



INTERNATIONAL  
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OF JURISTS

**POWER TO SILENCE:  
NEPAL'S NEW MEDIA ORDINANCE**

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# POWER TO SILENCE: NEPAL'S NEW MEDIA ORDINANCE

## SUMMARY

On 9 October 2005, His Majesty King Gyanendra promulgated an “Ordinance Amending some of the Nepal Act Related to Media” (the “Ordinance”), which amended six of Nepal’s key pieces of media-related legislation. The amendments entrench restrictions imposed on the media by the Government during the three-month state of emergency that ended in April 2005,<sup>1</sup> and impose new limitations that will further undermine freedom of expression, press freedom and the right to receive information in Nepal.

The Government moved swiftly to enforce the Ordinance after it was promulgated. On 21 October the authorities raided Kantipur FM’s radio station and seized satellite uplink equipment for allegedly relaying broadcasts without permission of the Government.

Freedom of expression is not absolute. However, under international human rights law that binds Nepal, any restriction on freedom expression and opinion is only legitimate if it fulfils a three-part test. The restriction must be properly set out in law and cannot be overly broad or vague. It must have as its purpose one of a very limited number of legitimate aims recognised under international law. Finally, the restriction must be clearly necessary and not disproportionate to achieve that aim.

The Government has reportedly stated that its motivation behind the Ordinance is not to silence the media and stifle freedom of expression, but to instill “discipline”.<sup>2</sup> However, the amendments in the Ordinance do not meet the three-part test and also violate Nepal’s own constitutional guarantees of free expression.

Many of the vague and ill-defined provisions open the door to arbitrary and abusive application of the law. The Ordinance seeks to provide a legal cover for unlawful practices and restrictions used by the Government to illegitimately suppress freedom of the media and the right of Nepalis to receive information, including by: prohibiting news broadcasts, suppressing criticism of the Government and discussions in the media that are seen as politically sensitive for the Government, severely limiting access to foreign media and enabling the Government to bar journalists from working professionally.

Especially since 1 February 2005, journalists have challenged the attempt by the Government to silence a forthright media. Through this Ordinance the Government is using the law to try and roll back some successes journalists have had in defending their legitimate democratic space for reporting, analysing and commenting. Enforcement of the Ordinance will have a chilling effect on the media. Its application will lead to greater self-censorship as journalists try to predict when the authorities will act to silence a newspaper or broadcast or close down whole media operations. Freedom of expression is a right and is always vital, but perhaps especially now in Nepal, at a time

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<sup>1</sup> The ICJ conducted a mission to Nepal in November 2004 and again in March 2005. The report setting out the missions’ findings and recommendations, “Nepal: The Rule of Law Abandoned”, is available at [www.icj.org](http://www.icj.org).

<sup>2</sup> Kantipur online, 18 October 2005 <http://www.kantipuronline.com/kolnews.php?&nid=54823>

of crisis, to allow critical reflection about how to address the conflict and underlying political, constitutional, economic and social issues. The ICJ calls on the Government to repeal the Ordinance and to review all existing laws related to the media for compliance with the Nepali Constitution and international human rights law.

Some of the main features of the Ordinance highlighted in this document include the following:

**Ban on news reporting by FM stations entrenched** - The amendments to the National Broadcasting Act prevent news-broadcasters from applying for a broadcast license, thereby entrenching the Government's ban on news reporting by radio stations. The amendments to the Radio Act make it easier for some broadcasters to obtain a license, while maintaining the existing onerous, and seemingly arbitrary, licensing regime for those broadcasters that transmit news. The Government should not discriminate against news broadcasters and should immediately ensure that news broadcasters can apply for licenses, end the prohibition on news broadcasting, and abandon any legal proceedings against FM stations.

**Vague and arbitrary prohibitions on content** - The Ordinance seeks to further limit criticism of government and public figures by extending the prohibition on criticism of the King to other members of the royal family. It introduces ill-defined prohibitions, such as the ban on broadcasting programmes that "are contrary to the non-aligned foreign policy of Nepal" or banning foreign publications that "adversely affect national interests and dignity". Such vague prohibitions serve no legitimate aim. They just exacerbate the opportunity for arbitrary and abusive use of the law to suppress legitimate expression. Contrary to the global trend towards abolishing laws that criminalize defamation, the Ordinance also dramatically and disproportionately increases the monetary and prison punishments for defamation. Such provisions will have a chilling effect on expression in Nepal.

**Restrictions on dissemination of news from foreign sources** - The combination of onerous content restrictions imposed on news distributed by the National News Agency and the need to obtain government approval to sell foreign news in Nepal, makes it even more unlikely that meaningful news from foreign agencies will reach the citizens of Nepal. The long-term effect may well be a reduction in the number of foreign news agencies operating in Nepal, thereby ensuring the progressive isolation of the country's citizens from the outside world.

**Power of Government-controlled Press Council to bar journalists** - The Press Council, which is not independent of the Government, is now empowered to recommend to the Government that a journalist's representative certificate be revoked. Journalists should not be required to obtain representative certificates in order to work, particularly from a body lacking independence.

**Restrictions on cross-media ownership** - The Government has failed to establish that the degree of concentration of media ownership justifies new restrictions on anyone owning more than two forms of media, out of radio, television and publications. On the contrary, the amendment has the effect of targeting only Kantipur, a critic of the government.

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# POWER TO SILENCE: NEPAL'S NEW MEDIA ORDINANCE

## INTRODUCTION

On 1 February 2005, King Gyanendra dismissed the Government he had appointed and assumed direct power. He declared a state of emergency and suspended key provisions of the Constitution of Nepal, including many of those guaranteeing fundamental human rights and freedoms. Following the announcement of the state of emergency the Government imprisoned journalists, politicians and human rights defenders, forcibly censored the print media, banned FM radio stations from reporting the news, disabled all access to the Internet, mobile and land telecommunications networks and closed the airport for several days.<sup>3</sup> The state of emergency was lifted on 29 April 2005 but many constitutional rights have not been restored in practice and abuses against the media have continued.<sup>4</sup> Even before 1 February 2005 there were frequent allegations of harassment, detention, beatings, torture and killings of journalists by the security forces<sup>5</sup>.

