



War of Words: Conflict and Freedom of Expression in South Asia



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1 INTRODUCTION

1.1 Rationale behind the study¹

Most of the countries in South Asia are involved in some kind of internal and/or external conflict. Freedom of expression has been a serious casualty in these conflicts. Typically, national security is used as a reason to justify legal and practical fetters on freedom of expression, while insurgent groups seek to suppress information or even to target independent journalists. Commonly, those involved on both sides perpetuate the conflict by promulgating a misleading, distorted image of the ‘enemy’. Active combatants try to prevent information about their human rights abuses getting to the general public.

Yet, it is precisely during times of conflict that freedom of expression and a free flow of information should be vigorously defended. Respect for freedom of expression is a crucial element in any long-term policy to promote peace and bring an end to the conflict. It is a necessary basis for the wider debate on the nature of the conflict and broader issues of accountability, which are essential to address the root causes. Freedom of expression is also necessary for adequate reporting on the conflict itself and for addressing human rights abuses – both as a cause of the conflict and a factor perpetuating it.

At the same time – almost by definition – it is difficult to highlight the problem of excessive restrictions on freedom of expression in conflict areas. Those trying to address this issue – or to combat distorted images of the ‘enemy’ – may be labelled as traitors or enemy sympathisers. Calling for greater openness in the face of a national threat may be seen as providing – even unintentionally – assistance to the ‘enemy’. Partly as a result of this, there is a need for good, practical studies on the issue of conflict and freedom of expression.

This study considers the conflicts in India, Nepal and Sri Lanka, primarily looking at restrictions, highlighting similarities and differences and drawing some general conclusions about the ways in which authorities and combatants restrict freedom of expression. It also sets

¹ Written by Shehara Candappa, consultant for ARTICLE 19.

out international standards pertaining to freedom of expression and information relevant to conflict situations.

The study is a collaborative effort between ARTICLE 19 and our partner organisations in the region – the Centre for Policy Alternatives (Sri Lanka) and the South Asia Forum for Human Rights (Nepal and India). The South Asia study has been completed within the context of on-going discussions taking place at international and regional levels on the role of the media in conflict situations and the importance of respect for freedom of expression. At the international level, on 3 May 2004, UNESCO marked the World Press Freedom Day by issuing the “*Belgrade Declaration on Support to the Media in Conflict and Post-Conflict Situations*”.²

ARTICLE 19 has published numerous country studies on freedom of expression, including on countries suffering from conflict, such as Sri Lanka.³ For many years we have also directly contributed to debates in other regions through the publication of extensive research on case studies in Africa and Europe. For example, in 1996, ARTICLE 19 published its report “*Broadcasting Genocide Censorship, Propaganda and State-Sponsored Violence in Rwanda 1990-1994*”, which examines and analyses the role of the Rwandan media in the 1994 genocide. The report demonstrates that the media was an instrument – not the cause – of genocide. In 1999, ARTICLE 19 reissued the publication “*Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina*”, which illustrates how the media was manipulated in the countries of the former Yugoslavia, preparing the ground for the acceptance of nationalist policies and violent confrontation.

² http://portal.unesco.org/ci/en/ev.php-URL_ID=15654&URL_DO=DO_TOPIC&URL_SECTION=201.html

³ *Sri Lanka, Fifty Years On*, ARTICLE 19, 1998 and *Sri Lanka: Silent War*, ARTICLE 19, 1998, both available at: <http://www.article19.org/>

1.2 Summary of findings

The case studies have identified a number of detrimental trends in relation to freedom of expression in conflict situations:

- Governments, as well as separatist or insurgent combatants, use ‘national security’ arguments to stifle dissent within their own sphere of influence;
- Conflict protagonists disseminate biased or manipulated information in order to mobilise public support for the way respective political leaders pursue their conflict goals. At times, this can mean that media voluntarily disseminate distorted information out of patriotic motivations. At other times, there is an underlying information strategy, planned and instigated at political levels;
- Persistent misinformation is a powerful factor further entrenching feelings of mutual hatred between divided communities and promoting the construction of enemy pictures, thereby adding to the obstacles that long and difficult conflict resolution and peace processes will have to overcome;
- Media reporting is often polarised along political, ethnic or religious lines. Ownership of the media is regarded by the parties to a conflict as a central element in gaining control of the flow of information;
- There is a direct correlation between an increase in intensity of a conflict and severity of restrictions on freedom of expression;
- Exact information on civilian casualties and human rights violations caused by combatants is often concealed from the broader public. Denial of facts, however, fuels fear and increases mistrust and resentment within the victim population against perpetrators and/or poor leadership;
- A culture of violence against the media and impunity is exacerbated during conflicts. This also leads to self-censorship by the media;
- Sometimes journalists and media outlets within conflict zones are deliberately targeted;
- Restrictions on freedom of expression during conflict situations have a disproportionately adverse effect on women.

1.3 The Nature of Recent Conflicts

Definition of armed conflict

International humanitarian law defines two categories of armed conflict: international and non-international. An international armed conflict is characterised under the Geneva Conventions by fighting between the armed forces of at least two States.⁴ Armed conflict of a non-international nature is defined as fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between armed groups fighting one another.⁵ To be considered a non-international armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.⁶ This study includes examples of both types of armed conflicts.

There is also a further type of armed violence, which can be described as ‘internal disputes’ and ‘other internal violence’. This is internal violence that has not reached the level of intensity and longevity to be classified as a non-international armed conflict under international humanitarian law. Undoubtedly, during these types of disturbances, freedom of expression is at risk of being restricted and examples of this can be found throughout South Asia; however, we have not included them for the purposes of this study, taking as the basis for our work the strict definition of armed conflicts under the current interpretation of international humanitarian law.⁷

Recent trends in armed conflicts

The 20th century has been recorded as one of the bloodiest in history. While the number of conflicts throughout the century may have declined, their impact in terms of human cost was devastating. Estimated figures put the number of deaths as a result of conflicts at around 110 million and the number of people wounded at many times that amount. Furthermore, UNICEF records indicated that whereas only 5 per cent of the casualties in the First World War were

⁴ Article 2 Common to the four Geneva Conventions of 1949.

⁵ Additional Protocol II to the four Geneva Conventions of 1949.

⁶ *International Humanitarian Law, Your Questions Answered*, ICRC, 2002.

[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC_002_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open)

⁷ There is a growing discourse around the ambiguities in the traditional international humanitarian law distinction between international and non-international armed conflicts. For further reading on this issue see: *Towards a single definition of armed conflict in international humanitarian law: A critique of international armed conflict*, James. G. Stewart, ICRC 2003.

<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/257D44C32005B3A8C1256D7400297427>

civilians, in the Second World War this proportion rose to 50 per cent, while at the end of the century that figure was approximately 80 per cent'.⁸ Unfortunately, the new millennium continues this trend and has been marked by both international and internal conflicts. According to the Conflict Data Project (CDP), it is estimated that in 2001 there were 34 on-going armed conflicts in the world, a figure that roughly reflects the average number of on-going conflicts recorded since the mid-1990s. Africa and Asia are the regions with the highest concentration of conflicts.⁹

Recent conflicts have also arguably seen a shift from international to more internal armed conflicts (also termed interstate and intrastate, respectively), although the distinction between the two can at times be ambiguous. According to the Stockholm International Peace Institute, only two of the 27 major armed conflicts that took place in 1999 were interstate, namely, India *vs.* Pakistan and Eritrea *vs.* Ethiopia.¹⁰ Yet, there has always been a close interrelation between international and internal conflict. Thus, the wars in Korea, Vietnam, Angola, and Afghanistan were initially domestic in nature but became international with the intervention by the Soviet Union and the USA. Further, many conflicts that are labelled 'intrastate' often reveal a strong international dimension. For example, the warring factions in Afghanistan were backed by powerful external actors who had an interest in prolonging the conflict.

1.4 Historical context: combatants have always sought to control information

What is common between international and internal armed conflicts throughout history is the desire by the warring parties to seek to control information. Indeed, information becomes a weapon in the hands of protagonists who manipulate it for three principal ends: to create conflict by building a case for war and demonising the enemy; to prolong conflict by diverting attention away from the root causes; and to conceal their own atrocities from public

⁸ Miall, Ramsbotham & Woodhouse, *Contemporary Conflict Resolution. The Prevention, Management and Transformation of Deadly Conflicts*. (London, Polity Press, 1999) p.32.

⁹ Conflict Data Project dataset available at <http://www.prio.no/cwp/armedconflict/>.

¹⁰ Stockholm International Peace Institute, 2002, pp.15-16.

and international scrutiny. In this section we examine some examples of how the media has been used in recent conflicts.

The Vietnam War

The Vietnam War (1964-1975) was the subject of intense media coverage, with explicit images and reports of the conflict being broadcast around the world. It has been described as the first television war and has been the subject of passionate debates; with some believing that the media lost the war in the “living rooms of America” by its gruesome reporting, while others remain critical of the one-sided view that was presented.

Marshall McLuhan, a leading communications theorist, stated in 1975, "Television brought the brutality of war into the comfort of the living room. Vietnam was lost in the living rooms of America – not on the battlefields of Vietnam."¹¹ Conversely, the French newspaper *Le Monde Diplomatique*, reports that the Vietnam War was one of the most covered topic within the US, yet only 3% of coverage gave an ‘enemy’ viewpoint.¹²

The Vietnam War media coverage seems to have suffered in the early years of the conflict by an over reliance on U.S. government officials as sources of information and a reluctance to question official statements on national security issues. The military officials provided news to the media through daily press briefings that became known as the “Five o’clock Follies”. At these briefings, the military officials would provide accounts of the day’s encounters and battles. However, the truthfulness of these briefings was often called into question by the attending journalists.¹³

However, while the media on the ground were able to relay disturbing images and pictures of the war, information about atrocities committed by the US military only emerged towards the very end of the conflict or afterwards. For example, the atrocity surrounding the *My Lai* massacre, only emerged after the end of the war. “The massacre of between 90 and 130 men, women and children at the village of My Lai on March 16, 1968, was not a story until long

¹¹ Quoted online at: <http://www.vietnamwar.net/media/media.htm>.

¹² *Le Monde Diplomatique*, titled "Show us the Truth about Vietnam", (April 2000), by Ignacio Ramonet available at <http://mondediplo.com/2000/04/15vietnam>.

¹³ Richard Pyre, *From Tonkin Gulf to Persian Gulf*, CNN. <http://www.cnn.com/SPECIALS/cold.war/episodes/11/then.now/>

after it had happened. For more than a year, a soldier who had heard about the My Lai massacre tried to interest *Newsweek* and others, without success. Finally, the story was ‘broken’, not by any of the 600 reporters in Vietnam, but by a freelancer in the United States, Seymour Hersh.... Only then did the correspondents in Vietnam tell their own atrocity stories. There was a cataract of them. Everybody, it seemed, knew about or had witnessed at least one; and everyone had either not reported it or been pleased that their office had ‘spiked’ the story they had sent.”¹⁴

Journalist John Pilger asserts that the war was cast as a conflict between ‘good’ teams and ‘bad’ teams. “The Americans were on the side of the good team, the South Vietnamese – who were defending themselves against ‘aggression’ by several bad teams of ‘communists’. Not surprisingly, this version excluded the fact that the Americans had killed tens of thousands of their South Vietnamese ‘allies’ and had destroyed their homes and crops, levelled their forests, poisoned their water and forced them into ‘refugee programmes’.

During the war, the pressure to conform appeared to be intense. Sometimes this pressure took the form of accusations that the journalists were anti-American and unpatriotic. At times, this pressure came from the highest levels of government.

For example, President Lyndon Johnson allegedly intervened in 1965, after correspondent Morely Safer’s CBS crew filmed marines burning down a village with Zippo cigarette lighters. Johnson telephoned CBS President Frank Stanton and demanded to know how CBS could employ a “communist like Safer” and how they could be so unpatriotic as to broadcast enemy film.¹⁵

Another example involved British journalist James Cameron and cameraman Malcolm Aird, who raised their own finance to make a filmed report from Hanoi in 1965, following which they were castigated as communist dupes – a charge Cameron later told John Pilger, he relished – “only when they call you a dupe, not a communist outright, but a dupe,” he said,

¹⁴ John Pilger, *Heroes*, (London, Jonathan Cape 1986, Vintage 2001), pp.258 – 259.

¹⁵ *Ibid*, pp.262-263.

‘did you know you’d broken the great mould that covered the reporting of the Vietnam war and that maybe you’d got it right!’¹⁶

Phillip Knightley, journalist and author, describes how journalists faced pressure to ‘dumb down’ their reports and struggled to find outlets to publish their harrowing accounts.¹⁷ He said newspapers in the United States refused to publish a series of articles by war correspondent Miss Gellhorn, saying the contents were ‘too tough for the American reader’. “Eventually, the *St. Louis Post-Dispatch* took the two mildest ones. Miss Gellhorn had to turn to Britain to get all five published. They appeared in the *Guardian*, and ended Miss Gellhorn’s career as a war correspondent in Vietnam. When she applied for a visa to return there, her request was refused. She tried over the years after that, applying to various South Vietnamese embassies around the world, and was refused every time.”¹⁸

On reflection, regardless of whether one agrees with the view that the media lost the war in the hearts and minds of the American public, or that the media was too patriotic and blinkered in its approach, what is clear is that the media played an important role in documenting the Vietnam War. In particular, certain images such as the photograph titled ‘*Vietnam Napalm*’ taken by Nic Ut, showing a naked girl running down the road after her village had been bombed by Napalm, have become iconic. There was a sense of immediacy to the coverage, with journalists being on the ground with troops and sometimes able to witness the fighting at first hand. The advantages and disadvantages of this type of reporting from the front line can be evidenced in subsequent conflicts.

Rwanda¹⁹

Rwanda is an example of how the media was used not only to incite genocide but – once the killing was under way – to actually organise the violence, which resulted in the genocide of 800,000 minority Tutsis and moderates from the Hutu majority in 1994.

¹⁶John Pilger, *Heroes*, (London, Jonathan Cape 1986, Vintage 2001), pp.262 – 263.

¹⁷ Phillip Knightley, *The First Casualty: The War Correspondent as Hero and Myth-Maker From the Crimea to Kosovo* (London, Prion Books, 2000) pp. 424.

¹⁸ *Ibid*, pp. 428.

¹⁹ *Broadcasting Genocide: Censorship, Propaganda & State-Sponsored Violence in Rwanda, 1990-1994*, ARTICLE 19, 1996.

In Rwanda, government officials easily manipulated information about the Tutsi rebel group, the Rwandan Patriotic Front (RPF) – which had invaded in October 1990 – and about security issues as a pretext to incite violence against Tutsi civilians. Wartime measures – introduced to improve security – further exacerbated the lack of accurate information about the conflict by severely limiting the movement of people within the country, thereby further hindering their ability to obtain information from a range of sources. Furthermore, with a high illiteracy rate and many people living in rural areas, where movement is greatly restricted, tight government control of the airwaves enabled the Rwandan authorities to suppress crucial information about the war and the killings of Tutsi civilians.

Prior to the genocide in 1994, the media in Rwanda was used by government officials as a means to relay hate propaganda and to incite violence. One of the most notorious was the *Kangura* newspaper, noted for its systematic and virulent abuse of the Tutsis. The newspaper appears to have been established by officials to counter the influence of the popular *Kanguka* newspaper. Even in its choice of titles, the newspaper presented itself as a self-conscious imitation of *Kanguka*; both titles mean “Wake up!” in different Kinyarwanda dialects, and sound similar. However, *Kangura*’s very different orientation was clear from its slogan, “ijwi rigamije gukangura no kurengera rubanda nyamwinshi”, which means, “the voice which seeks to awaken and defend the “majority people”.

Kangura was first published in May 1990 and was used as a conduit to spread false and inflammatory information, flouting national laws with apparent impunity. *Kangura* is reported to have enjoyed financial and logistical support from high-level officials. According to Reporters Sans Frontières (RSF), *Kangura* was principally financed by Félicien Kabuga, financial advisor to President Habyarimana and future President of the Board of Directors of RTLM.²⁰

Not surprisingly, *Kangura*’s content often mirrored official rhetoric. The newspaper accused opposition parties of being divisive and of encouraging RPF attacks. Soon after the parties were formally registered in July 1991, a *Kangura* editorial stated: “If the Hutu continue to bicker amongst themselves, in different political parties, the *Inkotanyi* and their accomplices

²⁰ Reporters Sans Frontières, Rwanda: Médias de la haine ou presse démocratique? Rapport de Mission 16-24 Sept. 1994 (Paris: RSF, 1994) pp.19.

will exterminate us”.²¹ Opposition leaders were systematically attacked and ridiculed in *Kangura*'s pages, which regularly depicted figures such as Prime Minister Agathe Uwilingiyimana and Faustin Twagiramungu of the MDR as naked caricatures, in a series of vulgar cartoons.

Kangura also took an active part in identifying and denouncing people whom it claimed were 'enemies', 'accomplices', and 'traitors', secretly working for the RPF in Rwanda. Shortly after denunciation, many of *Kangura*'s scapegoats were persecuted by governmental authorities. Accordingly, a feeling of fear was generated around *Kangura*.²²

Another form of media that was instrumental in inciting and organising violence was the *Radio Télévision Libre des Mille Collines* (RTLM), which began broadcasting in August 1993. This was a nominally private radio station with informal connections to high-level government officials, initially appearing to be broadcasting fairly innocuous programmes. After the assassination of Melchior Ndadaye on 21 October 1993, the first democratically elected and first Hutu President of Burundi, RTLM programmes quickly became inflammatory and began to incite ethnic hatred. The RTLM relayed false information regarding the assassination and ensuing violence, attributing blame generally to the Tutsi. It also warned against a larger plot against the Hutu in the region.

On 6 April 1994, a plane crash killed President Habyarimana and marked the beginning of the genocide. RTLM appears to have reached its peak of activity during the genocide, reportedly broadcasting 24 hours a day throughout the first several weeks of the genocide and then daily with a more limited schedule for the rest of the three-and-a-half-month period.

The RTLM indirectly and systematically advocated the killings of Tutsi by linking them with the RPF, who, it claimed, had just invaded Rwanda, assassinated the President, and would exterminate all the Hutu if the supposed attack was not immediately repulsed. RTLM described the genocide as a “final war” or “final battle”, claiming that the only way to stop the

²¹ “Si les Hutu continuent à se chamailler dans différents parties politiques, les *Inkotanyi* et leurs complices vont nous exterminer”. *Kangura*, No. 15 (Kigali: July 1991).

²² “Apprenons à connaître les plans des *Inkotanyi* et prévoyons de les exterminer jusqu’ au dernier”. *Kangura*, no. 9 (Kigali: Feb 1991), pp.10.

RPF was to exterminate all the rebels and their alleged ‘accomplices’, implying all Tutsi civilians in Rwanda.

The RTLM also went beyond generally inciting genocide against the Tutsi, actually playing a more direct role in assisting in the killing. The station aided the militias and security forces in their search to identify and locate individuals targeted for elimination. Genocide survivors interviewed by ARTICLE 19 reported that RTLM broadcasters frequently read out names of people whom they claimed were ‘RPA soldiers’ or ‘accomplices’, thus marking them for extermination. In many cases, RTLM announced the precise whereabouts or even vehicle number-plates of individuals trying to hide or flee. When this occurred, the people in question were usually killed very soon thereafter, sometimes within hours of the broadcast.

Former Yugoslavia²³

The 1990s were a bleak period in the history of the former Yugoslavia. Since the ten-day war in Slovenia in 1991, its inhabitants endured a truly modern war – one directed at the civilian population, characterised by arbitrary killings, forced expulsions and mass rape.

Throughout the conflict, media coverage in much of the world, with a few exceptions, portrayed the conflict as deep rooted, tribal and impenetrable. In fact, this conflict, like many other civil conflicts, was created, nurtured and encouraged by competing political forces. The media played a major role in manufacturing the conflict, just as it did in Rwanda. The combatants in Bosnia and latterly in Kosovo recognised that control of public opinion was as important as control over the battlefield. All sides sought to mobilise and manipulate public opinion. The media no longer solely commented on the war – they were part of the front line. Foreign public opinion was also as important to the combatants as domestic opinion. No one side was strong enough to secure victory by its own force – all needed the intervention of external powers to succeed. Consequently, controlling the media perceptions of the conflict became a crucial objective for all combatants.

The role that the media played in the conflict had its origins in the structure of the media in Yugoslavia. By the 1980’s, although Yugoslavia had a free press by the standards of most

²³ For more information see: Mark Thompson, *Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina* [sic], (ARTICLE 19, University of Luton Press, 1999).

Communist-controlled states, the republics that made up the federation controlled the media, and were prey to the tide of ethnic nationalism that began to sweep the country. Yugoslavia's news agency, *Tanjug*, was taken over by pro-Milosevic staff by the end of 1991. *Borda*, the official newspaper of Yugoslavia, sought to remain impartial when the conflict began in 1991. However, its booths were attacked in Croatia and Arkan (the Serb paramilitary leader) turned up at its Belgrade office threatening to "liquidate" a journalist who had run a report on him, unless he was interviewed. *Borda* illustrated the problem of remaining neutral. It was forced into treating all parties to the conflict in the same way with the result that it could not report on the true character of Serb aggression.

One federal television station, *Yutel* – founded in 1990 in a conscious attempt to combine commitment to democracy with a new professionalism – faced continual obstacles from the republican TV channels. In Serbia, it was broadcast at 2am or 3am, after a musical intermission. Like *Borda*, it suffered from an attempt to remain neutral.

Overall, media coverage was manipulated to sustain public support. Disinformation became a further weapon in the conflict. Martin Bell, former BBC war correspondent called the conflict "a television war, not just in the usual sense, that its battles and bloodshed for more than three years were beamed across the world in nightly newscasts, but in a further sense that the other campaign, for world opinion and the favour of governments, was waged on television too".²⁴

International coverage of events appeared to affect international policy in relation to the conflict. Mark Thompson, in *Forging War*, describes how the English Independent Television News (ITN) reports from Omarska and Trnopolje camps apparently helped to elicit United Nations Security Council Resolution 770, to allow humanitarian aid in Bosnia.²⁵ According to US special envoy Richard Holbrooke, "the reason the West finally, belatedly intervened was heavily related to media coverage. The Bosnia coverage really made a difference".²⁶

²⁴ Martin Bell, *In Harm's Way. Reflections of a War Zone Thug*, (London: Hamish Hamilton, 1995). p 140.

²⁵ Mark Thompson, *Forging War: The Media in Serbia, Croatia, Bosnia and Hercegovina*, (ARTICLE 19, University of Luton Press, 1999), pp. 3.

Iraq

The build-up to the war in Iraq, the three-week campaign in 2003 and the aftermath were all accompanied by intense propaganda from both sides.

During the campaign, Iraqi officials staged events such as street dances in support of Saddam Hussein and attempted to control media reports, monitor foreign journalists, and even expelled them. False information was relayed to the Iraqi people by the government. For example, the Iraqi Information Minister made claims that the coalition forces were nowhere near Baghdad, at a time when they were all around the area. Much of this propaganda was well covered by the Western media.

The US administration also followed a policy of propaganda and control over the media during the lead-up to the campaign and the ensuing conflict and continuing violence.

a) Embedding

The US administration adopted a policy of ‘embedding’ reporters with troops on the ground. This idea has been attributed to Victoria Clarke, the Assistant Secretary of Defence for Public Affairs. According to a 10-page memo prepared for the National Security Council, Clarke – apparently with the backing of the Secretary of Defence, Donald Rumsfeld – argued that allowing journalists to report live from the front lines would “give Americans the opportunity to get the story – both ‘good and bad’ – before others seed the media with disinformation and distortions.”²⁷

This – coupled with technological advancements – created a sense of immediacy to the reports that were sent back by the media. However, embedded reporters travelling with coalition forces sometimes indicated in their television reports that they were under strict control. A BBC Radio 5 broadcast on the morning of 9 April 2003 also said that many embedded journalists developed a viewpoint that was more sympathetic to coalition troops, after having spent so much time with them.

²⁶ *Ibid*, pp.3.

²⁷ Bill Berkowitz, *Embedded, enthusiastic and un-encumbered by truth, Working For Change*, April 9, 2003. Online:
<http://www.workingforchange.com/article.cfm?itemid=14813&CFID=6521062&CFTOKEN=49872048>

b) Sanitising the horrors of war

Possibly as a result of the policy of embedding, there have been allegations from media quarters around the world that the U.S. media's view of the war was alarmingly one-sided.

"CNN's Walter Rodgers' style of reporting resembles the live coverage of the Super Bowl," noted an editorial in Germany's liberal *Süddeutsche Zeitung*. "(It is) anecdotal, full of metaphors, enthusiastic and bubbling with admiration for the overwhelming technical advantages of the Abrams tank."²⁸

Todd Gitlin, professor of journalism and sociology at Columbia University, has examined these charges and asserts that they have some merit. "Our coverage is a little worse than I expected. (Reports from embedded journalists) are basically snippets of enthusiastic travelogue and up-close and personal stuff with the troops ... There's been a disappearance of political commentary. We don't seem to want to know why others are angry."²⁹

In October 2003, the *Washington Post* revealed that with the increasing death toll among American troops in Iraq, the Bush administration had decided to ban news coverage and photography of the arrival of dead soldiers on all military bases. It reported:

"Since the end of the Vietnam War, presidents have worried that their military actions would lose support once the public glimpsed the remains of U.S. soldiers arriving at air bases in flag-draped caskets. To this problem, the Bush administration has found a simple solution: It has ended the public dissemination of such images by banning news coverage and photography of dead soldiers' homecomings on all military bases."³⁰

In relation to this incident, Joe Lockhart, the former White House Press Secretary commented "This administration manipulates information and takes great care to manage events and sometimes that goes too far".³¹

²⁸ Marco R. della Cava, *Iraq gets sympathetic press around the world International media wary of U.S. reporting, USA Today, April 2, 2003*

²⁹ Marco R. della Cava, *Iraq gets sympathetic press around the world International media wary of U.S. reporting, USA Today, April 2, 2003*

³⁰ Dana Milbank, *Curtains Ordered for Media Coverage of Returning Coffins, Washington Post, October 21, 2003.*

³¹ *Ibid.*

c) Overt propaganda

On 17 April 2003, the BBC produced a list of events that were reported as fact during the war but which later turned out to be either false or unsubstantiated. The list includes reports of Scud missile attacks (there were none), of a civilian uprising in Basra (there was none), and of chemical weapons being found (none have been found to date).³²

One story that received enormous US and worldwide coverage was the ‘rescue’ of Private Jessica Lynch. This involved the alleged rescue by US special forces of a female private from Iraqi forces. According to official and media reports, Private Jessica Lynch had been captured along with 10 other US soldiers. It was claimed that she had been ambushed and captured after firing at the Iraqis until her ammunition ran out. It was reported that she had been hit by a bullet, stabbed, tied up, and taken to a hospital in Nasiriyah, where she was beaten by an Iraqi officer. A week later, she was freed in a covert operation, during which US Special Forces – as reported by US officials – “despite resistance from her guards, they broke into the hospital, rescued her and flew her by helicopter to Kuwait.”³³

That evening, President Bush, announced her rescue to the nation. Eight days later the Pentagon supplied the media with a video made during the mission. This grabbed the attention of the US public, and the media worldwide, and Jessica Lynch became an iconic figure for US patriotism.

After the war, a number of journalists from the international media, such as *The New York Times*, *Toronto Star*, *El Pais* and the *BBC*, travelled to the hospital to find out the facts behind the story. They found evidence that conflicted with the previous accounts. According to their interviews with Iraqi doctors who had looked after Lynch (and subsequently confirmed by US doctors who had later examined her), her wounds, a fractured arm and leg and a dislocated ankle, were not due to bullets but were more consistent with an accident in the lorry in which she had been travelling. It was confirmed that she had not been maltreated; on the contrary, the Iraqi doctors had done everything possible to look after her.³⁴

³² BBC article “*Iraq war: Unanswered questions*” available at http://news.bbc.co.uk/1/hi/world/middle_East/2929411.stm. The *Guardian* also ran a similar article by Stuart Millar and Michael White on March 29, 2003. “*Facts, some fiction and the reporting of war*” available at <http://www.guardian.co.uk/Iraq/Story/0,2763,925191,00.html>

³³ Ignacio Ramonet, *State-sponsored lies*, *Le Monde Diplomatique*, July 2003.

d) Attacks against the media

On 8 April 2002, U.S. forces in central Baghdad fired at the Al-Jazeera station, an Arab television station, and a hotel housing many journalists. Three journalists were killed. British journalist Robert Fisk was on the scene, and commented that a *Sky News* journalist, David Chater, had pointed out that the Pentagon knew that the hotel housed journalists. In addition, Al-Jazeera had constantly updated coalition forces of the locations of its stations. The *Asia Times* (10 April 2003) also quoted David Chater as saying that the shell fired at the hotel had been ‘aimed directly at this hotel and directly at journalists. This wasn’t an accident; it seems to be a very accurate shot.’³⁵

In relation to this incident, the Secretary General of the International Federation of Journalists, Aidan White, stated that ‘there should be a clear international investigation into whether or not this bombing violates the Geneva Conventions. Once again, we see military and political commanders from the democratic world targeting a television network simply because they don’t like the message it gives out.’³⁶ U.S. mainstream media supported the bombing, with some outlets even calling for the station to be bombed before it happened.

e) The Aftermath

The campaign to control information has continued in the aftermath of the war. The Inter Press Service (IPS) news agency reported that media watchdogs such as the Committee to Protect Journalists (CPJ) and Reporters Sans Frontières (Reporters Without Borders) had expressed concern about the clampdown on media for airing anti-occupation views and recorded statements of Saddam Hussein. ‘Penalising media outlets sets a poor precedent and raises serious questions about how Iraqi authorities will handle the broadcast or publication of negative news. The governing council should encourage open media,’ IPS quoted a CPJ member as saying.³⁷

IPS also noted that a number of media outlets had been closed after the Coalition Provisional Authority (CPA) accused them of incitement against occupation forces. Furthermore, it stated that ‘the Iraq Media Network (IMN) – a CPA-run project put together by a major U.S. defence

³⁴Ignacio Ramonet, *State-sponsored lies*, Le Monde Diplomatique, July 2003.

