

# Media Freedom in Nepal: A Situation Analysis<sup>1</sup>

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## Background

While in Nepal, there are no any official non-democratic declarations at the moment, as they were in the days of former king Gyanendra, there is mounting pressure on the media outlets to conform the narratives served by various state actors.

In November, 2018, the Ministry of Communication, Information and Technology had instructed the state-run media not to give space to critical news on Nirmala Pant rape case. The unprecedented issue came in lime light when ‘*Republica*’ daily (on November 26) revealed that the Minister for Communication and Information Technology Gokul Baskota in a recent meeting with the heads of state-run media “urged them not to publish critical news on the rape case,” reported *Republica*.

Minister’s instruction is by no means unique. There are scores of examples which suggest that government has created coercive environment curtailing the right to information and the freedom of the press. In this context, a woman journalist was arrested on December 13, 2018 for clicking photographs of a protest against the government’s decision to purchase a Rs. 180-million worth bullet proof vehicle for ceremonial President Bidya Devi Bhandari. The journalist Barsha Shah, who went to capture the protest occurred in front of President’s residence in Kathmandu, was taken into police custody for three hours and later released.

Speaking to Media Rights Violation Monitoring Desk (MRVMD)<sup>4</sup> of Media Action Nepal (MAN)<sup>5</sup>, Shah, who is associated with online news portal Deshsanchar.com, says “I had not received any official paperwork regarding my arrest. Nor had I received any formal speaking order at the time of release. It was an illegal detention which violated my fundamental rights, esp. right to communication and right to freedom of speech and expression.”

Article 19 of the Constitution of Nepal beginning with a marginal note of “Right to Communication” envisages that “There shall be no prior censorship of publications and broadcasting, or information dissemination, or printing of any news item, editorial, article, feature, or other reading material, or the use of audio-visual material by any medium,

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<sup>4</sup> Media Rights Violations Monitoring Desk (MRVMD) is an initiative of Media Action Nepal (MAN)- that looks after media rights violations, analyses the cases on the basis of international standards and provide with its recommendations to key stakeholders to take actions against perpetrators engaged in crimes against journalists. The Desk prepares and disseminates with periodic reports, policy papers and representative case studies analysing national legal provisions and international instruments on freedom of the press.

<sup>5</sup> Media Action Nepal (MAN)-[www.mediaactionnepal.org](http://www.mediaactionnepal.org) - is an independent media rights advocacy organization promoting free and accountable media. MAN safeguards Freedom of Expression and enhances citizen participation and dialogue to strengthen democracy for sustainable development by enabling a free, vibrant and responsible media in Nepal.

including electronic publication, broadcasting and printing.” Similarly, Article 17 guarantees six fundamental freedoms, including freedom to opinion and expression, to every citizen of Nepal. This Article also confers on every citizen the right to personal liberty.

It is to be noted that this clause expressly slams any form of prior censorship and by detaining Ms Shah the enforcement agencies have imposed prior censorship in a broad daylight. In doing so, the government has violated Shah’s fundamental rights secured under the Constitution and deprived her personal liberty.

Interestingly, Ms Shah was taken into illegal detention by a Sub-Inspector rank police officer. “It shows that the government’s officer ranked public servants are unaware, ignorant and little committed to protect and promote the established democratic practices,” laments she.

### **Coercive Environment**

At a time when women journalists have low presence in media, the government’s self-created coercive atmosphere to curtail the freedom of media could be taken as an unappealing environment for women to join this profession.

“It’s our job to speak truth to power. The onus of responsibility lies on the government to ensure that the media is able to report without fear or favour,” further says Shah, adding, “It’s very unfortunate to witness that the government enforcement agencies are adopting unreasonable restrictions on freedom of expression under the pretext ‘restricted areas to protest.’ We have an inherent right to cover the events, be it a protest, and do independent journalism without which democracy and democratic practices would have little chance of survival.”