On 9 October 2005, the King promulgated an “Ordinance Amending some of the Nepal Act Related to Media” (the “Ordinance”), which has the effect of amending six of Nepal’s key pieces of media-related legislation. The Government has justified the introduction of the Ordinance on the grounds that the media needs to be “disciplined”,<sup>6</sup> and it has already begun to enforce its provisions.

The legality of the Ordinance has been challenged in the Supreme Court of Nepal by the Federation of Nepalese Journalists on the grounds that it violates the Constitution of the Kingdom of Nepal 1990 (the “Constitution”), specifically the freedom of expression guarantee. Between 27 October and 7 December the Supreme Court issued at least two stay orders instructing the Government not to enforce the ordinance until it has decided on the Constitutional challenge. If the Ordinance is not struck down, it will entrench restrictions imposed on freedom of expression by the Government during the state of emergency declared on 1 February 2005, and will impose new limitations that will further undermine press freedom in Nepal. Nepalese citizens will also be further deprived of their right to receive information guaranteed under international law and the Constitution.

This document analyses whether the amendments set out in the Ordinance comply with the Constitution and international law and standards in the area of freedom of expression. Nepal is bound,

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<sup>3</sup> See “The Defence of Press Freedom and Freedom of Expression in Nepal – A Report by the International Press Freedom and Freedom of Expression Mission to Nepal”, July 2005, compiled by International Media Support. The following organisations participated: ARTICLE 19, Committee to Protect Journalists, International Media Support, International Press Institute, Press Institute of India, Reporters sans Frontières, South Asia Free Media Association, UNESCO, World Association of Community Radio Broadcasters, World Association of Newspapers, World Press Freedom Committee.

<sup>4</sup> The Government has relied on national security legislation – in particular the Terrorist and Disruptive Acts (Control and Punishment) Ordinance (TADO) – adopted during previous states of emergency to restrict civil rights. The Offences Against the State Act and the Public Security Act have also been used by the Government to silence critics. For example, between April and August 2005, student leader Gagan Thapa was repeatedly remanded into custody and released because of his alleged public criticism of the monarchy during a demonstration. See [www.icj.org](http://www.icj.org) for related information.

<sup>5</sup> The International Federation of Journalists has reported that between 2002 and 2004 four journalists or media workers are suspected to have been killed by security forces in Nepal <http://www.ifj.org/default.asp?Issue=KILL&Language=EN>

<sup>6</sup> Kantipur online, 18 October 2005 <http://www.kantipuronline.com/kolnews.php?&nid=54823>

by virtue of the obligations it has assumed under a number of international human rights conventions, to protect and promote of human rights and freedoms of the Nepali people.

While this document focuses on the impact of the Government's recently promulgated Media Ordinance there have been regular reports of Communist Party of Nepal (Maoist) (the Maoists) not tolerating freedom of expression in areas under their control. In the past the Maoists have threatened, intimidated and killed political party cadres expressing their political views. The Maoists have also kidnapped and detained journalists, banned the sale and distribution of specific publications, threatened, beaten, tortured and killed journalists and extorted FM broadcasting equipment from a local community radio station in the far west region.<sup>7</sup> On 22 November 2005 the Maoists committed themselves to respect freedom of expression in a 12-Point Letter of Understanding with the seven-party alliance of parliamentary parties. It remains to be seen if this paper commitment will be implemented in practice.

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<sup>7</sup> The International Federation of Journalists has reported that between 2002 and 2004 five journalists or media workers are suspected to have been killed by the Maoists. <http://www.ifj.org/default.asp?Issue=KILL&Language=EN>

## FREEDOM OF EXPRESSION AND PERMISSIBLE RESTRICTIONS: THE THREE-PART TEST

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to free expression in the following terms:

- “1. Everyone shall have the right to hold opinions without interference.
2. 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.”

Under international law, the right to freedom of expression and opinion is not absolute and may be subject to restrictions. However, to be legitimate, such restrictions must satisfy a strict three-part test, which is set out in paragraph (3) of the same Article:

- “3. 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.”

As explained by international jurisprudence, the test requires:

- (1) that restrictions be imposed in accordance with a law or regulation ("prescribed by law"). A restriction is prescribed by law if it is expressly provided for by statute or regulation and is not overly broad or vague. The way the restriction is described must be clear enough to be a standard that can guide behaviour<sup>8</sup>;
- (2) the purpose of the restriction must be the protection or promotion of a legitimate aim. Paragraphs (a) and (b) of Article 19(3) set out what constitutes a legitimate aim: respect for the rights and reputations of others, the protection of national security or public order, or public health and morals. Article 10 of the ECHR recognizes two additional legitimate aims, namely: prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary; and
- (3) the restriction must be necessary to achieve that aim. That is, it must address a "pressing social need" and the severity of the restriction be proportionate to achieve the legitimate aim.<sup>9</sup>

The right to freedom of expression and the test for permissible restrictions are set out in similar terms in the European Convention on Human Rights (Article 10), the American Convention on Human Rights (Article 13) and a number of national constitutions and bills of rights.<sup>10</sup> The articulation and application of the test has also been repeatedly confirmed by both international and national tribunals.<sup>11</sup>

<sup>8</sup> As stated by the European Court of Human Rights in the case of *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para.256: "A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.

<sup>9</sup> See, for example: *Handyside v. the United Kingdom*, 24 Eur. Ct. HR (Ser. A) (1976). ; *Sunday Times v. the United Kingdom*, (1979) 2 EHRR 245, 271.

<sup>10</sup> European Convention on Human Rights (ECHR), E.T.S. No.5, entered into force 3 September 1953; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S 123, entered into force 18 July 1983; African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) entered into force 21 October 1986.

<sup>11</sup> Most recently by the Human Rights Committee in *Rafael Marques v. Republic of Angola*, 18 April 2005, CCPR/C/83/D/1128/2002. See also: *Castells v. Spain*, 14 EHRR 445 (1992) and *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 62.

## NEPAL'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Nepal ratified the International Covenant on Civil and Political Rights (ICCPR) on 14 May 1991. The other international human rights conventions ratified by Nepal include: the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.<sup>12</sup>

Article 9 of the 1991 National Treaty Act 1991 states that, "in case any treaty to which Nepal is a party is inconsistent with the existing laws, the existing laws shall be void." As a result of this provision all of Nepal's laws – including the Ordinance – must respect the international human rights conventions that Nepal has ratified.