³⁵Pepe Escobar, *The Iraqi Killing Fields*, available at http://www.atimes.com/atimes/Middle_East/ED10Ak04.html

³⁶FAIR article “*US media applaud bombing of Iraq TV*” available at <http://www.fair.org/activism/iraqi-tv.html>.

contractor – had reportedly taken over a number of radio stations in various parts of the country, effectively silencing independent voices.³⁸

1.5 Freedom of expression and information and the 'war on terror'

Response of States

While restrictions to freedom of expression and information for reasons of national security are provided for under international law, the attacks on the United States on 11 September 2001 have had a particularly chilling effect on freedom of expression and information around the world. Following the attacks on 11 September 2001, the United States launched a 'War on Terror' and encouraged other governments to fortify themselves by taking active steps to either eradicate or combat 'national and global terrorism'. This had immediate implications for the media and information flow. Legislation greatly restricting freedom of expression and enabling closer scrutiny of information was enacted in many countries throughout the world.

In the US, in October 2001, the US Congress passed the USA Patriot Act, which "has since become the template for a raft of anti-terror legislation around the world, and a large part of this legislation has concentrated on making surveillance of computer users easier for authorities."³⁹

Under the Patriot Act, the authorities in the US now have greater powers to access user information held by internet service providers and to monitor web surfing, including terms entered into search engines.⁴⁰ This can be enacted with minimal input from the judiciary, and with a very low level of proof. Library internet user records and sign-in lists can be demanded by authorities and it has been made possible for surveillance software to be installed on library servers. The Act greatly expands the use of 'roving wiretaps'. This means that a wiretap order targeted to a person is no longer confined to a particular computer or telephone. Instead, it may 'rove' wherever the target goes.

³⁷ Jim Lobe, *Watchdogs Raise Alarm for Media Freedom*, Inter Press Service, September 25, 2003, available at <http://www.ipsnews.org/interna.asp?idnews=20318>.

³⁸ Ibid.

³⁹ Jim Lobe, *Watchdogs Raise Alarm for Media Freedom*, Inter Press Service, September 25, 2003, available at <http://www.ipsnews.org/interna.asp?idnews=20318>.

⁴⁰ Electronic Frontier Foundation. (2001). EFF analysis of the provisions of the USA Patriot Act.

Furthermore, since September 11, there has been a reduction in the availability of certain types of information on government websites.⁴¹ Maps, environmental resources, transport information and resources considered to aid terrorists are among the types of information reportedly being removed.⁴² Federal deposit libraries around the US have purportedly been requested to destroy resources considered sensitive in wartime.⁴³ The actions taken by the US administration in the name of the ‘war on terror’ have been enacted in other countries.

European Union legislation has been introduced to combat online fraud, hacking and terrorism, as well as to enable law enforcement agencies greater access to Internet traffic and communications data previously only kept for verifying customer bills.⁴⁴

Outside of Europe, the early results of the ‘war on terror’ were seen in Somalia, where the only internet company was forced to close until January 2002, along with the only telecommunications company, after its international gateway was blocked and its assets frozen by the US, which suspected them of terrorist links.⁴⁵ Internet controls in Saudi Arabia have also been tightened so that all ISPs are now required to keep records of all Internet users in order to track access to forbidden web sites.⁴⁶ Anti-terror bills that have restricted freedom of expression have been enacted in Asian countries such as Indonesia, China, and India.⁴⁷ India’s anti-terror bill for example, will punish anyone setting up an ‘anti-India’ website with five years in jail.⁴⁸

http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html

⁴¹ BBC News. (2002). *US Tightens controls on website*,

http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1888000/1888387.stm [2002, March 22].

⁴² OMB Watch. (2002). *Access to government information post September 11th*

<http://www.ombwatch.org/article/articleview/213/1/1/> [2002, April 16].

⁴³ Kline, G. (2002). *Information at risk*. The News Gazette,

<http://www.newsgazette.com/ngsearch/story.cfm?number=10892> [2002, April 16], and Radcliffe, J. and

Woolfolk, J. (2001). *Orders to purge records have librarians worried*. *Star-telegram*:<http://web.star-telegram.com/content/fortworth/2001/12/08/topstory/fw010102-1208-XA001-security.htm> [2002, Jan 14] and

Ombwatch. (2001). *The post-September 11th environment: Access to government information*:

<http://www.ombwatch.org/article/articleview/213/1/1/> [2002, Jan 14]

⁴⁴ Statewatch. (2002). *European parliament to cave in on data retention*:

<http://www.statewatch.org/news/index.html> [May 29, 2002]

⁴⁵ BBC News. (2001). *US shuts down Somalia Internet* :

http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1672000/1672220.stm [2002, Jan 14]

⁴⁶ Freedom House. (2002). *Press freedom registers slight gain despite terrorism and war*

<http://www.freedomhouse.org/media/pressrel/042202.htm> [2002, April 22]

⁴⁷ *Ibid*.

⁴⁸ Reporters Sans Frontières. (2001). *Asia – India – The law against terrorism threatens press freedom*, www.rsf.fr/rk/home.html [2002, Jan 14]

Countering terrorism and respecting free expression

As noted above, since the events of 11 September 2001, restrictions placed on freedom of expression and information enacted in the name of the ‘war on terror’ have had a chilling effect globally. Yet, efforts to promote greater respect for freedom of expression are crucial to any long-term strategy to address the problem of terrorism. It is only in the context of respect for freedom of expression that the root causes of terrorism can be addressed.

The Secretary-General in his address to the Security Council meeting on counter-terrorism on 18 January 2002,⁴⁹ stated that “human rights ... are one of the best prophylactics against terrorism”, the fight against which will be “self-defeating if we sacrifice other key priorities - such as human rights - in the process”. Similarly, the Policy Working Group on the United Nations and Terrorism, established by the Secretary-General in October 2001, emphasised that “the protection and promotion of human rights under the rule of law is essential in the prevention of terrorism,”⁵⁰ recalling that international human rights instruments include “limitations on the actions that States may take within the context of the fight against terrorism”.⁵¹

A joint statement issued on 10 December 2001 by 17 independent experts of the United Nations Commission on Human Rights⁵² reiterated this view. In their conclusion they state that “public policies must strike a fair balance between – on the one hand – the enjoyment of human rights and fundamental freedoms for all and – on the other hand – legitimate concerns over national and international security” and that “the fight against terrorism must not result in violations of human rights as guaranteed under international law”.

At the regional level, in response to growing concerns over restrictions on freedom of expression in combating terrorism, the Organisation for Security and Co-operation in Europe (OSCE)

⁴⁹ Press release *UN Secretary General’s address to Security Council on 18 January 2002*, <http://www.un.org/News/Press/docs/2002/SC7276.doc.htm>

⁵⁰ A/57/273-S/2002/875, annex, para. 26 available at: http://www.un.dk/doc/A.57.0273_S.2002.875.pdf

⁵¹ *Ibid.*, para. 28

⁵² *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Abid Hussain, pg 32 4th para. submitted in accordance with Commission resolution 2001/47 E available at: <http://www.hri.ca/fortherecord2002/documentation/commission/e-cn4-2002-75.htm>

approved the “Almaty Declaration on Freedom of the Media in Times of Anti-Terrorist Conflict”,⁵³ which states:

1. *The governments of the Anti-Terror Alliance should not, in times of conflict, use national security arguments to limit human rights at home and reduce their support elsewhere.*
2. *In particular, the governments of the Central Asian States should not take the new conflict situation as a justification for repressive steps against opposition media. On the contrary, they should use it as a catalyst for further steps towards creating a free media landscape in their societies.*
3. *The media should be free to exercise their corrective function towards economic, ecological and military decisions in their countries especially in times of conflict. The free public debate is imperative.*
4. *The media should be free to play its fundamental role as society’s watchdog against corruption, which is a serious obstacle for all countries on their way to democracy. Especially after 11 September, the media should not be prevented from informing the public about existing financial links between terrorist group activities and corruption.*
5. *Leading international media have to be, and must remain more actively engaged in the region, both as an important source of information and as example of professional journalism for their colleagues.*
6. *Under the conditions of increased international tension and continued contradictions in Central Asia, journalists should manifest more solidarity and support for each other.*
7. *Journalists must undertake further efforts to report objectively and edit carefully their coverage of the conflict. Journalistic ethic is needed more than ever in times of conflict and the journalists have to be aware of their increased responsibility.*
8. *The international community, governmental and non-governmental organisations must do more to safeguard journalists working in conflict zones. The leading media outlets could provide the needed training and insurance and can establish so-called security pools. Media foundations can be approached to financially support these pools. The creation of more efficient identification documents for professional journalists working in conflict zones should be promoted.*

⁵³ *Almaty Declaration on freedom of Media in times of Anti-terrorist conflict* available at http://www.osce.org/documents/rfm/2001/12/192_en.pdf

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ARTICLE 19 considers that additional restrictions specifically to combat terrorism are rarely justified. First, terrorism is not a new phenomenon and existing restrictions have generally been developed in light of it as an existing threat. Second, restrictions on freedom of expression and information are often generic in nature and are – as a result – sufficiently flexible to accommodate measures to address terrorism. For example, a prohibition on incitement to crime – common in countries around the world – already covers incitement to terrorism. Third, although terrorism is a unique form of criminal activity, the modalities by which law enforcement agencies seek to combat it, bear significant resemblance to approaches for other forms of international organised crime, such as drug smuggling. To the extent that this is the case, there is no justification for additional restrictions on rights.

Respect for freedom of expression is essential both in those countries which are potential targets of terrorism and in those countries which harbour or generate terrorists. Although there can be no question that the methods employed by terrorists are unlawful, it is equally clear that terrorism thrives in repressive environments, where peaceful, democratic means of expressing dissent, and of having one's views heard, are not available. It also thrives on rumours, distortion and bias – in other words in places where reliable, accurate information is not freely available. There is, therefore, a clear association between breeding grounds for terrorism and lack of respect for human rights, and in particular the right to freedom of expression. Accordingly, the problem of terrorism cannot effectively be addressed without taking steps to ensure respect for human rights. ARTICLE 19 believes that this can only be achieved through frank, open debate, in a context of respect for freedom of expression and the free flow of information and ideas.

2 INTERNATIONAL AND COMPARATIVE LAW

2.1 International Guarantees of Freedom of Expression

The Importance of Freedom of Expression⁵⁴

The *Universal Declaration of Human Rights* (UDHR)⁵⁵ is generally considered to be the flagship statement of international human rights. Article 19 of the *Universal Declaration on Human Rights* (UDHR)⁵⁶ guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵⁷

The *International Covenant on Civil and Political Rights* (ICCPR),⁵⁸ a treaty ratified by over 154 States,⁵⁹ imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

“Everyone shall have the right to freedom of opinion.

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.”

⁵⁴ Written by Shehara Candappa, consultant for Article 19.

⁵⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵⁶ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁵⁷ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁵⁸ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁵⁹ As of 24 November 2004.

Freedom of expression is also protected in all three regional human rights instruments, in Article 10 of the *European Convention on Human Rights*,⁶⁰ Article 13 of the *American Convention on Human Rights*⁶¹ and Article 9 of the *African Charter on Human and Peoples' Rights*,⁶² as well as in the *UN Convention on the Rights of the Child*.⁶³

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”⁶⁴ As the UN Human Rights Committee has said:

“The right to freedom of expression is of paramount importance in any democratic society”.⁶⁵

The guarantee of freedom of expression applies with particular force to the media. As the UN Human Rights Committee has stressed, a free media is essential in the political process:

“[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion”.⁶⁶

As noted above, international bodies have made it very clear that freedom of expression and information is one of the most important human rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

⁶⁰ Adopted 4 November 1950, in force 3 September 1953.

⁶¹ Adopted 22 November 1969, in force 18 July 1978.

⁶² Adopted 26 June 1981, in force 21 October 1986.

⁶³ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September 1990.

⁶⁴ 14 December 1946.

⁶⁵ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

⁶⁶ UN Human Rights Committee General Comment 25, issued 12 July 1996.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the African Commission on Human and People’s Rights has held:

*“Freedom of expression is a basic human right, vital to an individual’s personal development, his political consciousness, and participation in the conduct of public affairs in his country”.*⁶⁷

Similarly, the Inter-American Court of Human Rights has stated:

*“Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free”.*⁶⁸

This has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights.

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well established. For example, in a recent case the European Court of Human Rights stated:

*“According to the Court’s well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society”.*⁶⁹

⁶⁷ *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communications 105/93, 130/94, 128/94 and 152/96, para. 52.

⁶⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.

⁶⁹ *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93, para. 43.

These statements emphasise that freedom of expression is both a fundamental human right and also key to democracy, which can flourish only in societies where information and ideas flow freely.

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”⁷⁰

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

*[I]t is ... incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.*⁷¹

This applies particularly to information which, although critical, relates to matters of public interest:

*The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote omitted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.*⁷²

This has been recognised by the constitutional courts of individual States around the world. For example, the Supreme Court of South Africa held:

⁷⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, op it.*, para. 34.

⁷¹ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.⁷³

Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters.

Article 29 of the *Universal Declaration of Human Rights*, dealing with restrictions on rights generally, provides that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 19(3) of the International Covenant on Civil and Political Rights lays down the benchmark for restrictions on freedom of expression, stating:

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.*

⁷² *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

⁷³ *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.

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It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in a democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, approved by both the UN Human Rights Committee⁷⁴ and the European Court of Human Rights.⁷⁵ This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.⁷⁶ In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

National security is one area where vague and broadly defined restrictions are often placed on freedom of expression. Governments across the world are well known for invoking national security to cover a huge range of issues and information that they would rather not see in the public domain. Accordingly, restrictions on the ground of national security must in particular be scrutinised under the test outlined above.

In 1985, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities elaborated a set of principles entitled “*The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*” (Siracusa Principles).⁷⁷ Part IV of the Siracusa Principles relates to restrictions introduced in the name of national security and provides that:

⁷⁴ See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

⁷⁵ See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, paras. 28-37.

⁷⁶ *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.

⁷⁷ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1985/4 (1985).

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29. *National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.*
30. *National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.*
31. *National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there are adequate safeguards and effective remedies against abuse.*
32. *The systematic violation of human rights undermines true national security and may jeopardise international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.*

However, the most extensive statement of principles relating to national security restrictions is provided by the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.⁷⁸ The *Johannesburg Principles* were elaborated by a group of recognised experts in this field and are based on standards for the protection of human rights, involving State practice, and the general principles of law recognised by the community of nations. They outline, among other things, the prevailing standards for withholding information in the name of national security.⁷⁹

The *Johannesburg Principles* lay down the following provisions on restrictions on freedom of expression pertaining to national security:

6. *Subject to Principles 15 and 16, 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.*

⁷⁸ Adopted October 1995. Available at: <http://www.article19.org/docimages/511.htm>.

⁷⁹ Available at: <http://www.article19.org/docimages/511.htm#intro>.

7. (a) *Subject to Principles 15 and 16, (disclosure of secret information and information obtained through public service mentioned below under freedom of information) the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:*

(i) advocates non-violent change of government policy or the government itself;

(ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;

(iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;

(iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticising or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.

8. *Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security or a related interest.*

9. *Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.*

10. *Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.*

11. Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

12. A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

13. In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

14. The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

15. No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

16. No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

17. Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

18. Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

19. Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent

journalists or representatives of intergovernmental or non-governmental organisations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organisations from areas that are experiencing violence or armed conflict except where their presence would pose a clear risk to the safety of others.

Derogation from rights during a state of emergency

International human rights law does recognise that during emergencies, States may need to derogate from rights for the greater common good. In recognition of this, Article 4 of the ICCPR provides for emergency derogations in the following terms:

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*
3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*

Article 4 thus places a number of conditions, both substantive and procedural, on the imposition of emergency derogations:

- derogations may only be entertained in times of emergency which threaten the life of the nation;

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- derogations must be officially proclaimed;
- derogations may only limit rights to the extent strictly required and may never be applied on a discriminatory basis;
- no derogation is possible from certain key rights, including the rights to life, to be free of torture and slavery, not to be imprisoned for a contractual obligation, not to be tried or sentenced for something which was not a crime at the time of commission, to recognition as a person before the law, and to freedom of thought, conscience and religion;
- States imposing derogations must inform other States Parties of the rights to be limited and the reasons for such limitation; and
- Derogating States must inform other States Parties of the termination of any derogation.

Among other things, it is clear that any application of emergency laws derogating from rights must be limited in time. The UN Human Rights Committee specifically emphasised this in its General Comment on Article 4 stating:

*“Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”.*⁸⁰

Principle 48 of the *Siracusa Principles* provides that States shall “terminate such derogation in the shortest time required to bring to an end the public emergency...”. Principles 55 and 56 provide that derogations shall be subject to independent legislative review and that individuals who question the need for derogation measures shall have an effective remedy. These points are also restated and re-inforced by the *Johannesburg Principles*.

Accordingly, a right to freedom of expression continues to exist until such time as a state of emergency is declared and freedom of expression is formally derogated from and then only for such time and to such extent as is required by the exigencies of the situation.

⁸⁰ Available at: <http://www.article19.org/docimages/511.htm#intro.>, para. 2.

2.2 Freedom of Expression and Information under International Humanitarian Law

International humanitarian law (IHL) does not express explicit provisions that protect freedom of expression or information. The Geneva Conventions and their additional Protocols, the principal source of contemporary IHL, do make reference to journalists, but these provisions are not aimed at protecting the journalistic function as such; rather they protect the persons involved in carrying out this function.⁸¹

This does not mean, however, that the right to freedom of expression may be disregarded in times of armed conflict. While the emergence of an armed conflict triggers the applicability of IHL, it does not by itself suspend the applicability of international human rights law. Only if the conflict causes a public emergency may the State derogate from its human rights obligations, as discussed *supra*. IHL and international human rights law are thus complementary and – to an extent – overlapping, fields of law.⁸² For the purposes of this study, the importance of IHL is twofold; in the first place, IHL continues to apply even when a State has derogated from its human rights obligations (no derogation from IHL is possible), and in the second place, IHL applies equally to and expressly binds all parties to an armed conflict.

General Obligations

International humanitarian law is a set of rules which seek to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Under international humanitarian law, ‘protected persons’ are those to whom a particular humanitarian treaty applies. In a broader sense, protected persons are those who benefit in wartime from treaty-based or customary humanitarian law. In particular, protected persons are the wounded, the sick, the shipwrecked, prisoners of war, civilians and other persons

⁸¹ *The protection of journalists engaged in dangerous professional missions*, Hans-Peter Gasser, ICRC 1983. <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPGY>.

⁸² *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, Hans-Joachim Heintze, International Review of the Red Cross No 856, p. 789-814, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/\\$File/irrc_856_Heintze.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/$File/irrc_856_Heintze.pdf).

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not or no longer taking part in the fighting, medical and religious personnel, the staff of relief operations, the staff of civil defence organisations and mediators.⁸³

Article 27 of Geneva Convention IV sets out the core humanitarian law provisions relating to the protection of civilians in times of conflict. It provides, in relevant part:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

This has been interpreted broadly to include respect for the human rights of civilians in the widest sense. The authoritative Commentary to the Geneva Conventions published by the International Committee of the Red Cross states:

[I]t covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers; it includes, in particular, the right to physical, moral and intellectual integrity – an essential attribute of the human person.⁸⁴

According to the ICRC, Article 27 protects all inherent rights of the individual, and it flows from the preamble of the UDHR that the UDHR is an enumeration of what are considered to be inherent rights under international law. As such, Article 27 should be interpreted in light of the basic human rights norms as elaborated in the UDHR.⁸⁵ Given its central position in international human rights law, there can be little doubt that the right to freedom of expression is included among the rights protected under Article 27.

⁸³ *International Humanitarian Law in Brief*, ICRC,

http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_in_brief?OpenDocument

⁸⁴ *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, note 87, pp. 200-201.

Duties of occupational powers

IHL regards the phase of occupation as a transitional one. An occupying power does not assume the rights of a sovereign State upon the occupation of territory; it merely acts as a ‘caretaker government’ pending the establishment of the sovereign government.⁸⁶ As a matter of principle, therefore, it is under an obligation to respect the laws in force.

This principle is long-established in IHL and has been codified in the 1907 Hague Regulations and the 1949 Geneva Convention IV. Both these instruments provide that, as a general rule, the laws of the occupied territory shall remain in force, subject to some limited, narrowly drawn exceptions.⁸⁷

Principally, Article 64 of the Geneva Convention IV states that an Occupying Power may repeal or suspend existing legal provisions only to the extent that they constitute a threat to security or an obstacle to the application of the Convention.

Protection of journalists

Alongside the general protection of the right to freedom of expression provided for by Article 27 of the Geneva Convention IV, express measures for the actual protection of journalists during armed conflict are provided for under Article 79 of Additional Protocol I,⁸⁸ which provides:

- 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.*
- 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of*

⁸⁵ *The Handbook of Humanitarian Law in Armed Conflicts*, note 87, pp. 247.

⁸⁶ This principle is a logical consequence of the ban in the UN Charter on acquiring foreign territory by force.

⁸⁷ Hague Regulations, Article 43; Geneva Convention IV, Article 64. Although the text of Article 64 of Geneva Convention IV is limited to the penal law, it is widely recognised that the prohibition of interference applies to the entire legal framework. One reason Geneva Convention IV makes express reference only to respect for penal law, is that during the Second World War, occupying powers interfered in a particularly scandalous way with the criminal laws of occupied territories. See, amongst others, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, ICRC, Geneva, 1958, p. 335, online at <http://www.icrc.org/ihl>; *The Handbook of Humanitarian Law in Armed Conflicts*, D.Fleck, Ed., (OUP, Oxford: 1995), pp. 254-255.

⁸⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977.

war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention.

3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

These measures relate specifically to international armed conflicts. Common Article 3 of the Geneva Conventions and Additional Protocol II – which apply to internal armed conflicts – do not contain any express provisions for the protection of journalists. However, if not involved directly in hostilities, journalists still fall within the definition of a civilian even during internal conflicts.

In accordance with these principles, during international and internal conflicts, journalists are considered civilians and must be afforded protection as such; i.e., they must not be the object of a deliberate attack. Moreover, a deliberate attack causing the death or wounding of a journalist would constitute a war crime.⁸⁹ The protection granted to civilians under IHL is not linked to the nationality of the person concerned. Accordingly, any journalist who does not take part in hostilities is protected, regardless of his or her nationality.⁹⁰

⁸⁹ Article 85 (3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977.

⁹⁰ *The protection of journalists engaged in dangerous professional missions*, Hans-Peter Gasser, ICRC 1983. <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPGY>.

3 COUNTRY STUDY: SRI LANKA

3.1 Introduction⁹¹

*“Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs.... The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion, aided by the widest possible dissemination by diverse and antagonistic sources....”*⁹²

Dating back to colonial times, Sri Lanka has had a history of limited freedom of expression, restrained by both formal and informal mechanisms, based on factors ranging from literacy and social status, to ethnicity, tradition and caste. One key indicator was that the local population lacked the franchise, save for a small elite group, prior to 1931.⁹³ With the rise of nationalist movements during the immediate pre-independence period, the media in Sri Lanka in particular became polarised along ethnic and religious lines.⁹⁴

Many positive changes were seen in post independence Sri Lanka, such as higher literacy rates, increase of trade and trade union activities, secularisation and diversification of media, increases in local ownership and distribution of newspapers, assisting in the evolution of greater freedom of expression and access to information.⁹⁵

However, the adverse effects of the British rule in Ceylon (as it was then called), resulting in the creation of an English-speaking elite from among the Sinhalese and the Tamils, began to

⁹¹ This chapter was written by Cyrene Siriwardhana, Deshini Liyanaarachchi and Araliya Senapathi of the Centre for Policy Alternatives. They wish to acknowledge the valuable comments on the draft of the chapter provided by external reviewer Suriya Wickremasinghe of the Nadesan Centre for Human Rights Through Law.

⁹² *Joseph Perera v. the Attorney General*, (1992) 1SLR 199, p 223, per Sharvananda CJ

⁹³ International Centre for Ethnic Studies, *Baseline Study: Volume 1 – The Mass Media In Sri Lanka*, 1996, p 12. Generally however Sri Lanka has a good record on franchise, being one of the first British colonies to get universal franchise.

⁹⁴ *Ibid.* pp 9-14

⁹⁵ *Ibid.*

take its toll, engendering an opposition that took racial and religious overtones. The Sinhala Only Act was passed in 1956, making Sinhala the sole official language, followed by unequal expansion of educational opportunities and community quota-based changes to university admission policy in 1970, limiting the Tamil population's access to higher education, jobs and land.⁹⁶ Tensions heightened as a result, leading to the eventual eruption of an armed struggle by the separatist Liberation Tigers of Tamil Eelam (LTTE) against the government in the early 1980s. This ushered in a period of serious impediments to free expression and in particular to media freedom in Sri Lanka.

A somewhat parallel development was the rise of the leftist youth movement, leading to the Janatha Vimukthi Peramuna (JVP)⁹⁷ insurrection in 1971 and a massive clampdown using emergency regulations. The use of emergency rule as an easy way to govern – as distinct from a temporary device directed at a true situation of public emergency – dates back to this period. Emergency regulations began to be used gradually to regulate areas of activity increasingly unrelated to national security. Also around this period came two significant legal inroads into media freedom in particular - the Press Council Law (1973) and the Associated Newspapers of Ceylon Law (1974), both of which will be discussed later in this chapter.

As a result, freedom of expression has been a critical issue on the Sri Lankan political agenda since the early 1970s. Repressive laws and other state attempts to impose restrictions on freedom of information and expression, contributed to an atmosphere within which media freedom and the personal security of media personnel and artists in Sri Lanka were under severe threat. Informal methods – often arbitrary and hidden from public view – have included widespread threats and attacks on journalists and other media personnel for expressing views or publishing material that the authorities deemed undesirable. A culture of violence and impunity – that is still at large – meant that the expression of dissent in itself could pose severe dangers. It has been documented that more than 50 members of the media and artistic community have lost their lives as a direct consequence of their work during the

⁹⁶ See also, S J Tambiah, *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy*, University of Chicago Press, 1986 and K M de Silva, *To Restore Peace to Sri Lanka's Fractured Polity*, available at <http://www.peaceinsrilanka.org/insidepages/background/background.asp>

⁹⁷ Founded in the late 1960s, the JVP (People's Liberation Front) was popularly known as a militant youth group. With its roots in the South of the country, the JVP took an anti-capitalist stand, and were responsible for two of the most violent insurgencies in the history of post independence Sri Lanka; first in 1971 and later in 1987-1989. Currently, the JVP is a mainstream political party and forms part of the UPFA alliance which formed the minority government following the general election in April 2004.

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past two decades, while many media personnel have suffered physical attack, harassment and loss of property, while some have had to flee the country.⁹⁸

The right to peaceful protest has also been repeatedly violated in Sri Lanka in the past.⁹⁹ Numerous incidents are on record in which violence and intimidation have been used (at times with the alleged backing of the government) to break up peaceful meetings, preventing people from expressing their opposition to government policies and actions, and to attack demonstrators and strikers. Journalists in the field covering these events have also been victims of abuse.

In addition to censorship wielded by the government, armed groups have also attempted to silence their critics by murder and threats, thereby fostering a culture of fear. In the North and East, the LTTE sought to suppress all voices of dissent or criticism, allowing publication only of pro-LTTE newspapers. A large number of civilians and media personnel of all three ethnic groups, as well as members of the civil administration in the North and East, have been killed or driven from their homes for expressing views critical of the LTTE.¹⁰⁰ In the South, the JVP also assassinated a number of members of the then ruling United National Party (UNP) as well as members of other parties that supported the Indo-Sri Lanka Accord¹⁰¹ when it was signed in 1987. Further, the media became a target of JVP attacks during the 1987-89 insurgency in the South, during which they called for a boycott of the state-owned media and attacked and killed a number of senior media personnel and persons selling government-owned newspapers.

However, considerable improvement has been made in this area recently due to the peace negotiations and the ceasefire agreement (CFA) of February 2002 between the government and the LTTE. A number of oppressive laws have been repealed or amended. Yet, many restrictive laws remain, though they are currently not being resorted to, leaving open the possibility of excessive censorship to resurface in the event of changes in the political climate.

⁹⁸ Sunada Deshapriya, *Media Freedom in Sri Lanka, 2002: Some Critical Issues*, available at http://www.ifj-asia.org/Sri_Lanka___Media_Freedom.html

⁹⁹ See e.g. Supreme Court decisions of *Amaratunga v. Srimal* (1993) 1SLR 264; *Wanigasuriya v Peiris* SC(FR) 199/87, SCM 22.9.88; *Ratanasara Thero v. Udugampola* (1983) 1SLR 461.

¹⁰⁰ ARTICLE 19, *An Agenda for Change: The Right to Freedom of Expression in Sri Lanka*, 1994, pp.4

¹⁰¹ One of the several failed attempts at resolving the ethnic conflict.

