

The Confluence of the Constitution, Judiciary and Freedom of Speech: A Nepali Perspective

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Abstract

The right to think and speak freely, receive information and engage in open discussion without fear of punishment or government restriction is considered as the hallmark of freedom of speech. Recognized as one of the fundamental freedoms supporting all other fundamental rights, freedom of speech and expression enables individuals to express their opinions and participate in contemporary issues of public concern. However, when individuals face punishment under the stringent criminal laws solely for their speech and expression, the very essence of constitutional democracy goes on trial. This paper delves to discuss the legal framework of freedom of speech and expression in the light of Nepal's constitutional and criminal jurisprudence, international laws and judicial interpretations. It shall revisit the legal contours and restrictions imposed on this right. In addition, the paper shall critically analyze the legal frameworks, which relate to speech and expression, aiming to protect and promote democratic freedoms and to maintain social order in Nepal's evolving political, judicial and legal landscape.

Keywords: *Speech, expression, criminal law, judiciary, defamation, constitution*

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I. Introduction

In constitutional jurisprudence, no right is absolute. Every right has certain limitations to ensure a balance between rights and duties. For instance, the right to religion is restricted by considerations of public morality, health and decency. Similarly, the freedom of speech is subject to restrictions in the interest of sovereignty and integrity, federalism and its units, friendly relations with foreign states, morality, public decency and social harmony. Also, the freedom of speech cannot be lawfully exercised at the cost of defaming others.

The constitution and other prevailing laws allow an aggrieved party to file a lawsuit against a person who abuse or misuse the right to speech. The criminal law, like the National Criminal Code, 2017 contains a good deal of provisions, including offences relating to defamation, act against sovereignty and integrity of the state, treason, jeopardizing friendly relations with foreign states, obstructing public peace and tranquility, obstructing public services like that of telecommunication, and selling or distributing the foods or goods through misrepresentation. This way, the law neither allows a person voice against the sovereignty and integrity, nor permits speech that causes misrepresentation or harm friendly relations with foreign states. This is the reason why freedom of speech is said to be not an absolute right.

The Constitution of Nepal, along with international instruments, contains provisions that spearhead the cause of the fundamental freedoms. The preamble of the constitution envisions a welfare state founded firmly on democratic values. These democratic values include good governance, rule of law, inclusivity, non-discrimination, judicial independence, constitutional supremacy, respect for the fundamental rights, egalitarianism and socialism. Under the fundamental rights clauses, there appear several guarantees relating to freedom of speech and expression. Specifically, the constitution guarantees freedom of speech, right to information and media free-

doms. These provisions explicitly safeguard freedom of speech and expression, while other rights – such as right to religion and right to language-- supplement this freedom by allowing citizens to profess and propagate their faith as a personal matter and to use any language or means and modes of communication of their choice to voice their concerns.

This article seeks to examine the constitutional provisions on freedom of speech and expression, along with their limitations and judicial interpretations.

II. Constitutional scenario

The Constitution of Nepal prohibits the enactment of any law and order at the cost of fundamental freedoms and constitutional values. In this light, Article 1 declares that any law inconsistent with the constitution would be void. This means the fundamental freedoms, which include freedom of speech and expression, cannot be sabotaged by any law and order. Article 16 envisages that every person would have the right to life with dignity. Article 17(1) guarantees right to personal liberty.

Article 17(2) guarantees fundamental freedoms, like freedom of opinion and expression; freedom to assemble peacefully; freedom to form a political party; freedom to form unions and associations; freedom to move and reside in any part of the country; and freedom to engage in any occupation. However, these freedoms are not unrestrained. As every right comes with certain restrictions, right to speech and expression too include reasonable restrictions. A citizen cannot exercise his freedom of speech which may undermine the nationality, sovereignty, or jeopardize the harmonious relations among the people, or incite hatred, or incite an offence contrary to decency or morality or public order. This way, a person can voice his concerns in every way, and the way he wishes to but cannot defame or challenge other's dignity or law of the land. It means a citizen can enjoy his/her freedoms till the extent that it does not

harm their fellow citizens or contravene the laws. Simply put, you can enjoy your rights but at the same time, it's your duty to respect other's rights too. Freedom of speech does not include right to make hate speech.