Furthermore, Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant." The Government is therefore required to take positive actions to ensure, in this context, that the right to freedom of opinion and expression are protected and promoted in a manner consistent with international law.

In a widely publicized statement issued on 26 March 2004 by Nepal's former Prime Minister Surya Bahadur Thapa, entitled "His Majesty's Government's commitment to the implementation of human rights and international humanitarian law", the Government acknowledged its obligation to protect and promote human rights, including (at paragraph 15 of that statement) the right to free expression.

### **FREEDOM OF EXPRESSION IN THE NEPALI CONSTITUTION**

12. Right to Freedom:

- (2) All citizens shall have the following freedoms:  
(a) freedom of opinion and expression;

13. Press and Publication Right:

- (1) No news item, article or any other reading material shall be censored.

Provided that nothing shall prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities; or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act against which may be contrary to decent public behaviour or morality.

- (2) No press shall be closed or seized for printing any news item, article or other reading material.

- (3) The registration of a newspaper or periodical shall not be canceled merely for publishing any news item, article or other reading material.

16. Right to Information:

Every citizen shall have the right to demand and receive information on any matter of public importance; Provided that nothing in this Article shall compel any person to provide information on any matter about which secrecy is to be maintained by law.

<sup>12</sup> See: <http://www.lrwc.org/pub2.php?sid=58>.



## **THE ORDINANCE**

This section of this document analyses in detail the amendments set out in the Ordinance. The impact of these changes on the right to freedom of expression are assessed and recommendations are made as to how the Ordinance and the affected laws can be made compliant with international human rights standards.

### **Ban on news reporting by FM radio stations entrenched**

#### ➤ *Prohibiting news broadcasts through licence requirements*

When the King declared a state of emergency on 1 February 2005, among the many restrictions imposed on the media by the Government was a ban on FM radio stations reporting the news. The legal basis for the ban was said to be in Section 7 of the National Broadcasting Act, 2049 (1993) (the “Broadcasting Act”), which empowers the Government to prevent the broadcast of any programme on any subject for a period not exceeding six months at a time. The original ban on news programming, therefore, should have expired on 2 August 2005, but the Government continued to enforce it.<sup>13</sup>

After the Supreme Court made an interim order on 10 August 2005 requiring the Government to halt proceedings against Rainbow FM radio station for broadcasting news,<sup>14</sup> many other FM stations also started broadcasting news programmes. In effect circumventing the court order, the Government adopted the Ordinance on 9 October and then on 18 and 19 October the Ministry of Information and Communications issued public notifications instructing every FM station to stop broadcasting news, on the grounds that Section 5 of the Broadcasting Act, as amended by the Ordinance, makes such broadcasts illegal.

In fact, the Broadcasting Act does not directly make it illegal to broadcast news. Rather, the Broadcasting Act (Section 4) prohibits the broadcast of any programme without a license. Section 5 has been amended seemingly to exclude news-broadcasters from the group of broadcasters entitled to apply for a broadcast license. While previously any broadcaster of “news-based” programmes was able to apply for a license, the Ordinance replaces the words “news-based program” with “informative programs”. The definition of “informative programs” does not include information about politics, government or foreign policy but rather is limited to programs “designed with a view to providing information or raising people’s awareness on health, education, population, environment, weather, road transportation or those related with development activities.” Therefore, a broadcaster who intends to air news programmes could be prevented from submitting a license application.

If indeed this is the effect of the amendment to the Broadcasting Act, it serves to entrench the Government’s repeated moves against the independent FM radio stations. While the Ordinance does

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<sup>13</sup> After 2 August 2005, some of the FM stations chose to resume broadcasting the news, including Rainbow FM Pvt. Ltd., an independent private commercial radio station. On 3 August 2005, the Government sent a letter to Rainbow FM, demanding an explanation for why the station was broadcasting news in violation of the Government’s directive and asking the station’s operators to provide reasons for why its license should not be terminated, as contemplated by Section 8 of the Broadcasting Act. Rainbow FM filed a petition with the Supreme Court and on 10 August 2005 the Court issued an interim order instructing the Government not to restrict the broadcasting of news by the petitioner.

<sup>14</sup> See footnote 13, above.

not prohibit acts such as broadcasting news, it has the same effect by making it more difficult or impossible for news broadcasters to obtain, or maintain, a broadcasting license. The notification of the Ministry of Information and Communication on 19 October 2005 to FM stations makes it clear that the aim of the Government is indeed to restrict news broadcasting.

However, Section 16(a) and (b) of the Broadcasting Act may prevent the Government from prohibiting the broadcast of news since this provision states that all broadcasters, including FM radio stations, have the function of broadcasting news. This Section should prevail over Section 5, which, as described above, relates to the procedure for obtaining a license but does not actually prohibit any specific acts.

*On 21 October 2005, officials from the Ministry of Information and Communications arrived at the Khathmandu premises of Kantipur FM to check the satellite uplink. Later the same evening, the station was surrounded by security forces, who entered the station and seized the satellite uplink equipment. On this occasion the Government claimed that it was enforcing, not Section 5, but Section 11 of the Broadcasting Act, which states that “no broadcaster may relay their broadcasting without permission of the Government.” On 26 October, the Ministry of Information and Communications issued a letter to Kantipur FM seeking an explanation as to why its license should not be terminated on the grounds that it was broadcasting news, in violation of the amendment to the Broadcasting Act. Similar letters were also issued to other FM stations. On 11 November the Supreme Court refused to issue an interim order instructing the Government to stop the implementation of the Ordinance.*

### ➤ **The right to receive information**

The legal and practical moves to prevent the broadcast of news programmes violates the right of Nepalis under ICCPR Article 19(2) “to seek, receive and import information”. The right to information necessitates that the citizens of Nepal have access to as many sources of information as possible and as large a variety of information as possible. As stated by the United Nations Human Rights Committee:

“Because of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression....<sup>15</sup>”

A recent meeting of the Ministers of the Council of Europe, which has 46 Member States, adopted a resolution reaffirming the importance of media pluralism to the full exercise of freedom of expression and information.<sup>16</sup>

Broadcasters should not be denied access to means of communication because they disseminate news programming. The citizens of Nepal have a right to receive this information and they have a right to receive information from a plurality of sources.