Further, a continuing degree of self-censorship and significant restriction of media freedom still continues through informal means.¹⁰²

In a sense, despite the peace process looking fragile, the current climate has ironically created within it a new space for divergent views and for looking critically at the past negotiations. Yet, the question of potential tension between freedom of expression and information and national security, and the wider role of free expression and accurate reporting in conflict resolution processes, continue to merit greater attention and study.

3.2 Recent political developments

Coming into power on a human rights and media reform platform in 1994, the People's Alliance government, under Prime Minister Chandrika Bandaranaike Kumaratunga, was sworn into office amidst considerable hope that her government would bring about significant changes affecting freedom of expression. In its manifesto, the PA committed itself to strengthening public expression of views and independence of the media.

In 1995, the government established four Committees to inquire into the following areas:

- broad-basing of the state-owned Lake House newspaper group;
- reform of laws relating to the media and to media freedom;
- establishing a media training institute;
- improving conditions for media personnel.

Reports of the above Committees, containing far-reaching recommendations promoting free expression were handed over to the President by the end of 1996. Instead of implementing these, in 1997, a Parliamentary Select Committee on the Legislative and Regulatory Framework relating to the media was set up. The mandate of the Select Committee included the establishment of a new broadcasting authority, the repeal of the Sri Lanka Press Council

¹⁰² See also http://www.rsf.fr/article.php3?id_article=10275 for details on the recent intimidation of TamilNet journalist Dharmaratnam Sivaram.

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Law and the creation of a new Media Council. However, yet again, there were no conclusive results.¹⁰³

Over the few years that followed, the state media grew progressively more critical of the private media due to increasing coverage given to issues of opposition interest. In particular, coverage of violence perpetrated by persons linked to the state and blatant violations of election law by the police during the series of elections that were held since 1997, led to a heightening of tensions.

Some of the important developments of general human rights interest in the 1990s were the ratification by the Sri Lankan Government of the Optional Protocol to the International Covenant on Civil and Political Rights; the establishment of a new Human Rights Commission; and legislation making torture a specific offence - the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No 2 of 1994. In addition, 1994 saw the repeal of the repressive legal provisions on parliamentary privileges, which gave Parliament concurrent power with the Supreme Court to punish in respect of certain breaches of privilege.¹⁰⁴

In December 2001 – following a year of political upheaval – a new government was formed by the United National Front (UNF). The lapsing of emergency rule in July 2001 and the ceasefire agreement with the LTTE in 2002 enabled a resuscitation of media freedoms in Sri Lanka. In response to various campaigns launched by local media freedom organisations in collaboration with international organisations, the new government embarked on a promising media law reform programme. The North and East of the country – former war zones – became once again accessible to journalists. Interviews with rebel leaders appeared in many newspapers and on television. Freedom of movement was re-established. However, in the North and East, media freedom remained curtailed by a culture of violence. Viewpoints critical of the LTTE are conspicuously absent in the Tamil language press.

¹⁰³ Pinto-Jayawardena, “Freedom of Expression and Media Freedom” in *Sri Lanka: State of Human Rights 2003* – Law & Society Trust, pp. 136.

¹⁰⁴ For instance, publication of defamatory statements reflecting on the proceedings and character of the House, or concerning any member in respect of his/her conduct as a member: Parliament (Powers and Privileges) Act No 21 of 1953 as amended.

Media reform

Some of the key developments of this period are as follows:

- *Code of Professional Practice (Code of Ethics) for Journalists, Media Training Institute and Voluntary Press Complaints Commission*¹⁰⁵

Resulting from efforts initiated in 2000 by the Editors Guild of Sri Lanka, the Newspaper Society of Sri Lanka and the Free Media Movement, the Sri Lanka Press Institute was established in 2003, under a board of directors comprised of members of the three organisations. The institute spearheads a college of journalism providing media training and also appoints the self regulatory Press Complaints Commission.

- *Freedom of Information Bill*

The drafting of the Bill was initiated by the Editors Guild and facilitated by the Centre for Policy Alternatives with support from the Free Media Movement. The Bill conforms to international standards on the right to freedom of information.¹⁰⁶ The Bill was approved by the Cabinet and was to be tabled in Parliament during the course of last year. However, due to upheavals in the political arena, no further progress has been made.

- *Repeal of criminal defamation laws*

Criminal defamation laws have been relied upon extensively in the past as a means to persecute editors and journalists for critical reportage. The beginning of 2002 saw five cases filed in the High Court of Colombo against Victor Ivan, the editor of the *Ravaya* newspaper. Four other mainstream newspaper editors were also facing criminal defamation charges.¹⁰⁷ Local and international human rights organisations had been campaigning for the abolition of criminal defamation laws in Sri Lanka for over a decade. In 2002, Parliament unanimously passed a law abolishing criminal defamation.

¹⁰⁵ See also Pinto-Jayawardena, *op cit*, pp. 160-161.

¹⁰⁶ *Ibid.* pp. 143-146.

¹⁰⁷ Sunanda Deshapriya, *Media Freedom in Sri Lanka, 2002: Some Critical Issues*, available at http://www.ifj-asia.org/Sri_Lanka___Media_Freedom.html.

Developments since the ceasefire

In November 2003, the President – on the grounds of safeguarding national security and combating corruption and crime – used the powers conferred on her by Article 44 of the Constitution to take over three critical Ministries – Defence, Media and Interior. Following this act, there ensued a period of increased tension between the government led by Prime Minister Wickremasinghe, with the parliamentary majority, and the President, with executive powers. In spite of a series of high level talks, no cohabitation agreement could be reached.

In February 2004, the President dissolved Parliament and snap Parliamentary elections were called for April. The coalition party United People's Freedom Alliance (UPFA) came into power through this election, forming a minority government. The JVP emerged as the leading member of the coalition, next to the Sri Lanka Freedom Party (SLFP).

The most significant new political formation that emerged from the process was, however, the Tamil National Alliance (TNA) – a coalition of former Tamil United Liberation Front (TULF) politicians and the LTTE – which won 20 seats in the North and East. Nine seats were won by Buddhist monks who contested under the Jathika Hela Urumaya (JHU – National Sinhala Heritage)¹⁰⁸.

Another recent development was the first public emergence of a rift within the LTTE, hitherto widely seen as indivisible. In early 2004, the LTTE district commander for Batticaloa-Amparai, Karuna, voiced his intention to break away with cadres loyal to him. Karuna claimed that the North was dominating the East, with development taking place in the North ignoring the needs of the East.¹⁰⁹ This resulted in considerable political instability and the outbreak of violence in the region during the months that followed. Karuna was discharged from the LTTE in March 2004 and a new special commander appointed to the district.¹¹⁰

¹⁰⁸ This is the first time in Sri Lanka's history that a political party fielded a list of candidates consisting only of Buddhist monks.

¹⁰⁹ http://www.eelam.com/freedom_struggle/ltte_press_releases/2004/PR20040306.html

¹¹⁰ <http://www.lttepeacesecretariat.com/mainpages/n06034.htm>

3.3 Media situation

Sri Lanka has both state-owned and privately-owned media. What follows is a brief overview of the media and the framework for its regulation.

State-owned media

The state controls the Associated Newspapers of Ceylon Limited. (ANCL, or Lake House as it is popularly known), the biggest newspaper establishment in the country with approximately 20 publications, the broadest outreach in terms of distribution networks and extensive benefits through state advertising. The state also controls the Sri Lanka Broadcasting Corporation (radio), the Sri Lanka Rupavahini Corporation (television) and ITN radio and television network – ten radio channels and three television channels – as well as five regional radio stations.

State media is predominantly perceived as the main propaganda arm of successive governments. Editors, publishers, and news directors – particularly in state media institutions – often fall prey to partisan agendas or consciously adopt them. The appointment of favourable senior managers by newly elected governments based on personal connections as opposed to merit is often seen in the state-owned media operations. Privately owned media in Sri Lanka has long been accused of being pro UNP (the main political party in the United National Front) due to family links with the former Prime Minister Ranil Wickremasinghe. In general, a partisan media culture is deeply entrenched in almost all Sri Lankan mainstream media.

There is also a strong state-centric bias among the mainstream media. The party in power and party politics in general get high coverage, while human rights, democracy, gender and minority issues do not get sufficient coverage. In general, the media in the country is male-dominated and patriarchal in its attitudes. Most media personnel do not question popular thinking and insert themselves into existing structures in the social hierarchy.

Privately-owned media

There are seven large private establishments that print a number of daily newspapers in all three languages. In addition there are also a number of private establishments that publish several weekend newspapers. Although radio and television were a government monopoly until the mid-1980s, several privately-owned television and radio stations have now been established. The private sector owns four TV stations (with seven channels), and four radio stations (with 12 channels). The transmission capacity and reach of the private stations still remain far more limited than that of the state-owned electronic media. Thus, state radio and television remain the electronic media with the widest reach.

Four daily Tamil newspapers are published in Jaffna in the North, one of them being the provincial edition of a Colombo-based newspaper.¹¹¹ The daily *Eelanatham* is now also published in the LTTE-controlled areas of the Vanni District in the Eastern province.

The LTTE has its own media arrangement, including a radio station broadcasting within a limited radius (Voice of Tigers Radio), an extensive video production unit and three monthly publications.¹¹² One of the three publications, *Dedunna* (Rainbow), is the LTTE official Sinhala language paper, which has a limited reach in Kilinochchi and Jaffna. *Dedunna* is also distributed to interested persons in Colombo and other parts of the country, including the East.¹¹³

Navamani, a weekly paper aimed at a Muslim audience is published in Colombo and also reaches certain areas within the Eastern province (and the South) with a high Muslim population.

Thinakathir, a Tamil language daily was also published in Batticaloa in the Eastern province until late 2002. However, this paper has now ceased publication due to political violence against it by the LTTE. In August 2002, the *Thinakathir* office was raided by a gang of

¹¹¹ Namely *Udayan*, *Namadu Eezanadu*, *VALampuri* and *Thinakural* (Jaffna Edition).

¹¹² Namely *Viduthalai Pulihal*, *Suthanthira Paravehal* and *Dedunna*.

¹¹³ Centre for Policy Alternative, *Study of Media in the North-East of Sri Lanka*, 2003, pp. 17

masked and armed men, who bound and blindfolded the journalists and staff present, removed computers and other equipment and set fire to the newspaper office.¹¹⁴

The LTTE has also attacked the Tamil language weekly *Thinamurusu*, a pro-Eelam People's Democratic Party (EPDP) paper published in Colombo that reaches the North and East of the country. In November 2000, Aputharajah Nadarajah, the editor of *Thinamurusu*, was shot dead in a Colombo street by unidentified gunmen.¹¹⁵ In May 2002 sales of *Thinamurusu* were banned in many places in the North and East¹¹⁶ and returned to the stands only after strong intervention by the Sri Lanka Monitoring Mission (SLMM).¹¹⁷ In December 2002, an unidentified gang also attacked the *Navamani* editorial office.¹¹⁸ In August 2003, a group suspected to be LTTE cadres, burned a stock of the Tamil weekly newspaper *Thinamurusu* in Valachchenai while the papers were in transit to Batticaloa.¹¹⁹

However, the LTTE has not been the only party accused of wielding violence against journalists and media institutions in the North and East. Mylvaganam Nimalarajan, a respected journalist based in the North, was shot dead in October 2000 by a group of unidentified gunmen.¹²⁰ Nimalarajan contributed regularly to the BBC's Sinhala and Tamil language services, was a correspondent for the Colombo-based Tamil daily *Virakesari* and Sinhala weekly *Ravaya*, and the secretary of the Northern Journalists Association.¹²¹ The EPDP, a political ally of the People's Alliance (PA) is suspected of having carried out the Nimalarajan murder in order to silence his reportage on atrocities by the military in the past as well as his coverage of election malpractices by the EPDP during the general election held in October 2000.¹²² The Committee to Protect Journalists (CPJ) referred to Nimalarajan as "one of the few sources of independent news from Jaffna, a strife-torn area where journalists have rarely been allowed free access."¹²³

¹¹⁴ IFJ, *op cit*.

¹¹⁵ RSF, *2000 Annual Report Asia, Sri Lanka*, <http://www.rsf.org/rsf/uk/rap2000/asia/srilanka.html>.

¹¹⁶ IFJ, *op cit*.

¹¹⁷ Pinto-Jayawardena, *op cit*, p 164.

¹¹⁸ *Ibid*.

¹¹⁹ IFJ, *op cit*.

¹²⁰ <http://www.wsws.org/articles/2000/oct2000/sri-o28.shtml>.

¹²¹ <http://www.wsws.org/articles/2000/oct2000/sri-o28.shtml>.

¹²² <http://www.wsws.org/articles/2000/oct2000/sri-o28.shtml>.

¹²³ http://www.cpj.org/attacks00/asia00/Sri_Lanka.html.

In a more recent incident apparently connected to the rift within the LTTE, Tamil journalist Aiyathurai Nadesan was gunned down by two unidentified men in the Batticaloa town in May 2004.¹²⁴ Nadesan – who won the award for Best Tamil Language Journalist in 2000 at the Journalism Awards for Excellence – was the Batticaloa correspondent for the Tamil language newspaper *Virakesari*, the Tamil language service of the London-based radio station IBC and several online media.¹²⁵ Allegations regarding the murder have been made against the Karuna faction of the LTTE, while backing by the military (government) is also alleged.¹²⁶ Nadesan had been threatened by the military in 2001 for his criticisms of the government and security forces.¹²⁷

Irrespective of who may be responsible for these acts of violence and murder, these incidents typify the difficult situation faced by journalists in the North-East, which has led to minimal investigative, critical, or independent news reports from these provinces and a significant drop in journalistic capacity.¹²⁸

Exacerbating the situation is the problem of impunity in relation to attacks on freedom of expression. A number of factors contribute to this, including the lack of evidence as well as the lack of will to prosecute those involved in harassing, intimidating and at worst murdering media personnel. The case of Iqbal Athas – which saw the prosecution and conviction of the perpetrators – is the exception to the rule. It is discussed later in this chapter.¹²⁹

Media activism

A number of journalists' organisations work for the advancement of the media profession in Sri Lanka. Key among them are: the Free Media Movement (FMM), Working Journalists' Association, the Photo-Journalists Association and the Editors Guild of Sri Lanka. There is also a Foreign Correspondents' Association and the Centre for Counter-Conflict Journalism (CCCJ). There are a number of trade unions of media workers and the Federation of Media Employees Trade Union (FMETU), which unites all of them. Amongst media organisations

¹²⁴ <http://www.tamilnet.com/art.html?catid=13&artid=12131>.

¹²⁵ *Ibid*.

¹²⁶ http://www.cpj.org/cases04/asia_cases04/srilanka.html.

¹²⁷ *Ibid*.

¹²⁸ See also Centre for Policy Alternative, *op cit*.

¹²⁹ See section 3.3.

providing journalism and communications training are the Sri Lanka Foundation Institute (SLFI) and the Sri Lanka Newspaper Society.¹³⁰

The Northern Journalists Association (NJA), the Jaffna Journalists Association (JJA), the Eastern Journalists Associations (EJA) and the Kattankudy Media Forum (protecting the rights of Muslim journalists) are also among the organisations working to protect the rights of journalists and media in the North and East of the country.¹³¹

The Women and Media Collective is an organisation that focuses on equality for women in Sri Lanka and changing attitudes about women's oppression. Its work includes lobbying for legal reforms, strengthening women's networks and promoting discussion on gender issues.¹³²

3.4 Cultural, religious and language factors

As the Media Monitor points out:

“Sri Lankan newspapers of the three language media cater to sets of individuals who inhabit different worlds and espouse different worldviews. Though the island is small, yet the gulf that separates these language groups appears to be ever-widening, particularly between the Tamil readership and the rest.

An analysis of the reportage of the North-East war demonstrates that these differences are not accidental or innocent, but rather, a reflection of deep ideological divergences that need to be brought to the surface and addressed directly for any lasting solution to the ethnic crisis to be meaningful and just.”¹³³

¹³⁰ See section 1.5 for information on media training in the North and East.

¹³¹ Centre for Policy Alternative, *op cit*, pp. 17-33.

¹³² <http://www.cenwor.lk/womenmedia.html>.

Case example: News coverage in Sri Lanka¹³⁴

On 9 October 2002, a clash took place between a few hundred people and the Special Task Force (STF) Army Camp in the East of Sri Lanka, in a place called Kanjirankuda. Some persons among the group attacked the camp with stones and tried to enter and destroy the camp premises. They wanted the camp to be removed. On this particular day, according to LTTE sources, two of their members had been assaulted by STF personnel, a charge which the STF denied. The LTTE undoubtedly helped mobilise the mob against the STF camp. Unable to stop the agitated mob from entering the camp after using tear gas and rubber bullets, STF personnel opened fire using live ammunition, killing seven people and wounding 14 others.

A look at the way in which the mainstream media in Colombo reported this incident a day after is revealing:

English Newspapers

“Four killed as mob attacked STF camp – Premier orders full probe” (Daily Mirror, Wijeya Group)

“LTTE storms Akkareipattu STF Camp” (The Island, Upali Group)

Sinhala Newspapers

“Gun fire at a group who tried to storm in to STF camp – 6 dead. 5 STF injured as well” (Daily Lankadeepa, Front Page 3 column, Wijeya Group)

“Four tigers dead after clash in Ampara – PM orders commander to investigate” (Divaina, Front Page 3 column, Upali Group)

“Group which attacked STF Camp shot at. Six dead. 27 injured. PM Orders a probe” (Lakbima, Front Page 2 column, Sumathi Group)

“Military leaders dispatched to investigate Akkareipattu incident where two persons have died.” (Dinamina, Front Page 3 column, Lake House)

Tamil Newspapers

“Four dead as STF fires into a hartal. 14 injured. Potuvil LTTE leader accuses STF” (Virakeseri)

“Seven people dead, 15 injured due to STF firing in Thitukkovil – Ranil orders probe” (Thinakkural)

¹³³ Centre for Policy Alternatives, *Media Monitor*, Vol. 1, Issue 1, 1997, pp. 6

¹³⁴ Sanjana Hattotuwa, *Media and Conflict in Sri Lanka*, see <http://www.cpalanka.org>

“Seven dead, 16 injured due to STF firing into a peoples rally in East” (Suder Oli)

“Hartal in Kalmunei, tires [sic] in Akkareipattu burned to protest STF action – PM orders immediate inquiry” (Thinakaran, State Owned)

Other than the immediately evident differences in the headlines, one can also see that not a single Tamil language newspaper used the word ‘stormed’ or the equivalent. The Tamil media has the STF firing into a peoples’ protest (Hartal), and gave more prominence to the LTTE version of events. On the other hand, news reports of privately owned English newspapers had the STF firing into a mob led by the LTTE. Here too, while the *Island* directly attributes the mob attack to the LTTE, the *Daily Mirror* does not.

The Sinhala newspapers were milder in their headlines, but reflected the bias in the English newspapers. *The Sinhala daily* (Divaina) of the Upali Group did not mirror the headlines of its English counterpart (The Island). However, the weekend *Divaina*, under a different Editor, took a Sinhala nationalist line on the Akkareipattu incident. This anomaly between the daily *Divaina* and *weekend Divaina* is also reflected in differences of reporting and bias between *the Daily Mirror* and *the Sunday Times* of the Wijeya Group.

On the whole, while the state-owned printed media tried to water down the incident and tried to show that the situation was under control, the private-owned media took to the other end of the spectrum and reported the incident in an inflammatory manner.

A recent development in the local political arena has been the emergence of a strong Buddhist nationalist agenda within mainstream politics. This was set against a backdrop of a series of attacks on Christian churches, which appeared to be – at least in part – in protest against the conversion of Buddhists and Hindus to Christianity. A large number of such attacks were recorded in the six months from June to December 2003. This was exacerbated by allegations of murder surrounding the death of Venerable Gangodawila Soma, an influential Buddhist monk described as Sri Lanka’s first Buddhist tele-evangelist.

This emergence was also strongly reflected in the Sinhala language media in the recent past, particularly evident in the coverage of the recent general election campaign, in which the JHU received high coverage, particularly in the privately owned Sinhala language print media.¹³⁵

The arts too have had their fair share of censorship, both formal and informal. *Trojan Kanthawo*, a Sinhala language version of Euripides' Greek drama *The Trojan Women* directed by acclaimed producer and director Dharmasiri Bandaranayake, is a notable artistic venture, which has had to face various impediments since its inception. The play highlighted the sufferings of the Tamil women in the North-East areas in Sri Lanka, at the hands of the state security forces. From its inception, the play has been targeted by various groups for party political reasons as well. The lead actress in the play was Anoja Weerasinghe, who supported the United National Party. After the Presidential Election in 1999 her house was burnt to the ground. Rukantha Gunatilleka, who provided the music for the play, was also victimised by political opponents along with his songstress wife. The director has stated that the Sinhala daily paper *Divaina*, published by the *Island* group, played a prominent role in the campaign.¹³⁶ This paper is known to bear Sinhala extremist views.

The attack on the Sinhala Tamil cultural festival held in Colombo in October 2003 is yet another instance of extremist-driven censorship and political intimidation. The festival was disrupted by a group of provocateurs who launched a physical attack on the audience, alleging that the event was in support of the LTTE. Another armed mob waiting outside the hall entered the premises and attacked the participants. According to the organiser, the festival was the first of its kind, where the Sinhala and Tamil artists came together in Colombo after nearly two decades of civil war.¹³⁷ The attack was allegedly staged by the Sinhala Urumaya political party, a Sinhalese extremist political party, which – at the announcement of the festival – launched a media campaign alleging that the organisers of the festival were supporters of the rebel LTTE.

¹³⁵ Centre for Policy Alternatives, *Monitoring of Media Coverage: General Elections April 2004 Final Report*, 2004, pp. 22-25.

¹³⁶ Panini Wijesiriwardana, *Sri Lankan artist speaks about death threats by Sinhala extremists*, available at <http://www.wsws.org/articles/2003/dec2003/sril-d12.shtml>

¹³⁷ *Ibid.*

Another instance of censorship, not directly related to the conflict but reflecting the role of communal interests, was the withdrawal of permission to the British Broadcasting Corporation to film an adaptation of Salman Rushdie's *Midnight's Children*. This was presumed to be due to pressure from certain Muslim political elements.¹³⁸ It was one of a series of bans relating to the arts on the ground that the material in question might offend some sectional interests. S J Tambiah's *Buddhism Betrayed?* and Taslima Nasreen's *Lajja*, had earlier been banned on similar grounds.¹³⁹ (For the more recent attempted ban of the film *Death on a Full Moon Day*, see the account of the legal challenge later in this chapter.)

3.5 Role of the international community

There are a number of international organisations actively contributing to freedom of expression in Sri Lanka, by acting as watchdogs providing national and global news alerts on violations of freedom of expression and restrictions on media freedom; lobbying the government for redress; building capacity among local journalists; and supporting civil society organisations working in the area.

Organisations such as International Freedom of Expression Exchange (IFEX) through its Action Alert Network (AAN)¹⁴⁰ and IFEX Communiqués, and Reporters Sans Frontières (RSF)¹⁴¹ through their Annual Reports, Press Freedom Barometer and online petitions, highlight attacks on journalists, use of censorship and other restrictive laws and violations of the freedom of expression, taking this information to a global forum with the assistance of local organisations such as the Free Media Movement (FMM).

RSF has also lobbied the government on numerous occasions, demanding action¹⁴² and investigation¹⁴³ against violations of press freedom. The Committee to Protect Journalists

¹³⁸ ARTICLE 19, *Fifty Years On: Censorship, conflict and media reform in Sri Lanka*, 1998, pp. 34-35.

¹³⁹ ARTICLE 19, *Fifty Years On: Censorship, conflict and media reform in Sri Lanka*, 1998, pp. 34-35.

¹⁴⁰ See also <http://www.ifex.org/en/content/view/full/57486/>

¹⁴¹ See also http://www.rsf.org/article.php3?id_article=10275

¹⁴² See also http://www.rsf.fr/article.php3?id_article=7685

¹⁴³ See <http://www.rsf.org/rsf/uk/html/asia/letOuv01/181001.html> for a letter to the President on October 19 2001 urging a full investigation into the murder of Tamil journalist Mylvaganam Nimalarajan in 2000, sent by RSF and signed by 285 local and foreign journalists, editors, media groups and supporters of media freedom.

(CPJ) promotes press freedom by publicly revealing abuses against the press and by acting on behalf of imprisoned and threatened journalists. CPJ also lobbies the government on violations against media personnel and institutions.¹⁴⁴

Other organisations such as Freedom House through its Freedom in the World annual survey and the International Press Institute (IPI) through its Watch List, act as a yardstick on media freedom for both local and foreign organisations. For example, Sri Lanka was added to the IPI watch list in 2000 due to the low levels of media freedom that prevailed at the time. However, later, in 2003, IPI sent a 5-member mission to Sri Lanka in order to assess the situation of the media. Based on the recommendations presented by this mission, Sri Lanka was removed from the IPI Watch List due to improvements in the media situation.¹⁴⁵

In addition to raising awareness regarding restrictions and lobbying the government, a number of international organisations such as the Institute for Media, Policy and Civil Society (IMPACS)¹⁴⁶, International Media Support (IMS), Asian Media Information And Communication Centre (AMIC) and International Federation of Journalists (IFJ) actively engage in media training and capacity-building for journalists and editors in areas such as conflict-sensitive reporting, journalistic ethics and skills, critical reporting and public service broadcasting.

The United Nations Educational Scientific and Cultural Organisation (UNESCO), conducts a Media Research and Training Centre based at the University of Jaffna in the North of the country, an area in dire need of media capacity-building.¹⁴⁷ The Norwegian Agency for International Development (NORAD) together with Swedish International Development Cooperation Agency (Sida) supports the Sri Lanka Press Institute (SLPI) and the media training programme conducted by them in the South of the country.

The Commonwealth Press Union (CPU), ARTICLE 19, World Association of Newspapers, IPI and CPJ have made significant contributions by working closely with local organisations such as the Editors Guild, assisting in media reforms, actively lobbying the government for

¹⁴⁴ <http://www.cpj.org>

¹⁴⁵ http://www.freemedia.at/Sri_Lanka_Mission_Report.htm

¹⁴⁶ See also http://www.impacs.org/index.cfm?Group_ID=2719

the implementation and promotion of freedom of expression and access to official information, organisations such as. The CPU has also conducted Media Monitoring exercises on election coverage in 2000 in Sri Lanka.¹⁴⁸

Organisations such as ARTICLE 19, CPU, the Commonwealth Human Rights Initiative (CHRI) and PANOS South Asia, play a key role through the active engagement of local and regional partners in organising international and regional seminars and conferences to promote awareness, supporting advocacy campaigns, proposing recommendations and promoting declarations in areas such as media freedom, free expression and human rights.

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression buttresses these efforts through periodic reports to the United Nations Commission on Human Rights¹⁴⁹ on the freedom of expression situation in the country and communicates with the government, via formal letters, regarding reported allegations of freedom of expression violations. In addition, Index on Censorship puts out a regular publication with analysis, reportage and interviews on free expression issues as well as a country by country list of free speech violations which includes Sri Lanka.¹⁵⁰

3.6 The general approach of the media

The local language media has a long history of being divided along ethnic lines as well as of identifying with political agendas that promoted their ethnic and religious identities. With its roots in the colonial period, these trends of ethnic and religious bias as well as deeply partisan reporting are still entrenched in the media culture of Sri Lanka.

In reaction to exclusionary practices of the British rule and the English language press aimed at the social elite, a number of Sinhala publications such as *Lanka Lokaya*, *Lakmini Pahana* and *Sandaresa* were started in the 1860s, taking a distinctly Sinhala-Buddhist stance.¹⁵¹ The

¹⁴⁷ Centre for Policy Alternative, *Study of Media in the North-East of Sri Lanka*, 2003, pp. 15-17.

¹⁴⁸ <http://www.cpu.org.uk/sitemap.html>.

¹⁴⁹ See Reports by the UN Special Rapporteur on Freedom of Expression to the UN Commission on Human Rights, 2002 and 2001 (E/CN.4/2000/63 and E/CN.4/2001/64).

¹⁵⁰ <http://www.indexonline.org/about.html>.

¹⁵¹ International Centre for Ethnic Studies, *Mass Media In Sri Lanka*, Baseline Study: Volume 1, 1996, pp. 10.

same trend of religious and cultural focus was also reflected in the limited Tamil media of the time.¹⁵² With the advent of universal adult franchise in 1931, a multitude of publications which barely qualified as ‘newspapers’ mushroomed for the sole purpose of promoting the agendas of one political contestant or the other.¹⁵³ In the 1950s, the media played a significant role in bringing into power governments which championed the “Sinhala only” policy.

Ethnic bias and stereotyping which pervades media and popular culture during both times of war and peace, is well-demonstrated in crime reporting. For example:

- “*Attempt to steal chain of soldier: Muslim suspect in custody*”.¹⁵⁴
- “*Tamil woman in custody for pick-pocketing Rs. 40,000*”.¹⁵⁵
- “*Muslim erects barbed-wire fence around plot of land given by English Governor*”.¹⁵⁶

While it is natural that any media has to keep its language audience in mind, ethnic ownership of media houses, along with sustained exposure to ethno-centric editorial policies, has impeded independent journalism, which would critique the dominant paradigm and provide unbiased reportage on issues related to other ethnic groups.

None of the Sinhala-owned private mainstream media establishments publish newspapers in Tamil. Very little effort is taken to examine news from the perspective of minority communities, save for a few newspapers such as the *Daily Mirror* and *Lankadeepa*, which feature regular columnists who write on inter-ethnic perspectives. The same is true for media establishments with Tamil ownership. None of them publish newspapers in Sinhala.

With the nationalisation of the largest newspaper group in the early 1970s, the stage was set for government manipulation of the media. The regulatory framework of the media and how the present system affects peoples’ freedom to exchange views and information is discussed later in this chapter.

