

Comparative Analysis of Nepal's Media Council Bill



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On May 9, Nepal's Government registered a highly controversial bill in Parliament that aims to establish a new media regulatory authority for all electronic and printed mass media. The 'Nepal Media Council Act, 2018,' also referred to as the 'Media Council Bill,' contains a number of provisions which, if enacted, would seriously weaken the country's democracy by reducing media pluralism and curtailing press freedom. It would contravene international human rights law, most notably Article 19 of the International Covenant on Civil and Political Rights (ICCPR)—which Nepal has ratified—protecting the freedom of expression. It would also conflict with Article 17(2)(a) and Article 19(1) of Nepal's Constitution, which guarantee freedom of opinion and expression and freedom of the press.

The press does not operate in a legal vacuum, but excessive state regulation threatens to suppress dissent and the public's right to be informed, converting the press from public watchdogs into political mouthpieces. In order to uphold media ethics and guarantee accountability to the public, democracies around the world often structure their press councils as self-regulating bodies. The concept of self-regulation entails the 'development and enforcement of rules by those whose conduct is to be governed, with the ultimate aim of improving the service offered to ... the public at large.' While there is no single method for the press to regulate itself, various common practices can be identified that establish institutional, financial, and technical separation between press councils and the state.²

The press councils of four established democracies—Denmark, South Korea, India, and the United Kingdom—will be examined here in order to gain insight on the extent to which they facilitate self-regulation. These countries have all taken different approaches to regulating their press, so they provide useful examples of practices and structures that do and do not enhance press freedom. Then the Media Council Bill will be analyzed with respect to the proposed Council's composition, powers and competences, and funding. Press councils are not the only determinants of press

¹ARTICLE 19, *Freedom and Accountability: Safeguarding Free Expression Through Media Self-Regulation* (2005) 11.

²Fabrizio Cafaggi, Federica Casarosa and Tony Prosser, 'Private Regulation and Freedom of Expression' (2017) 11 *IJoC* 1998, 2009 <<https://pdfs.semanticscholar.org/515f/60bbf7e62a9d8bd0ba72d725b55a650a2b22.pdf>> accessed 2 August 2019.

freedom in a country; factors such as the political climate and the general legislative framework play a critical role.

Denmark

Denmark enjoys some of the greatest press freedom in the world, ranking fifth in Reporters without Borders' (RSF) 2019 World Press Freedom Index. The Danish Press Council combines statutory and self-regulating elements. It provides mandatory regulation for all domestic print media that is published twice a year or more, broadcasting services that hold a Danish license, and online services that receive subsidies under the Danish Media Liability Act. Additionally, online services that meet several criteria can register for voluntary regulation, and there are numerous incentives to do so.³ The Council's eight members are appointed by the Minister of Justice pursuant to section 41(1) of the Danish Media Liability Act, but only after they have been recommended by various stakeholders. The chairman and the vice-chairman must be lawyers and are recommended by the President of the Danish Supreme Court; two members are recommended by the Danish Journalists' Union; two members represent the editorial managements of the printed press, radio, and television and are recommended by these media; and two members are recommended by the Danish Council for Adult Education. Each member has a deputy who substitutes if there is a conflict of interest.

The Council acts as a public tribunal, essentially providing 'an alternative to complainants seeking remedy through the courts that is cost-effective for all sides.'⁴ It consists of four members when ruling in a case—the chairman or vice-chairman and one member from each category above (sec. 42(1)). It may hear complaints or—in important cases—try a case on its own accord (sec. 44(2)) relating to the violation of 'sound press ethics.' This concept is not defined in the Act, but the Council does issue a set of rules. Its sanctioning powers are limited. It can rule that a publication made is contrary to sound press ethics and express its criticism, and it can require that a mass medium publicly correct information that might cause anyone significant financial or other damage (sec. 43(1)). Failure to do so can result in a four-month prison sentence (sec. 53(1)). For a complainant to request a reply, the information published must be of a factual nature and its correctness must be questionable (sec. 36(1)). It has a peculiar method of ensuring financial independence: the Minister of Justice funds the Press Council but is reimbursed by the industry, with public service broadcasters and print publishers each covering half of the budget.⁵

India

The Press Council of India (PCI) is a self-regulating body for the print media and operates under the Press Council Act 1978. It consists of a Chairman—generally a retired justice of the Supreme Court—and 28 other members. Composition and appointment procedures are as follows (sec. 5): 13 working journalists or editors and

³Lara Fielden, 'Regulating the Press: A Comparative Study of International Press Councils' (Reuters Institute for the Study of Journalism, April 2012) 28, 112 <<https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Regulating%20the%20Press.pdf>> accessed 30 July 2019.