These restrictions are also recognized by the Constitutions of other states, including India and the United States. Article 19(2) of the Indian constitution imposes restrictions on freedom of speech on the grounds such as sovereignty, morality, contempt of court, hatred and others. In US, the Supreme Court (SC) has been interpreting the scope of permissible restrictions on this freedom since the ratification of the First Amendment in 1791. Justice Holmes held that unless there is "clear and present danger", this freedom could not be restricted, thereby propounding the "clear and present danger" doctrine for the first time(Schenk v United States , 1919).

Similarly, the US SC recognized that this freedom must not be exercised for a 'Bad Tendency', meaning it cannot be used in ways that harm social welfare, offend public decency and morality, incite violence or disturb social harmony(Gitlow v New York , 1925). This doctrine, known as the "Bad Tendency Test" states that restrictions may be imposed after examining whether the intent behind exercising this right was harmful. "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

Further, the US SC held that the balance must be maintained between the right to freedom of speech and its limitations(Brabdenbury v Ohio, 1969).

Meanwhile, the concept of freedom of speech can also be understood through the lens of doctrine of equality. In a democracy,

it violates rule of law if any section of people is prevented from exercising this right. Article 18 guarantees equality, meaning every citizen is equally entitled to express concerns. Article 19 ensures freedom of communication and prohibits pre-censorships of publications or broadcasts. However, speech must not be discriminatory, defamatory or threaten sovereignty, incite hatred, or cause contempt of court or go against decency or public order. Communication through the press, telephone or electronic media cannot be obstructed, except by law, which means the government or private person cannot arbitrarily seize broadcasting equipment or press. Article 24 prohibits untouchability and discrimination, which means no one can express views that discriminate against fellow citizens or family members. Article 27 grants citizens the right to information, allowing them to seek matters of public concern, though confidential information may be withheld. Right to speak or right to know is considered to be part and parcel of speech and expression, just as the right to privacy (Article 28) ensures one's freedom not to speak, to remain silent and to control disclosure of personal and private facts. Article 28 guarantees a person right over his personal facts when and under what circumstances to make them public. This means a person is at a driver's seat when it comes to the question of his personal facts.

If we read between the lines of the provisions of freedom of speech, freedom of media, and the right to information, these three interrelated rights provide people with the opportunity to participate in the governance system. Such participation is essential for democratic governance system and, in turn, helps in upholding the rule of law (Bashyal, 2021).

As we are a religion-neutral country, i.e., a secular state, our constitution guarantees every person the right to profess, practice and propagate religion under Article 26. Similarly, Article 32 provides the right to language. Reading these two provisions together (Article 26 and 32), it can be inferred that a person has

the right to profess and practice religious freedoms in their mother tongues or in any other language of their choice. Accordingly, a person may deliver speeches for the protection and promotion of his/her language or voice his religious concerns in the language he/she prefers to.

In addition, the accused, who is facing criminal cases before the law court, cannot be made bound to testify against himself. This right has been guaranteed to the accused under Article 20(7) of the constitution, Section 11 of the National Penal Code, 2017, and Section 122(3) of the National Criminal Procedure Code, 2017. This right has been recognized under Article 14(3) of ICCPR, 1966. This way, the accused, who faces criminal charge, cannot be denied of right to speech in court of justice. Similarly, our law (under Section 11, Victim's Rights' Protection Act, 2018) confers right on victims to express their views over a matter before the officer trying the case. The Supreme Court held that the constitutional guarantee of right against self-incrimination signifies that no person shall be compelled to testify against themselves. It further clarified that a person cannot be held guilty merely on the basis of their refusal to speak on a matter. In this way, right to remain silent is also a part of freedom of speech(Jeevan Nepali v His Majesty Government, 2051).

On the contrary, the Electronic Transaction Act, 2063 [2008] empowers the authority to criminally prosecute a person for expressing opinion through electronic media that are contrary to public morality or against law. Section 47 of this Act envisages a jail sentence of up to five years for anyone who posts comments on social media or through digital means that violate the law, public morality or decency. This provision is a stringent legal measure in Nepal, imposing stricter punishment for hate speech on electronic platforms.