It’s an uncontested fact that media has a responsibility to act as a watchdog upon the wrongdoings and loopholes so as to remind the state organs to act within the bounds of democratic norms. “Is it just to suppress the freedom of media simply because press acted as a watchdog or fourth pillar of state?” questioned Shah.

When asked whether police staffs were directed to arrest journalists capturing the protest, Shah said, “Actually, there was no any instruction from the top authority to arrest or detain media persons. I came to learn that a Sub-Inspector and his subordinates were thrashed by their superior on that day for their professional misconducts. They were annoyed with their superior. They arrested me just to release their frustration. Had not they been thrashed, they would not have detained me. It was just the misuse of power. They arrested me just to satisfy their ego.”

Much like Barsha Shah, Raju Basnet, editor of Khojtalash.com, too met with the same fate. He was arrested on September 10, 2018 from his residence in Lalitpur on the charge of publishing a news report. “The report exposed an attempt to transfer the ownership of land owned by Harisiddhi Brick Industries in Lalitpur to some private individuals, allegedly with the involvement of Maoist lawmaker Pampha Bhusal and some other leaders of the party,” reported *Republica* daily on September 12, 2018.

While speaking to Media Action Nepal, Basnet said, “The arrest of a journalist on the charge of publishing a news story in this age of frank discussions aided by the free flow of information is really unfortunate.”

He further said that the ruling party [Nepal Communist Party] and police are standing in the way of press freedom. “The mere enactment of laws will not be enough. The state must demonstrate in spirit that it stands by freedom of press.” On the other hand, “What is unfortunate is that the polarisation within the media has also eroded the free flow of information.”

Basnet then went on to claim that the government is little committed to ensuring the safety of media workers. Under KP Oli’s regime, Nepal remains a dangerous place for journalists to work in,” claimed he.

### **Democratic or Authoritarian Press?**

While speaking to Media Action Nepal’s MRVMD, Yuvraj Ghimire, editor-in-chief of Deshsanchar.com, said, “It was an illegal detention. She was there as a journalist to cover event which she thought has a news value. It was illegal and unfortunate on the part of the police and the state to have detained her.” There was wide protest from professional groups, media organizations and then the government felt compelled to release her couple of hours after the detention. But, even that detention was highly objectionable, he added.

When asked whether the detention was accidental or intentional, Ghimire argued, “It was intentional. She was there to cover the event. She called me from there and she said the police was not allowing her to take photographs. She was asked by the police to leave the place as soon as possible. I suggested her to show her press card to the police and tell them that you are a journalist and it’s your fundamental freedom to move and cover the incidents. Nobody can snatch away your fundamental rights. I suggested her to let me know if she finds any problem. I told her that if she did not call me within five minutes, I will understand that she has been taken into custody. That’s what she did. When I found no response from her side, we started approaching different people, organizations, police and among others.

Ghimire revealed that Shah was also tortured by the police. “I can understand sometimes police take wrong judgment but the way it was justified by the people in power, including the subordinates of the Prime Minister, was objectionable. It shows the mind of the state that they [vital government office bearers] are authoritarian and they don’t respect fundamental freedoms when they are in the government. Unfortunately, this is the tragedy in our part of the world that the political parties have different values and understanding of press freedom when they are in power and when they are in opposition.

Expressing his dissatisfaction with the response of the press advisor to the Prime Minister Ghimire said, “It was very unfortunate to witness that a teacher of journalism, who is well versed with the journalistic ethics and practices, justified the illegal detention of a journalist. He is the Prime Minister’s Press Advisor as well as a faculty of Journalism. So, it shows the mind-set of the government.”

While writing a tweet, the Press Advisor to the Prime Minister had justified the police action and argued that it was just and sane on the part of police to arrest a journalist who goes to cover the incidents occurring at prohibited areas. “It should be borne in mind that the restricted area is not a place to visit and the same theory applies to journalists. The state cannot ensure safety, protection or the compliance of journalistic practices when the media persons start entering prohibited zones,” wrote he [the Press Advisor to the Prime Minister] on Twitter. Perhaps he is in need of a reminder that the duty of journalist is to uncover the covered information.

