, and like many other sections of these laws, carry severe criminal penalties. Citizens have little way of knowing what would be deemed to violate these arbitrary standards.

Nepal has long been proud of its independent media. Although the Mass Communications Bill does mention a self-regulatory body formed by the industry itself, this proposed law, along with the Media Council Bill, also provide for the creation of authorities that are not independent of the government, and which will exercise considerable power to limit media and online content and impose fines and other criminal penalties upon journalists and internet users. To prevent any future abuse of these laws to punish views that might displease the government, the proposals for a new Media Council and a new Mass Communications Authority should be substantially amended to ensure independence or dropped altogether. We

are aware that members of the government have expressed a willingness to amend the Media Council Bill, but the substance of any such amendments is not yet known.

The amendments to the Penal Code and the proposed Information Technology Bill criminalize additional offences for online speech, including on social media and online "mass media." They include terms so ill defined as to plausibly encompass almost any content that appears or is intended to appear on the internet. They also include several, very similar, criminal provisions which create a risk that a person could be penalized several times under different laws for the same act of expression.

The misuse in recent years of section 47 of the Electronic Transactions Act (ETA, 2006) shows there is a real threat that broadly drawn or restrictive provisions will be used to curtail the freedom of expression of journalists and ordinary social media users. Since your government took office in 2018, there have been at least seven cases in which section 47 of the ETA, purportedly designed to prevent online fraud, has been used to punish journalists or internet users for exercising their free speech rights. Frequently, these cases have targeted individuals who made allegations of corruption. In the most recent case, a young comedian was held by police for over a week after a critical film review, posted online, offended the film's director.

Although many of those charged under section 47 of the ETA have not been convicted, they have been detained for weeks before being bailed pending trial. This means that even those ultimately found not guilty of violating the law will have suffered significant punishment for their speech. This alone may have a considerable chilling effect on the free speech of journalists and ordinary internet users. While the ETA is open to abuse, the Information Technology Bill currently before parliament, which is intended to replace the ETA, is even broader.

The International Covenant on Civil and Political Rights (ICCPR), to which Nepal is a signatory, in article 19(3), permits governments to impose restrictions or limitations on freedom of expression only if such restrictions are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security, public order, public health, or morals.

The UN Human Rights Committee, the independent expert body that monitors state compliance with the ICCPR, states that restrictions on free expression should be interpreted narrowly and that the restrictions "may not put in jeopardy the right itself."

Restrictions on freedom of expression to protect national security are permissible only in serious cases of threat to the nation and should not be used to prosecute human rights activists or journalists for disseminating information in the public interest. Since restrictions based on protection of national security have the potential to completely undermine freedom of expression, "particularly strict requirements must be placed on the necessity (proportionality) of a given statutory restriction."

With respect to criticism of government officials and other public figures, the Human Rights Committee has emphasized that the "mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties." The

Human Rights Committee has further stressed that the scope of the right to freedom of expression "embraces even expression that may be regarded as deeply offensive."

The United Nations special rapporteur on the protection and promotion of the right to freedom of opinion and expression has recommended that criminal defamation laws be abolished.

We have provided, in an annexure, a detailed analysis of how provisions under the various amendments and proposed laws violate international standards. We urge you act on the following recommendations:

- Revise the laws and draft laws discussed in this letter to ensure that restrictions imposed on speech are narrow and clearly defined, and that the restrictions on speech are limited to those permissible under the ICCPR, as interpreted by the UN Human Rights Committee and the UN special rapporteur on the protection and promotion of freedom of opinion and expression;
- Repeal all laws making defamation, libel, or slander a criminal offense. Defamation should be solely a civil matter, and any pecuniary awards should be strictly proportionate to the actual harm caused;
- In limited instances where criminal law is used to govern speech, clearly separate these functions from civil laws, and the administrative or regulatory bodies established by them. There should be no duplication of criminal provisions which may expose individuals to multiple prosecutions under similar but slightly differently framed provisions of different law;
- Revise amendments to the Penal Code that violate international human rights law including Article 229(1) and Article 300 which include undefined provisions forbidding actions that "annoy", "insult," or "trouble" another person. This is not a legitimate basis to restrict speech under international law, and the standard for what constitutes "fear", "terror," or "pain" under these provisions is undefined, making them vulnerable to abuse;
- Repeal Articles 305 and 306 of the Penal Code that criminalize slander and libel. Under international standards causing reputational damage should not be treated as a criminal offence, should never result in a jail sentence, and truth should always be a defense for any civil liability;
- Revise the proposed Information Technology Bill to clearly and narrowly define which online activity will be subject to regulation. There should be no intermediary liability for internet service providers; and
- Amend the proposed Media Council and Mass Communications bills to remove scope for government interference through appointments to regulatory bodies. Media regulation should be handled according to a code of conduct entirely independent of the government. The draft legislations create three separate but overlapping mechanisms for media regulation.