¹⁵² International Centre for Ethnic Studies, *Mass Media In Sri Lanka*, Baseline Study: Volume 1, 1996, pp. 10.

¹⁵³ *Op cit*, pp. 13.

¹⁵⁴ *Divaina*, 9 September, 2001.

¹⁵⁵ *Lankadeepa*, 25 May, 2001.

¹⁵⁶ *Lankadeepa*, 1 September, 2001.

Many laws and policies have been in existence for a long time, hindering free expression in Sri Lanka. These, and in particular their impact during conflict, will be discussed at different relevant points in this chapter. There has always been a tendency for those in power to intimidate others, beginning with the policeman and junior bureaucrat to the highest levels of state. The ordinary person has not considered him/herself as having the right to government-held information. On the contrary, such information – even when it directly affects the person concerned – has been seen as a commodity one has to struggle to obtain. There was not a culture of openness which suddenly gave way to repression with the escalation of conflict, mainly in the North and East but also in the South. With violence and military operations increasing, there has been a tendency to use existing provisions more indiscriminately. In other words the more intense the conflict became the more afraid the government felt to allow divergent views to be heard and the more protective it became of information in its possession. While the current climate cannot be labelled ‘normal’ but more ‘an interim state of no-war/no-peace’, as mentioned earlier in this chapter, there is a discernible loosening up by the state of controls over expression and information.

3.7 LEGAL FRAMEWORK

Overview

Sri Lanka has a plethora of laws dealing with freedom of expression. The basic design of the legal framework has the Constitution at its apex, guaranteeing freedom of expression as a fundamental right. Other laws – both pre-dating the present Constitution and passed after it – stipulate different conditions under which this right may be circumscribed.

a) Laws directly restricting freedom of expression

Since the present study concentrates on free expression in the context of conflict, it was found helpful to broadly categorise the various laws that directly restrict free expression according to how specifically they are directed to a conflict situation.

Two broad categories were identified:

- *General laws that take on special significance in a conflict situation* – These include the Official Secrets Act, Sri Lanka Press Council Law and the Parliament (Powers and Privileges) Act. (Other restrictive laws of general application include defamation and

contempt of court laws (which are not found in legislation).¹⁵⁷ There is no reason why a conflict setting should give these laws particular significance. Hence they will not be discussed in any detail in this study.)

- *Laws directly targeting conflict situations* – These include laws generally pertaining to national security, of the kind that most countries have on the statute books, to be used as and when a conflict arises. In Sri Lanka, the Public Security Ordinance is a prime example. This legislation also includes laws that are originally designed to address a particular conflict at a given point in time, but which may end up being in force for so long that they are seen almost as part of the country’s permanent body of law. The Prevention of Terrorism Act falls into this category.

National security has long been considered a key responsibility of the state. It is this consideration that has shaped the way in which legislators, officials and judges have responded to the interface between public security and the equally fundamental obligation of the state to protect free expression. Three major problems have been identified as affecting national security laws:

- They are often vague, so that their scope is difficult to determine;
- They are often overbroad, so that they cover matters that are insufficiently connected with national security to warrant censorship;
- Many impose unnecessarily harsh sanctions, which create a ‘chilling’ effect.¹⁵⁸

b) Laws indirectly restricting/ regulating freedom of expression

These include primarily the laws that regulate the media. Due to the tensions between the state-controlled and private media; and the confrontational party political journalism that is on the rise in Sri Lanka, who regulates the media and how, take on a special significance. These factors affect the way in which the conflict is portrayed and generally impact on the flow of information on the conflict.

¹⁵⁷ The term “restrictive” is used here not necessarily in a pejorative sense, but merely to indicate the fact that these laws place restrictions on freedom of expression. It does not in any way reflect on the quality of the restrictions imposed by the laws.

¹⁵⁸ Toby Mendel, presentation at an international seminar on Media Freedom, National Security and Election Reporting held in Sri Lanka, April 2000, organised by the Centre for Policy Alternatives.

The principal laws in this regard are the Associated Newspapers of Ceylon Law regarding state ownership of the print media; the Sri Lanka Broadcasting Act and the Sri Lanka Rupavahini Act on the grant of radio and television licences respectively; and the Sri Lanka Telecommunications Act, which regulates the assignment of radio frequency spectrum to broadcasters.

3.8 Constitutional provisions

Right to free expression and restrictions on that right

Article 14(1)(a) of the Sri Lankan Constitution guarantees every citizen the freedom of speech and expression, including publication. This right may nevertheless be restricted by law in the interests of racial and religious harmony, in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence (Article 15(2)). It may also be restricted by law in the interests of national security, public order or the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society (Article 15(7)). In this context “law” includes regulations relating to public security, which have been interpreted as limited to emergency regulations.¹⁵⁹ There is a further specific restriction in relation to the armed forces and police in Article 15(8) wherein free expression rights may be curtailed by law in their application to such forces in the interest of the proper discharge of their duties and the maintenance of discipline.

It is notable that the permissible restrictions on fundamental rights in Article 15(7) do not include the requirement that they be *necessary in a democratic society* to protect the interests claimed (for instance, national security). This is the standard under international law for restrictions on human rights, found in the International Covenant on Civil and Political Rights (which Sri Lanka has ratified) and the European Convention on Human Rights, as well as in other national Constitutions in South Asia. This expressly gives the courts – as ultimate arbiters of human rights issues – the opportunity to examine whether the restrictions are really necessary for the purpose claimed by the government or if some other less restrictive method of achieving the stated aim could have been employed.

¹⁵⁹ SC (FR) Applications Nos 20, 25, 26/2002, SCM 25 March 2003.

Although this requirement is not included in express terms in the Constitution, the Supreme Court has held that the concept of necessity is inherent in Article 15(7).¹⁶⁰ However, rather than leaving this as a matter of judicial interpretation, it would be highly desirable for the Constitution to expressly stipulate that restrictions on fundamental rights must be necessary in a democratic society (in furtherance of the interests specified), in keeping with the texts of international and other human rights documents.

A related problem applicable to all fundamental rights is that, most unusually in a democratic Constitution, the Sri Lankan Supreme Court has no power to strike down unconstitutional legislation. Article 16(1) preserves the validity of all pre-existing laws, both written and unwritten, despite any inconsistency with fundamental rights. For laws passed after the present Constitution (which was adopted in 1978), Article 80(3) provides that no court or tribunal may inquire into the validity of any such law on any ground. Notwithstanding that such a law may violate fundamental rights.¹⁶¹ This whittles down an important aspect of the judicial protection of human rights. There is a brief window of one week after being laid before Parliament when a Bill can be challenged in the Supreme Court on the basis that its provisions infringe fundamental rights. This is woefully inadequate, since it is often difficult to obtain information about a Bill during such a short period, let alone mount a legal challenge against it. For legislation passed prior to 1978 - which includes most of the restrictive laws discussed in this chapter, even this limited possibility of challenge is unavailable.

Seventeenth Amendment - free expression during election time

The recent Seventeenth Amendment to the Constitution strengthens freedom of expression against the manipulation by government of state-controlled media during the time of elections. It sets up an Election Commission with greater power and independence, to conduct free and fair elections. The Election Commission is empowered to issue guidelines on fair

¹⁶⁰ See the *Joseph Perera case*, and more recently *Abeysekera v Rubesinghe*, discussed later in this part.

¹⁶¹ Cf Article 82(6), which states that no law shall be deemed or interpreted to amend, repeal or replace the Constitution, unless enacted according to the special procedure in chapter XII of the Constitution. One suggested approach is that the court may use this Article not to give effect to a provision which infringes fundamental rights in any Act (unless passed in accordance with the special constitutional amendment procedure), on the basis that such a provision is tantamount to an amendment to the Constitution. This argument has not been tested.

reporting during election times and to appoint a competent authority over the Sri Lanka Broadcasting Corporation and the Sri Lanka Rupavahini Corporation (state radio and television). Although the Election Commission has unfortunately not yet been appointed, the current incumbent of the post of Commissioner of Elections is given all the powers of the Commission. As a result we saw, for instance, the appointment of a competent authority for the first time at the general election held in April 2004.

Certain weaknesses have however been identified in the new scheme. Only some state-controlled media is subject to it: the Independent Television Network (ITN), even though owned by the state, is not. In addition, the preconditions for appointing a competent authority mean that by the time the set procedure has been followed and the Authority is appointed, it is often too late to achieve effective monitoring. The Elections Commissioner himself recognises this.¹⁶² It has therefore been recommended that the relevant provisions be amended to allow for the appointment of a competent authority at the start of the election campaign. Overall, the non-appointment of the Election Commission almost two years after legal provision for it was made, is disheartening. The relevant provisions in the Seventeenth Amendment should be implemented as a matter of urgency.

Sixth Amendment - prohibition on advocacy of separate state

Article 157A, brought in by the Sixth Amendment to the Constitution in 1983, contains one of the restrictions on free expression most directly related to the ethnic conflict:

“No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate state within the territory of Sri Lanka.”

This offence attracts severe penalties, including deprivation of civic rights, forfeiture of property and debarment from being a Member of Parliament. All MPs were compelled to take an oath to the effect that they will not support the establishment of a separate state in the above terms. As a result all the MPs belonging to the Tamil United Liberation Front lost their positions as MPs. Their departure pushed Tamil demands for autonomy out of the mainstream

¹⁶² Dialogue on Electoral Process and System, conducted by Centre for Monitoring Election Violence, 30 May 2004.

of politics and further towards violent resistance. The conflict only grew more fierce, with positions hardening on both sides, indicating that attempts to stifle people's freedom of expression only backfires and leads away from rather than towards a peaceful resolution of differences.

3.9 Emergency regulations

Overview

Emergency regulations have been one of the most powerful means by which censorship on conflict has been achieved. The President's power to issue emergency regulations arises from the Public Security Ordinance No 25 of 1947. This power is reinforced and elaborated on by Article 155 of the Constitution, which clarifies that any provisions in the law in relation to the President's power to make emergency regulations will only come into operation after a Proclamation that a situation of emergency exists in the whole or a specific part of the country. The Article also sets out the procedure for making a Proclamation of Emergency, communicating it to Parliament and sanctioning any extension of emergency rule by Parliament. Emergency regulations take precedence over all other laws except the Constitution¹⁶³ and once an emergency has been declared, the fact of the existence of a state of emergency cannot be questioned in court.¹⁶⁴

Section 2(1) of the Ordinance provides that in view of the existence or imminence of a state of public emergency, the President, if of the opinion that it is expedient to do so in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, may, by Proclamation published in the Gazette, declare that provisions relating to Emergency Regulations shall come into operation throughout or in specified parts in Sri Lanka. Subsection (2) states that where Emergency Regulations have come into operation, they will remain in force for a period of one month from the date of coming into effect. This is subject to the earlier revocation of the Proclamation or to the making of a further Proclamation at or before the end of that period. Where Emergency Regulations have come into effect by virtue of a Proclamation, such Proclamation expires after a period of fourteen days from the date of coming into operation

¹⁶³ Public Security Ordinance, section 7; Constitution, Article 155(2).

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unless such Proclamation is approved by a resolution of parliament.¹⁶⁵ While the Proclamation of Emergency must be approved by parliament, there is no requirement that the regulations made must be laid before parliament. Thus there is no mandatory parliamentary oversight of the substance of Emergency Regulations. In practice, however, their substance is sometimes discussed in Parliament.

After being operative almost uninterrupted for many years, emergency rule lapsed in July 2001, along with the search and arrest regime under the Prevention of Terrorism Act (see below). To this extent, Sri Lanka can be satisfied that – parallel to the process of normalisation following the cessation of hostilities – the most repressive laws are being discontinued – at least for the moment. However, the constitutional and legislative provisions that govern the operation of emergency rule remained, leaving open the possibility that an emergency regime could be imposed in the future under the same legal conditions as before. Two general problems pertaining to emergency regulations that have long been identified are the lack of access to the regulations as they are issued, so that the public often remain unaware of their precise content; and inadequate scrutiny by Parliament.¹⁶⁶

In practice, a regular feature in censorship by emergency regulation, and sometimes under other legislation, is the appointment of a competent authority, which must vet the information before it is allowed to reach the public. The competent authority is usually, if not invariably, appointed by a Minister or the President, raising grave doubts over his or her independence.

The following are some of the more draconian emergency regulations restricting free expression, which Sri Lanka has been under, at different times over the past years:

- Editorial comment, feature stories, news reports on any subject should be submitted for approval to a competent authority
- There could be no publication of any matter which is under consideration or alleged to be under consideration by any Minister or Ministry

¹⁶⁴ Public Security Ordinance, section 3.

¹⁶⁵ Public Security Ordinance, section 1 (4).

¹⁶⁶ *Report of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression*, 1996, pp. 20.

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- No person may affix in a public place or distribute among the public any poster or leaflet without prior police permission
- No person shall bring the President or government into hatred or contempt or incite feelings of disaffection
- Printing presses could be sealed if public security, public order or essential services are threatened¹⁶⁷

As an illustration, it may be useful to look at a specific regulation in detail. The Emergency Regulations issued by the President under the Public Security Ordinance on 3 May 2000, brought about the controversial blanket censorship on all newspaper and media institutions. Part 3 of these regulations made provision in respect of the control of meetings, processions, publications, firearms and right of entry. Regulation 14 relates to the control of publications and Regulation 14(1) provided as follows:

“A competent authority may take such measures and give such directions as he may consider necessary for preventing or restricting the publication in Sri Lanka or any specified area in Sri Lanka, or the transmission from Sri Lanka to places outside Sri Lanka, of matters which would or might be prejudicial to the interests of national security or the preservation of public order ...and any directions issued under this paragraph may contain such incidental and supplementary provisions as appear to the competent authority to be necessary or expedient, including provision for securing that documents, pictorial representations, photographs, cinematograph films, teleprinter, telegraph, television, transmission of matters relating to the operations of security forces including news reports, editorials, articles, letters to the editors, cartoons and comments, shall before publication be submitted or exhibited to the competent authority.”¹⁶⁸

Regulation 14(2)(a) states that any person who contravenes the provisions of any direction given under regulation 14(1) shall be guilty of an offence and that where any person is convicted of such an offence for having published a newspaper, the President may by order

¹⁶⁷ Coomaraswamy, “Regulatory Framework for Sri Lanka Press” in *Studies on the Press in Sri Lanka and South Asia*, ed. GH Peiris, 1997, pp. 231.

¹⁶⁸ Gazette Extraordinary No. 1,130/8 – 3 May 2000.

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direct that during such period as may be specified in that order, that person shall not publish any newspaper in Sri Lanka.¹⁶⁹

Regulation 14(1)(b) provides for the closure and take-over of printing presses. It states that where there has been a contravention of the provisions of any direction given under regulation 14(1) in respect of any publication in any newspaper, the competent authority, after issuing one or more warnings, may order that no person shall print, publish or distribute such newspaper for such period as may be specified in the order, or that the printing press in which such newspaper was published shall, for such period as specified in the order, not be used for any purposes whatsoever or used for any purpose as specified in the order.¹⁷⁰ This further provided for the state to take possession of any printing press or any premises on which a press is contained.¹⁷¹ Furthermore, where the competent authority is of the opinion that there has been or is likely to be in any newspaper, publication of any matter which in his opinion, is calculated to be prejudicial to the interest of national security, preservation of public order or the maintenance of supplies and services essential to life of the community, or matter inciting or encouraging persons to mutiny, riot or civil commotion, powers were granted to him by Regulation 14(3), to take over or close down such printing press.

The clauses relating to the control of publications in the 3 May Regulations were amended a week later, which made provision for "...transmission of matters relating to the operations of security forces facsimile, computer, audio or video cassettes including news reports, editorials, articles, letters to the editors, cartoons and comments, or matters to be broadcast on radio or television"¹⁷² being submitted or exhibited to the competent authority prior to publication or broadcast. The same gazetted regulations amended the provisions of Regulations 14(2) and 14(3). As per the amended regulations, the President and/or the competent authority may, by order, direct that any person convicted under Regulation 14(1) for having broadcast any matter on radio or television, shall not operate any radio or television broadcasting station during such period as specified in the order. The closure and take-over clauses were also similarly amended to include radio and television broadcasting stations.

¹⁶⁹ Gazette Extraordinary No. 1,130/8 – 3 May 2000.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

A further significant feature in these 2000 censorship regulations was the breadth of the applicability of an order made by the competent authority. Regulation 14(4) of the 3 May Regulations as well as the amending regulations of 10 May, stated that where a competent authority has made an order under Regulations 14(2)(b) and 14(3) in relation to any newspaper specified by name, such order shall apply not only to any newspaper published under that name, but also to any newspaper published under any other name, if the publication thereof, is in any respect, a continuation of, or in substitution for, the publication of the newspaper specified in the order.

International norms

Article 4 of the International Covenant on Civil and Political Rights sets out the conditions under which rights could be derogated from and deals with the question of emergency. The situation must equal a *public emergency which threatens the life of the nation*, and the restrictive measures taken under it must be *to the extent strictly required by the exigencies of the situation*.

The following are some of the recommendations that have been presented to make emergency rule more accountable:

- The necessity for a state of emergency should be fully stated at the time of the declaration and whenever it is renewed
- There should also be a statement of conditions that must be achieved for the state of emergency to be lifted
- There must be provision for courts to assess whether a declaration of a state of emergency and any extension of it are justified

These kinds of safeguards will help ensure that emergency rule is not used as a matter of expediency to circumvent the usual law-making procedure.¹⁷³

¹⁷² Gazette Extraordinary No. 1,131/20 – 10 May 2000.

¹⁷³ See ARTICLE 19, *An Agenda for Change: the Right to Freedom of Expression in Sri Lanka*, 1994.

3.10 Prevention of Terrorism Act

Another statutory restriction on freedom of expression usually discussed alongside emergency regulations is found in the Prevention of Terrorism Act No 48 of 1979 (PTA). The PTA was first enacted on a temporary basis in 1979 to deal with the armed struggle by the Tamil separatist movement. As this threat grew over the next few years, the law became permanent in 1982. It is however currently inoperative in practice, since the Sri Lankan government made a commitment not to arrest anyone under the PTA as part of the ceasefire agreement with the LTTE in 2002.

The Act is mainly concerned with providing the police with wide powers of search, arrest and detention to deal with suspected terrorism. But Part V deals with the prohibition of publications. It makes it an offence to print or publish in any newspaper, without the approval of a competent authority (appointed by the relevant Minister), any matter relating to:

- (i) the commission or investigation of an offence under the Act, or
- (ii) incitement to violence, or which is likely to cause racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups.¹⁷⁴

Section 2(1)(h) of the PTA additionally provides:

“[Any person who] by words either spoken or intended to be read or by signs or by visible representation or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility among different communities or racial or religious groups... [shall be guilty of an offence]”.

This provision could be seen as deriving some legitimacy from Article 20 of the International Covenant on Civil and Political Rights. Article 20 prohibits any propaganda for war. It further

¹⁷⁴ Section 14(2); the subsection also makes it an offence to distribute newspapers containing material falling into this category.

stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In itself therefore, section 2(1)(h) is not particularly objectionable. But a couple of instances can be identified which indicate a potential for this provision to be abused by the authorities. In one case brought under the Act in 1996, an editor of the newspaper *Satana* (meaning “battle”) and four others were detained in relation to an article about a defeat of the Sri Lankan army by the LTTE. They were later released on the basis that the proper procedure under the Act had not been followed. A more high profile case in the same year saw the news director of a television channel, considered sympathetic to the opposition, charged over a broadcast which said that the LTTE had attacked security forces in the East resulting in the forces fleeing. The Press and the human rights community, both domestic and international, created an uproar over this particular suppression of broadcasting freedom, and the case was withdrawn.¹⁷⁵

The PTA has not been used for censorship purposes as sweepingly as emergency regulations, and it is currently in a state of effective suspension. However, this situation cannot be taken for granted. Instead of pretending it is not there, it would be wise to take this opportunity to review it thoroughly and amend it so that it tackles terrorism in a more rights-conscious manner. The case of the TV news director highlights the room for manipulation by authorities provided by this Act.

3.11 The Constitution, emergency rule and judicial protection of free expression

There are many decisions by the Supreme Court on the right to free expression in Article 14 of the Constitution. This study will concentrate on those cases that deal with emergency regulations, and in particular on cases directly related to restrictions on free expression imposed due to conflict.¹⁷⁶

¹⁷⁵ Coomaraswamy, *op cit*, pp. 232-233.

¹⁷⁶ Jurisdiction in fundamental rights cases is vested in the Supreme Court under Article 126 of the Constitution.

Restrictive approach

Visuvalingam v Liyanage (1984) 2SLR 123 was a Supreme Court judgment delivered soon after the sharp escalation of the armed conflict in the North following the ethnic riots in 1983. It concerned the interference with the press in Jaffna under emergency regulations. The competent authority appointed under the regulations was empowered to censor as well as prohibit the publication of newspapers. While censorship was imposed on virtually all newspapers, the printing and publication of one newspaper circulating in Jaffna, the *Saturday Review*, were banned outright. Two regular readers and one columnist of the newspaper challenged the ban on the ground that it violated their fundamental rights to free expression and to equal treatment under the Constitution. In the Supreme Court, the competent authority sought to justify the ban on the ground that the *Saturday Review* was a political newspaper supporting the division of the country and advocating the use of force to settle the ethnic conflict. The ban was upheld by the Supreme Court on the ground that the competent authority was best placed to judge the security situation and therefore the need for prohibiting the publication.

This case set the trend for a very cautious judicial approach to government censorship of both the war in the North-East and later the youth insurrection in the South. See for example, *Rajapakse v Kudahetti*, where customs officials seized documents pertaining to human rights abuses in Sri Lanka from an opposition Member of Parliament on his way to United Nations Human Rights Commission, and the seizure was held to be lawful.¹⁷⁷

Greater judicial protection

The celebrated case of *Joseph Perera v Attorney General* (1992) saw the tide turn.¹⁷⁸ This case concerned the use of emergency regulations to disrupt a public meeting held by a leftist youth group to protest changes to the education system. The organisers were arrested and detained, and their handbills seized, on the ground that they should have obtained police permission before distribution in terms of the regulation in question.

¹⁷⁷ SC 52/90.

¹⁷⁸ 1SLR 199.

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In a landmark decision, the Supreme Court held that the regulation violated the petitioners' fundamental right to free expression, on the ground that it confers unguided and unfettered powers of pre-censorship on the police. This was the first of only two occasions since independence in which the Supreme Court has held an emergency regulation to violate the Constitution. It is the closest the Court has come to post-enactment review of legislation, which is expressly prohibited by the Constitution (see above). Even though emergency regulations are not Acts of Parliament, but rather subordinate legislation, Article 15(7) of the Constitution elevates them to the position of primary legislation for the purposes of permissible restrictions on specified fundamental rights, including freedom of expression. The paragraph says that the exercise of these fundamental rights shall be subject to such restrictions as may be prescribed by law in the interests of, inter alia, national security, and that for the purposes of this paragraph "law" includes emergency regulations.

The Supreme Court, in a closely argued judgment, explained that Article 15(7) must be read with Article 155(2) of the Constitution. This paragraph states that the power of the President to make emergency regulations includes the power to make regulations that override, amend or suspend the operation of any law, *except the provisions of the Constitution*. Under the Constitution, restrictions on fundamental rights are permitted only on specific grounds. When a regulation is thought to be justified on the grounds of national security, the State must establish that the regulation is indeed necessary to protect national security and the means set out in it are reasonable and proportionate to achieving that end. In this way the Court effectively misapplied the ouster clause in the Public Security Ordinance, which states that no emergency regulation shall be called in question in any court.

The *Joseph Perera case* is thus significant for another reason. One of the criticisms against the fundamental rights chapter of the Sri Lankan Constitution has been the omission of the requirement that restrictions on rights should be necessary in a democratic society (see above). In what could be seen as a victory for constitutionalism over literal interpretation, the Supreme Court in effect read this requirement into Article 15(7). This approach has been reinforced in subsequent cases, notably *Abeysekera v Rubesinghe* (discussed below) and *Wickremabahu v Herath* (1990).¹⁷⁹

¹⁷⁹ 2SLR 348.

In a number of cases after *Joseph Perera*, the Supreme Court upheld the rights to free speech and protest against executive action under emergency rule – see for instance *Amaratunge v Sirimal*(1992)¹⁸⁰ and *Saranapala v Solanga Arachchi* (1999).¹⁸¹

However some commentators have observed a difference in the way in which the Court approaches the free expression rights of the media in contrast to ordinary citizens.¹⁸² In *Wickremasinghe v Jayasinghe* (1995),¹⁸³ an emergency regulation imposing military censorship was challenged as unconstitutional on the ground that it suppressed legitimate debate on government military policy. The petitioner was an opposition Parliamentarian, a former Minister and editor of a newspaper critical of the government. He contended that under the impugned regulation a system of selective censorship was in operation, allowing state-controlled media to censor itself while the private media was targeted more strictly. This was demonstrated by the fact that stories that the private media was prevented from running, appeared in the state media. The petitioner was not even granted leave to proceed. The Supreme Court, while agreeing that it would examine emergency regulations to see if they are overbroad and impinge on fundamental rights, held that the regulation did provide clear guidelines for censorship, given the high level of conflict it was seeking to address.¹⁸⁴

It is pertinent to mention at this point that there have also been attempts in the past to stifle rights of free expression of non-governmental organisations (NGOs). The case of Paul Nallanayagam, President of the Citizens' Committee in the Eastern province, highlights the intersection between NGOs, the ethnic conflict and free expression.¹⁸⁵ Mr Nallanayagam had made certain inquiries himself and requested a police inquiry on the arrest of 23 youth by the Special Task Force (STF) - a government anti-terrorist commando unit, and the subsequent disappearance of these youths. He had also been questioned by foreign journalists about the matter. When Mr Nallanayagam was arrested in connection with this incident, the police found in his briefcase a report he had written about the destruction of a Tamil village by Muslims with the support of the STF. He was charged in relation to both these events under

¹⁸⁰ (SC 468/92).

¹⁸¹ 2SLR 166.

¹⁸² Selvakumaran and Edrisinha, *Mass Media Laws and Regulations in Sri Lanka*, 1998, pp. 65.

¹⁸³ 1SLR 307

¹⁸⁴ Selvakumaran and Edrisinha, *Mass Media Laws and Regulations in Sri Lanka*, 1998, pp. 65-66.

¹⁸⁵ *The Democratic Socialist Republic of Sri Lanka v Nallanayagam*, HC Colombo Case No 1715/85, decided on 17 July 1986, see ARTICLE 19, *Freedom of Expression Manual*, 1993, pp. 138-139.

emergency regulations, with uttering “rumours or false statements likely to cause public alarm or public disorder” and with “exciting feelings of disaffection to or hatred or contempt of the Government”. Mr Nallanayagam was acquitted in a notable determination by the High Court. The judge held that the offence of spreading false rumours could only be established by showing that the allegations were unreasonable or in bad faith, which was not the case here. Further, Mr Nallanayagam could not be regarded as “exciting disaffection” since all his report did was ask for an investigation and that the responsible officers be dealt with.¹⁸⁶

Current position

Another version of the regulation permitting censorship of military information was discussed, this time in detail, in the recent case of *Abeyseker v Rubesinghe* (2000).¹⁸⁷ Here, we find that even where the rights considered were those of a citizen and not the media, when it comes to the particular issue of military censorship of news, the approach of the Court is no different.

A human rights activist challenged the regulation in question as overbroad and thereby in violation of her rights under Article 14. Her complaint was that she was being denied the right to receive information on the war by prior restraint and also prevented from communicating information on important public issues contrary to her rights to free expression and to freedom of thought, conscience and religion.¹⁸⁸

The regulations in question were entitled “Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations”. They applied to military operations in the North and East, including operations carried out by the armed forces or the police, the deployment of troops or use of equipment by such forces, “or any statement pertaining to the official conduct, morale or the performance” of the armed forces or police or any person authorised by the commander-in-chief to assist in preserving national security. The Regulations had been amended from time to time, and this particular formulation was arrived at after a particularly heavy defeat for the army.

¹⁸⁶ *The ARTICLE 19 Freedom of Expression Manual*, 1993, pp. 138-139.

¹⁸⁷ ISLR 314.

¹⁸⁸ The right to receive information has been held an inherent part of the right to free expression, see *Visuvalingam v Liyanage*; *Joseph Perera case*. Cf *Fernando v SLBC*, (1996) 1 SLR 157. The ICCPR expressly includes it in the definition of freedom of expression.

The definition was clearly very broad. It is linguistically, and legally, hard to justify including conduct and morale within the term “sensitive military information” which would normally – even in a war situation – be expected to refer to matters of military intelligence such as military strategy, troop movement and location of crucial equipment. The petitioner argued that the true aim of the regulations was to prevent embarrassment to the government rather than to safeguard national security, which is the lawful purpose for which emergency regulations are permitted to be promulgated under its parent Act, the Public Security Ordinance.

Despite an impressive analysis of the petitioner’s case and the relevant law, the Supreme Court concluded that the Regulations struck a fair balance between the competing interests of national security and the freedom of information. This case demonstrates that it is not possible to rely too heavily on the courts for the protection of free expression rights, particularly in the context of military operations. The approach of the Supreme Court has not always been consistent, with perhaps an increased tendency to defer to the judgment of the executive in times of intensified armed conflict.

At the same time, this case does highlight a dilemma which arises in a war situation, even if there are now increasingly widely accepted principles of war reporting. The petitioner placed heavy reliance on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. The Principles say:

“A restriction sought to be justified on the ground 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 of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology or to suppress industrial unrest.”