⁴ibid 29.

⁵ibid 25.

seven owners or managers of newspapers are nominated by press organizations and news agencies; three have experience in education and science, literature and culture, and law, and are respectively nominated by the University Grants Commission, the Sahitya Academy, and the Bar Council of India; and five represent and are nominated by the two houses of Parliament. The PCI is funded by fees collected from newspapers, based on their circulation, and these fees are supplemented by grants from the Government (sections 16-17). It has the power to issue a code of conduct (sec. 13(2)(b)) and to hear and inquire into complaints regarding professional misconduct (Press Council (Procedure for Inquiry) Regulation, 1979, sec. 3(1)(c)). If such misconduct is found to have violated journalistic ethics or public taste, it may warn, admonish, or censure newspapers, news agencies, editors, or journalists (sec. 14(1)). Additionally, it may direct a newspaper to publish any particulars related to its inquiry that it deems necessary (sec. 14(2)).

The PCI has been relatively ineffective, because its structure creates an environment that is an obstacle to self-regulation. RSF ranks India in 140th place in its 2019 World Press Freedom Index. Media ownership is highly concentrated and often subject to significant political or financial influence.⁶ While this low ranking is due in part to an inadequate legislative framework, the composition of the Council is a contributing factor as well. Because nearly half of the Council is made up of media owners and parliamentarians; there are frequent conflicts of interest. The representation of politicians on the Council is contrary to the principles of self-regulation, as the media should not serve political interests. Additional factors in India's media environment—including threats of physical harm, harassment, and a law criminalizing 'sedition'—push journalists and editors to self-censor.

South Korea

The Press Arbitration Commission (PAC) is a quasi-judicial organization that was founded by the Act on Press Arbitration and Remedies, etc., for Damage Caused by News Reports. It resolves disputes regarding damages allegedly caused by any broadcasting, newspapers (including online news), or periodicals. It is composed of 40-90 arbitration commissioners who are commissioned by the Ministry of Culture, Sports and Tourism (art. 7(3)). They consist of judges who are recommended by the Minister of National Court Administration, attorneys who are recommended by the President of the Korean Bar Association, persons with ten years or more experience in a press organization, and other persons who have knowledge and experience in the press. Persons in the first three categories should constitute a majority of commissioners. Public officials, members of a political party, candidates in a political election, incumbent journalists belonging to a press organization, persons of 'incompetence or quasi-incompetence,' and persons filing for bankruptcy are ineligible to serve as commissioners. Active commissioners may be dismissed on the same grounds (art. 8).

⁶Reporters Without Borders, 'Media Ownership Monitor: Who owns the media in India?' (29 May 2019) <<https://rsf.org/en/news/media-ownership-monitor-who-owns-media-india>> accessed 30 July 2019.

Claimants may request a press organization to correct a news report, publish a reply, make a follow-up report, or pay damages, but the press shall not be held liable if they presented a true report related to the public interest (art. 5(2)). Disputes arising from such a request are settled by the PAC through mediation or arbitration, with the PAC's decisions having the same effect as judgments of a court (arts. 23, 25). Arbitration panels are composed of a maximum of five commissioners and are headed by one of the commissioners who is a lawyer or judge (art. 9). Financing for the Commission comes from the Broadcast Development Fund, which consists of government contributions and fees from broadcasters, and State subsidies (art. 12).

RSF considers South Korea to have the freest press in Southeast Asia, ranking it 41st place worldwide in their most recent index. Similar to the Danish model, the Press Arbitration Commission resembles a court more than a press council, providing petitioners with the opportunity to resolve disputes quickly and inexpensively. The Government does have significant say in the Commission's composition and funding, but the involvement of the judiciary and the Bar Association, as well as members with experience in the media industry, increases the body's independence. The grounds of removal for members are clearly formulated, and the bankruptcy provision aims to eliminate financial conflicts of interest.