Ghimire was of the opinion that these types of incidents have potential to put the democratic credentials under suspended animation. “I hope let it be the last of such event in the country. But, if the government does not respect the freedom of press, and right to free movement then that government would be considered authoritarian and dictatorial government and it will have to pay the price.”

### **Security Sensitivity: Police keeps long nails that act as a weapon**

Shah, who sustained injury in her neck, says, “I sustained injury when a woman police constable forcefully caught me with her longer fingernails. Longer nails have potential to cause number of diseases since they are perfect place for germs to stay. Longer nails have been connected to women’s beauty and femininity since time immemorial but this assumption is not true for police or army. Since, the job of police or army demands strict compliance of professional conducts.

The professionalism of the police or defence personnel demands short, trimmed and clean nails. They have not only violated my rights but also violated the basic disciplines or conduct of the Nepal Police.” She further added that the long nails of women police staffs often act as a weapon. “Their long nails have potential to cause injury to others and they may use it as a sword against others. I am one of the victims of their long nails and my personal experience says that they [women police staffs] could injure and transmit infections to others with the help of their long nails, which are in no way associated with women police staffs’ beauty and femininity.”

### **NHRC Commissioner slams the Government**

At this backdrop, it would be just for the Media Rights Violation Monitoring Desk of Media Action Nepal to argue that the police action to detain a journalist was a sheer violation of fundamental freedoms which the Constitution of Nepal guarantees to every citizen.

“Detaining a journalist is an unpardonable offence. The journalists in Nepal are under threat from police, government and the corrupt persons. This kind of acts would never favour vibrant journalism and it would ultimately frustrate the established democratic norms,” says Mohana Ansari, Commissioner of National Human Rights Commission (NHRC) while responding to query of Media Rights Violation Monitoring Desk (MRVMD) of Media Action Nepal.

“I demand action against the police staffs whosoever engaged in suppressing the freedom of media. In case of Barsha Shah, the police action was unfortunate and unpardonable. These things could not be expected in a constitutional democracy where rule of law has a major role to play,” added she. When asked whether law of the land failing to curb such practices, Ansari says, “The newly promulgated Criminal Code Act, 2018 has adopted clauses that expressly curtail the freedom of press. Some of the provisions of the Act, particularly Sections 293 to 308 relating to privacy and defamation are restrictive to freedom of press. These provisions have potential to obstruct independent as well as investigative journalism.”

She then went on to argue that these provisions could act as a shield for perpetrators. “The perpetrators could suppress the independent voices or media with the aid of these derogatory provisions.”

“Moreover, these provisions are inconsistent with the constitutional provisions. We have enacted fair corpus of laws relating to freedom of press in our Constitution but at the same time the Criminal Code Act adopts restrictive provisions that frustrate the constitutional guarantees,” argues Ansari. She is of the view that the media people in Nepal are under threat these days. “The state is failing to ensure safety to journalists.” However, “The journalists should also refrain from practicing partisan journalism. The duty of journalists is to question the power, not appease the power.”

### **Restrictive Laws**

Some of the provisions of the Act, especially Sections 293 to 308 relating to privacy and defamation, are restrictive to the press freedom and criminalize free speech and expression.

- Section 293 prohibits listening or recording of conversations held between or among the persons without their consent;
- Section 294 prohibits publication of private information without express or implied consent;
- Section 295 prohibits taking of photos without consent;
- Section 296 prohibits selling or publishing of photos for commercial purpose without seeking the consent of subjects in photographs;
- Section 298 prohibits receiving or sending or publishing unauthorized information on an electronic medium;
- Section 305 prohibits slander; and criminalizes it;
- Section 306 prohibits libel, including satire, and criminalizes it. At the instance of ignorance or non-compliance of these provisions, one could be imprisoned for a term that may be between one to three years or charged with fine of NPR 10,000 to NPR 30,000 (USD 100 to 300).