Nevertheless, it needs to be recognised that some information may not *simply* be embarrassing to the government, but may indeed *also* have an adverse effect on the morale of troops, in such a way that undermines the government’s military strategy and ultimately affects the

outcome of the military operations. What is necessary therefore, is not merely to criticise the government when it seeks to restrict this kind of information on the ground that it is a purely face-saving device, but confront the fact that disseminating such information could actually have an effect on the war effort. From the government's point of view, the isolated reporting of a heavy government defeat can jeopardise the government's medium- or long-term military strategy. Having accepted that, the case must then be built up for openness in war reporting, in the wider, longer-term interests of achieving a durable solution to the conflict. As the petitioner pointed out, she and others in civil society concerned about the ethnic conflict need to know the true factual situation in order to have a constructive discussion on the possible ways of resolving the conflict.

Moreover, Sri Lanka's recent history has shown that despite official censorship, information on war casualties infiltrates into the public domain. Successive governments have seen the trust in them deteriorate with this persistent seepage of legally censored or censorable news. With news frontiers and communications opening up as they have done in the past few years, it is difficult to imagine that governments would again consider it worthwhile imposing censorship regimes in the way that they did in the 1980s and '90s in Sri Lanka. Nevertheless, given the country's record, there are those who would consider this prediction too optimistic.

Another opportunity to review (a slightly altered version of) the above regulation arose in *Withanage v Amunugama* (2001) 1SLR 391, which concerned the banning of the film *Death on a Full Moon Day*. This case was decided under an emergency regulation that had recently been revised, after a decision by the Supreme Court that its predecessor made no provision for the appointment of a competent authority to regulate its operation.¹⁸⁹ The new regulation prohibited publication of any material pertaining to any operations by the armed forces or police; procurement or proposed procurement of arms or supplies by such forces; deployment of troops or equipment; *and* the official conduct or performance of the forces, which affects the morale of such forces. This definition is somewhat narrower than the one in the *Abeysekera case*, in that it applies not to *any* official conduct or performance by the forces but

¹⁸⁹ *Leader Publications v Rubesinghe* (2000) 1SLR 265. This case proved an embarrassment for the government. The Supreme Court held that the censorship imposed on a Sunday newspaper on the grounds of national security was of no effect, because the Competent Authority who sought to impose the censorship was appointed without any proper legal basis.

only to such conduct or performance as would affect their morale. Whether this tightening of the definition was due to the legal challenge in the *Abeysekera case* or not is a matter for speculation.

The film in question, which in brief depicted the absurdity of a wartime society, was alleged to contain material regarding the conduct of the forces which would affect their morale. The Supreme Court held that the regulation did not apply to producers of films, distributors of films for exhibition at cinemas, and owners of cinemas. As such the Minister in charge of the National Film Corporation had no authority to direct that the exhibition of the film be deferred.

The Court also held, significantly, that since emergency regulations can only be made in the interests specified in the Public Security Ordinance, the regulation in question cannot prohibit *all* statements which affect the morale of servicemen, but only those which affect national security. The Court did not go that step further, however to examine the legality of the regulation itself for compatibility with fundamental rights. It observed that this was unnecessary, since the emergency had by then lapsed and the case could be decided on other grounds.

The recent *Batticaloa Voters' case* is a good illustration of state authorities attempting to use national security laws for apparently collateral purposes.¹⁹⁰ The right to a free and fair exercise of the franchise has been recognised as part of the right to free expression.¹⁹¹ About 50,000 people were prevented from crossing over from “uncleared” (LTTE-controlled) to “cleared” (government-controlled) areas to vote in the general election of December 2001. They were stopped and turned back at an army check point on the grounds that they would pose a security threat. This appeared to be a decision suddenly taken for no valid reason, and was improperly recorded and inadequately communicated to the Elections Commissioner who had overall responsibility for the conduct of the election. The government claimed that the measures were taken under the PTA. The true motive behind the measures appeared to be to prevent the casting of votes which would be unfavourable to the ruling party at the time.

¹⁹⁰ SC (FR) Applications Nos 20, 25, 26/2002, SCM 25 March 2003.

¹⁹¹ *Karunathilaka v Dissanayake* (1999) 1SLR 157.

The Supreme Court held that no rules or orders made under the PTA could lawfully restrict fundamental rights. It held that the measures in question violated the petitioners' rights to freedom of movement and expression, and to equality. Mark Fernando J summed up the situation in the following way:

“The decision-making processes which resulted in those infringements were shrouded in secrecy, haste and bad faith. The infringements took place at a time when there was a serious erosion of public confidence in the integrity of the electoral process, and when it was extremely important to ensure that elections were free and fair, particularly in the “uncleared” areas. Citizens living in those areas needed reassurance – if peace and national reconciliation were to become realities – that elections would be truly democratic; that fundamental rights would be respected and protected; and that judicial remedies would be available for wrongdoing. In that context, the infringements were a national disaster.”

3.12 Other legislation

Sri Lanka Press Council Law

The Sri Lanka Press Council Law No 5 of 1973 imposes restrictions specifically on the press. According to the preamble of the Act, its aims were to ensure freedom of the press, high ethical standards in journalism and the free flow of information. However the Act was greeted with suspicion by human rights persons, who feared that the press regulatory mechanisms established under the Act were designed to stifle dissent.

Many aspects of the Press Council Law have been criticised, such as the level of government control in the composition of the Council and the wide regulation-making power granted to the relevant Minister. This study, however, will focus on the provisions of the Act which are more directly related to the control of information.

One of the principal objections raised by human rights groups has been to the creation of new offences that have nothing to do with the Press Council, but which have been “smuggled in” through the Law. The Law prohibits publication of material falling into the following broad

categories: obscenity and profanity, government decision-making, fiscal policy, official secrets and defamation. A provision which has long been highlighted as peculiarly undemocratic is section 16(1), which prohibits publication of any proceeding of a Cabinet meeting without prior approval of the Secretary to the Cabinet. This provision has been used in the 1980s but fortunately not in the recent past.

Section 16(5) also prohibits the publication of any matter alleged to be under consideration by a Minister or the government when such a matter is in fact not under consideration. The Act also prevents the publication of any official secret (see below) or any matter relating to military, naval, air force or police establishments, equipment or installation, which is likely to be prejudicial to the defence and security of the country.

The Press Council Law did not achieve its objectives as stated in its preamble, but neither was it used as invidiously as some critics anticipated. On the contrary, the Council turned out to be a fairly ineffective, rarely acting on its own initiative against the press. In the meantime, legislation is being considered to abolish the Press Council, while the new Sri Lanka Press Institute and the Press Complaints Commission have already been set up.

Official Secrets Act

Under the Official Secrets Act No 32 of 1955, it is an offence for anyone in possession of an official secret to communicate it to any unauthorised person or any person to whom it is not in the interest of the state his or her duty to communicate it. An official secret is widely defined and includes any information of any description whatsoever relating to:

- any arm of the armed forces
- any implements of war maintained for use in the service of the country
- any equipment, organisation or establishment intended to be or capable of being used for the purposes of the defence of Sri Lanka
- directly or indirectly, the defences of Sri Lanka

Unlike the Press Council Law, the Official Secrets Act applies to everyone and not just the press. However like all laws restrictive of freedom of expression, its impact on the media is especially significant. In practice, this Act too has not been used in a draconian fashion to pursue either citizens or media personnel. However the chilling influence that these kinds of

provisions exert, by their mere existence, should not be underestimated. Journalists in particular, aware of these legal provisions, would be inhibited and engage in self-censorship when reporting on sensitive issues, such as the ethnic conflict where defence information often plays a key role.

The term “official secret” should be defined more specifically and narrowly, so that not all matters relating to defence come within its purview. There are many issues around defence and the military which should be subject to open debate, and public knowledge of which would not be prejudicial to national security. Corruption in government procurement of military equipment and arms deals is one prominent area in which speculation had been rife during the period of the ethnic war. The few reports that were made indicated that there was corruption at the highest levels of government. Therefore, it appeared helpful for the government that the subject matter was governed by the Official Secrets Act/Press Council Law regimes. While a handful of intrepid journalists persisted in exposing suspicious arms deals and other malpractice in the armed forces, a wider exposure could have been expected if the media were not subject to such far-reaching legislation. It has been recommended that official secrets be defined so that they are confined to military intelligence information, and preclude issues around the military and around defence policy and finance, which have no bearing on public security and safety.

Freedom of Information Bill

The freedom to receive information and views is an intrinsic part of freedom of expression. Access to government-held information, often of vital relevance to the lives of ordinary people, has been limited both by practice and by the legislative framework not just in Sri Lanka but South Asia. Therefore we have seen in recent years a growing demand, both at the regional and national level, for a freedom of information law.

In Sri Lanka, a Freedom of Information Bill was prepared as a joint effort by interested civil society and media organisations.¹⁹² The Bill got as far as being approved by the Cabinet and was ready to present to Parliament early in 2004, but this did not happen as it was overshadowed by other political events resulting in Parliamentary upheaval. It is hoped that

¹⁹² These were the Editors Guild, the Free Media Movement and the Centre for Policy Alternatives.

the Bill has not been entirely forgotten and that those who worked to bring it this far will continue to lobby for it to be placed before Parliament as soon as an opportunity arises.

3.13 Regulatory framework for the media

The Press

There are a number of privately owned newspapers over which there is no state control except under emergency or PTA censorship regimes when they are in force. However the newspapers with the widest circulation in each of the three main languages are owned and controlled by the state. After having been a very successful family-run newspaper enterprise, the Associated Newspapers of Ceylon Limited (ANCL) was “nationalised” when the then government took over 75% of its shares under the Associated Newspapers of Ceylon Limited Law No 28 of 1973. These shares were vested in the Public Trustee, the stated intention at the time being to broad-base the ownership of the company by distributing its shareholding widely among the public. The law itself provides that this should be done and sets out a procedure for doing so.¹⁹³ This has however not been done despite repeated election promises,¹⁹⁴ and as a result successive governments have used and abused their monopoly over these newspapers.¹⁹⁵ News reporting on the ethnic conflict has been a major area of control and manipulation by the state.

Broadcasting

Radio and television broadcasting is governed by the Sri Lanka Broadcasting Corporation Act No 37 of 1966 (SLBC Act) as amended and the Sri Lanka Rupavahini Corporation Act No 6 of 1982 (SLRC Act) as amended respectively.

The SLBC Act established the Sri Lanka Broadcasting Corporation for carrying out radio broadcasting in Sri Lanka, and provided for the issue of licences by the Minister in charge, for private broadcasting stations. The Minister has control over the appointment and removal of members of the corporation and the director general of the corporation must be appointed in

¹⁹³ Sections 5 and 6.

¹⁹⁴ Having been a recurrent item in political manifestos, this issue was rather ominously dropped from the manifestos of both the major parties in Sri Lanka at the last general election.

¹⁹⁵ In 1995 a Committee on the broad-basing the ownership of the ANCL proposed a scheme for divesting the shares of the company. This Report – like many others – remains unimplemented. It is widely felt that state interest in retaining this monopoly over the press is too deeply entrenched for the government to take any effective measures to change the status quo.

consultation with the Minister. The SLBC runs several services, in Sinhala, Tamil and English.

Similarly the SLRC Act sets up the Sri Lanka Rupavahini Corporation to carry out television broadcasting services in the country and provides for the grant of licences for private television broadcasting. The Minister in charge appoints the majority of members of the corporation while the other members are appointed by the Ministers responsible for the Sri Lanka Broadcasting Corporation and the National Film Corporation. The Rupavahini Corporation now runs two television services and covers 95% of the country, giving it the widest coverage amongst the television channels in Sri Lanka.

In addition to the Rupavahini Corporation, the state also owns the Independent Television Network (ITN), which started as a private station but was acquired by the government after running into difficulties early on. There are a number of private radio and television channels operating under licences issued in terms of the above legislation. These services are not controlled by government.

Both the state and private radio and television stations run programmes in all three languages. However the *Report of the Committee to Advise on the Laws affecting Media Freedom and Freedom of Expression*¹⁹⁶ noted that the current system does not achieve an equitable balance between the different language services:

“Disparity in the service provided in the two official languages, is no mere technical denial of the constitutional rights but a serious deficiency in the process of trying to build a just and harmonious society. It is necessary that the law also articulate the principle that the state-run or public-funded media should at every level of its activities recognise and reflect the multi-ethnic, plural nature of our society and the issue of language rights.”

One factor which would help achieve this goal is a wider use of community radio. Community radio is a fast-growing and potentially important tool for ensuring that the special

¹⁹⁶ *Report of the Committee to Advise on the Laws affecting Media Freedom and Freedom of Expression*, 1996, pp. 48.

interests of different ethnic and religious groups in a particular geographical area are voiced. Currently the SLBC provides technical facilities for a handful of community radio stations, but these tend to be government-oriented and not substantially address real community issues.¹⁹⁷ Ironically, a licence for a genuine community radio station was granted in 2002 to the LTTE, allegedly circumventing standard procedures, in an attempt to legitimise their clandestine channel in the North-East, “Voice of Tigers”.¹⁹⁸ It has been noted out that: “A major bottleneck [in the expansion of community radio] is the discretionary broadcast licensing system that lacks transparency, accountability and consistency. As a result, the electro-magnetic spectrum – a public property – has been plundered by officials and politicians who have granted licences to relatives and business cronies.”¹⁹⁹

The legal framework provides for substantial government control over both radio and television broadcasting. In practice, the two services are tightly controlled by the state, with the services being considered as vehicles for government propaganda and officials being replaced on the basis of their political sympathies or malleability with each change in government. In a situation of ethnic tension, this tends to exacerbate the conflict, creating confusion and suspicion. While in a climate of free enterprise, private broadcasters have the right to put across their point of view, even if one-sided, state – i.e. publicly owned media – have a greater responsibility to operate a truly public, as opposed to a government, service.

Currently there are no direct legal restrictions related to the conflict under which radio or television operates. However the legal framework is not conducive to genuine freedom of expression or balanced reporting of ethnic issues. This can be seen as being the result of a lack of commitment on the part of both state and private broadcasting to operate their services in a manner that would clarify and help ease ethnic tensions. But it is also due to the lack of a coherent national policy framework for broadcasting which should be enshrined in legislation. Such a policy should embrace a number of factors, but should ensure editorial/programming freedom particularly in relation to news and documentary broadcasts. It should also contain a specific commitment to diversity in programming, so that the political, social and cultural

¹⁹⁷ *Report of the Committee to Advise on the Laws affecting Media Freedom and Freedom of Expression*, 1996, pp. 38 –39.

¹⁹⁸ Pinto-Jayawardena, *op cit*, pp. 163-164.

¹⁹⁹ Nalaka Gunawardene, *Radio suffers as Colombo bosses call the shots*, 22/10/2003, <http://www.panos.org.uk/newsfeatures/featuredetails.asp?id=1160>

dimensions of different communities in the country could be portrayed adequately and effectively.

The Sri Lankan experience demonstrates that allowing private broadcasters to operate relatively freely will not automatically ensure balanced reporting. Many commentators have called for the establishment of an independent authority to regulate broadcasting in Sri Lanka, which would have as its mandate, *inter alia*, ensuring that sufficient diversity in broadcasting is maintained.²⁰⁰ It is increasingly considered important that the remit of such an authority covers both state and privately owned broadcasting.

3.14 OFFICIAL POLICY AND PRACTICE

Secrecy

For the functioning of a true democracy, the right to information is critical. Currently, there is no legislation in force specifically enabling freedom of information. Instead, there are items of legislation which enable secrecy and undermine the free flow of information to the public. These include the Official Secrets Act, Official Publications Ordinance, Sri Lanka Press Council Law, as well as the laws relating to national security.

In December 2003, the Freedom of Information Bill was approved by the Cabinet of Ministers. This was an important step towards ensuring freedom of information of the people. The Bill was expected to be placed before the Parliament in 2004. Unfortunately, probably due to the political uncertainty that hit Sri Lanka around that time, at the time of writing, the Bill appears to have stalled. As already mentioned, it is important that organisations that worked on the Bill and lobbied hard to get it this far, do not now allow it to be forgotten as legislative priorities change.

Prior to 2001, intensified press censorship and denial of independent access to conflict areas frustrated accurate war reporting and civilian access to conflict-related information. The government issued emergency regulations banning live television and radio coverage of the

²⁰⁰ An attempt was made to overhaul the system of media regulation by the Broadcasting Authority Bill 1997. This Bill was challenged as infringing rights of free expression and held unconstitutional by the Supreme Court, mainly due to the level of state control over the proposed Authority.

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war, requiring government approval for the transmission of such news outside the country, and empowering the authorities to detain journalists, block the distribution of newspapers, seize property, and shut down printing presses. The credibility of the information disseminated to the public during this period was extremely questionable, as most of it was selected information released by either the government of Sri Lanka, the Sri Lankan army or the LTTE.

Even prior to the commencement of the ethnic conflict, Emergency Regulations were used by the government on various occasions to suppress freedom of expression. In 1982, the competent authority appointed by the government issued orders directing that no persons shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the newspaper known as the “Aththa”, and that the “Mahajana Press” in which the newspaper is printed, shall not be used for any purpose whatsoever, during the continuance in force of the said orders.²⁰¹ The “Aththa” newspaper was, at the time of it being sealed, the principal newspaper which publicly supported and campaigned for Mr. Hector Kobbekaduwa, the Presidential candidate for the Sri Lanka Freedom Party (SLFP), the main opposition party. (See above for discussion on the Emergency Regulations.) During this period, there were allegations of manipulation of information such as the publication of inaccurate figures of casualties and suppression of information regarding respective military setbacks of the army and the LTTE.

A prime example of such manipulation of information was the battle in Kilinochchi on 26 October 1998.²⁰² By the following morning, the government’s first press release on the battle was issued. According to the release, only nine soldiers had died and 29 injured. A day after, casualty figures of the government had risen to 43 dead and 110 injured. On the 29 October it was a little higher: 62 dead. The same evening casualty figures had gone still higher: 150 dead and 300 injured. On the same day, a press release was issued in the night as well, according to which the number of dead soldiers was 200.²⁰³ By 1 November, figures had risen to 400 dead and 400 injured. It took the government 12 days and 10 military press releases to admit that nearly 1000 soldiers were either dead or missing in action. The military’s admitted death toll

²⁰¹ *Siriwardena & Others v. Liyanage & Others* (1983) 2 SLR 164.

²⁰² Sunanda Deshapriya, *Silent War*, 2001 (unpublished).

was lower than the figure that journalists had calculated from Red Cross reports, hospitals accounts and earlier sketchy reports from the defence ministry.²⁰⁴ The LTTE exploited the situation by spreading rumours, there being no independent reports to confirm their veracity. According to the statements of the LTTE, the casualty figures of the government troops were higher than reported by the government.²⁰⁵ The accuracy of this information remained in question, as there was no independent reporting on the battle. Apart from the foreign media, the local mainstream media did not report the battle in detail.²⁰⁶

The Defence Review Committee in Sri Lanka, established in July 2002 by the then Minister of Defence to look into higher defence organisation, legislation governing the armed forces and future roles and missions, states that in most countries public interest in defence matters is minimal. It further states that access to information is not an issue which would stir up a great controversy.²⁰⁷ According to senior journalists, even in Sri Lanka, the culture of officially requesting information from the authorities does not exist. Journalists rely on their own sources to provide the information they require. Some journalists state that they are still not comfortable with requesting information directly from the government.

It should be added that the culture of secrecy is institutionalised by various means, chief amongst them the Establishments Code, which sets out the norms of conduct that binds all public servants. While authorising the Secretary or Head of Department to “use his discretion to supply to the press or the public, information regarding Government and Departmental activities which may be of interest and value to the public”, it goes on to water this down by stating that “no information even when confined to statements of facts should be given where its publication may embarrass the Government as a whole or any Government Department or officer.” Every other public officer is prohibited from being interviewed or communicating any information, which he may have gained in the course of his official duties to anyone including the press.²⁰⁸ This underlines the need for freedom of information legislation which would help dilute the effect of provisions that encourage state secrecy.

²⁰³ Sunanda Deshapriya, *Silent War*, 2001 (unpublished).

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Defence Review Committee, *Transparency and Accountability*, <http://www.army.lk>.

²⁰⁸ Mark Fernando, “Is Whistle-blowing an Exercise of a Fundamental Right to Freedom from Corruption?” in *The Law Commission of Sri Lanka Commemorative Journal 2003*, pp. 83.

The Supreme Court determination in the *Batticaloa Voters' case*,²⁰⁹ discussed earlier, exposes the problems of a lack of transparency and accountability linked to inadequate communication, even within government. As the Supreme Court in that case pointed out:

“The failure to record, and communicate, that decision [to close security check points] in writing gives rise to grave suspicions as to its bona fides. That decision affected a significant number of citizens, and not just a handful; it related to the conduct of a general election of serious concern to all citizens..., particularly at a time when public confidence in the integrity of the electoral process was sinking fast. Furthermore, the decision... must have been communicated to the civilian authorities. There was no need for secrecy. Indeed, the need was for publicity.... It should, unquestionably, have been promptly reduced to writing..., and communicated in writing. Respect for the Rule of Law required that the decision-making process, particularly in a matter relating to the franchise, should not have been shrouded in secrecy and that there should have been no obscurity as to what the decision was and who was responsible for making it.”

Access to conflict areas

Prior to the signing of the ceasefire agreement (CFA) in April 2002, there was a serious lack of access to the war-torn areas. Journalists who wished to enter the “cleared areas”, under the control of the Sri Lankan army, or the “uncleared areas” under the control of the LTTE, were required to apply through the Ministry of Information in order to obtain authorisation from the Ministry of Defence. Such authorisation is not freely given by the Ministry of Defence, and even when authorisation has been granted, the journalists were given restricted guided tours to selected areas. Rarely was authorisation granted to journalists to enter LTTE held areas.

In July 2001, the Defence Ministry abolished the system of granting approval for journalists to enter “cleared” and “uncleared” areas in the North-East. Hence it was impossible for a journalist to independently obtain accurate information in respect of the situation in the conflict areas. As a consequence, the right to information of the public was seriously undermined and the public had to depend on information released by the government, the

²⁰⁹ SC (FR) Applications Nos 20, 25, 26/2002, SCM 25 March 2003; see earlier for details of case.

army and the LTTE. The credibility of such information was questionable, especially in the light of the censorship which was imposed in June 1998 and remained in force until May 2001.

However, access to conflict areas was eased to some extent from 2002. A significant development in facilitating such access was the opening of the A9 highway, linking Jaffna with Kandy, in February 2002. The closure of this vital artery imposed upon the people of the North many hardships. Scarcity of essential commodities, exorbitant cost of transport and restriction of movement between Jaffna and Colombo had resulted from the closure of this road.

The Sri Lankan government and the LTTE agreed at the fourth session of the peace talks in January 2003²¹⁰ that the military high security zones (HSZ) in the North-East involve major humanitarian and security concerns for both parties. The HSZs around military bases and in other strategic locations cover more than 18% of the Jaffna peninsula. The LTTE want refugees resettled in the HSZs, but the army say that the zones are vital to the security of Sri Lanka and the LTTE must disarm before resettlement can begin.

*"A substantial land area is occupied by the Sri Lankan Army (SLA) and the Police in the North-East, in particular in Mannar and Jaffna Districts. The Ceasefire Agreement requires parties to the conflict to list their High Security Zones. In practice, however, the SLA continues to occupy areas which are not listed as HSZ. There are also concerns that the Army has been expanding or creating new High Security Zones. In addition to HSZ, a high number of Army and Police posts located on people's properties have still not been vacated."*²¹¹

The current situation in respect of HSZs is only slightly better. Access to those areas is still highly restricted. Pilgrimages are permitted, but photography within HSZ areas still remains prohibited. The government is yet to permit the residents of the HSZ areas to reoccupy their lands. In a significant development regarding the issue of resettlement, three petitions have been filed in the Supreme Court by residents of the Valikamam area accusing the army of

²¹⁰ <http://www.tamilnet.com/art.html?catid=13&artid=8103>

²¹¹ Centre for Policy Alternatives, *Land and Property Rights of Internally Displaced Persons*, 2003, pp. 46.

preventing them from occupying their homes and barring them from earning a living. At the close of 2002, an issue which drew much attention was the LTTE's demand that the government dismantle the HSZs in the North and East. However, this remains unresolved at the time of writing.

3.15 Structural issues

Corruption

One of the fundamental structural issues that undermine the right to information is corruption, especially in the public sector. In the context of the North-East conflict, corruption is closely linked to the imposition of restrictions on the availability of accurate information, which has in turn led to a policy of secrecy. Few journalists have endeavoured to publish exposés on military malpractices and they have at times come under attack by the military hierarchy. One such instance was the case of Iqbal Athas, the defence correspondent of *The Sunday Times* when five armed men forcibly entered his residence and threatened him, his wife, and young daughter at gunpoint. The intruders were backed by around 25 armed men who waited outside the house, according to neighbours. The intruders eventually left without inflicting serious injuries, but the raid was apparently designed to intimidate Athas. It was believed that the attack came in retaliation for a series of exposés Athas wrote for *The Sunday Times* about corruption in the military and irregularities in the Air Force's weapons procurement practices.

In a noteworthy High Court ruling in the Athas case in February 2002, the judge observed, "In a democratic country like Sri Lanka, newspapers have a right to expose the corruption of anyone."²¹² Noting that violent attacks against journalists undermine press freedom, the judge added that, "If crime is used to suppress [this right], then stern action should be taken."²¹³ The High Court sentenced the two air force officers accused to nine years' imprisonment for trespassing, criminal intimidation and unlawful entry with weapons. An appeal is pending.

²¹² High Court Case No 9739/99; CPJ, News Alert; *Sri Lanka: Journalist's assailants sentenced to nine years imprisonment*, 2002, <http://www.cpj.org>.

²¹³ *Ibid.*

The Athas case highlights the problem of corruption within the military, but corruption is not limited to that aspect of the state. It is prevalent throughout government, and despite the issue attaining a higher profile over the past years, this does not seem to have stemmed the malpractice and squandering of public resources. The higher the incidence of bribery and corruption, the greater the incentive to maintain secrecy regarding the workings of government. When it is the military that is implicated, this tendency is heightened because of the levels of public interest and emotion that the war can arouse.

Religious nationalism

A recent phenomenon in the Sri Lankan media has been a systematic build-up against Christians. Particular newspapers and television channels have been at the forefront of this move. A survey of the *Irida Divaina*, a Sinhalese Sunday paper, from June to December 2003, reveals that there have been articles every week (altogether 93) critical of Christians. Many of these articles have been deliberately propagating prejudices against Christians, demonstrating the latter as an immediate threat to Buddhism. The backdrop to these attacks is the conversion of Buddhists and Hindus by Christian evangelical movements, which has intensified over the past few decades, and which may have contributed to the wave of anti-Christian violence recently witnessed.

Media reporting has also linked the macro-economic reform programmes of the UNF government to a global Judeo-Christian fundamentalist conspiracy, believed to have been designed to destroy the Sinhalese-Buddhist civilisation. For example, the proposed water management law was described in three articles in *Irida Divaina* as a Judeo-Christian conspiracy to destroy the Buddhist hydraulic civilisation in Sri Lanka. The campaign against the introduction of a sound-and-light project at a major Buddhist historical site, Sigiriya, was also argued to be a step in the direction of Christianisation of Sri Lanka. In all these, there has been a strong element of xenophobia.

This xenophobia also surfaces in connection with the peace process. One of the recurrent arguments in the *Divaina* campaign has been to portray Norway as the foreign power behind the 'Christian-fundamentalist' threat to Buddhism and as acting on behalf of US imperialism.

Another related factor was the unexpected death of an influential and charismatic Buddhist monk, Venerable Gangodawila Soma Thero. Nationalist Buddhist groups alleged a Christian conspiracy behind his death. The coverage of this event by the mainstream media incited an overwhelming arousal of Buddhist patriotism and a renewed anti-Christian sentiment. While such irresponsible journalism may have contributed to the attacks against churches, the attacks themselves were not given the coverage and condemnation they deserved, once again suggesting that the media were motivated by some sense of misplaced patriotism.

The Buddhist nationalist influence on the media was evident even prior to the death of Venerable Soma. For example, the state-owned English-language *Sunday Observer* scrapped 90,000 copies of its issue of 6 January 2002, as it was about to go out because a Buddhist temple in the holy city of Kandy objected to one of the articles.²¹⁴ Asif Hussein, senior journalist with the *Sunday Observer* was dismissed by the management for writing the article. Mr Hussein was later exonerated of all charges and reinstated on the same paper. However in March 2004, after the President took over the media ministry, Mr Hussein was interdicted by the newly appointed management, demonstrating how political grudges can be pursued.²¹⁵

3.16 THE CASE FOR OPENNESS

The public and other actors

Of all the actors involved, the negative effect of information control is probably most obvious in the case of the public. If the public are unaware of the true situation regarding a conflict, they are seriously hampered in their debate of the relevant issues and consequently in coming to a measured conclusion. In a democracy, it is ultimately the people who should decide the most appropriate manner of resolving a matter of public importance. At the very least they need to be given maximum opportunity to put forward their *informed* views and have them considered by the decision-makers.

During the height of the war in the North and East of Sri Lanka, hundreds of persons ‘disappeared’, sometimes to be found later raped and tortured.²¹⁶ Scores of civilians were

²¹⁴ RSF, *Sri Lanka – 2003 Annual Report*.