UK

The Independent Press Standards Organisation (IPSO), as established by The Companies Act 2006, replaced the British Complaints Commission (PCC) in 2014 and operates independently from the Government. Over 1500 print and 2500 online publishers have contractually bound them to voluntary self-regulation, in return receiving a symbol on their publications that increases their credibility.⁷ It is financed by member publications. Its multi-tiered structure includes a board of 12 directors, of which seven are independent—meaning they are not connected to bodies that are regulated or are capable of being regulated by IPSO—and five are associated with the industry. Directors serve three-year terms and are disqualified from appointment if they are editors of bodies that are or could be regulated, or if they serve in the government or legislature of the UK or one of its constituent countries (sec. 22). They are dismissed by the other directors in case of personal bankruptcy, excessive debts, or a mental disorder that leaves them incapable of acting (sec. 23). Directors are appointed by a panel consisting of six members—three independent members, two with recent publishing experience, and the chair of the board of directors—which are in turn appointed by the board for six-year terms.

The organization enforces compliance with the Editor's Code of Practice—the UK's code of conduct for the press—which is drafted by ten editors of national news organizations and five IPSO commissioners. It also hears complaints, conducts monitoring, provides non-binding guidance, and investigates and adjudicates breaches (sec. 8). These activities are conducted in coordination with the complaints committee and the investigation panel—each appointed by the board of directors and composed of members with and without industry experience. (Independent Press

⁷Independent Press Standards Organization, 'Annual Report 2017' 34.

Standards Organization Regulation, sec. 41, 69). The board of directors, upon recommendation from the investigation panel, may impose sanctions, including requiring the newspaper or magazine to publish corrections and terminating the regulated entity's membership in the organization (Independent Press Standards Organization Regulation, sec. 66). In case of serious violations, a maximum fine of £1,000,000 may be imposed (Independent Press Standards Organization Financial Sanctions Guidance, sec. 2.2).

Nepal

Composition of the Council/Appointment and dismissal of members

The proposed Nepal Media Council would have nine members, including one chairperson. Most members should have significant experience in journalism or other relevant fields (sec. 7(1)(a-d)). Except for the president of the Federation of Nepalese Journalists and the chairperson, the other seven members are to be nominated by the Ministry of Communication and Information Technology (hereinafter 'the Ministry'). The chairperson of the Media Council will be appointed by the Government of Nepal upon recommendation of a committee composed of the Secretary of the Ministry and two persons appointed by Ministry (sec. 7(1)(3)). The grounds for dismissal of members by the Government are (sec. 10(2)): '(a) [i]f there is lack of efficiency, (b) [i]f the performance is not satisfactory, (c) [i]f her/his conduct is bad, (d) [i]f the duties required of the position are not discharged, or (e) [i]f s/he has lost mental balance.'

In a 2003 Joint Declaration, the United Nations (UN), the Organization of American States (OAS), and the Organization for Security and Co-operation in Europe (OSCE), as quoted by the Centre for Law and Democracy, stated:

*All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*⁸

The appointment procedures proposed in the Bill are dominated by the Government. The Ministry—and therefore one political party—controls nearly all aspects, and other methods of appointment, such as all-party committees of parliament or recommendations by civil society groups, are not employed. It is unlikely that a body composed of government appointees would act independently. The analyzed countries demonstrate how different appointment procedures can be used to facilitate self-regulation and insulate the process from political interference: Denmark's Minister may only appoint members that were nominated by various stakeholders; India, despite demonstrating how members with political and financial interests can cause a press council to fail, also involves various civil society groups; South Korea has appointees from the judiciary and the Bar association; and the UK has a multi-tiered structure in which members from the media industry and other groups of civil society appoint each other.

⁸Centre for Law and Democracy and International Media Support, 'Independent Regulation of the Media' (Briefing Note Series on Freedom of Expression, 2015) <<http://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-4.pdf>> accessed August 1 2019.

The grounds for dismissal are also problematic. The Bill does not provide precise criteria for evaluating, for example, whether a member's conduct is 'bad', whether performance is 'satisfactory', or whether a member has lost their 'mental balance.' These vaguely-worded and unclear provisions—essentially permitting discretionary dismissals or threats of dismissals by the Government—are another means for political interference in the Council's work.