Annexure

We include here a detailed analysis of how recent amendments to the Penal Code, and new laws proposed by your government, violate international standards on upholding the right to free speech and expression.

Amendments to The Penal Code

Part 3 of the Penal Code (Offences against Individual Privacy and Prestige), as revised in 2017, contains several provisions which are in conflict with Nepal's obligations under international human rights law to protect freedom of expression.

Article 229(1) and Article 300 forbid actions that may "annoy", "insult," or "trouble" another person. This is not a legitimate basis to restrict speech under international law, and the standard for what constitutes "fear", "terror," or "pain" under these provisions is undefined, making them vulnerable to abuse.

Articles 305 and 306 criminalize slander and libel. The truth of the statement is not a defense to prosecution under the law. Under international standards causing reputational damage should not be treated as a criminal offence and truth should always be a defense for any civil liability.

Information Technology Bill

The proposed law presently before parliament contains several concerning elements.

Preamble

The preamble of the Bill speaks of the intention to "make the use of social media organized and dignified." Under international law, speech does not have to be organized or dignified to be protected.

Scope of Definitions:

Section 2(c) defines the "originator" of material as the individual who "originates, stores, or disseminates the electronic record." This means that the law applies not only to the person who first posts the material, but to anyone who shares it and could also be used against Internet Service Provider(s) that host it.

Provision on Cyberbullying

Cyberbullying can cause real harm and can and should be subject to restriction. However, any law seeking to address this problem must be proportionate and must clearly define what constitutes that offense as clearly and narrowly as possible. Section 83, which criminalizes cyberbullying with a punishment of up to five years in jail, is so broadly framed as to criminalize a wide variety of speech. It prohibits using a computer to "continuously harass, tease, demean, discourage, insult, or scold another person." While the inclusion of "continuously" is some help, it is not defined, and it is not clear how it will be interpreted.

Provision on Cyberterrorism

Section 84, which criminalizes cyberterrorism with a punishment of up to five years in jail, is again so broadly drawn that it threatens legitimate expression. Disturbing Nepal's "self-

pride" is said to constitute "terrorism," yet this could be used to describe a wide range of statements which are critical of the government or society and fall well within the scope of protected speech. The provision should be narrowed to cover only speech that poses a real risk to national security.

Incitement

Under article 20 of the ICCPR, any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law. The UN Rabat Plan of Action has set out how this can be achieved while protecting freedom of expression, including through legislation. Section 88 of the current Bill addresses inciting hatred, but does so with language that is too broad and undefined.

Section 88(1) of the bill prohibits using a computer to carry out an act "to create hatred, mistrust, or neglect on the basis of class, ethnic, religious, regional, communal, or any such other ground to foil Nepal's sovereignty, territorial integrity, nationality or national unity, freedom, self-pride, or cordial relations between the federal units, or to foil the relations among various ethnic groups, ethnicities or communities." This definition could plausibly be extended to encompass almost any statement on political or social issues which the authorities find objectionable. The penalty for violating this provision will be decided "as per the prevalent law under the crime against the state."

Section 88(2) prohibits using a computer "to incite racial discrimination or untouchability, neglect labor, incite to commit crime, promote activities that foil law and order . . . or carry out any act or cause to carry out any act against public good conduct and morality." While incitement of racial discrimination can be criminalized under human rights law, as can incitement to commit crimes, it is unclear what constitutes incitement to neglect labor. The last clause, which criminalizes acts "against public good conduct and morality" provides the authorities with an almost open-ended basis to arrest those whose public views they dislike. Again, this offence carries a penalty of up to five years in jail.

Sections 87 and 88 of the IT Bill replace the powers provided in the much-abused section 47 of the Electronic Transaction Act (ETA). However, instead of narrowing the scope of that provision to make it less open to abuse, it has been made broader and more draconian.

Intermediary liability

While the ETA imposes no intermediary liability on internet service providers (ISPs), the current bill does.

Section 89 appears to limit the liability of intermediaries such as ISPs for hosting content. However, the final sentence of section 89 undercuts this effect, with the caveat "provided that if any fact or details mentioned or included in any information, data or link violates the prevalent law, knowingly or if the service provider itself encourages or supports commission of any illegal act then the service provider shall not be free from liability." This makes ISPs responsible for judging whether material they host violates the prevailing law, something they are not competent to do, and creates the risk that they will take it upon themselves to censor content rather than risk liability.