<sup>15</sup> General Comment on Article 19 of the ICCPR, adopted by the Human Rights Committee at its 461st meeting on 27 July 1983, UN Doc. A/38/40,109.

<sup>16</sup> Resolution adopted at the 7<sup>th</sup> European Ministerial Conference on Mass Media Policy, 10-11 March 2005, MCM(2005)005.

*In the case of Tulsi Ram Niraula v. Ministry of Information and Communication and others, considered by the Supreme Court on 30 November 2005, it was argued that the prohibition on the broadcasting of news programmes on FM stations, as ordered by the Ministry on 19 October 2005, violated the petitioners right to information. The Supreme Court issued an interim order instructing the Ministry not to implement its notice of 19 October 2005<sup>17</sup>. This ruling paved the way for nearly 50 FM radio stations around the country to resume news broadcasts, at least temporarily.<sup>18</sup>*

**Recommendations:**

**The Government should end to prohibition on broadcasting news programmes and abandon any legal proceedings against FM radio stations.**

**The amendment to Section 5 of the Broadcasting Act, which seems to prevent the broadcasting of news by withholding licences from news broadcasters, should be revoked.**

### **Discriminatory licensing regime for operators of radio equipment**

The Radio Act 2014 (1957) (“Radio Act”) institutes a licensing regime for all owners and operators of “radio equipment”, defined to include all equipment used to transmit and/or receive broadcast programming. The Ordinance amends the Radio Act to make it easier for some broadcasters to obtain a license, while maintaining the existing licensing regime for those broadcasters that transmit news.

By inserting a new proviso to Section 3 of the Radio Act, the Ordinance expands the category of persons who are not required to obtain a license under the Radio Act in order to use radio equipment. Previously, a person with a license granted under the Telecommunications Act, 2053 (1956) to operate a “telecommunications service”, or a customer of such a person, did not need to obtain an additional license under the Radio Act. Under the new proviso, only persons or corporate bodies licensed to broadcast programs through satellite, cable or otherwise and who air “educative, entertaining and information-oriented programs”, and their customers, do not need to obtain a separate license under this Act.

There is no definition of what constitutes “educative, entertaining and information-oriented programs”. However, in light of the amendment to Section 5 of The National Broadcasting Act, 2049 (1993), discussed above, it appears to exclude news programming. Therefore, while the amendment appears to lessen the administrative burden imposed on some cable and satellite broadcasters, it maintains the obligation on persons and corporate entities that broadcast the news – and their customers – to obtain licenses under the Radio Act.

<sup>17</sup> MoIC order 19 October 2005 ““ As the Ordinance to Amend some Media related Acts, 2062 has amended section 5 of the National Broadcasting Act, 2049 by replacing the term 'News Related Programme' with the term 'Information Related Programme', and moreover defined Information related Programme as ' programmes to inform and to aware people information about development and construction related subjects like health, education, population, environment, weather and road transportation', now all Frequency Modulation (FM) stations are informed through this notice not to broadcast any news programmes. This notice is published to inform all concerned, that action in accordance to the National Broadcasting Act, 2049 would be taken against all broadcaster, broadcasting (news) against above mentioned law.”

<sup>18</sup> <http://www.ifex.org/en/content/view/full/70789/>

The system of licensing created by the Radio Act is excessively onerous and seemingly arbitrary. The definition of what constitutes a “radio equipment” is very broad, listing 14 categories of equipment that qualify, including radio transmitters, walkie-talkies, cordless phones and television equipment.<sup>19</sup> Furthermore, there are no criteria specified for obtaining the license and the Government can arbitrarily exempt a person or a machine from the licensing requirement. Section 4 of the Act states that, “with or without specifying any terms”, the Government may exempt any person or body or radio equipment from the requirements of the Act.

The equipment covered by the Radio Act is essential to the exercise of the right to receive and disseminate information, recognized in Article 16 of the Constitution and Article 19 of the ICCPR as an element of the right to freedom of expression. In Nepal, where a large percentage of the population depends on radio as a primary source of information, the importance of radio equipment to the exercise of this right is particularly acute.<sup>20</sup> Article 19, ICCPR, sets out explicitly that people are free to choose the form of media to “receive and import information”, “either orally, in writing or in print, in the form of art, or through any other media of his choice”.

The ICJ considers that the prohibition on “holding, making and using” radio equipment without a license (Section 3 of the Radio Act) is not a legitimate aim that would justify the limitation that the licensing requirement imposes on the right to receive information through any media. Internationally, the justification for licensing broadcasters has been the limited nature of the broadcast spectrum, thereby necessitating government oversight in order to maintain pluralism in broadcasting.<sup>21</sup> No similar rationale exists in relation to the equipment used for broadcasting. The rationale for the Radio Act appears to be the establishment of Government control over the dissemination of information.

The licensing regime also fails to be “prescribed by law”, since the criteria for obtaining the license are not set out in the law. Finally, the amendment to the regime contained in the Ordinance discriminates against news broadcasters, again for no evident legitimate purpose. The ICJ is concerned that the failure to include news broadcasters within the amendment is consistent with other actions of the Government to silence the news media.

**Recommendations:**

**News broadcasters should not be discriminated against under the law.**

**The Government should exempt all radio equipment from the licensing requirements. At minimum, any licensing regime that has the effect of restricting the right to freedom of expression should be consistent with Article 19, ICCPR, and administered by a body independent of the Government.**

<sup>19</sup> By virtue of Section 18 of the Radio (Communications) License Rules 1992, ordinary radios and television sets are not covered by the definition.

<sup>20</sup> See note 3, above.

<sup>21</sup> Article 10(2) of the European Convention on Human Rights specifically contemplates the licensing of broadcasters on this basis.

## Categories of prohibited content expanded for print and broadcast media

The Ordinance introduces a number of amendments to both the Press and Publication Act, 2048 (1991) (“Press Act”) and to the Broadcasting Act, which serve to entrench and strengthen restrictions imposed on the media by the King during the most recent state of emergency. The amendments expand the range of subject matter that cannot be published or broadcast in Nepal without incurring a sanction.