The constitution provides remedy clauses that confer a citizen right to move the Supreme Court (under Article 133) and High

Court (under Article 144) at the instance of violation of his/her fundamental rights.

III. Judicial interpretation

The freedom of speech and expression ensures a person right to express their convictions and views freely through words, writing, printing, pictures or other modes of communication. It is universally hailed as one of the sacrosanct rights with reasonable restrictions and is protected in almost every Constitution worldwide. The Supreme Courts have further expanded the horizon of this right through landmark judgments.

The Supreme Court held that the restrictive provisions on press freedom ought not be viewed as a form of control over the press, rather a form of realistic perspective as measures to ensure professional discipline, accountability to the public, or the harmonious exercise of right guaranteed by the constitution (*Meena Nepali v Government of Nepal and Others*, 2075).

Further, the Supreme Court held that there is nothing wrong in conclusively considering the statements made by a minor in a rape case, unless otherwise corroborated. This ruling clarifies that the views of a minor could play a pivotal role in adjudicating a matter by the court (*Pushparaj Sitaula v Government of Nepal*, 2075).

The apex court also held that no medical treatment should be carried out without patient's consent. The doctors shall perform treatment procedures only after informing the patient about possible consequences of undergoing or refusing the treatment. Informed consent is required throughout the entire medical process. This verdict clarifies that patients have the right to information and right to know regarding the treatment provided by doctors and hospitals. At the same time, doctors are duty-bound to respect the patient's right to freedom of speech and expression when they seek medical care (*Amarnath amatya v Surya Kumari Adhikari*, 2076).

The Supreme Court(Advocate Ratna Kumari Shrestha v Sudhir Sharma, Editor-in-chief, *Kantipur Daily and Others*, 2073) held, in the name of the exercise of press freedom, it is not in the interest of a democratic system to regulate press freedom at the cost of contempt of court. Both institutions—the press and the judiciary—must operate within their respective limits. The media shall be liable for contempt of court if it publishes information that tends to undermine the dignity, independence and functioning of the courts.

The Supreme Court held that, while exercising any freedom, including freedom of thought and expression, the values of pluralism, tolerance, peace and non-discrimination must never be compromised. Expressions that incite hatred on the basis of caste, religion, language, gender, identity, or region should be lawfully restricted(Advocate Kalpit Parajuli and Others v Government of Nepal and Others, 2074).

The apex court held that the personal identity and information of HIV/AIDS patients must be kept confidential to protect their right to privacy and judicial remedy. Personal information remains private unless the individual chooses to disclose it, and it cannot be claimed under others' right to information. Thus, the right to information also includes the right to privacy, and freedom of speech equally protects the right not to speak or to remain silent(Advocate Sapana Malla Pradhan and Others v OPMC, Govt of Nepal and Others, 2064).

The apex court held that Nepal's constitutional norms and values clearly prohibit any form of pre-censorship, cancellation of newspaper registration, or shutdown and confiscation of printing press(Thir Prasad Pokharel v Hari Har Birahi, editor of Bimarsha Prakashan Pvt Ltd, 2074). Even in court proceedings, parties have the right to be heard, and a judge cannot decide a case without listening to the second party. The 'doctrine of *audi alteram partem*' a celebrated concept of natural justice guarantees this right. The apex court held that no proceeding can be conducted without giving the other party

an opportunity to defend(Padma Kumari Thapaliya v District Land Reform Office, Nuwakot , 2031).This verdict clarifies that freedom of speech and expression also includes the right to defend oneself in court which covers the freedom to present evidence and other materials in support of one's case.

Supreme Court of Nepal in the case of Sunil Babu Pant v. Government of Nepal in 2007 held that the persons were entitled to select their gender identity based on their self-feeling. Nepal recognized the status of the transgender by including a third gender option in its census forms in the year 2011. It is actually the result of this landmark decision.

From the above rulings, it's evident that freedom of speech is a qualified right, like other rights. The US Supreme Court held that "Freedom of Speech thus does not comprehend the right to speak on any subject at any time"(American Communications Assn. v Douds, 1950).