Section 293 which prohibits listening or recording of conversations held between or among the persons without their consent has potential to stifle freedom of press. The journalists have rights to watch upon the wrongdoings or any conversations taking place among or between conspirators and to make it public as their profession demands. Its in

the nature of investigative journalism. By doing so, they protect the state from possible damage or misuse of funds which in one way or the other could supplement ‘*right in rem.*’ However, Section 293 comes in the way of investigative journalism which violates ‘*right in personam*’ of a journalism who has all right to practice journalism without any fear or favour and inform the people.

### **Contravening Constitution**

The provision which is given in the criminal law directly contravenes with the constitutional provisions, i.e., Articles 17 and 19. These criminal laws don’t leave any option for the freedom of media workers to do investigative journalism. In this way, the explicit mention of one (thing) is the exclusion of another (i.e., *Expressio Unius Est Exclusio Alterius*) and it does not exclude press from any criminal prosecution at the instance of violation of Section 293 or Section 294. In this way, these provisions are clearly providing restrictive measures on freedom of press which are the “things speaking for itself” (i.e., *Res Ipsa Loquitur*).

*It is to be noted that the parliament of Nepal has failed to take cognizance of Article 14(1) of International Covenant on the Civil and Political Rights (ICCPR), 1966 which envisages that “The press...may be excluded from all or part of a trial for reasons of morals, public order...” The National Criminal (Code) Act, 2018 would be free from criticism or unreasonableness had the Parliament of Nepal given effect to Article 14(1) of ICCPR, 1966 and enacted exception clauses (under Sections 293-308) for press and media persons.*

### **Task force fails to provide concrete recommendations with substance and analysis**

After witnessing the widespread criticism from national and international sectors, the Ministry of Communication and Information Technology, Government of Nepal on September 11, 2018 formed a 15-member Task Force under the leadership of senior journalist Dev Prakash Tripathi to make recommendations for bringing reformation in the existing laws contained under Sections 293-308, Criminal Code Act, 2018.

However, the task force so formed fails to provide concrete recommendations with analysis. The document submitted to the Ministry lacks detailed analysis on the recommendations and fails to justify its readings. The document has incorporated international practices but does not provide any explanation or analysis as to establish nexus between municipal laws and international laws.

The 66-page document in its first page explains the background and objective of study. The objective of the study was to present a detailed analysis on the freedom of speech and expression and the restrictions associated with it. The document just acknowledges the constitutional provisions of other states but it lacks any explanation or analysis on them. *Much like Nepal, the efforts were made through different legislations in India or England to suppress the freedom of press.* For instance, the House of Lords of England in the case of *Derbyshire County Council v. Times Newspaper Ltd*<sup>6</sup> ruled that a local authority could not sue the press for libel. The topmost Court of England further held that “there is no public

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<sup>6</sup> (1993) 2 WLR 449

interest in allowing government institutions to sue for libel; it is contrary to the public interest because to admit such actions would place an undesirable fetter on the freedom of press.”

Had the task force been serious, it would have incorporated best international practices to support its argument. The task force could have suggested that Nepal could borrow English legal provision on this point and exempt press from criminal prosecution on the charge of libel. In Nepal, Section 306 prohibits libel, including satire, and criminalizes it. Similarly, the Daily Newspaper (Price and Page) Act, 1956 was enacted by Indian parliament to regulate the number of pages according to the price charged. The Act prescribed the number of supplements to be published and regulate the size and area of advertisement in relation to other matters contained in a newspaper. However, the Supreme Court of India in the case of *Sakal Papers v. Union of India*<sup>7</sup> ruled it invalid for its purpose was to reduce circulation of some newspapers by making their price unattractively high for their readers. The Court held that the newspapers have freedom to publish any number of pages.