²¹⁵ See <http://www.ifj.org/pdfs/sri%20lanka230304.pdf>

²¹⁶ See <http://www.uthr.org>

tortured and killed by both military forces and the LTTE. Women and children were particularly vulnerable targets at the time, with allegations of a large number of women being raped by military forces – including by the Indian Peace Keeping Force (IPKF) during its occupation in the 1980s – and mass-scale recruitment of child combatants by the LTTE. However, media reports of these atrocities were suppressed by both parties through the enforcement of both formal and informal censorship, helping nurture a culture of violence, impunity and disregard for human rights.²¹⁷

Ironically, less than a week after the Cabinet approved the Optional Protocol to the International Covenant on Civil and Political Rights, which enables individual complaints of violations to be made to the United Nations Committee on Human Rights, the University Teachers for Human Rights (Jaffna) (UTHR(J)) accused the government of covering up extra-judicial killings and abductions by the army in Jaffna. It also accused the LTTE of assassinating those promoting peace and rehabilitation in the area. UTHR(J) points out the benefits of openness thus, citing the Krishanthi Kumarasamy incident which took place a few days later on 7 September 1996.²¹⁸

The Krishanthi Kumarasamy case involved an 18 year old student from Chundikuli Girls' College, who had been cycling home to Kaithady at noon, past the isolated Chemmani check-point, after sitting the A Level Chemistry paper. She was detained at the check-point and this was seen by a neighbour who alerted her mother Rasammah Kumarasamy, a school vice-principal. Mrs.Kumarasamy had gone to the check-point with her son Pranavan Kumarasamy and her neighbour Sithamparam Kirupamoorthy at 3.00 PM. All four went missing. The matter was raised in Parliament as a question by Joseph Pararajasingham MP on 13 September 1996. Deputy Defence Minister Anuruddha Ratwatte promised to inquire and give a reply.

Despite the fact that the mother and the two who accompanied her had remained at the check point from 3.00 PM till quite late in the evening and had been seen by several passers-by, the Army first denied the arrest. About 10 October, nearly a month later, when the *Hindu* [an Indian newspaper] correspondent, Amit Baruah, raised the matter at a press-conference,

²¹⁷ See also <http://www.ahrchk.net/hrsolid/mainfile.php/2000vol10no08/671/>

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Ratwatte continued to maintain that there were no violations in Jaffna. There is little doubt that in Ratwatte's mind the plan was to sit it out by sticking to bland denials – the practice of the State since the passage of the PTA in 1979. But in Jaffna, General Janaka Perera, an officer who had maintained good public relations, was feeling the heat. He maintained that he wanted to get to the bottom of it. Matters had been made worse by the disappearance of a second girl, Rajini Velauthapillai, at a check-point in Kondavil on 30 September.

Given Ratwatte's position and his decisive influence in security matters, it is certain that the decision to conduct a full investigation was taken by President Kumaratunge, who had until then not responded publicly on the reports of violations. By 22 October, arrests had been made in both cases. The Krishanthi case became a focus of agitation by women's groups in Colombo and went into a much publicised trial in the Colombo High Court, leading to unprecedented death sentences being passed on 6 service personnel on 3 July 1998.

This highlights the importance of transparency. If the government had taken serious note of the complaint when it was first raised, instead of immediately taking a defensive stance and denying the incident, it could have avoided the much greater embarrassment that was to follow. While there would have been blame on the government for such atrocious conduct taking place at all, the damage to the government's image – internationally and nationally – could have been lessened by a prompt and effective investigation. On a very pragmatic level, it is in the interests of the state to come clean on military matters, since the LTTE has an effective fact-finding and publicity machinery, which would quickly seek to exploit an incident like the one described in order to discredit the government.

Restricting the flow of information could have a double-edged impact on the military. The awareness that wrongdoing on its part may not come to light could contribute to a sense of irresponsibility and lack of accountability. In the long run, this will have a deleterious effect on the functioning of the forces as a whole. At the same time, knowledge that the information around them may be unreliable, could engender suspicion and even fear, which in turn is likely to affect morale. So the argument that under-information or even plain misinformation

²¹⁸ See <http://www.uthr.org/SpecialReports/spreport12.htm> and <http://www.uthr.org/bulletins/bul13.htm>

is necessary to keep up the morale of the armed forces is ultimately unconvincing. As observed by Mark Fernando J in *Withanage v Amunugama*, discussed above:

*“Every statement about the conduct or performance of the Head or a member of the Forces which might affect the morale of the members of the Forces does not necessarily prejudice national security. On the contrary, some such statements may actually promote national security. Thus statements which disclose misconduct or negligence of members of the Forces... may adversely affect the morale of members of the Forces. But the concealment of such matters may much more seriously prejudice national security. To take a hypothetical example, if unknown to them, soldiers were being issued sub-standard weapons, ammunition or equipment, purchased at inflated prices, disclosure would most certainly affect their morale. **On the other hand, non-disclosure would most certainly endanger their lives, and the security of the nation. Disclosure and exposure may be the most effective and expeditious means of remedying a situation enormously prejudicial to national security.**”²¹⁹ [Emphasis added]*

Some senior journalists in the country have further expressed the opinion that censorship could be advantageous to the rebels. Iqbal Athas, defence correspondent to the *Sunday Times*, has stated that the censorship is actually helping the Tamil Tigers.²²⁰ He points out that the rebels are regularly feeding the foreign media with their version of the conflict and that in such a situation, the rumour mill takes over and works against the government.²²¹ A statement by the Newspaper Society representing publishers of national newspapers has been quoted as saying: “Continued censorship will not only fuel deleterious rumours and speculation, which will, by their own nature, be counter-productive, but also push media personnel into a further position of antagonism.”²²² Thus the negative consequences that censorship could have on the Sri Lankan military as well as the government have been highlighted by concerned media and military personnel.

²¹⁹ (2001) 1SLR 391 at 406.

²²⁰ <http://www.atimes.com/ind-pak/BF14Df01.html>

²²¹ *Ibid.*

²²² <http://www.atimes.com/ind-pak/BF14Df01.html>

This discussion concentrated on the adverse effects of inaccurate or inadequate information, on the people in general as well as on the military. At the same time, state-imposed restrictions on people's ability to debate matters of interest to them and to support particular causes they hold dear – whether reasonable or not – also deserve careful scrutiny. Earlier in this chapter, we examined the prohibition on advocacy of separatism brought in by the Sixth Amendment to the Constitution. The outlawing of peaceful demands for Tamil autonomy could have contributed to the separatist movement being driven further underground, and overseas, resulting only in the strengthening of its resolve to achieve self-rule by any means possible.

The Krishanthi Kumaraswamy case epitomises the brutality of the Sri Lankan conflict. It indicates the levels of mistrust and antagonism between the two ethnic groups. The Muslim community too has suffered a great deal as a result of the conflict, being forced to flee in their thousands from the North and now constituting a significant proportion of the internally displaced. In the period since the ceasefire, attempts have begun to heal the deep rift between communities. But any real reconciliation must be built on understanding past events, and in order to understand, the truth must be revealed. If part of the truth is concealed or people are denied information, both on the war recently ended and on the current peace moves, it would be that much more difficult to reach a stable peace built on respect for human rights and dignity.

3.17 Independence and quality of media

While the responsibility of adhering to practices of good journalism falls on the media, an environment to nurture such growth within the sector should also be in place. A case in point would be the story of Victor Ivan, the editor of the Sinhala language weekly *Ravaya*, who lists 27 civil and criminal cases of defamation that were brought against him during a period of the six years in that position. Ivan states:

“...such cases take so long to be resolved that the editor has to waste a great deal of his time in the courthouse. Therefore, even though an editor has before him sufficient authenticated data, in consideration of the fact that he runs the risk of facing a long

*and tortuous period of pressure, he may refrain from publishing the evidence he has against the powers-that-be.”*²²³

The role of the media is pivotal and is inextricably intertwined with the specific dynamics of any conflict it is involved in reporting. In such situations, the media can be a weapon that manipulates public sentiment and proliferates intolerance through disinformation. According to Taraki (Mr. Dharmaretnam Sivaram), journalist for the *Tamil Net*, the media has played an integral role in precipitating the ethnic polarisation in Sri Lanka.²²⁴ He states that the historians of the ethnic conflict in the island have well documented the manner in which the independent and state-run media have done their part to fan the passions and suspicions that have led to three bloody pogroms against the Tamil people.²²⁵ He is of the view that sections of the Sinhala mainstream media have assumed and portrayed the Tamils as suspect, alien and hostile interlopers.²²⁶ An illustration on this point was the instance when all members except one, of the committee appointed by the PA to ‘Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression’, held the view that the Sixth Amendment to the Sri Lankan Constitution "prohibits even the peaceful advocacy of separatism, and furthermore provides the most draconian penalties. It is a limitation on the freedom of expression". The committee, with one dissent, recommended that the Sixth Amendment should be repealed. It also urged that no prohibition of the peaceful advocacy of separatism should be included in the new constitutional provisions proposed by the PA government. The committee member who opposed this was a veteran English language journalist in Sri Lanka.²²⁷

On the other hand, the media can be a key instrument in conflict resolution,²²⁸ when it:-

- presents reliable information
- respects human rights
- represents diverse views
- upholds accountability
- and exposes malfeasance

²²³ Article 19, *Fifty Years On: Censorship, conflict and media reform in Sri Lanka*, 1998, pp 22-23.

²²⁴ <http://www.tamilcanadian.com/eelam/conference/taraki.html>

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ <http://www.tamilcanadian.com/eelam/conference/taraki.html>

All of which would enable a society to make well-informed choices, reduce conflict and foster human security.

Following the two-decade-old war, Sri Lanka is currently attempting to work out a lasting solution to its ethnic conflict. There is much that is yet to be achieved, for example, trust in government and key stakeholders of the process, trust and understanding between the various communities and a sense of justice and fairness to all. Major efforts of reconstruction, rehabilitation and reconciliation – all of which require significant amounts of both national and international cooperation and investment – are key components of such a process.

As such, at this juncture, a culture of openness and thereby an open media is critical to the accomplishment of such an objective.

In general, the media can impact any peace process in the following way:²²⁹

- They help in *defining the political atmosphere* in which the peace process takes place.
- The media has an *active influence on the strategy and behaviour of the stakeholders* to the conflict.
- The media has an important influence on the *nature of debate* about a peace process.
- The media can *buttress or weaken public legitimacy of the stakeholders* involved in the peace process.

A critical media, free to express itself, can create vital trust in government and the peace process among the citizenry by bringing to light irregularities and wrongdoings, thereby changing the culture of politics and governance from one shrouded in secrecy to one that is democratic, just and transparent. An open and free media can also draw considerable investor trust, both in the commercial sphere as well as in donor aid, both vital components for the ‘rebuilding’ efforts and much required economic growth.

²²⁸ See also Gadi Wolfsfeld, Hebrew University of Jerusalem, *The Varying Role of the News Media in Peace Processes: Theory and Research*, 2001.

²²⁹ Sanjana Hattotuwa, *op cit*, based on *The Varying Role of the News Media in Peace Processes: Theory and Research* by Gadi Wolfsfeld from the Hebrew University of Jerusalem, See <http://www.cpalanka.org>

However, having suffered years of suppression and fear resulting from the conflict and a history of violent politics, there are currently insufficient avenues for vibrant and free expression of varied opinion in the media and the public sphere in Sri Lanka.

3.18 Impact of activism and law reform

Ever since the repressive laws and policies were brought into effect in the 1970s, civil society groups have been lobbying to create an environment more conducive to free expression. Several of the organisations involved from the early stages were those with a more general human rights interest and not predominantly focused on media/free expression. These included the Civil Rights Movement, MIRJE (Movement for Inter-Racial Justice and Equality), Centre for Society and Religion, Movement for the Defence of Democratic Rights and Lawyers for Human Rights. Building on these efforts, in the past decade or so we have seen a cohesive and effective movement towards changing the culture and laws, resulting in significant pressure from media activists and civil society organisations in the early 1990s. The then PA government – which incidentally came into power on a media reform platform – did not make a notable contribution, with no real impact resulting from a number of committees that were appointed to look into various aspects of media law and reform.²³⁰

One of the first recent victories in legal reform was the repeal in 1997 of the provision that gave Parliament the power to punish for breach of privilege introduced in 1978.²³¹ The repeal had been urged both at the international and local level for several years.²³²

Another welcome change was in the area of criminal defamation. The Editors Guild, The Newspaper Society and the Free Media Movement, with the support of civil society organisations such as the Centre for Policy Alternatives and a number of international organisations including ARTICLE 19, strongly advocated for erring media professionals to be brought to book under civil and not criminal procedures. They argued that penal provisions and resources of the state were being used to serve partisan purposes and to withhold information from the public.²³³

²³⁰ Pinto-Jayawardena, *op cit*, pp. 136-137.

²³¹ See section 1.2.

²³² See for instance Article 19, *An Agenda for Change: The Right to Freedom of Expression in Sri Lanka*, 1994.

²³³ *Op cit*, pp 139-140; see also the resolution resulting from the International Colloquium on Freedom of Expression and Defamation held in Colombo in 1999.

Following a change of government in 2001, the move towards reform gathered momentum, with continuous vigorous campaigns carried out by media practitioners and activists in collaboration with civil society organisations, coming to a head in 2002. These efforts were further strengthened by the Special Rapporteur in his reports to the United Nations Commission on Human Rights, who advocated repealing of all the criminal defamation laws. Also important, was a memorandum from International PEN (a world association of writers with a 94-country membership) in January 2002, raising concerns regarding the use of criminal defamation legislation in Sri Lanka to silence the media.²³⁴

As a result of these efforts, in June 2002, the Penal Code Amendment Act No 12 was passed, repealing criminal defamation laws and amending related criminal procedure. Also around the same time, the Press Council Amendment Act No 13 of 2002 repealed section 15 of the Press Council Law, which made defamation an offence punishable by a maximum two year imprisonment.²³⁵

Though not tabled in Parliament yet, the approval by the Cabinet of a Freedom of Information Bill, which had diverse civil society input, has been yet another accomplishment in the field of freedom of expression in Sri Lanka. Among the present priorities in this area is the progress of this Bill, so that people are provided with a clear legal right to the kinds of information that have so often in the past been unjustifiably withheld from them.

Women's voices during the conflict

During a conflict, it is often women who suffer the most, and Sri Lanka's conflict in the North-East has been no exception. Most families in the conflict areas have been displaced from their houses and have lost all their property and their livelihood. Moreover, many families have lost their male members as they have been either killed in the conflict or have simply disappeared. As a consequence many households are being headed by females, vested with the responsibilities of bringing up and educating children, generating income, in addition to the regular household chores. Amid poverty, trauma and the still existing uncertainty in the conflict areas, these women are strongly committed to peace. To them, the need to bring about

²³⁴ Pinto-Jayawardena, *op cit*, pp. 139-140.

²³⁵ Pinto-Jayawardena, *op cit*, pp. 139-140.

permanent peace is paramount, in the context of the hardships they have had to face as a result of the conflict.

The question is whether the rights of these women were adequately recognised and addressed during the peace process, which was initiated in 2002, but is presently on hold. Displaced women have expressed dissatisfaction with the level of commitment shown to women's rights during the process. At the same time, they have felt unable to contribute to it for lack of knowledge of how, to whom or where to direct their concerns.

Following the initial ceasefire agreement between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE) in February 2002, two women's coalitions (Mothers and Daughters of Lanka and the Sri Lanka Women's NGO Forum) called for the strengthening of the agreement and petitioned the parties to ensure that the peace process would be inclusive, representative, and conducted within a democratic framework.²³⁶ An international consultation on women, peace-building, and constitutional development organised by the International Centre for Ethnic Studies soon followed, sparking the development of a Women's Peace Memorandum that was delivered to leaders on both sides of the conflict.²³⁷ The Memorandum sought to include women's concerns in the peace process and articulated the basic elements of a gendered framework for conflict resolution and peace-building. It called for women's full and equal participation in peace negotiations and in decision-making in all phases of the reconstruction, rehabilitation, and transformation process and also underscored the importance for all efforts towards peace to take place within the norms and standards of human rights and humanitarian law.

Subsequently, an International Women's Mission was organised to assess women's concerns and prepare specific recommendations to the Plenary of the Peace Talks. The findings were compiled in a mission report used for lobbying the government, the LTTE, multilateral missions and delegations attending the Sri Lanka aid group meeting, and the third round of peace talks in Oslo in December 2002.²³⁸ The Mission Report concentrated on recommendations for the peace process and for policy formulation that flowed from the

²³⁶ <http://www.un.org/womenwatch/daw/egm/peace2003/reports/CASESTUDY.pdf>

²³⁷ *Ibid.*

²³⁸ <http://www.un.org/womenwatch/daw/egm/peace2003/reports/CASESTUDY.pdf>

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findings, and highlighted the need for a gendered and rights-based approach to peace-making, rehabilitation, and reconstruction. One outcome of the third round of peace talks attributed to the impact of the Mission Report was the establishment of a Sub-Committee for Gender Issues (SGI), composed of five women from the South and five from the North, mandated to explore the effective inclusion of gender concerns in the peace process.²³⁹ The effectiveness of this remains to be seen, since the peace process has been on hold for over a year and uncertainty appears to be clouding the process again.

²³⁹ <http://www.un.org/womenwatch/daw/egm/peace2003/reports/CASESTUDY.pdf>

4 COUNTRY STUDY: NEPAL

4.1 Introduction²⁴⁰

When thinking about the concept of freedom of expression in any given society, one would have to consider the history of the polity with specific regard for the distribution of political power.²⁴¹ In the case of Nepal, this would mean looking back first at the history of the formation of its political society during the course of its territorial consolidation during the eighteenth century and the subsequent evolution of the distribution of power during the nineteenth and twentieth centuries. This would require us to provide a brief sketch of the processes that resulted in the territorial Nepal of today and its subsequent historical trajectory. The first part of this paper reviews the historical context. In addition, an overview is provided of the struggles between the state and the citizens over the right to freedom of expression until the demise in 1990 of the so-called ‘Party-less Panchayat System’.

The paper then looks at the constitutional guarantees of fundamental rights enshrined in the Constitution of Nepal 1990 before going on to discuss at length the growth of the independent media in Nepal in the past 14 years. The structural characteristics of the Nepali media landscape and how they impinge upon its performance as a medium of expression are examined. In this section, the growth of non-governmental organisations (NGOs) is considered and how this has extended the realm of freedom of expression in Nepal. The next section reviews the restrictive legal framework that has impinged on freedom of expression in Nepal, especially since the imposition of the state of emergency in November 2001 (which was lifted in August 2002). The policies and practices regarding control of information with respect to the present conflict by both the State and the Maoists are considered. Lastly, we

²⁴⁰ Written by Pratyoush Onta, consultant for the South Asia Forum for Human Rights. The author would like to acknowledge the following persons: Mohan Mainali, Deepak Thapa, Govinda Bandi, Mandira Sharma, Seira Tamang, Taranath Dahal, Hem Bahadur Bista, Aditya Man Shrestha, Binaya Kasaju, Pradip Ghimire, Sudhir Sharma and several other individuals for conversations that helped to think about the issues covered in this paper. Comments on earlier drafts by Rita Manchanda, Tapan Bose, Bhaskar Gautam, Ramesh Parajuli, Rama Parajuli and an anonymous reviewer have helped to write the present version. I am also grateful to Navaraj Humagain, Pravakar Gautam, and Devraj Humagain for help in locating some of the references cited in this article. I would like to thank all of the above while assuming sole responsibility for the paper.

²⁴¹ The research for this paper was completed in early August 2004. Hence except for some brief references, this paper does not incorporate happenings in Nepal since then.

examine the negative effect of these restrictions and conclude with some thoughts on openness and the peace process.

4.2 Historical Development

Territorial consolidation and Rana Century

What we know as Nepal today is the result of territorial consolidation activities that started from the relatively impoverished tiny kingdom of Gorkha in the early 1740s. Under the leadership of King Prithvinarayan Shah (r. 1742-1775), Gorkha set out to conquer and rule a long stretch of land in the central Himalayas.²⁴² Despite the phenomenal growth of the Kingdom, its leadership continued to come from a small set of families from the heartland of Gorkha. This class was completely dependent upon the king for its economic security and hence could not become the basis for the growth of oppositional power centres in Nepali society. Under the absolute control of the King, Nepal functioned as a socially hierarchical Hindu polity with no legal or constitutional recognition of ideas related to the concept of freedom of expression.

This was the situation in the first half of the nineteenth century when one faction of the royal supporters, the Kunwars, usurped power in 1846. By eliminating its rivals, the Kunwars were able to even relegate the Shah Kings to the margins of power until 1951 and re-title themselves as the Ranas. Their strategy for retention of power was a composite of diplomacy vis-à-vis British India and ruthless control of public life inside Nepal. In the 1930s and the 1940s, some activists inside Nepal organised themselves under the banner of political entities, some of which later appeared in the form of political parties. In 1950, an armed resistance was launched and Rana rule came to an end in February 1951.²⁴³

What was the state of freedom of expression in Rana Nepal? With respect to ‘mass media’ there wasn’t much around. Although a newspaper, *Gorkhapatra*, was started in 1901, its operation was fully controlled by successive Rana premiers and their functionaries. While a

²⁴² Regmi, Mahesh C. 1995. *Kings and Political Leaders of the Gorkhali Empire 1768-1814*, Hyderabad: Orient Longman.

²⁴³ Shaha, Rishikesh. 1990. *Modern Nepal: A Political History 1769-1955*. 2 vols. Riverdale: The Riverdale Company.

magazine, *Sharada*, was allowed to be published from Kathmandu from 1934, its editors were careful not to publish any material that would upset the Ranas, who did not permit the publication of any other periodicals until the very last days of their rule. By about 1920, opposition to Rana rule had emerged, most potently among Nepalis living in India and manifested mainly through publications from the Indian cities of Banaras and Darjeeling. The import of these publications into Nepal was severely controlled.

Bala Krishna Sama (1903-1981) – himself a Rana but not eligible to become a ruler and who later became one of the pillars of 20th century Nepali literature – described the environment of the early 1920s in the following manner in his autobiography:

*“I was feeling suffocated in the environment then prevailing in Nepal. The red blood inside me used to criticise that situation every moment. But Premier Chandra Shamsher’s beard used to entangle my pen and would not let me move forward. The piercing look of his eyes, ones that seemed as capable of destruction as a rocket, could dry up the ink that had even arrived at the tip of my pen”.*²⁴⁴

Although Ranas had instituted an office to promote the publication of books in Nepali during the second decade of the 20th century, its de facto function was to censor the circulation of books that were deemed to be deleterious to their rule in Nepal. Public education was almost non-existent and the circulation of ideas that were considered to be detrimental to the reign of the Ranas was severely proscribed inside Nepal. In 1930, several persons were punished for trying to open a library in Kathmandu. Those whose writings seemed oppositional in terms of even the literary motifs they contained were often forced into exile or given long prison sentences.

Those who had managed to bring radio sets into Nepal (from the late 1920s) had to seek special permission. During WWII (when Nepal had committed huge numbers of its own troops and Gurkha recruits to the British cause in the war), even these sets were seized from the few who owned them as the Ranas did not want members of the general public to listen to broadcasts that could have a detrimental impact on how they were justifying their support to

²⁴⁴ Sama, Balkrishna. 2029 v.s:22. *Mero Kabitako Aradhan*. Vol. 2. Kathmandu: Sajha Prakashan.

the Allied forces. In June 1941, when German troops reached the outskirts of Moscow, rumours spread in Kathmandu that British loss was imminent. Hence the Ranas decided to seize radio sets from most of the owners.²⁴⁵ These sets were kept for five years until the ban on radios was revoked in mid-1946. While many parts of the world were already experiencing what historians would later call the “golden era” of radio (i.e. the 1930s and the 1940s), there were no radio stations inside Rana Nepal. The present day state-owned entity Radio Nepal was born during the last phase of the anti-Rana movement in 1950-51.²⁴⁶ Hence, throughout 1950, Nepal did not have independent newspapers or radio stations. The social basis for a culture promoting freedom of expression was almost non-existent until then.

Post-Rana decade

After the fall of the Ranas, the “Interim Government of Nepal Act 2007” came into force in April 1951. This Act provided for a judiciary that was independent of the executive branches of the government. This Act guaranteed that the citizens of Nepal shall have, among others, the right to freedom of speech and expression, to assemble peacefully without arms, to form associations and union, to move freely throughout Nepal, and to practice any profession, occupation, trade or business.²⁴⁷ This was followed through, in the next two years, with the Press and Publication Registration Act 2008 BS and the Press and Publications Act 2009 BS. The Press and Publications Act 2009 BS listed a set of ‘crimes’ that all printed matters had to avoid. These included the stipulation that printed matters should not incite government workers against their duties and service to the King. It also included the provision that in the public interest, the government can put a stop to any news, criticism and publication.

²⁴⁵ Pandey, Bhim Bahadur. 2039 v.s. *Tyas Bakhatako Nepal*. Vol. 1. Kathmandu: Centre for Nepal and Asian Studies, Tribhuvan University, pp.375.

²⁴⁶ When opposition to their rule began to gain momentum in 1947, the second last Rana premier, Padma Shamsher issued a “Government of Nepal Act 2004 BS” in January 1948. The Act in general sought to preserve Rana rule while, in its part II entitled “Fundamental Rights and Duties”, some provisions were made to provide a semblance of a polity run under the rule of law. While freedom of speech and the liberty of the press seemed to be guaranteed by this Act, their substantive content was left undefined. In addition, their conditional recognition through the clause “subject to the principles of public order and morality” meant that the Ranas ultimately could restrict the domain of these rights. Moreover, the whole Act was a still-born document as other powerful Rana factions did not support it.

²⁴⁷ Shaha, Rishikesh. 1990. *Modern Nepal: A Political History 1769-1955*. 2 vols. Riverdale: The Riverdale Company, pp.251-254

After much delay, a constitution was promulgated in 1959 and it guaranteed personal and political fundamental rights. Every citizen was entitled to freedom of speech and expression, freedom of assembly without arms, freedom to form associations or unions and freedom to move to or reside in any part of Nepal. However this constitution failed to make the people of Nepal ultimately sovereign over their political destiny as it vested with His Majesty the King emergency powers that allowed him to suspend the whole constitution and assume all powers otherwise vested in the Parliament or any other governmental body.

How can we characterise the 1950s from the point of view of freedom of expression? Free from the fear characterising the Rana century, Nepali intellectuals sought to exercise their right to explore uncharted territories. This was accomplished through a brisk growth in the number of small publications in Nepali, English, Newari and Hindi from Kathmandu and some other urban areas of Nepal. The state-owned *Gorkhapatra* continued to be published, three times a week. In the meantime, several privately run newspapers came into existence. Many of these were started by political and social activists, often as one-person ventures and had very short lives.

There was also a growth in the number of libraries, schools, colleges, periodicals, journals, and books. The realm of analytical expression about Nepali society increased exponentially even though it remained true that in a Nepal that had just emerged from the grips of the Ranas, the set of people who did engage in intellectual activities remained small and confined to male Brahman, Chhetri and Newars, i.e., those who occupied the higher echelons in the caste hierarchy. Most of the production and consumption of media was limited to the literate set in Kathmandu and a few other urban areas of the country.²⁴⁸ Some experiments with educational radio were launched over Radio Nepal in the mid-1950s and it was used by the government in the months leading up to the 1959 elections for voter education.

Panchayat's three decades (1960-90)

Using various pretexts as justification, King Mahendra used the emergency power articles of the 1959 Constitution to dismiss Prime Minister B.P. Koirala's government, dissolve the parliament, and assume all executive state power in December 1960. After he became an

²⁴⁸ Baral, Lok Raj. 1975. The Press in Nepal (1951-74). *Contributions to Nepalese Studies*. 2(1): 169-186.

absolute monarch, political parties were banned and their leaders were imprisoned for most of the 1960s. In 1962, King Mahendra promulgated the constitution of what was called the "Party-less Panchayat Democracy". Political parties were not allowed to function because they were thought to be inherently divisive, faction-oriented and incapable of playing "an integrative role in the Nepali context".²⁴⁹ The Panchayat Constitution conceived a multi-tier political set-up led by the King who was projected as the sole institution that could 'unify' all Nepalis and rally them to the cause of the development of the country. It put village communities (panchayats) at the bottom of this system, showcasing this feature as the proof of the decentralisation of power, and deployed notions of community-led mobilisation as being central to the system's political logic. The Panchayat Constitution committed itself "to end all forms of exploitation – social, political or economic – through class co-ordination and harmony".²⁵⁰

The 1962 Constitution guaranteed freedom of speech and expression and the freedom to assemble peacefully and without arms but it did not guarantee the right to form unions and association (this was later included after the first amendment in 1967). Several restrictions were also placed on the exercise of fundamental rights for the "sake of public good." After he took over, King Mahendra set out to control the available means of communication and establish offices that could be used to disseminate government messages favourable to his regime and censor items that could damage its interests. Private Nepali newspapers and their editors who were critical of the King's regime were variously punished. Several newspapers were banned for various periods of time.²⁵¹ Correspondents from some foreign newspapers were thrown out of Nepal and foreign newspapers were subject to censorship (from November 1961) before they were allowed to be sold in Kathmandu. In 1962, two independent news agencies were nationalised and merged into one to form the government controlled agency, *Rastriya Samachar Samiti*.

²⁴⁹ Shaha, Rishikesh. 1990. *Three Decades and Two Kings (1960-1990): Eclipse of Nepal's Partyless Monarchic Rule*. New Delhi: Sterling Publishers, pp.5.

²⁵⁰ Koirala, Bharat Dutt. 1981. *Nepal's Panchayat Democracy*. 4th revised edition. Kathmandu: Department of Information, pp. 4.

²⁵¹ Chauhan, R.S. 1971. *The Political Development in Nepal 1950-70: Conflict between Tradition and Modernity*. New Delhi: Associated Publishing House.