Expanding the categories of prohibited content is a form of prior censorship that constitutes inappropriate interference with and control over the media. Article 13(1) of the Constitution states that “no news item, article or any other reading material shall be censored”. The Article goes on to provide that laws may be introduced that impose “reasonable restrictions” on expression in certain listed circumstances.<sup>22</sup> However, a restriction will only be “reasonable” if it complies with the requirements set out in the three-part test (see page 6) for the legitimacy of limitations on freedom of expression.

The ICJ is of the view that the content restrictions imposed by the Press Act and the Broadcasting Act, and expanded by the Ordinance, are not necessary and serve no legitimate aim. Furthermore, given that the prohibitions are drafted using vague terms and concepts, which provide little guidance to the press on where the boundary lies between permitted and prohibited expression, they cannot be said to be prescribed by law.

### ➤ *Restricting what the press can write*

Section 14(a) of the Press Act already prohibits the publication, in any book, newspaper or magazine, of material that will, “foment hatred, disrespect, contempt or malice toward His Majesty or the royal family, or undermine the dignity of His Majesty”. The Ordinance expands the prohibition to make it an offence to undermine the dignity of members of the royal family, as well as the King.

Laws that prohibit the criticism of heads of state and other public officials have been repeatedly struck down by courts and tribunals around the world on the grounds that these constitute an unwarranted infringement on the right to free expression.<sup>23</sup> Most recently, the United Nations Human Rights Committee stated that: “the right to freedom of expression in Article 19 [of the ICCPR], paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.”<sup>24</sup>

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<sup>22</sup> Article 13 of the Constitution permits the adoption of laws that will impose restrictions “on any act which may undermine the sovereignty and integrity of the Kingdom of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities; or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act against which may be contrary to decent public behaviour or morality.”

<sup>23</sup> The European Court of Human Rights decision in *Castells v. Spain*, Judgment of 23 April 1992, Series A no. 236, is one of many judgments in which the Court reiterates the principle that public officials and governments should tolerate more, rather than less criticism. Additionally, the U.S. Supreme Court decision in *New York Times Co. v. Sullivan*, 376 US 254 (1964), which held that the right to free expression protects even false statements made about public officials – absent any actual malice – has been cited with approval by courts around the world.

<sup>24</sup> Sri Lanka, for example, repealed its criminal defamation law in June 2002, and Ghana repealed its law in 2001. Argentina, Peru, Costa Rica and Paraguay also repealed their *desecato* laws within the last two years. The last time an action for criminal defamation was brought in the UK was in the 1970s, and it was unsuccessful.

The Nepalese Government's plan to arrest six journalists for the publication of a political cartoon, depicting the constitutional monarchy as a dead animal, provides an illustration of how Section 14 of the Press Act can be used in a completely disproportionate manner to violate the media's freedom of expression.<sup>25</sup> Even without carrying out the actual arrests, the mere threat of sanctions has a chilling effect on lawful expression. The media in Nepal already practice self-censorship to avoid attracting legal or other less formal sanctions. By fostering such a climate the Government is effectively in breach of its obligations under Article 2 of the ICCPR to take positive measures to protect and promote the right to free expression.

The Ordinance also introduces a new paragraph (c)(1) to Section 14 of the Press Act, prohibiting the encouragement of "acts that are deemed as crimes under current laws". Both Article 13 of the Constitution of Nepal and Article 19 of the ICCPR permit restrictions on the press that threaten the public order or public morals, but not all acts which are criminal threaten public morality or public order. Furthermore, the prohibition uses the broad and ill-defined term "encouragement". The Constitution employs a higher standard, by requiring that the behaviour of the press can only be restricted if it amounts to "incitement to an offense". Similarly, Article 20 of the ICCPR provides that any advocacy of national, racial or religious hatred that constitutes "incitement to discrimination, hostility or violence" should be prohibited. This language illustrates the very narrow circumstances in which it is permissible for the state to restrict press articles.

The ICJ is concerned that in the present context in Nepal, in which the media is being closely monitored and heavily sanctioned by security forces and the Government, merely reporting on actual or perceived criminal activity could be interpreted as constituting "encouragement". To be consistent with the Constitution and with the ICCPR Section(c)(1) should therefore be reformulated. As drafted, the amendment serves no clear legitimate aim and it suffers from a lack of proportionality. It is not a reasonable or justifiable form of censorship.

Section 16(1) of the Press Act has also been amended to empower the Government to ban the import of foreign publications if they are likely to produce any of the vaguely-worded consequences listed in the provision. These include: "(a) adversely affecting national interests and dignity; (c) undermining relations with foreign states and governments; (d) assisting, supporting or encouraging terrorist, terrorism and destructive activities".

The amendment deletes paragraphs (b) and (e) of Section 16(1), which is positive, as these prohibitions were vaguely drafted. However, new prohibitions have been added which serve to strengthen the King's control over the dissemination of information within Nepal. The Ordinance now enables the Government to ban the importation of any material that is likely to have as a consequence "assisting, supporting or encouraging terrorist, terrorism and destructive activities." None of these terms is defined and there is a risk of broad interpretation and application of the prohibition.

Under international law, articles in the media can only be restricted for somehow assisting terrorism, if the words are likely to incite others to carry out terrorist acts. It is necessary to show a direct causal link between the words and the likelihood of terrorist acts being carried out. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information provide useful

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<sup>25</sup> Reported by the Committee to Protect Journalists, 25 August 2005. The cartoon was published in the papers *Kantipur* and the *Kathmandu Post*.

guidance on the relationship between freedom of expression and national security, within which counter-terrorism measures sit. They provide:

“Subject to (...), expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence;”<sup>26</sup>

In practice it is only in highly exceptional cases that that media articles could be said to fulfill this causal link. Criticism of government policy and discussion of controversial political views should not be confused with incitement to commit terrorist acts. Perhaps especially in times of crisis, as in Nepal now, freedom of expression and of the media are vital, to allow critical reflection about the situation and how to resolve it. The amendments would bring a false legal cover to vague and arbitrary measures that would curtail legitimate political and social dissent and media discussion.