Section 89 (c) implies that "any public authority" can deem online material to be illegal and require it to be censored. Such powers should be limited to the courts, or at most to a small number of specifically empowered authorities operating under clearly defined procedures and subject to the right of judicial appeal.

As described below, sections 92 and 94 of the bill provide a narrower description of these powers, although these provisions are also vague and lack safeguards.

Provisions on Social Media

Section 91 requires anyone wishing to operate a social network to register with the government. Those that do not register can be banned in Nepal.

Section 94 defines social media as "any internet or information technology-based system that provides the facility of carrying out interactive communication between individuals or organizations and also disseminate matters developed by the subscriber." Such a definition could, for example, extend to individuals operating YouTube channels, or blogs on which readers leave comments, or even email, meaning that users would be required to register with the government, and be subject to the harsh legal penalties described below if the authorities object to content they create or share.

Sections 92 and 94 allow the Department of Information Technology to order a social network to delete any material "considered to be an offense under this Act." It appears that this empowers government employees in the Department to make the determination of what violates the act and order it removed, without any notice to those posting the material or any way to appeal that decision.

Section 94 contains extremely broad restrictions on what can be posted on social networks. Besides being in conflict with clear international legal principles, these provisions carry extremely severe penalties, which will have a chilling effect on free speech.

Defamation

Section 94(e) once again creates a duplicate offence of criminal defamation, meaning that while defamation should never be a criminal offence, Nepali citizens are vulnerable to multiple prosecutions under different laws for the same alleged act of "defamation". Violation of this provision carries a potential penalty of up to five years in prison.

The Information Technology Tribunals

Sections 115, 116 and 117 provide for the formation of a new IT tribunals, with the power to hand down custodial sentences. These are not ordinary or independent courts. The chairman of the tribunal must be someone who "meets the qualification to become a judge in the District Court" (section 16. 1) but is not necessarily a judge, while other members are government nominees not required to have any legal background, undermining their independence.

Government Access to Digital Keys

Section 47 gives the newly created IT Controller the right to take control of individual computer users' secure keys without sufficient safeguards. This weakens data protection and privacy.

The Media Council Bill

This proposed law sets out the decision to establish a regulatory authority. While a media council or similar body may be useful to help regulate the media, this should be established on the basis of voluntary self-regulation and independence.

Preamble

The preamble to the bill mentions "independent" journalism, but it also talks of "dignified" and "responsible" journalism. Both terms are vague and could be used to justify restrictions on media conduct that violate international standards.

Government Control

The Media Council, as proposed, is not independent, but rather amounts to a government body imposing unspecified rules upon the media. It is a serious threat to press freedom.

The unit proposed under the draft Media Council Bill grants the government extensive control through its ability to appoint the chair and some of the members (sec. 7), its ability to fire members for "unsatisfactory performance" (sec. 10), and through the fact that the government provides an unspecified portion of the Council's budget (sec. 21). In addition, the draft law says the government "may, as necessary, give instruction to the Council in line with the mass media policy of the country, for the development of and advancement of healthy, independent, dignified and responsible journalism and maintenance of professional conduct." The Council is required to follow any such instruction (sec. 29). The government can frame rules and by-laws to govern implementation of the Act, and must approve any by-laws proposed by the Council itself (sec. 31). In addition, the media is required to comply with the code of conduct drafted by the council (sec. 6).

The proposed Council has the power to impose sanctions including the suspension of press passes and the imposition of fines (sec. 17, 18). Withdrawing of press passes amounts in effect to state licensing of journalists, which is in violation of article 19 of the ICCPR.

Defamation

Furthermore, the Media Council Bill effectively duplicates provisions of the Penal Code, creating additional offences of criminal defamation. Section 18 of the Bill empowers the Media Council to impose large fines upon a publisher, editor or journalist for the publication or broadcast of material that harms the "image or prestige" of an individual.

Section 19 of the Media Council Bill makes clear that proceeding under this law does not preclude filing of criminal charges under other existing laws and, in fact, requires the Council to report violations of the Code of Conduct that violate existing laws to the proper authorities. Since the code of conduct has not yet been drafted, it is unclear what, if any, limits it will put on defamation claims.

While any offence of criminal defamation is itself a threat to the full exercise of the right to freedom of expression, this makes the situation worse, creating the possibility that an individual can be punished for defamation under more than one law for the same statement.

Scope

The definition of "mass media" (section 2 (b)) as any "electronic or print medium operated by the government, community or private sector for publication or broadcasting, with the objective of disseminating information and messages" is very broad and could be construed to include bloggers and those posting messages on social media.