In plain language, the report submitted by the task force lacks any detailed analysis. The document acknowledges the legal provisions of other states but does not contain any analysis on them. Similarly, the drafters could have used Nepali words of ‘social media’ as ‘सामाजिकसंजाल/मिडिया/माध्यम’ or ‘technology’ as ‘प्रविधि’. The document contains many English words like this which shows that task force just reduced the words of the learned people on the paper and they were not much serious with the assignment.

From the above readings, it can be concluded that the task force was not serious with its assignment and it was formed just to silence the wide spread national and international criticism against the recently promulgated Criminal Code Act.

### **Media rights organizations criticize laws of the land**

Issuing Nepal Alert, Committee to Protect Journalists (CPJ) observed: “Nepal's government must repeal or amend the new criminal code that came into effect on August 17 to remove provisions that severely threaten press freedom, the Committee to Protect Journalists said today.”<sup>8</sup>

“The law criminalizes a range of ordinary journalistic activity, according to news reports and analysis of the law provided to CPJ by the CIJ and Media Action Nepal (MAN), independent Nepali press freedom organizations. Provisions of the law prohibit the release of private information without prior consent or satirizing and disrespecting an individual. Depending on the infraction, journalists could face fines of up to 30,000 rupees (US\$270) and imprisonment of up to three years.”<sup>9</sup>

"Nepal's new criminal code marks a giant step backward for press freedom," said Steven Butler, CPJ's Asia program coordinator. "Legislators need to go back and scrub the law of

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<sup>7</sup> AIR 1962 SC 305

<sup>8</sup> Available at: <https://cpj.org/2018/08/new-nepali-criminal-code-threatens-press-freedom.php> (Retrieved on January 1, 2019)

<sup>9</sup> Ibid

these overly broad provisions that effectively criminalize the normal newsgathering activities of journalists."

Namrata Sharma, chair of the CIJ, said in a telephone interview with CPJ that while she appreciated the need to protect privacy in the internet age, the law threatened to outlaw public interest journalism, including sting operations that CIJ journalists have used to expose wrongdoing that have led to legislative reform. Sharma also pointed to a long tradition of political satire in Nepal, which now appears to be outlawed.<sup>10</sup>

Laxman Datt Pant, chairperson of MAN, said in an email message to CPJ, "Provisions relating to the privacy and defamation are inconsistent to the spirit of the Constitution of Nepal and jeopardize Nepal's commitments to several international human rights treaties including ICCPR [the UN's International Covenant on Civil and Political Rights] and the Universal Declaration of Human Rights (UDHR)."

"The Articles go totally against the Preamble and spirit of the constitution that supports complete press freedom, and opposes any moves to curtail it," said Kunda Mani Dixit, editor of the Nepali Times, in an email. "Photojournalists are especially going to be affected because they cannot take pictures without permission!"<sup>11</sup>

Likewise, 'Reporters Without Borders' too found the Nepali laws restrictive to freedom of press. "We call on the Nepalese authorities to immediately rewrite these provisions because, in their current form, they would seem to constitute an unacceptable censorship tool," said Daniel Bastard, the head of RSF's Asia-Pacific desk.<sup>12</sup> "They must take account of the need to be able to gather news and information in the public interest. By leaving too much to the judge's discretion, these articles could be used to criminalize all investigative journalism and criticism of public figures. If they are not amended quickly, Nepal is liable to fall sharply in RSF's World Press Freedom Index."<sup>13</sup>

"The preamble of Nepal's 2015 constitution proclaims full freedom of the press, while article 19 prohibits censorship. Journalists are nonetheless often subjected to pressure from various authorities, as when the head of the Supreme Court tried to prevent the publication of any reports criticizing him. He was later removed. Nepal is ranked 106th out of 180 countries in RSF's 2018 World Press Freedom Index."<sup>14</sup>

### **Violation of International Obligations**

There could not be assurance of rule of law without the assurance of freedom of press. It means freedom of speech is a fundamental freedom without which a just, fair and reasonable democratic environment could not be maintained. So, the international instruments impose an obligation on the state parties to respect and recognize the fundamental freedoms.