➤ ***Restricting content of broadcasts***

Section 15 of the Broadcasting Act previously banned the broadcast of any advertisement that related to prohibited matters, as set out in that section. Prohibited matters include: matters adversely affecting political parties; vulgar materials, and matters of such a nature as to create unusual fear and terror in the general public.

The Ordinance amends Section 15, expanding the prohibition to all programming, not just advertisements. Additional categories of prohibited content have also been added, including matters “contrary to the non-aligned foreign policy of Nepal” and “matters or materials banned or prohibited for publication under current laws.”

*On 27 November 2005 a police team seized transmission equipment and detained four journalists at Radio Sagarmatha. The police handed over two separate letters reported to be from the Ministry of Information and Communication requesting the radio station to hand over transmission equipment and cease operations until further notice. In one of the letters the Government reportedly accused the radio station of airing programmes that encourage terrorists and terrorism in violation of Section 15(d) and (i) of the National Broadcasting Act-2049 and the license provided to the radio station. The closure took place on the day the station was to air a BBC Nepali Service interview with Maoist leader, Prachanda. The journalists were released from detention the following day. Despite an interim order from the Supreme Court on 29 November, Radio Sagarmatha was not allowed by the Government to relay BBC Nepali Service. On 7 December the Supreme Court issued a second stay order to the Government instructing it to let Radio Sagarmatha air the BBC Nepali service broadcast.*

The amendment to Section 15 has also resulted in the removal of paragraph (2) of that provision which protected the right of political opposition parties to disseminate information. While not prohibited

<sup>26</sup> Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 5.

outright, it may become even more difficult for opposition parties to gain access to the media, if only because broadcasters will be unsure of the status of the law regarding such subject matter.

Content restrictions of the nature imposed by Section 15 constitute a form of censorship and thus, unless they can be justified in accordance with the three-part test, violate international human rights law.

Most of the restrictions set out in the new Section 15 of the Broadcasting Act are vaguely drafted and cannot be said to be prescribed by law. The prohibition on broadcasting matters contrary to Nepal's "non-aligned foreign policy" is one such example. Given the dearth of news available within Nepal it would be very difficult for any member of the independent press to determine what actually constitutes Nepal's "non-aligned" foreign policy, nor when one is making a declaration "contrary" to this policy. The potential for abuse of this provision because of its lack of clarity is significant and it should be repealed.

The content restrictions also fail for the most part to satisfy any legitimate aim. For example, paragraph (a), which prohibits the broadcast of matters that might "adversely affect political parties" can be used to prevent reporting on official wrongdoing. Preventing the exposure of government incompetence and/or corruption is not a recognized legitimate aim, neither under the Constitution nor under Article 19 of the ICCPR. On the contrary, this is precisely the type of information the dissemination of which is protected by the right to freedom of expression.<sup>27</sup>

Other vague prohibitions include those against "vulgar" matters, materials aimed at creating "unusual fear" and materials that "misinterpret" any caste. It would be legitimate for the Government to restrict broadcasts to protect morals or public order, both legitimate aims under Article 19 ICCPR, but the law would require much greater elaboration and precision.

**Recommendations:**

**The ICJ urges the Government to remove the remaining content restrictions contained in the Press Act by repealing Sections 14 to 16. If these provisions are not removed, then they should be amended so that they reflect the very limited permitted restrictions set out in the Nepali Constitution and Article 19 of the ICCPR.**

**Prohibitions against the import of foreign media should be lifted as this violates the right to freedom of expression, which exists "regardless of frontiers".**

**The new Section 15 of the Broadcasting Act, which further restricts broadcast content, should be repealed. Section 15(2) of the Broadcasting Act, which protected the right of political parties to disseminate information, should be reinstated.**

<sup>27</sup> See for example European Court of Human Rights, *Sürek v Turkey* (No 2), Judgment of July 8, 1999, Application 2452 22 /94, para.29; See also Johannesburg Principles, supra, Principle 2(b) "In particular a restriction sought to be justified on the grounds of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including for example, to protect a government from embarrassment or exposure or wrongdoing (...)".



## Restrictions on dissemination of news from foreign sources in Nepal

The National News Agency Act, 2019 (1962) (“News Agency Act”) empowers the Government to create a State-owned and controlled news agency responsible for disseminating news both within and outside Nepal. This agency, the *Rastriya Samachar Samiti* (National News Agency (RSS)) is the official mouthpiece of the Government, required by Section 17 of the Act to abide by a number of content restrictions, including a prohibition against disseminating reports that “create doubt or suspicion with regard to Nepal’s friendly relations with other nations or world peace.”

The News Agency Act (Section 32(1)) prohibits any other news agency from collecting or distributing foreign news items about Nepal, inside Nepal. Foreign news agencies used to be prohibited from selling or distributing news items except through the RSS or the Government. Now, by virtue of an amendment set out in the Ordinance (new Section 32(2)), foreign news agencies are entitled to sell their news in Nepal, provided they obtain Government approval. No permission is needed for selling or distributing news to the RSS.

While the amendment constitutes a slight improvement on the original prohibition on foreign news agencies, the improvement is merely cosmetic. There is no specified mechanism through which foreign news agencies may obtain Government approval to sell their news, and in light of the onerous content restrictions imposed on the RSS, it is unlikely that much meaningful news from the foreign agencies will reach the citizens of Nepal through this channel. Furthermore, the long term effect of these measures is a likely reduction in the number of foreign news agencies operating in Nepal, thereby ensuring the progressive isolation of the country’s citizens from the international community.

Article 19 of the ICCPR provides that the right to free expression applies “regardless of frontiers”. The amended Section 32(2) of the News Agency Act violates the rights of the foreign press in Nepal and also the right of Nepalese citizens to receive information, as guaranteed by Article 16 of the Constitution.

### **Recommendation:**

**The ICJ recommends that the Government repeal Section 32 of the News Agency Act or abandon the requirement imposed on foreign news agencies to obtain permission from the Government to sell their news in Nepal.**

## Greater powers of Government-controlled Press Council to strike off journalists

The Press Council in Nepal is an entity appointed and controlled by the Government. Its primary functions are to regulate the press through the enforcement of a code of conduct and to control access to the profession. Any entity charged with oversight of the media should be independent from the government and must be *seen* to be independent.<sup>28</sup> This, however, is not the case with the Press Council.