Ministers in the Panchayat regime asked the press to be “useful” and avoid “unhelpful” criticisms of the government.²⁵² Newspapers were subject to be censored by a government authority before being sold in the market. King Mahendra’s government also enacted the General Security Act in 1961 to repress political opposition. A new Press and Publication Act was brought into existence in 1963. Its Article 30 stated:

*“His Majesty’s Government may issue an order directing the suspension of any news, criticism, or publication in case it is deemed reasonable to do so in the public interest. No appeal or complaint shall be entertained against such order”.*²⁵³

This section was described by some sections of the private and oppositional press “as a screen for all evils, notably the growing list of powers, anti-popular measures, corruption and so on”.²⁵⁴ As the relationship between the Panchayat Government and journalists working for oppositional newspapers became increasingly strained, the former tried to impose a “code of conduct” on the journalists to tame them and bring them “in line with the Principles of the Panchayat System”.²⁵⁵ In 1970, the Press Act was somewhat modified by including “the provision for appeal to guarantee judicial protection of the Press”.²⁵⁶

After the imposition of the Panchayat System, media owned by the government such as the *Gorkhapatra* newspaper and the only radio station in Nepal, *Radio Nepal*, were turned into the service of the regime. *Gorkhapatra* was converted into a big-size daily from February 1961.²⁵⁷ To try to showcase to the international community both how ‘indigenously democratic’ the Panchayat System was and how much progress Nepal was making under it, the government started two publications in English in the mid-1960s. In October 1964, the Panchayat Government started a weekly magazine called *The Nepalese Perspective*, whose

²⁵² Baral, L.S. 1974. The New Order in Nepal under King Mahendra, 1960-62: An Assessment. *International Studies* 13(1), pp.50.

²⁵³ *Ibid.* pp.174.

²⁵⁴ *Ibid.*

²⁵⁵ Baral, Lok Raj. 1975. The Press in Nepal (1951-74). *Contributions to Nepalese Studies*. 2(1), pp.175.

²⁵⁶ *Ibid.*

²⁵⁷ Baral, L.S. 1974. The New Order in Nepal under King Mahendra, 1960-62: An Assessment. *International Studies* 13(1).

editors were some of the biggest apologists for the system.²⁵⁸ In December 1965, it started an English daily, *The Rising Nepal*.

Given the high illiteracy rate of the population and the difficulties of transporting newspapers over an unforgiving terrain, Radio Nepal, was by far the more attractive among the media used by the Panchayati state for its own purposes.²⁵⁹ It was used to serve both the state's ideological needs and its nation-building imperatives. On the one hand, gate-keeping practices that were consistent with the ideological underpinnings of the Panchayat regime meant that (i) only programmes consistent with the overall ideological cultural matrix of the Panchayat regime were broadcast and (ii) only the Nepali language was allowed over Radio Nepal after 1965 in its current affairs and educational programming. News broadcast in Hindi and Newari was stopped. The policing of the Panchayat-inspired Nepali identity also influenced its entertainment programmes, where even though songs in other languages of Nepal, and in Hindi and English were broadcast, in the main, only certain kinds of music and songs were promoted in the name of serving 'Nepali-ness'.²⁶⁰ On the other hand, as part of its role in "arousing development consciousness among the masses",²⁶¹ Radio Nepal broadcast programmes related to farming, education, family planning, health and a whole host of other development themes.

King Birendra succeeded his father, King Mahendra in 1972 and continued – more or less – on the same course of development. Student-led protests in the late 1970s resulted in the national referendum in May 1980 regarding the question of whether the citizens of Nepal would like a multi-party system or an 'improved' Panchayat system.²⁶² Once the referendum was announced, the Panchayat regime was forced to relax its control over freedom of speech

²⁵⁸ The editor-in-chief was Dr Mohammad Mohsin, who became the minister of communication as this essay was being finalised in early July 2004. The Foreign and Economic editor was Mr Pashupati SJB Rana. Internal Editor was Mr T. R. Tuladhar.

²⁵⁹ See: Onta, Pratyoush, Debating beyond foreign investment in Nepali media. *The Himalayan Times* (Perspectives supplement), 22 February 2004, pp. 4, and Onta, Pratyoush. Independent news in FM radio. *The Kathmandu Post*, 8 July 2004, p. 4, and Onta, Pratyoush, Democracy and duplicity: the Maoists and their interlocutors in Nepal. In *Himalayan 'People's War': Nepal's Maoist Rebellion*. Michael Hutt, ed., 2004, pp.136-151. London: Hurst and Co, and Onta, Pratyoush. 2004. The Right to Information. *Nation Weekly*, 5 September, pp. 30-31.

²⁶⁰ Grandin, Ingemar. 1989. Music and Media in Local Life: Music Practice in a Newar Neighborhood in Nepal. Linköping: Linköping University.

²⁶¹ Khatri, T.B. 1976. *Mass Communication in Nepal*. Kathmandu: Department of Information, pp.36.

²⁶² Shaha, Rishikesh. 1990. *Three Decades and Two Kings (1960-1990): Eclipse of Nepal's Partyless Monarchic Rule*. New Delhi: Sterling Publishers.

and expression. For the referendum to be seen as legitimate, the regime had to allow public debate about issues that would inform people's choice of either an 'improved' Panchayat system or a multi-party system. Hence, an ordinance allowing for such debate was issued in June 1979. However, it did not go as far as acknowledging the legality of political parties, as they were still banned under the then existing Panchayat constitution of 1962. After revisions, it was passed as an Act in August 1979. Oppositional and private newspapers took advantage of this relaxation and their use of the relatively open environment during the months leading up to the Referendum in May 1980, has had – according to the view of one analyst – a lasting impact on the Nepali press.²⁶³ After the verdict of the Referendum went in favour of the Panchayat System, the extra freedom provided to the Nepali press was again withdrawn through a new Press and Publication Act issued in the early 1980s. Newspapers critical of the Panchayat regime, were banned for various lengths of time throughout the 1980s. There was even an attempt to assassinate an editor whose paper had exposed the doings of a powerful camp within the Panchayat monolith.

It must also be pointed out here that King Mahendra's imposition of Party-less Panchayat politics in Nepal received tacit support from the United Kingdom and the USA. Queen Elizabeth visited Nepal in February 1961, less than three months after the dismissal of the multi-party political set-up in Nepal. British development aid to Nepal up to the beginning of the 1990s was closely tied to UK's foreign policy interests in Nepal.²⁶⁴ According to this view, these interests have largely been formed around the recruitment of Nepalis as soldiers in the British Gurkha regiments. As long as the Nepali monarch could insure the continuity of the recruitment arrangement, it made very little difference to the UK whether or not there was multi-party democracy in Nepal. Panchayat's multi-tiered political set-up was interpreted by the US as a good model for development from the community level to the national level and its party-less system was interpreted as one-party rule.²⁶⁵ Hence, while rhetorically there might have been gestures to the contrary, the US and the UK supported King Mahendra even

²⁶³ Nepal, Kishor. 2057 v.s. *Janmat Sangrahadekhi Jana Andolansamma: Nepali Patrakaritako Bikas ra Prabhav*. Kathmandu: Vyabasayik Patrakarita Pratisthan, pp.8.

²⁶⁴ Nickson, R. Andrew 1992. *Foreign Aid and Foreign Policy: The Case of British Aid to Nepal*. Birmingham: Development Administration Group, School of Public Policy, The University of Birmingham.

²⁶⁵ Isaacson, Joel, Christa A. Skerry, Kerry Moran and Kay M. Kalavan. 2001. *Half-a-Century of Development: The History of U.S. Assistance to Nepal 1951-2001*. Kathmandu: United States Agency for International Development.

after he had removed and imprisoned democratically elected representatives of the people of Nepal. International media consultants from UNESCO and other multilateral or bilateral donor agencies advised Panchayat governments to harness the media for national development without uttering a single word about the need for democratising the polity or respect for the freedom of expression.

To summarise the argument that has been developed in this section, we could say that the Panchayat system continued the political culture built around the muzzling of dissent that had flourished during the Rana period. While on the one hand, state-owned media was deployed to provide a picture of development and ‘happy and peaceful’ Nepalis led by the monarch, on the other hand, restrictive laws and administrative hounding created a social geography of fear. By keeping Nepal’s power structure very much intact in its traditional fold revolving around the King (backed by the Royal Nepali Army) the system stunted the possibilities of democratic growth in Nepal.

Certain levels of educational achievements and exposure as well as the gradual development of non-governmental sectors of employment introduced some degrees of freedoms including the freedom of expression in Nepali public life. But these freedoms were severely policed and circumscribed. Dissenters spent long years in prisons or in self-exile. The judiciary on the whole did very little to protect the rights of these dissenters. Professionals from various walks of life who refused to comply with the system suffered in terms of career dislocations and difficulties. Because NGOs were also severely policed by the state, the growth of the non-governmental sector was stunted. The few NGOs that were allowed could hardly function as alternate sources of news or be producers of media themselves. Despite the platitudes of Panchayat apologists, Nepali society in general, paid a heavy price because of the ambitions of King Mahendra and his successor King Birendra. A political system that spoke about creating an exploitation-less society in 1962, left Nepal as one of the poorest countries in the world in 1990.²⁶⁶

²⁶⁶ Shaha, Rishikesh. 1990. *Three Decades and Two Kings (1960-1990): Eclipse of Nepal’s Partyless Monarchic Rule*. New Delhi: Sterling Publishers.

4.3 The Democratic Experience

The *Jana Andolan* (People's Movement) of 1990 put an end to the Panchayat system. Subsequently, the Nepali people promulgated a Constitution that finally recognised their sovereignty as supreme. A bi-cameral, multi-party political set-up was brought into existence by the Constitution of Nepal, 1990. This Constitution is a landmark document in the history of the country, for the guarantees it provides as fundamental rights of the citizens of Nepal. These include the right to freedom of thought and expression, right to assemble without weapons, right to establish organisations, right to information, and the right to protection from censorship. These are fundamental legal guarantees without which the growth in Nepali media, non-governmental organisations and social movements since 1990 would not have been possible. The Constitution, however, also provides for restrictions on these rights. For instance, Article 12(2a) guarantees freedom of thought and expression provided that:

(1) nothing mentioned in sub-clause (a) shall be deemed to 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 jeopardise 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 which may be contrary to decent public behaviour or morality.

Article 13(1) of the Constitution guarantees that “no news item, article or any other text shall be censored prior to its publication” but the Constitution also provides for limitations to this right on the same basis as for the freedom of thought and expression. But Article 13 also goes further and prevents the seizure of press hardware and de-registration of newspapers as follows:

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

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

Article 16 guarantees the right to information as follows:

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.

As a commentary by ARTICLE 19 notes, by delimiting the scope of this article to matters of ‘public importance’, the constitutional right to information is unnecessarily circumscribed.²⁶⁷ Despite these restrictions, the legal guarantees provided by the Constitution of Nepal, 1990 are the fundamental causes of the growth of the media and non-governmental sectors in Nepal. In this section, the growth in the media sector is examined first, before discussing how the realm of freedom of expression has increased through work from other sectors as well.

The media boom of the 1990s²⁶⁸

Due to a confluence of several factors, the demise of the Panchayat being the most significant, the media is the one sector that recorded massive growth during the decade of the 1990s. While the government continues to publish two newspapers, their influence has vastly diminished in the face of stiff competition from eight other broadsheet dailies – five in Nepali and three in English – all from the private sector. In 1993, a new era in print journalism began with the launch of two private-sector broadsheet dailies, *Kantipur* (in Nepali, circulation c. 100,000) and *The Kathmandu Post* (in English). As of early 2004, the success of these newspapers, in particular the financial record of *Kantipur*, has not yet been replicated by others that came in their wake. These include *Himalaya Times*, *Nepal Samacharpatra*, *Rajdhani*, *Annapurna Post* (all in Nepali) and the English daily *The Himalayan Times* and some others which have ceased publication. Nevertheless, these papers have made the daily news market fairly competitive.

²⁶⁷ ARTICLE 19 adds: This right “should apply to all information held by public authorities, and that requesters should not have to justify their requests by reference to matters of public importance. The underlying rationale for access is that public authorities hold information not for themselves but as custodians of the public good so that, subject only to legitimate secrecy exceptions, the right should cover all information they hold”, ARTICLE 19, *Memorandum on Nepal’s draft Public Information Act*, 2004, pp.5-6. See also: Timalseña, Ram Krishna. 2003. *Right to Information: Philosophy, Law and Practice*. Bigya Timalseña, for details about the debates that took place in the Constitution Recommendation Commission regarding the right to information.

²⁶⁸ This and the following two sections are adapted from Onta, Pratyoush, Debating beyond foreign investment in Nepali media. *The Himalayan Times* (Perspectives supplement), 22 February, pp. 4.

The weekly Nepali-language tabloids (known as *saptahiks*) continue to exert substantive influence in political circles and – if only for that reason – have to be considered part of the mainstream media in Nepal. They are mostly run by publishers and editors close to political parties and their factions. These tabloids continue to provide grist for the political mill, with even occasional investigative pieces that the larger dailies tend to shy away from, and demonstrate a daring that the larger dailies do not. The investment required for weeklies is extremely modest, as are the printing costs, using subsidised newsprint and for the most part black-and-white printing. The most popular weeklies found in the market today include the following: *Deshantar*, *Punarjagaran*, *Ghatana ra Bichar*, *Saptahik Bimarsha* (all considered close to factions within the Nepali Congress Party), *Chhalphal*, *Dristi*, *Jan Astha*, *Budhabar* (all considered close to the main opposition Communist Party of Nepal – Unified Marxist-Leninist), *Jana Ekata*, *Hank* (considered close to the Community Party of Nepal – Unity Centre and Masal). Another popular weekly, *Janadesh*, close to the CPN (Maoist), has been closed after the imposition of emergency in November 2001. These weeklies have an estimated circulation of 10,000 to 25,000 each.

Since 1999, within the various print media forms, magazines have seen the most spectacular growth. The investment in this genre has come from both big investors who have spent a lot of money creating a market for their general newsmagazines (e.g., *Himal Khabarpatrika*, *Nepal*, *Samaya* in Nepali and *The Nation*) and others with specific profiles. In the latter category, for instance, *Mulyankan* and *Nawa Yuba* are Nepali monthlies read extensively by leftist activists, workers and the youth. NGOs also publish quite a few periodicals, but some of the more influential ones have ceased publication in the recent past.²⁶⁹ The circulation of the most successful magazines varies from 10,000 to about 50,000.

Although the state-owned Radio Nepal continues to be the most powerful media in Nepal with a communication infrastructure unmatched by any other institution, there has been a phenomenal growth in independent FM radio. *Radio Sagarmatha* FM 102.4 (owned by the NGO Nepal Forum of Environmental Journalists), which received its licence in May 1997,

²⁶⁹ Basnet, Purna. 2003. Baikalpik patrika: vyavasayikta ra atmanirvartako cunauti. In *Midiya Utpadan ra Antarvastu*. Ramesh Parajuli and Pratyoush Onta, eds., pp. 23-56. Kathmandu: Martin Chautari and Centre for Social Research and Development.

was the trailblazer in the movement for independent FM radio in Nepal. By mid-2004, licences had been issued to 56 independent radio operators, out of which some 30 were on air, more than half of them outside of the Kathmandu Valley. When all of stations with licences go on air, some 22 of the 75 districts of Nepal will have FM stations. In terms of radio station ownership, NGOs, cooperatives, locally elected bodies and private commercial companies own and manage FM radio stations with their own transmission sets and towers. This variety in ownership is an important indication of the pluralism achieved in radio in Nepal.

Comparatively little happened in the television sector in the 1990s apart from the government-owned NTV selling slots to commercial and NGO operators. The government has finally decided to open the television sector and has given licences for satellite linking to several commercial operators from among applications received from various parties, including NGOs. Three commercial stations – *Channel Nepal of Spacetime Network*, *Image Metro* and *Kantipur TV* – went on air in 2002-2003. The internet has also begun to be part of the lives of a small but influential group of Nepalis.

Factors responsible for media growth

The legal guarantees of freedom of expression after 1990 coincided with the expansion of the market as well as the expansion of the reach of the distribution networks via highways and airways. Thus, the opening up of the legal and economic spaces to forces of democratisation and the market has contributed to the growth of the media in Nepal since the early 1990s. Five factors seem in particular to have played important roles in the growth of the media in Nepal since 1990.

a) *Legal regime:*

Following the promulgation of the Constitution, several acts relating to the media in Nepal were passed, two of the more significant ones being the Printing Press and Publications Act 2048 BS, and National Broadcasting Act 2049 BS. The first of these provided guarantees against seizure for investments in the print media sector and the second made it possible for the private sector, NGOs and local governments to enter the field of electronic media.

b) *New participants:*

The second factor that is responsible for the growth of the media is the increasing involvement of private institutions, NGOs and elected local government bodies in media production and education. Since their investment in media hardware – such as printing presses and radio transmitters – is guaranteed against confiscation, the private sector has invested heavily in print media, radio, television and the internet. NGOs have become significant players in media output, both as content producers and sources of news. Various NGOs now produce feature services focused on specific themes such as women, biodiversity, tourism and nutrition and produce radio and television programmes.²⁷⁰

c) *Growth in advertisement market:*

The third factor responsible for the growth of media is the cumulative increase in the advertisement market. Industry insiders suggest that the advertisement markets were growing at an annual rate of about 25 per cent until recently. The growth in state-promoted advertisements and public service announcements, the arrival of Indian multinationals in Nepal as part of the liberalisation of the economy, the modest growth in the Nepali private sector, and the increase in the number and activities of both international donor agencies and Nepali NGOs account for most of this increase. In addition, individual patronage of print media in the form of personal ads (condolences and congratulations) is also contributing significantly to this growth.

d) *Growth in media consumers:*

The fourth factor to consider is the increase in the number of Nepalis who, for various reasons, use media products on a level that is unprecedented in the history of Nepal. This consumption can be tied to the increase in the absolute number of literate Nepali citizens. It now seems that for more and more Nepalis some form of media is becoming an integral part of their lives. Pressures emanating from professional compulsions, increased reliance on the media for development or politics-related information, changes in popular culture and fashion, and other reasons have contributed to this greater usage.

²⁷⁰ Subedi, Anup. 2002. Nepali Telivijanma Riporting. In *Midiyako Antarvastu: Vividh Vislesan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., pp. 197-215. Kathmandu: Martin Chautari, Centre for Social Research and Development, *Op.cit.*

e) *Imperative of the Nepali language:*

The cultural politics of the Panchayat regime had relied to a large extent on the promotion of the Nepali language as a fundamental marker of the Nepali identity. Its educational and other programmes had promoted Nepali at the cost of other languages spoken inside Nepal. While this did historical violence to the local cultures and languages and dialects of Nepal, the Panchayat's language policy resulted in a Nepali population that overwhelmingly speaks with each other in the Nepali language. When the environment for media growth became congenial, media promoters and producers cashed in on this fact. It is also true that the more democratic environment has made it possible for the production of media in other languages, however small their volume might be at the moment.

Weaknesses and limitations of Nepali media and how they affect capacity:

Despite the growth described above, there are several remaining structural weaknesses of Nepali media that limit its potential as a vibrant force for the democratisation of Nepali society. Some of the more important weaknesses and how they affect its working capacity are discussed below.

a) *Kathmandu-centric:*

Almost all of nationally influential print and electronic media in Nepal is edited, printed and produced in Kathmandu. Most of the nationally influential newspapers are produced from Kathmandu.²⁷¹ As mentioned earlier, there has been a phenomenal growth in independent FM stations outside of Kathmandu as well, but just like in the case of print, the organisations running these radio stations are institutionally very weak. Television too is Kathmandu-based. This kind of spatial concentration of all nationally significant media production in Kathmandu means that the Nepali media represents the Kathmandu establishment point of view on almost all issues. The corporate media houses, being based in Kathmandu and close to the 'power centres' in society tend to play it safe between the various political, financial and intellectual elite camps. This should be cause for alarm to anyone interested in generating the conditions in which a diversity of orientations and points of view (both intellectual and spatial) can be served by a truly pluralistic and

democratic media in Nepal. In addition, the highly partisan nature of the Nepali elite makes fair reporting a difficult exercise even for committed journalists.²⁷²

b) Ownership pattern and form:

While every post-1990 government has talked about privatising Gorkhapatra Sansthan which now publishes two newspapers and three monthly magazines (for reasons of the perceived incongruity of the print media being government-owned in this day and age) no definitive decision has been made so far. In the case of the print media, the market is now dominated by the private sector. While this is an improvement over the situation that prevailed in 1990, there is the danger that commercial interests will get the better of editorial imperatives in print journalism. While the ruling dispensation's ability to effectively use its print media for propaganda has decreased, the misuse of *Radio Nepal* and *Nepal Television* for the same purpose continues. The independent FM radio movement is currently dominated by the commercial sector but opportunities for good public service broadcasting are also limited by several institutional weaknesses of these stations. Most notable among these is the need for an annual renewal of licences, which can be withheld at the whim of the minister concerned. These must be repealed if radio pluralism is to be fully realised in Nepal.

c) Gender, ethnic and caste composition:

Journalists in Nepal tend to be overwhelmingly male and from the Bahun, Chhetri and Newar (BCN) caste groups. They also tend to come from a Hindu religious background. While the number of women columnists has increased in the past decade and there is a visible presence of women in the independent radio stations, the percentage of women reporters and editors, both in print and electronic media, continues to be small. In a nation-wide study of 114 print media institutions undertaken by a team of researchers from the Kathmandu-based Centre for Social Research and Development (CSR), it was

²⁷¹ Two of them, *Kantipur* and *Nepal Samacharpatra*, also publish Eastern region editions from Biratnagar. These editions give extra space (a page or two) to news related to the Eastern region but they are essentially more or less similar to the national edition published from Kathmandu.

²⁷² Details on the media produced in parts of Nepal other than Kathmandu can be found in Onta, Pratyoush, ed. *Ksetriya Midiya: Vigat ra Vartaman*. Kathmandu: Centre for Social Research and Development.

found that women constitute less than six per cent of the workforce in the editorial department.²⁷³

In the 104 ‘mainstream’ publications surveyed (10 publications were specialist ethnic or for the dalit²⁷⁴ community), dalits constituted less than two per cent of the staff of editorial and managerial departments, and less than one per cent among regular columnists. Members of the minority ethnic groups, referred to as *janajatis*, constituted about 14 per cent of the editorial staff, 22 per cent of the managerial staff and 12 per cent of the columnists. If you exclude upper caste Newars (all Newars have been included in the broader *janajati* group) from these calculations, all three statistics regarding the participation of ethnic Nepalis in mainstream print media would be around 10 per cent or less. Similarly the number of *madhesis* – Nepalis from the Tarai – is very small. What is clear is that there is very little participation of women (half of an estimated 23 million population), dalits (about 20 per cent of the population) and ethnic minorities (about 35 per cent of the population) in Nepal’s print media. The scenario is not very different in the case of electronic media.

The overwhelming presence of Bahun, Chhetri and Newar males in the world of Nepali media means that its social base is very limited. As a result of this, minority concerns and voices of women, dalits, *janajatis*, and *madhesis* are not adequately represented, both textually and numerically, in all the media products and institutions. The biases of the group from which the editors come (‘BCN’), mean that critical issues do not get coverage, particularly in relation to women, the ethnic *janajatis*, *madhesis*, and dalits.

d) Patriotism and self-censorship:

Nepali media practitioners, by and large, also suffer from an insecure variety of nationalism that makes them succumb, more often than not, to highly emotive defences of the Nepali nation. This makes them susceptible to illogical reasoning and leads them to give unnecessary benefit of doubt to various interest groups in Nepal, who resort to the nationalistic bandwagon to promote their own parochial interests. This is in part a

²⁷³ Parajulee, Shekhar and Bhaskar Gautam. 2001. *Print Midiyama Dalit ra Janajati Sahabhagita*. In *Nepali Midiyama Dalit tatha Janajati*. Pratyoush Onta and Sekhar Parajulee, eds., pp. 21-56. Kathmandu: Ekta Books.

pathological product of the patriotic lessons learned by the populace during the three decades of the Panchayat rule. It forecloses certain debates and prevents others from ever emerging in the public sphere. This became evident, for instance, in the way in which mainstream media accepted the imposition of the state of emergency in late 2001 as discussed below or how journalists from various media organisations responded to a proposed question in a BBC programme on South Asia (in September 2000), which hinted at the inclusion of Nepal within a larger Indian ‘security umbrella.’ Instead of tackling the question head-on and demonstrating how, realistically speaking, its intellectual basis was vacuous, Nepali journalists resorted to mob diplomacy that eventually earned a ritualistic apology from the BBC. It was also evident when influential owners of Nepal’s commercial media opposed foreign direct investment (FDI) in the print media sector as, according to them, such media would be fair game to content that is detrimental to Nepal’s ‘national interests’.²⁷⁵

e) “Cronyism” in donor support:

The international community has invested a lot of money in capacity enhancement of media training institutions and media practitioners, but there has not been a single public assessment of this experience. No-one has kept a public record of the types of assistance rendered to Nepali media practitioners and institutions and there is virtually no analysis of what kind of assistance has worked and what has not. There is a plethora of project reports, held in private by the donor agencies and the Nepali institutions executing the projects. Tacitly, it is understood that the primary logic of these reports is, in the last instance, to justify that donor funds were disbursed in an approved manner and that the work proposed in the mutual contract was accomplished. There is a lot of emphasis on the accountability of this type of assistance, accountability as understood by accountants and auditors. This would have been something to celebrate were it not taking place in the more or less complete absence of accountability, understood as honesty and integrity of both intellect and effort, and also in the absence of a debate on the public policy implications of support whose benefits and costs have not been appraised comparatively.

²⁷⁴ “Dalit” is the name given to those people who are considered to be at the bottom of the Hindu caste system, sometimes also referred to as “untouchables”.

²⁷⁵ The debate regarding FDI in the media sector in Nepal has been on since 2001 see: Pratyoush Onta, 2004. *Debating beyond foreign investment in Nepali media*. The Himalayan Times (Perspectives supplement), 22 February, pp. 4.

How can we then summarise the developments since 1990? The growth in all forms of media has enlarged the space of what can be called civil society in Nepal and facilitated the search for democratic foundations for the state and the entire society at large. Learning by experience, a younger generation of Nepali journalists is examining and commenting upon society in ways that have never been done before. However it must also be added that despite the media boom in Nepal, it does not necessarily mean that media as an institution has served the cause of democracy in a satisfactory manner. Nor does it mean that media institutions themselves, as discussed above, are fully democratic. Since even the toughest structural constraints allow some flexibility for individual action, it is not being suggested here that the structural characteristics of the Nepali media, discussed above, determine its ability as a democratic force in the last instance.

Even within the current world of Nepali media, there is room for greater journalistic vigour and commitment to public interest. In other words, media is a partial democratising force in Nepal, but at the same time it shares the privileges of power associated with the three wings of the state and the Nepali financial business world.

Growth of other civil society spheres

In addition to media, Nepal has seen a growth in other civil society spheres since 1990. In particular, the number and activity domains of non-governmental and non-profit organisations have grown quite a bit. The proliferation of NGOs in post-1990 Nepal must be seen as the manifestation of Nepali citizens exercising their fundamental rights to form associations in accordance with the Constitution of Nepal, 1990. While questions regarding issues of transparency, dependency on donor contributions and public monitoring (of services and products for quality) of NGO activities need to be further debated and discussed, it is definitely the case that NGOs have expanded the realm of freedom of expression in Nepal.

By actively searching for information about development projects that had been shrouded in governmental secrecy and by filing cases of public interest litigation in the Supreme Court of Nepal, which has forced it to make decisions impacting the citizen's right to know, Nepali NGOs have contributed to the legal and social opening up of Nepali society.²⁷⁶

²⁷⁶ Siwakoti 'Chintan', Gopal. 2000. *Public Interest Litigation as a Tool of Social Change*. The Kathmandu Post Review of Books, 24 September, pp. 4.

Some NGOs have been involved in the drafting of Acts related to the right to information²⁷⁷ and the protection of whistleblowers.²⁷⁸ Others have also been at the forefront of critical exercises – in the form of research, publication, public hearings, debates, training, etc. – related to the enjoyment of fundamental rights of relatively disenfranchised sections of Nepal’s population. Other NGOs have led the fight through public interest litigation, execution of and training in investigative journalism, and research and training related to media capacity-building. Still others have documented human rights violations by the state and the rebels.

NGOs have also worked as part of and in collaboration with various social movements. If women’s, dalit and *janajati* movements as well as the movement to free bonded labourers, known as *kamaiyas*, have recorded some success, then some of that success is due to the participation of NGOs. In the articulation of the issues highlighted in each of these movements and through advocacy, the limited realm of freedom of expression that Nepal inherited as a legacy of Rana and Panchayat Nepal has certainly been stretched to a significant degree. This has happened through the participation of NGOs as sources of alternate information, as well as through their direct involvement in the production of media content through feature services, investigative journalism programmes, publication of magazines, production of radio and television programmes, etc.²⁷⁹

4.4 Legal Framework against Freedom of Expression

Background

The Communist Party of Nepal – Maoists (CPN Maoists) began its war against the Nepali state in February 1996. Its ultimate aim is to make the country a ‘people’s republic’. The dominant view of how the conflict started falls within what experts call the ‘grievance theory’

²⁷⁷ One version of the draft of the Public Information Act was prepared about four years ago by the Nepal Press Institute (an NGO that offers various types of training to potential and working journalists) and the Federation of Nepalese Journalists, the largest elected umbrella body of journalists in Nepal. After some public discussions with legal activists and others, its text was revised and that version is published in *Khabar* vol 5, no. 4, August 2003. However the current draft is still inadequate as a public information act.