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Available at: <https://rsf.org/en/news/guarantee-press-freedom-nepal-must-amend-its-new-criminal-code> (Retrieved on January 1, 2019)

<sup>13</sup> Ibid

<sup>14</sup> Ibid

In this context, the fourth paragraph of preamble of International Covenant on Civil and Political Rights (ICCPR), 1966 obliges the state parties to protect and promote the civil and political rights. The paragraph goes like this: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.” Similarly, the fifth paragraph of preamble reads as: “Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”

In this way, the fourth paragraph of the preamble directs the signatory states to guarantee the fundamental freedoms required to lead a dignified life, while the subsequent paragraph demands the assurance of the observance of human rights in the state. The preamble, which is regarded as a window to see the objective the legislation has intended to achieve, clarifies that the Convention intends to bind the states to adhere to human rights and fundamental freedoms.

In particular, clause (1) and (2) of Article 19 expressly secures every person’s right to free speech and expression through the medium of writing, expression, print, art or any medium of his/her choice. However, **clause (3) puts a reasonable restriction on this fundamental freedom: the exercise of this freedom shall be subject to public order, or morality, or health.** As it’s a well-settled rule that no right can be unrestrained, this right too has certain limitations. *It means the speech and expression which have potential to challenge public order; morality or health cannot be covered under the province of freedom of speech and expression. It is to be noted here that the provisions contained under Section 293-308 of Nepal’s Criminal Code Act, 2018 have potential to frustrate Article 19 of ICCPR and not covered under the reasonable restrictions: public order, morality or health.* Article 19 of ICCPR, 1966 mirrors the provision contained under Article 19 of Universal Declaration of Human Rights (UDHR), 1948.

**Likewise, Article 2(2) of ICCPR, 1966 obliges the state to adopt and enact laws in furtherance of the Constitution and implement the provisions of this Bill of Rights.** The provision reads: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” *By enacting derogatory provisions under national penal code, drafters of the Criminal Code Act, 2018 have also failed to give effect to the constitutional mandates. Article 19 of the Constitution of Nepal is an enabling and welcome provision which guarantees freedom of press.*

Nepal ratified ICCPR in 1991 [i.e., May 14, 1991] a year prior to the ratification of convention by the United States of America (US).

## Conclusion

The violation of press freedom is not a healthier sign in a constitutional democracy where rule of law has a major role to play. The attack on the media workers and journalists in a broad daylight would not only harm the constitutional spirits but it would also promote impunity.

Its high time to learn that criticising governmental wrongdoings is not wrong on the part of government itself, rather it would provide an opportunity for government to rectify its errors. It's impossible for the government to carry out its agenda of prosperity putting media in dark age. The government of the day should abide by the international commitments in both letter and spirit. Above it all, the Constitution of Nepal slams any form of unreasonable restriction on the press. The incidents of press freedom violation mentioned here are just representative incidents. The attack on free press is an attack on fundamental freedoms.

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### About Media Action Nepal (MAN)

Media Action Nepal (MAN) is an independent media rights advocacy organization promoting free and accountable media. MAN safeguards Freedom of Expression and enhances citizen participation and dialogue to strengthen democracy for sustainable development by enabling a free, vibrant and responsible media in Nepal. It engages media in creating constructive dialogue to improve governance and increase public participation in development. MAN's interventions are focused on building the capacities of independent media to boost the professional competencies of journalists and media professionals. Media Rights Violations Monitoring Desk (MRVMD) is an initiative of Media Action Nepal (MAN)- that looks after media rights violations, analyses the cases on the basis of international standards and provide with its recommendations to key stakeholders to take actions against perpetrators engaged in crimes against journalists. The Desk prepares and disseminates with periodic reports, policy papers and representative case studies analysing national legal provisions and international instruments on freedom of the press.

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