<sup>28</sup> A number of the mechanisms which would ensure the independence of the Press Council are lacking in the Act. For example, the Council is required to obtain the Government’s permission prior to accepting funds from foreign governments and agencies (Section 13(3)) and the Government can prescribe how the Council’s fund is to be operated (s.13(4)).

At the end of September this year, Reporters Sans Frontières reported that the Ministry of Information and Communications issued a set of directives on the assignment of state advertising in which the Government asked all state entities to place advertising only with media that “respect the nation, the nationality and the monarchy”.<sup>29</sup> Five days before the Ministry’s announcement, the Press Council published a list of 322 publications, ranked according to circulation. A number of the publications that are critical of the Government were demoted from Category A to Category B, despite having large circulations. A couple of publications supportive of the monarchy were promoted to Category A, and consequently will have priority access to state advertising funds. On 24 September 2005, newspaper and magazine editors demonstrated outside the Press Council’s offices, protesting the ranking on the grounds of bias.<sup>30</sup>

The Ordinance amends Section 12(2)(d) of the Press Council Act, 2048. Prior to the amendment, the Press Council could recommend to the Government that a journalist “who is in defiance of the professional code of conduct time and time again”, should have any privileges or facilities received from the Government suspended in whole or in part. The amendment grants the Council the additional power to recommend the cancellation of the journalist’s representative certificate. Given that the Press Council is not independent of the Government, it seems more likely than not that the Government will adhere to any recommendation made by the Council.

The ICJ is concerned that this additional power will be misused by the Press Council, as an arm of the Government.<sup>31</sup> By having a certification system in place for journalists, which essentially functions as a form of licensing regime, journalists can be controlled through the threat to revoke their certificates. The Inter-American Court of Human Rights has ruled that compulsory membership in an association prescribed by law for the practice of journalism is incompatible with Article 13 of the American Convention on Human Rights. (Article 13 contains the freedom of expression guarantee, in the same terms as Article 19 of the ICCPR.)<sup>32</sup> A law that requires journalists to be licensed violates not only the individual journalist’s right to seek and impart information, but also the public’s right to receive information without any interference.<sup>33</sup>

#### **Recommendations:**

**The ICJ recommends that until the Press Council becomes a truly independent entity, it should not have the power to recommend that journalists lose their representative certificates. The amendment to the Press Council Act should be repealed.**

<sup>29</sup> 29 September 2005, [www.rsf.org](http://www.rsf.org).

<sup>30</sup> In February 2005, following the state of emergency but prior the promulgation of the Ordinance, the International Federation of Journalists (IFJ) estimated that at least 600 journalists had already lost their jobs in Nepal as a result of the restrictions imposed on the media and the general level of insecurity within the profession. Restricting access to advertising revenues and increased powers granted to the Press Council will further weaken this already fragile sector. See: IFJ Report, “Coups, Kings and Censorship”, released February 2005.

<sup>31</sup> The lack of independence of regulatory and oversight bodies in Nepal has already been documented by the ICJ. See for example, the ICJ’s open letter sent to King Gyanendra in June 2005, calling on the King to take steps to ensure the independence of the National Human Rights Commission.

<sup>32</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, (Ser. A) No.5.

<sup>33</sup> *Ibid.*, para. 84.

**The media should be self-regulating and journalists should not be required to obtain representative certificates in order to work.**

**The ICJ further recommends that, as in other jurisdictions (for example the UK and Sweden), journalists should be able to decide voluntarily whether to accept the Press Council's recommendations and should not be compelled to submit to the Press Council's authority.**

## **Restrictions on cross-media ownership**

The Ordinance introduces another troubling amendment to the Broadcasting Act, through a new Section 6(a) that restricts media cross-ownership. Under the provision, no single legal entity will be entitled to obtain a licence or operating certificate for more than two forms of media, out of three possibilities: radio, television and publishing. Any entity that currently possesses licenses for all three media is required to surrender one of these within a year.

Controlling the degree of media concentration in a society is recognized as an important mechanism for achieving the pluralism required for the full exercise of freedom of expression, as set out above. However, restricting media ownership (and thus access to the means of communication) does constitute an infringement on the right to free expression and it must therefore satisfy the three-part test for legitimacy. The burden lies on the Government to establish that each limb of the test is met.

The Government has not made any attempt to establish that the degree of concentration of media ownership in the country has reached such a level that it actually threatens freedom of expression in Nepal by undermining media pluralism. The ICJ believes that this measure is disingenuous given that, as events over the past four years have demonstrated, the Government itself is one of the most significant threats to media pluralism and freedom of expression in Nepal. Currently there are only two companies that own and operate more than one form of media in Nepal: Image Channel and Kantipur. Image Channel has an FM radio station and a television station. Kantipur has print, television and radio operations. Therefore, whether or not it is the motivation behind the provision, the practical impact of the amendment at present is to target and only affect Kantipur.

Furthermore, as the experience of countries with far more concentrated media markets, including in Italy, the United States and Canada, has shown the process of creating a more competitive – and hence more pluralistic – media sector is a complex one. Merely limiting entities to operating two forms of media will not eliminate the problems arising from excessive concentration of media ownership. Indeed, an entity could voluntarily opt to operate only broadcasting outlets and then establish a total monopoly on television stations. In other words, the measure introduced by the Ordinance is unduly restrictive and probably ineffective.

### **Recommendations:**

**The ICJ urges the Government to conduct a thorough study of the need for measures to limit media ownership in Nepal. Until the need is established, Section 6(a) of the Broadcasting Act, which prohibits the licensing of “more than any two of radio, television and publication at a time or time by time”, should be repealed.**

## Disproportionate sanctions for criminal defamation

The threat of fines is an effective means through which governments can control the press. Imposition of fines on a media organization, even for a series of minor offences, can effectively bankrupt the organization.<sup>34</sup> Furthermore, just the threat of sanction can have a chilling effect on expression. Fines, therefore, regardless of their amount, can constitute a disproportionate restriction on freedom of expression and thus violate international law.

The UN Commission on Human Rights has called on states to “refrain from the use of imprisonment or the imposition of fines for offences relating to the media which are disproportionate to the gravity of the offence and which violate international human rights law”.<sup>35</sup>

If and when penalties must be used against the media, the Government should employ a system of graduated sanctions to achieve compliance, starting with a warning and only using fines as a last resort. Such a system would respect the principle of proportionality.