Mass Communications Bill, 2019

The Mass Communications Bill aims to consolidate and replace a number of existing pieces of media legislation (the Press and Publication Act, National Broadcasting Act, and Working Journalist Act). It contains a number of coercive powers that may be used to constrain the freedom of the press. It duplicates provisions of the penal code and other draft legislation which criminalize broadly and vaguely defined forms of speech.

The Mass Communications Bill creates another new authority, called the Mass Communications Authority, seemingly duplicating the role of the Media Council proposed in the Media Council Bill. However, it also speaks of a third new body, responsible for media self-regulation. In fact, a single body implementing self-regulation is the appropriate way to protect the freedom of the press.

This bill also creates an obligation for people engaged in online "mass media" activity to register with the state, although this is so broadly defined that it could be deemed to include ordinary citizens' commonplace online activity. To require citizens to register with the government in order to express themselves, as journalists or otherwise, is a violation of article 19 of the ICCPR.

Government Control

The proposed law aims to establish a new Mass Communications Authority with responsibility for "registration, licensing, monitoring and regulatory functions." This largely duplicates the role of the proposed Media Council. Since the government, and especially the communications ministry, control appointments, this will not be an independent unit.

Under section 42 of the bill, the proposed Mass Communications Authority will have coercive instruments to discipline the press. These include withholding government advertisements, a power that the government has already abused to punish publications that displeased it in recent years, and the power to deny media companies the right to import raw materials.

Section 45 requires mass communication institutions to "follow the principles of self-regulation." They shall be required to establish a committee comprised of experts and to provide their names to the Mass Communications Authority within one month from the start of the publication or broadcast. The draft law further provides: "As part of self-regulation and self-evaluation, such institutions shall be required to make public their code of conduct, editorial policy and the financials, annually. They shall be required to establish an independent ombudsman to look into matters related to the institution."
There therefore appear to be three separate but overlapping mechanisms for media regulation in current draft legislation, the relationships between which are unclear.

Registration of Online Journalists

The Act defines online media as: "a process or medium established under prevailing law for the objective of producing, publishing, broadcasting or distributing signs, voice, graphics, songs, music, video, animation and informative messages or thematic opinion, photos, information and news through use of multimedia."

This definition is extremely broad and could be used to include social media activity, blogs, YouTube channels, and so on. Like the IT Bill, the Mass Communications Bill seeks to regulate and sanction a broad range of online activity, providing for hefty fines.

Restrictions on Content and Punitive Powers

Section 44 seeks to establish broad and vaguely defined government control over editorial content. It reads in part: "Media shall only publish and broadcast information, news, articles and programs in the prescribed time after verifying the truthfulness of the content. Their publication, broadcast or editing shall be politically impartial and they shall not produce or broadcast materials which compromise public safety and security, morality, social harmony or dignity and they shall not publish or broadcast false or misleading news."

Terms such as "politically impartial", "morality", "social harmony," and "dignity" are undefined and are open to abuse.

Section 50 duplicates broad and vague prohibitions on content similar to those in the Penal Code and other pieces of draft legislation: "National or foreign mass communication institutions shall not publish or broadcast contents that (a) undermine Nepal's sovereignty, territorial integrity and nationality; (b) subjects which damage harmonious relations between the Federal Units; (c) subjects which damage the good relations between various castes, ethnicities, religions or communities; (d) subjects deemed as treasonous or contempt of court or incitement to an offense; (e) defamation; (f) subjects that are contrary to public decency or morality; (g) incite caste-based discrimination or untouchability or any act of disrespect of disrespect to labor; and (h) subjects that promote untouchability and gender discrimination."

Not only does this create another set of duplicate offences, potentially exposing Nepali citizens to multiple prosecutions for a single act of expression, it carries by far the harshest penalty of any of these laws or draft laws, of up to 10 to 15 years imprisonment (article 59).

According to section 52, operating licenses shall not be withdrawn from media institutions, but it goes on to add the broad caveat that, "this provision shall not prevent the imposition of reasonable restriction on any mass communication institution if its actions undermine Nepal's sovereignty, territorial integrity, nationality or the harmonious relations between the Federal Units or the people of various castes, ethnicities, religions or communities, involve in treason, or incite caste-based discrimination or untouchability or any act of disrespect of labor, defamation, contempt of court, incitement to an offence or on any act which may be contrary to public decency or morality."

The bill proposes a number of harsh criminal penalties for violating what should properly be civil regulatory provisions. While custodial sentences under the bill are to be given only by

the courts, fines may be awarded by the Mass Communications Authority, a politically appointed committee with little independence.