IV. Global precedent

The law in USA not only recognizes the right to fly national flag but it has gone to the extent of holding flag burning as an expression of free speech and expression of its citizens against the establishment but Indian constitution does not approve the latter part of the right as envisaged in the US, the Supreme Court of India ruled (Union of India v. Naveen Jindal, 2004).

The provision protects the right to receive information and ideas. The first Amendment to the US Constitution (1791) provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The right to freedom of speech is recognized as a human right under article 19 of Universal Declaration of Human Rights (UDHR). Article 19(1) of International Covenant on Civil and Political Rights (ICCPR) states that "Everyone shall have the right to hold opinions without interference." Article 19(2) stipulates the freedom of speech "includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, in writing, print, art, or any other media of choice." However, this right is subject to certain restrictions. Article 19(3) of ICCPR provides:

"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, or of public health or morals."

In the context of English law, Section 12 of Virginia Bill of Right, 1776 declares that the liberty of press is one of the grand safeguards of freedom and can never be reserved by autocratic governments. The 1st Amendment of the Constitution of the United State binds parliament also. It has been an established principle that even the Congress shall create no rule abridging the liberty of words or of the press.

In the 19th century, Germany guaranteed freedom of opinion in their Constitution with an express prohibition of press censor (Singh, 2011). Article 5(1) of the German Constitution provides:

"Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship."

Interestingly, Sweden became the first state in the world to adopt a provision for the availability of official information for the citizens on their demand. The Rome Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 played a significant role in spearheading the cause of freedom of speech and expression. It entered into force on September 3, 1953. Article 10 of Rome Convention talks about the right to liberty of words and expression. This Convention envisions that this right knows no boundary. It means freedom of speech and expression enjoys similar currency regardless of any frontiers.

In India, the preamble of Indian Constitution at the very outset clarifies that the democratic credentials, like liberty of thought, expression and belief; justice along the social, economic and political; or equality and fraternity, would be secured and promoted by the governments. Article 19 of Indian constitution expressly guarantees freedom of opinion.

V. Conclusion

The right to freedom of speech and expression is the fundamental right guaranteed by the Constitution, as in other democratic constitutions around the world. Since this right is not absolute, the Constitution and other prevailing laws provide for reasonable restrictions. Generally, a person cannot express opinions in a manner that defames others, causes contempt of the court, incites hatred in society, or jeopardizes friendly relations with other nations.

It's often said that words have power. Some words touch a person's inner mind and bring joy, while others may cause pain. Music, too, can bring joy to one person but be a nuisance to another; it all depends on intensity, volume and choice/selection of words or lyrics. If a piece of music entertains a section of society but disturbs others due to abusive or hateful content, it would be considered

harmful to public tranquility and social harmony, and therefore maybe prohibited by a lawcourt or appropriate government. In expressing opinions, making presentations or composing language, a person's intelligence and sensibility are expected to come together. When exercising our freedom of writing, publishing or personal communication—whether on social media or in personal spaces-- it is inappropriate if it harms or injures the dignity and respect of others. So, this right is not unrestricted. Courts have passed plethora of landmark judgments to clarify both the scope of the right and its limitations.

From the outset, the preamble of Nepal's constitution seeks to foster socio-economic and political justice and democratic liberties as a whole. Similarly, Part-III of the Constitution protects and guarantees the fundamental rights. Articles dealing with freedom of speech and expression, right to privacy, right to information, right to language and the likes intend to plant, secure and cultivate basic fundamental freedoms on sovereign soil of Nepal. Similarly, Nepal's criminal laws also provide both the accused and the victims the right to express their concerns during investigation and court proceedings. In the field of healthcare, patients or their relatives/attendants have right to know (or right to be informed) about the treatment process and medication provided to them, which also falls within the ambit of freedom of speech. However, the stringent punishment prescribed under the Electronic Transaction Act often places freedom of speech as a subject matter of stricter criminal law regime.

Over and above all this, Nepal's Constitution, criminal legislation and judicial decisions have protected and promoted the celebrated right to freedom of speech and expression. Judicial decisions further clarify that while citizens have the right to speak, they also have a duty not to defame others and to abide by the law of the land.

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