The Ordinance amends the sanction provisions in both the Press Act and the Libel and Defamation Act. In both instances, the new sanctions that have been introduced are disproportionate to the offences and therefore violate international human rights law.

### ➤ *Criminal sanctions in the Defamation Act*

The Ordinance amends the sanction provisions in the Libel and Defamation Act, 1959 (“Defamation Act”) (Sections 5 to 8) by increasing potential fines and imposing prison terms of six months to two years. The Ordinance also amends Sections 27 to 30 of the Press Act, increasing by about ten times the amount of the fines that will be imposed for any violation of Sections 14 through 17 of the Press Act. In some circumstances, for example if a defamatory statement is published, the person responsible for the publication can be both fined *and* imprisoned (Defamation Act, Section 5).

Laws that criminalize defamation constitute a restriction on the right to free expression. The ICJ considers that they create an unjustifiable “chilling effect” on the flow of protected speech. The threat or imposition of criminal sanctions is a disproportionate response to the harm caused by defamatory speech. The experience of other countries demonstrates that such laws are not necessary, since the reputation of people can be effectively protected by other means, including application of civil remedies and the right of a person defamed to seek a correction of the statement and/or to be able to reply.

There is a growing body of jurisprudence that supports the principle that criminal defamation laws cannot be justified. The UN Human Rights Committee, in a decision published in April 2005, made

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<sup>34</sup> The General Rapporteur on the Media to the Council of Europe’s Parliamentary Assembly noted the use of disproportionate fines in a number of countries, with the effect of bringing the media “to the brink of extinction.” Parliamentary Assembly, Council of Europe, *Freedom of Expression in the Media in Europe*, Doc. 9640 revised, 14 January 2003.

<sup>35</sup> Commission on Human Rights Resolution 2002/48, para. 19 (c).

the following statement in upholding a complaint from an individual charged with criminal defamation:

“Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.<sup>36</sup>”

The Inter-American Court of Human Rights, in two landmark rulings, has also held that the application of criminal defamation laws constitutes an unwarranted and unjustifiable restriction on the right to free expression.<sup>37</sup> While the European Court of Human Rights has yet to make a decision on the validity of criminal defamation laws generally, it has repeatedly found that the sanctions imposed in particular criminal defamation actions violate the right to free expression and their application should be subject to careful scrutiny.<sup>38</sup> Furthermore, a number of countries have repealed their criminal defamation laws within the past few years. In most countries that still have them, the laws have not been used in recent times.<sup>39</sup>

Since the Ordinance was promulgated at the beginning of October 2005, the chief editor, editor and manager of the Lamjung weekly paper *Karmada*, have been sued for defamation under the new provisions, for statements published in June 2005.<sup>40</sup> At a time when the international community and international tribunals are rejecting the use of criminal defamation laws on the grounds that they constitute an unwarranted infringement on the right to free expression, the ICJ is troubled by the Government's decision to legislate in the opposite direction.

**Recommendations:**

**The amendments to the Defamation Act should be repealed. The sanctions for criminal defamation should not be increased.**

**The Government should, in light of the Constitution and the country's international obligations, consider decriminalizing defamation.**

**Sanctions should be proportionate to the offence and should achieve the appropriate balance between competing interests.**

**A graduated system of sanctions should be introduced.**

**Imprisonment should never be an option for a media-related offence.**

<sup>36</sup> Human Rights Committee in *Rafael Marques v. Republic of Angola*, 18 April 2005, CCPR/C/83/D/1128/2002, para 6.8

<sup>37</sup> *Herrera Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107, and *Canese v. Paraguay*, 31 August 2004, Series C, No. 111.

<sup>38</sup> See for example: *Castells v. Spain*, 24 April 1992, 14 EHRR 445, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82.

<sup>39</sup> Sri Lanka, for example, repealed its criminal defamation law in June 2002, and Ghana repealed its law in 2001. Argentina, Peru, Costa Rica and Paraguay also repealed their *deseccato* laws within the last two years. The last time an action for criminal defamation was brought in the UK was in the 1970s, and it was unsuccessful.

<sup>40</sup> Kantipur Online Report, 20 October 2005.

## **Other vague provisions introduced by the ordinance**

The Ordinance makes two amendments to the Broadcasting Act, the effects of which are unclear.

First, the Ordinance amends the definitions section of the Act by removing “television technology” from the definition of “frequency modulation broadcasting system.” Now only broadcasts made using radio technology, carried out by a broadcasting entity through prescribed channels qualifies as a frequency modulation broadcasting system (Section 2(c)).

The concept is relevant to Section 5 of the Act, which requires any person who intends to broadcast by establishing a frequency modulation broadcasting system to submit a license application to the Government. It appears, therefore, similar to the manner by which news broadcasters are excluded from the licensing regime (see above section), those who operate television technology are also precluded from the licensing process. Television is not expressly addressed elsewhere in the Broadcasting Act. The actual effect of this amendment to the definitions section requires clarification.

A final amendment to the Broadcasting Act by the Ordinance merits special mention. A new Section has been added after Section 11, prohibiting the broadcasting of programs “from other places”, or “simultaneously from other than one place” without first obtaining permission from the Government. The meaning and effect of this new provision is not entirely clear and may have been drafted in an intentionally vague manner.

The ICJ urges the Government either to elucidate the wording of this provision so that the objective is obvious and consistent with the requirements of the Constitution, or to repeal it. If the goal of the prohibition is to limit the ability of broadcasters to transmit broadcasts within Nepal (or beyond Nepal’s borders) without permission then this introduces yet another unwarranted mechanism through which the Government can exercise control over the independent broadcast media.

A restriction that does not provide sufficient information to be able to guide behaviour with any certainty cannot be said to be prescribed by law. Consequently, both of the amendments to the Broadcasting Act as set out above fail the test for permissible limitations on the right to freedom of expression.

### **Recommendations:**

**The new Section 11(a), prohibiting the broadcasting of “programmes simultaneously from other than one place without obtaining permission”, should be redrafted for greater clarity. If the objective of this provision is to restrict the ability of broadcasters to transmit programs the provision should be repealed.**