Powers and competences

The Media Council Bill grants various functions, duties and powers to the Nepal Media Council, such as to advise the Government of Nepal on the formulation of a mass media policy (sec. 5(b)), to formulate and issue a code of conduct (sec. 6(1)), to monitor compliance and give instructions for compliance to mass media (sec. 6(4)), and to receive complaints regarding violations of it (sec. 5(c)). The Council is empowered to impose a wide range of sanctions, including ordering the publisher or broadcaster to (sec. 17): publish or broadcast the complainant's version, issue an apology or publish the complainant's rebuttal in the number, time, and page determined by the Council, or publish the Council's decision or order. Further, the Council may suspend the violator's press credentials, downgrade or exclude a print medium from categorization, and recommend the Ministry to partially or fully stop any discount, welfare advertisement, or benefits provided by the Government to the violator. Fines ranging from Rs 25,000 to Rs 1 million may be imposed where there is a finding of harm to a complainant's image or prestige (sec. 18(1)). Damages may also be awarded to the complainant (sec. 18(2)).

Section 18(1) of the Bill is perhaps the most serious threat to media freedom in Nepal. Any person, including Government officials, may file a complaint stating that his or her image or prestige was harmed. If the Council—composed of members appointed by the Government—finds that this was done in contravention of the code of conduct, one can foresee situations in which publishers and broadcasters are severely sanctioned for expressing views or observations that are critical or dissenting of the ruling political party. The other sanctions are also far too severe. Nepal's media council would not be acting as a judicial or quasi-judicial body and should thus not be empowered to suspend press passes or downgrade a newspaper's categorization. Awarding damages is within the purview of the civil law system, not of administrative bodies. Again, Denmark sets a good example: complainants are only entitled to a reply or an expression of criticism toward the violator by the Council. Harsher penalties are only imposed in case of non-compliance. A press council's purpose is to uplift the standard of the media and act as a complaint system—not to punish.

Funding

Establishing financial independence between the press and the state is a pre-requisite for self-regulation. The Centre for Law and Democracy explains that '[t]he best way to achieve this is to set out the framework for funding clearly in the law, including the way annual budgets are approved, and in a manner which is insulated from political

interference.⁹Nepal's Media Council would receive its funding from two sources (sec. 21): (a) the Government of Nepal, and (b) grants or financial assistance received from individuals or institutions from within the country. The annual budget is approved by the Council itself (sec. 5(a)) but given the Council's composition of government appointees, political interference is likely. Individuals and institutions remain eligible to contribute to the Council even if they have political interests. As can be seen in Denmark, the United Kingdom and to a certain extent also in South Korea and India, the preferred method is to partially or fully finance press councils through licensing fees and contributions by regulated entities.

Conclusion

The independence of media regulatory authorities is a precondition for establishing an environment conducive to and protective of freedom of expression, a right that is enshrined in Nepal's Constitution and international law. By ratifying the ICCPR, Nepal has bound itself to provide protection against and prevent illegitimate restrictions of these fundamental values. Enacting the Media Council Bill would curtail press freedom and restrict the public's right to receive information, and would be at odds with these obligations. Denmark, India, South Korea, and the United Kingdom have structured their press councils in different ways, providing valuable lessons on which practices work and which tend to fail. Nonetheless, they all attempt to incorporate self-regulation to a certain extent and should be looked upon by Nepal for guidance.

Political and financial interference in the conduct of media regulatory authorities threatens to reduce media pluralism, suppress dissent and weaken democratic institutions. While a reform of the current Press Council Act is needed, the Media Council Bill jeopardizes the progress that has been made in press freedom throughout the years and represents a notable regression from the status quo. Its vague provisions and restrictive measures allow the Government to strengthen its stronghold on the media, leaving little room for the latter to regulate itself. The result is an environment in which the Government effectively dictates who may express their opinions to the public and what these opinions may be. The result is an environment in which '[t]he Government of Nepal may, as necessary, give instruction to the Council in line with the mass media policy of the country. . . . It will be the duty of the Council to follow the instruction given.' (sec. 29(1-2)). The Media Council Bill should be substantially reformulated or withdrawn altogether.

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⁹Centre for Law and Democracy and International Media Support (n 8) 2.