²⁷⁸ Pro Public 2003. Draft of the Whistleblower Protection Act. Prepared by ProPublic and submitted to His Majesty’s Government of Nepal. *Khabar* 5(3): 11-13.

²⁷⁹ Subedi, Anup. 2002. Nepali Telivijanma Riporting. In *Midiyako Antarvastu: Vividh Vislesan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., pp. 197-215. Kathmandu: Martin Chautari, Centre for Social Research and Development.

of conflicts. This view, for instance, finds its articulation in one of the most read books about contemporary Nepal, *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996 to 2003*.²⁸⁰ The authors conclude that economic and social inequalities (“pronounced ethnic and class dimension to the problem of poverty”) are the fundamental causes behind the rise of the Maoists in Nepal. Combined with the efficacy of organisational activism of the far left in the mid-Western hills under the tutelage of Mohan Bikram Singh and the ineptitude of successive governments led by the Nepali Congress Party in dealing with the ‘initial rumblings’ of the Maoists, the authors conclude that structural inequalities in the system provided the fertile grounds for ‘Maoist ideas to grow’. Therefore, Maoists “found ready support for their promises of an alternative to an economically, socially, culturally and politically flawed system that they sought to replace.” In other words, the perception of the rebellion as a conduit to rectify existing grievances and seek justice for Nepal’s downtrodden suffuses the narrative of the dominant view of how the conflict started and grew in Nepal.

An alternate explanation, is located within a complex platform that first looks at the history of the far left in Nepal. Here I am talking not so much about the formal splintering of the Communist Party of Nepal but more of the long history for ideological purity in terms of revolutionary ideals. The CPN (Maoists) emerged as the faction within the communist movement in Nepal that asserted that an armed revolution was necessary and hence it declared a war against the Nepal state. This was led by a core group of Maoist ideologues and guerrillas who believed that the only way to seek redress to social injustice in Nepali society was through an armed revolution. However, the growth of the Maoist insurgency has been made possible by agencies (e.g., the king, political parties, Royal Nepali Army, India, etc.) who, deliberately or otherwise, contributed to the reduction of risks associated with its ability to finance itself and recruit cadres. Hence, while the strong formulation of the alternative ‘greed model’ of conflicts (in which it is postulated that civil wars are motivated by the desire to acquire wealth, especially in the form of natural resources) does not apply in the case of Nepal, an argument can certainly be made for its weak formulation in which the opportunity for rebellion is tied to risks associated with accessing finances (domestic and international)

²⁸⁰ Thapa, Deepak. 2001. *Day of the Maoist*. Himal South Asian 14(5): pp.4-21.

through the deployment of youth available in large numbers for recruitment.²⁸¹ In other words, the non-involvement of the Royal Nepali Army in the Nepali state's response to the insurgency before 2001 forces us to examine the post-1990 Nepali state as a constellation of not only inept political parties but also an obstructive semi-constitutional monarchy with a tight hold on the use of the army as a credible state institution affecting the risk calculus of the insurgents. In this view, the success of the Maoist insurgency has to be attributed to their ability to exploit the weaknesses of and fissures in the Nepali state to its maximum advantage.

Passing through what they call 'tactical stages' of their plan, by 2001 the Maoists had come to a position where they could largely dictate the agenda for national politics in Nepal. The state's response until then had been to try to contain the insurgency through the use of the police force under the home ministry of the civilian government. It had engaged in several episodes of what can only be described as counter-productive police-led repressions such as the one in 1998 known as Kilo Sierra Two. Such state responses only served to provide further fuel to the rebel movement.²⁸²

The first round of negotiations between the government and the CPN (Maoist) took place in mid-2001. The ceasefire lasted for about four months, but the talks did not succeed. On 23 November 2001, the Maoists attacked army barracks in Dang in Western Nepal and police posts in the district of Syangja in central Nepal. They also hit several other places in the country. In the attacks in Dang and Syangja, about 40 army and police personnel were killed and the Maoists were also able to capture important weapons from the security forces. The government immediately declared a state of emergency, which lasted for about nine months. In this section I discuss the legal framework that has impinged upon freedom of expression in Nepal since late 2001.

The Imposition of the State of Emergency

After the attack in the army barracks in Dang, the government headed by Prime Minister Sher Bahadur Deuba quickly moved to mobilise the army against the Maoists for the first time. On

²⁸¹ See: Bray, John, Leiv Lunde and S. Mansoob Murshed. 2003. Nepal: Economic Drivers of the Maoist Insurgency. In *The Political Economy of Armed Conflicts: Beyond Greed and Grievance*. Karen Ballentine and Jake Sherman, eds., pp. 107-132. Boulder: Lynne Rienne.

²⁸² See Thapa, Deepak, ed. 2003. *Understanding the Maoist Movement of Nepal*. Kathmandu: Martin Chautari and Centre for Social Research and Development, for a collection of writings on Maoist conflict.

26 November, Prime Minister Deuba's Cabinet decided to impose a state of emergency in Nepal and asked His Majesty King Gyanendra for the issuance of an order regarding this as provided by Article 115 (1) of the Constitution. Suspension of certain constitutional rights was also recommended. On the same day King Gyanendra issued an order of a state of emergency with respect to the entire Kingdom of Nepal and in accordance with Article 115(8), suspended the following Articles of the Constitution of Nepal, 1990:

12(2) (a), (b) and (d): freedom of thought and expression; freedom to assemble peacefully and without arms; and freedom to move and reside in any part of Nepal.

13(1): right against pre-publication censorship

15: right against preventive detention

16: right to information

17: right to property

22: right to privacy and

23: right to constitutional remedy except for habeas corpus.

On the same day, King Gyanendra approved the mobilisation of the Royal Nepali Army and promulgated the Terrorist and Disruptive Acts (Control and Punishment) Ordinance (TADA) about which more will be said below. Given the long list of rights that were suspended during the state of emergency, the environment in Nepal for the freedom of thought and expression deteriorated abruptly.

Terrorist and Disruptive Acts (Control and Punishment) Ordinance and Act

Citing Section 7(3) of TADA, the government declared as “terrorist the Nepal Communist Party (Maoist) group and any person, organisation or group, who is directly or indirectly involved in, or renders assistance in, the activities carried out by that group”.²⁸³ The Ordinance was passed as a bill in the Parliament in a slightly revised form on 4 April 2002 and became the Terrorist and Disruptive Acts (Prevention and Punishment) Act on 10 April 2002.²⁸⁴

²⁸³ Order from the Ministry of Home Affairs, 26 November 2001.

²⁸⁴ As an Act, it was valid for two years and thus its validity ended on 9 April 2004. On 10 April 2004, a Terrorist and Disruptive Acts (Prevention and Punishment) Ordinance was issued by King Gyanendra. A comparative study of this last ordinance suggests that it is the same as the Act that came into existence on 10

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Section 3 of the Act provided for a wide ranging definition of activities that qualified as terrorist and disruptive crimes.²⁸⁵ Section 5 of the Act gave government authorities widespread power to carry out many actions in the name of preventing any terrorist or disruptive crimes. Section 9 delineates the power of preventive detention. Anyone charged under the TADA shall be generally detained in judicial custody pending hearing (section 11). Those accused under this Act can be kept in remand for investigation for a period not exceeding 60 days with the permission of the judge (section 17(5)). Section 18 allows the Government to impound any letters or communication equipment such as telephone, fax, etc. of any person or groups engaged in terrorist and disruptive activities. Section 20 provides impunity to government or security officials for any activity they might conduct “in good faith” under TADA. Section 12 states that even when terrorism-affected areas are defined by section 7, the right to assemble without arms, the right to thought and expression, and the right to travel in any part of the Kingdom of Nepal will not be restricted provided that the exercise of such rights does not prejudice TADA. While there is ambiguity regarding what ‘prejudicing TADA’ might mean, this section clearly recognises that the freedom of thought and expression is not annulled by TADA.²⁸⁶

Section 2(i) defines an “accomplice” in a terrorist and disruptive act as a “person who is in contact or involved with any person or group involved in the terrorist and disruptive act” and a “person who gives any information to, or assists in giving information to, any person or group involved in the terrorist and disruptive act or who transmits or publishes or disseminates information of the person or group involved in the terrorist or disruptive act.” Thus the danger to journalists who make contact with Maoists for professional reasons being defined as an accomplice was real. Compounded with section 7, section 2 could produce an effective chilling effect on the media against reporting about Maoist activities.

April 2002. Since the revisions in this Act from the original ordinance text are minimal, only the text of the Act is analyzed here in general.

²⁸⁵ In the Act, Section 3(e) from the original ordinance has been dropped. It stated that a terrorist and disruptive crime included “any other act committed in a manner to create an environment of terror or fear in public life.” Also dropped was a part of section 3(2) where it was stated that any person who “gives shelter to or harbours any person involved in a terrorist and disruptive act shall also be deemed to have committed a terrorist and disruptive crime.”

²⁸⁶ However, when first promulgated as an ordinance it contained a section 7(2) that referred to the declaration of emergency and under such a situation, it stated that the freedom of expression and the freedom of press and publication could be restricted. This subclause was removed when the ordinance was revised as an Act in April 2002.

Other executive orders

Along with the imposition of the state of emergency and TADA ordinance, the government of Nepal issued a series of orders. On 26 November 2001, the Ministry of Information and Communication issued a notice in the *Nepal Gazette* which said the following:

“In exercise of the powers conferred by sub-section (1) of Section 15 of the Press and Publication Act, 2048 (1991), His Majesty’s Government has, in view of the national interest, prohibited the publication of any interview, article, news, news or reading material or view guided to entice/facilitate the slogan “let us move ahead on the path of people’s war to establish people’s regime” or to encourage disruptive and terrorist activity such as battery, looting, kidnapping, arson, murder, violence or guided with intent to support that purpose, for a period not exceeding six month of the date of publication of this notice. It is also informed, by this notice, that if any person publishes the prohibited matters in violation of this notice, such person shall be liable to action under the Press and Publication Act, 2048 (1991).”²⁸⁷

On the same day, the same ministry issued another notice prohibiting the broadcast of materials described above. This time it referred to section 7(1) of the National Broadcasting Act, 2049 (1992).

What is interesting is that in both notices, no reference to the State of Emergency or TADA ordinance was made. In other words, articles in two existing, separate laws related to print and broadcast media respectively were evoked to begin a period of censorship on news and other items related to the Maoists (without naming them as such but making it clear from the context). Apparently this was done to suggest that the government was ‘soft’ about imposing restrictions on the press,²⁸⁸ but there is no doubt that these notices contributed to the amassing of fear against which media persons had to work.²⁸⁹ In these existing laws, the prohibition is

²⁸⁷ Part 3, Notice – 1, *Nepal Gazette* No. 51, Additional Issue 49, 26 November 2001.

²⁸⁸ Bista, Mahendra. 2001. Sankatkalko Nepali press: *Sanyam ki samarpan?* Nepal Samacharpatra, 8 December, pp. 4.

²⁸⁹ The punishment for violators of these prohibitions is as follows. In the case of print, the publisher or editor can be punished according to any other relevant laws evoked by the particular violation and in the absence of such a condition, he can be fined ten thousand rupees or imprisoned for a year or both. If anyone exports, prints,

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simply justified in the name of the nation or national interest and it is held to be valid if such a prohibition is published in the Nepal Gazette. What constitutes national interest is not defined in both laws and hence based on this lack of specificity; the use of these articles can be quite arbitrary.²⁹⁰

On 27 November 2001, the Royal Nepali Army issued a notice in which it “called upon mass media to publish, transmit or dispatch news, articles, commentaries, photographs or any other materials concerned with the Royal Nepali Army only after getting them confirmed from the Army News Department of the Headquarters.” This request was made, according to the notice, “in view of the sensitivity of security matters”.²⁹¹ On 28 November, the Home Ministry issued a similar notice in which it called upon mass media to publish news related to the Nepal Police and the Armed Forces only after getting them confirmed with the spokesperson of the Home Ministry.²⁹²

On 28 November the Minister of Information and Communications issued an order containing a list of “dos and don’ts” for journalists and publishers. Citing the promulgation of TADA as the context, the Minister declared that the directives were meant to discourage the coverage of Maoist activities in a positive light. However, he did not refer to section 7(2) of the TADA ordinance while making this announcement. Among the permissible directives were items such as news that expose the criminal activities of Maoists without boosting their morale, news that highlight the brave work and achievements of the Royal Nepali Army, the police and civil servants, and news obtained from His Majesty’s Government and other official governmental sources. The list of non-permissible activities was long and included items that were already part of the existing laws. However, it also included the following: “news that might spread ill-feelings against and demoralise or tarnish the image of the Royal Nepali

sells, translates, quotes or exhibits such prohibited printed materials, he can be fined up to five thousand rupees. For the case of a broadcast violation, the licence to broadcast can be cancelled.

²⁹⁰ For that reason I also think that they violate the constitutional guarantees regarding freedom of expression [12(2a)] and against censorship [13(1)] despite these rights being circumscribed by provisos that allow the framing of reasonably restrictive laws delineating specific circumstances. However, both the specificity and the ‘reasonableness’ of these restrictions had not been tested before November 2001. They remained unchallenged at the point of the issuance of these two notices because under the state of emergency, the Supreme Court could not be moved for this purpose.

²⁹¹ The Rising Nepal. 2001. *Army asks media to verify news*, related materials. 28 November, pp. 1.

²⁹² Bista, Mahendra. 2001. Sankatkalko Nepali press: *Sanyam ki samarpan?* Nepal Samacharpatra, 8 December, pp. 4.

Army, the Nepal Police and civil servants; news that might encourage or boost the morale of the Maoists; and matters related to the objective of overthrowing the elected government through violent means”.²⁹³ In addition, the Defence and Home ministries issued various ‘requests’ to the media for its cooperation.²⁹⁴ The legal and executive directives contributed to an environment of fear amongst people in the media and helped generate a regime of self-censorship. While the legal bases of these directives and requests were questionable, they went unchallenged because of the emergency environment in the country.

Legitimacy of restrictions in comparison to constitutional and international law

Two different general analyses of the legitimacy of restrictions in comparison to constitutional and international law have been undertaken. The first of these was prepared by a team from the International Bar Association (IBA) in September 2002 following a fact-finding mission to Nepal in mid-June 2002.²⁹⁵ The second of these was prepared by the Asia Pacific Human Rights Network in January 2004 (APHRN) for submission to the Advisory Council of Jurists. While both analyses raise a number of concerns (which are not reviewed here), they agree on the question of TADA not breaking any constitutional or international law with reference to the right to freedom of expression.

In addition to analyses of articles related to preventive detention, investigative detention and the setting up of a special court to try charges under the Act, the IBA report considered if the freedoms of assembly and expression guaranteed by the Nepal constitution had been breached by TADA. It reached the following conclusion:

“Section 12 of the TADA provides that the right to assemble peacefully without arms and the rights of freedom of opinion, expression and movement throughout Nepal shall not be restricted, even in areas declared to be terror-influenced under section 7. Article 12 of the Constitution also provides that all citizens have the right to assemble

²⁹³ In reference to this order, the then Minister of Information and Communication, Jayprakash Prasad Gupta, said in an interview, “We have not censored the press. We have only given directives asking them to be careful about venting the point of view of terrorists – who for some years have managed to gain a firm hold in the Nepali press and had managed to get them to publish reports almost everyday justifying their activities” (Nepali Times 2001: 1).

²⁹⁴ Bista, Mahendra, ed. 2060b v.s. *Sankatkalma Nepali Press*. Kathmandu: Federation of Nepalese Journalists.

²⁹⁵ International Bar Association (IBA). 2002. Nepal in Crisis: Justice Caught in the Cross-fire. Downloaded from <http://www.ibanet.org/pdf/HRINepalJusticeFinal.pdf>.

peacefully without arms, but proviso 2 of Article 12(2) allows the making of laws to impose reasonable restrictions on any acts undermining law and order in Nepal. The TADA is therefore constitutionally valid in this regard."²⁹⁶

Similarly it also concluded that with respect to the freedom of expression, TADA did not breach Nepal's international human rights obligations. The second analysis also raises concerns about many sections of TADA but is silent on the issue of it breaching constitutional and international law regarding freedom of expression. From this, I have assumed that the second analysis also concluded that TADA did not violate the national and international norms on freedom of expression.

However, these two analyses seem to have overlooked some key features of the TADA (both the original ordinance and later Act). In the original ordinance, section 7(2), allowed the government to issue an order to control expression of opinion, press and publication in terrorism-affected areas or the entire country under the state of emergency. This was indirectly referred to in various executive orders of the state without quoting section 7(2) precisely. In addition – as mentioned above – the danger of a journalist who gets in touch with Maoists for professional reasons being charged as an accomplice in terrorist and disruptive activities was made real by the TADA ordinance and later the TADA Act sections 2 and 7. It is possible that this point is embedded in the following reading of section 7 of TADA by the APHRN:

“The grant of power to the Government to declare any person, organisation, association or group ‘involved’ in terrorist or disruptive activities as terrorist in nature. While Article 12 of the Constitution and Article 22(2) of the ICCPR allow for certain reasonable restrictions to be placed on the freedom of association, TADA is unreasonably imprecise in that it criminalises membership of associations and organisations deemed to be ‘involved’ in terrorism without providing an adequate

²⁹⁶ International Bar Association (IBA). 2002. Nepal in Crisis: Justice Caught in the Cross-fire. Downloaded from <http://www.ibanet.org/pdf/HRINepalJusticeFinal.pdf>. pp.47.

explanation of the process through which involvement in terrorist or disruptive activities is determined."²⁹⁷

The subsequent arrest of journalists working for publications close to the Maoists took advantage of this inadequacy.

Restrictions on the media with respect to its possible coverage of Maoist activities was implemented in the name of protecting the national interests of Nepal but there was confusion regarding the legal bases of these restrictions as well as the lack of substance in proving the necessity of these restrictions for the protection of Nepal's national interest.²⁹⁸ Although the legality of the various other orders that emanated from different wings of the state was questionable, their purpose was to tame the Nepali public and the media and in that they were largely successful in the immediate aftermath of the declaration of emergency. The overwhelming nature of these executive orders had a chilling effect on the work and mindset of Nepali journalists and others engaged in public commentary at that point in time.²⁹⁹

Applications of the Emergency and TADA laws

During the nine-month period of the emergency, more than 160 journalists were arrested by the security forces. Many of them were held for prolonged periods without being charged.³⁰⁰ Take the case of Ambika Adhikari, a stringer for a popular weekly, *Jana Aastha*. Adhikari was detained for more than 16 months and was tortured while in detention. The security forces sought information from him about his relative Hemraj Bhandari, who was said to have some connection with the Maoists. He was 'released' (as a form of official paper masquerade) every three months and then re-arrested under the 90-day preventive detention provision of TADA. This was a clear abuse of the particular provision in TADA. The case of journalist Navaraj Pahadi who had exposed corruption in the Marsyandi Hydropower Project under

²⁹⁷ Asia Pacific Human Rights Network (APHRN). 2004. Nepal: The Terrorist and Disruptive Activities (Control and Punishment) Act, 2002. Downloaded from http://www.asiapacificforum.net/jurists/terrorism/aphrn_nepal.pdf.

²⁹⁸ This would be expected from Nepal's obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

²⁹⁹ This view was also expressed by several speakers during a discussion on 'Nepali media during the Emergency: How did it report and what did it learn from the experience?' held at Martin Chautari, Kathmandu, on 10 June 2004.

³⁰⁰ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists, pp.31-81.

construction in central Nepal is also instructive. Contractors falsely accused Pahadi of having had contacts with the Maoists and as a result, the local administration arrested him. He was given papers saying he was going to be held for 90 days under the preventive detention provision of TADA. After 30 days of imprisonment, he was released as a result of action taken on his behalf by the Federation of Nepalese Journalists.³⁰¹

Journalists were also summoned to the offices of local administrators or arrested for interrogation regarding materials they had published. For example, the Kathmandu District Administration Office (where newspapers are registered) summoned Pushkar Lal Shrestha, the chief editor of *Nepal Samacharpatra*, on 31 December 2001 to ask for an explanation of why his newspaper had published a news report based on Maoist leader Prachanda's statement. A more serious incident occurred after the arrest of Gopal Budhathoki in March 2002. He is the editor of *Sanghu*, a weekly published from Kathmandu and one of the vice-presidents of the Federation of Nepalese Journalists (FNJ). While in detention, he was blindfolded and handcuffed and was intensively interrogated about a news item he had carried in his paper in late February 2002, "*Hon'ble Chief of the Army Staff, shall we also try to know the price of the tears?*".³⁰² No charges were filed against him. This is indicative of the fact that the security forces appeared to be intimidating a journalist who had dared to question the army about its recent record.

In its report filed after a fact-finding mission to Nepal in mid-2002, the International Bar Association concluded that:

“arrest without warrant; arrest without charge, detention incommunicado where relatives or legal representatives cannot ascertain the place of detention; lengthy detention periods before formal charges are laid; treatment in detention relating to alleged physical abuse, hooding/blindfolding, and lack of adequate health care; lengthy period before habeas corpus applications are heard and determined; and

³⁰¹ Dahal, Taranath. 2003. Vartaman dwandama press. *Khabar* 5(5): pp.6.

³⁰² Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists, pp.49-50.

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interference with professional files/records are prima facie a breach of Nepal's international human rights obligations".³⁰³

What the IBA fact-finding team found in Nepal is also valid regarding how journalists or people who have functioned as communicators have been dealt with by the state and its security forces since November 2001 with or without the state of emergency and under TADA. Media persons have been held under TADA but precise charges have not been brought against them. TADA's preventive detention clause (along with a similar clause in the previously existing Public Security Act) has been widely misused for the arrest of media practitioners.

Given what has been described above, we must conclude that the state's intentions in imposing a state of emergency along with TADA in November 2001 were to provide full impunity to the Royal Nepali Army (RNA) as it was deployed against the Maoists.³⁰⁴ Through the imposition of the state of emergency and TADA, the security forces have sought full impunity regarding any and all operations they might conduct in the name of tackling the Maoists. When we look at what has happened in Nepal since late 2001 – the state of emergency and TADA combined and after August 2002, TADA alone – have been misused to harass members of the civil society. Since only a few Maoists have been specifically charged under TADA, it has been used to generate a state of fear in the general population at large, rather than to legally try insurgents for specific criminal acts they have committed. For the state's security forces, it was much easier to break the law by arresting and torturing journalists who have raised legitimate questions regarding their operations and practices, than to convince the population at large that they were gaining an upper hand in their military efforts against the Maoists. Even after the end of emergency and hence the formal restoration of fundamental freedoms, the fear induced by TADA continues because the targeting of media persons by the state authorities, with recourse to legal manipulation and physical threat, has not ended.

³⁰³ International Bar Association (IBA). 2002. Nepal in Crisis: Justice Caught in the Cross-fire. Downloaded from <http://www.ibanet.org/pdf/HRINepalJusticeFinal.pdf>.

³⁰⁴ This is a point also made by lawyer Satish K. Kharel in a discussion on the 'Politics of Security Acts' held at Martin Chautari, Kathmandu, on 6 June 2004. Human rights lawyers Gobinda Bandi and Mandira Sharma have also stressed this point during discussions with this writer.

4.5 Official Policy and Practice of the State and the Maoists

Control over information – both its content and flow – has been at the heart of the conflict in Nepal. Both the state and the Maoists have strategically tried to control the environment of information processing and the final products to benefit their own interests. Thus it is no surprise that secrecy, control over physical access to areas of violent exchanges between troops of both sides, and harassment and threat to media practitioners who exhibit an independence that questions the motivations of both the security forces and the Maoists, have become routine parts of the tactics of waging conflict in present day Nepal. In addition both sides have posed hurdles against the easy passage of print media products that might be detrimental to each side's interests. Moreover, both the state and the Maoists have been aggressively involved in the production of print and electronic media content where extreme partisan use of information is the norm. Both the state and the Maoist insurgents, appeal to the people using their own rhetorical devices. Patriotic exhortation flows easily from both sides as each try to 'win' the people by reminding them that it is the security and future of the people of Nepal that both are fighting for. Hence they even manage to argue that this entails certain sacrifices, duties, and compliance on the part of the ordinary people and media practitioners. If arguing for peace is the dominant public interest agenda at the moment, it can be said without doubt that the present politics of information control of the two main protagonists presents a serious challenge to the articulation of that agenda. I shall examine the politics of information first for the state and then for the Maoists.

State policy and practice

In this section I want to look at both the rhetoric of state efforts and official policies and practices that have hindered freedom of expression in Nepal in recent times.

Speaking to the nation over state-owned media on 27 November 2001, Prime Minister Deuba blamed the Maoists for forcing the government to declare a State of Emergency even when his government had shown utmost flexibility to negotiate with them. He said, "In an utter disregard to the government's efforts and people's goodwill, the Maoist terrorists carried out attacks on innocent people, political party workers, civil employees and they even attempted to hurt the national integrity by assaulting the security personnel including police and army."

To prevent the situation in the country from further deterioration, he argued, the government had declared a state of emergency. Seeking support from all sectors of Nepali society, he added, “I am fully convinced that all the Nepali people, political parties and the civil society is (sic) aware of the fact that a government accountable to the people won’t take such a difficult decision if an unfavourable situation is not there”.³⁰⁵ He also sought support from all political parties and media and civil society dedicated to the cause of peace and democracy.

Although Deuba did not explicitly explain why the declaration of the state of emergency was necessary for the mobilisation of the military against the Maoists, it was tacitly understood that both this proclamation and the issuance of the Terrorist and Disruptive Acts (Control and Punishment) Ordinance were demanded by the Royal Nepali Army (RNA) as preconditions for its involvement in the conflict which until that point had only seen the participation of the police force under civilian government control. Since the military had been asked to tackle the armed insurgents, suspension of various fundamental rights of the citizens of Nepal was necessary, the army had argued, so that full public opinion could be mobilised in its favour. It was considered that nothing that could reduce the morale of the state’s army should find its way into the public domain. But all this was never said publicly by the state. It was first asserted that the Maoists had precipitated a state of emergency and then the Nepali citizens’ cooperation in bearing with discomfort and inconvenience arising from that declaration was exhorted, all in the name of national interest.

The declaration of the State of Emergency was supported by many sectors in Nepal. Some of them were to be expected; others were a surprise. Among the former, Hindu fundamentalists such as the Nepal Sivasena group, distributed pamphlets in the streets of Kathmandu during the first week of December 2001, threatening those who opposed the emergency. Their text read as:

“When the state of emergency comes up for endorsement in Parliament in three months, the leaders of all the parties that do not support the government will be dealt with harshly by a joint group of Sivasainiks and Nepali janataharu [people].... Those who oppose this valiant effort of the government are anti-nationalist supporters of

³⁰⁵ The Kathmandu Post. *PM seeks cooperation*. 28 November 2001, pp.1.

terrorism and Nepal Sivasena demands that they should be imprisoned immediately for life.”³⁰⁶

In the next paragraph of the same pamphlet, Sivasainiks are exhorted to physically eliminate those who oppose the state of emergency. At that time Prime Minister Deuba (and his Cabinet colleagues) had reiterated that the suspension of fundamental rights was targeted only against the Maoists and no other sector of Nepali society. But neither Deuba nor any of his colleagues made it clear if the kind of publicly available hate speech and open exhortation to violence advocated by a Hindu fundamentalist group, which derives its existence from another Hindu fundamentalist group in India, is acceptable public speech under conditions of emergency. Nor was it made clear how the exhortation to violence by the Nepal Sivasena is different from that advocated by the Maoists.³⁰⁷ The claims to patriotism by the self-appointed vigilantes of Nepali nationalism went unchallenged. In fact, what Nepal Sivasena demanded in its pamphlet, fit rather nicely with the claims of the RNA as the last champion of nationalism in Nepal. Compliance regarding the parliamentary approval obviated the need for street vigilantism on the part of the Sivasainiks.

As expected, the main oppositional party in the House of Representatives extended its support to the emergency.³⁰⁸ Somewhat surprising (at least when it happened) was the full-support given to both the State of Emergency and TADA Ordinance by the media. The newly formed Nepal Media Society consisting of publishers and editors of the most influential broadsheet daily newspapers of the country met on 27 November to discuss the role of the press during the state of emergency.³⁰⁹ The Society, it was reported, “agreed to responsibly write in favour of parliamentary system and democratic constitution” and “to write against all kinds of

³⁰⁶ Quoted in: Onta, Pratyoush. 2001. Democracy beyond Emergency. *The Kathmandu Post*, 7 December, pp.4.

³⁰⁷ *Ibid.*

³⁰⁸ The 24th central committee meeting of the Communist Party of Nepal (UML) decided on 28 November 2001 to support Deuba government’s decision to declare a state of emergency in the country. The CPN (UML) blamed the Maoists for bringing about the critical situation through their activities before going on to say that it was the wrong policies of the Nepali Congress Party that was responsible for the crisis in the country. However in a press release, the CPN (UML) added that “Declaration of the State of Emergency is not the solution to the present crisis” before suggesting that government should work with all political forces to initiate much needed reforms (The Kathmandu Post 2001g: 1). The CPN (UML) also supported Deuba when the parliament ratified the state of emergency in February 2002, thus extending its life as per the original declaration to a period of six months, namely, up to May 2002 (Thapa with Sijapati 2003: *Op-cit.* pp.126-27).

³⁰⁹ It was widely believed that the Nepal Media Society was formed during the third week of November 2001 as a forum to oppose foreign investment in the print media sector in Nepal.

terrorism”.³¹⁰ This was indicative of tame compliance on the part of the influential press along the lines suggested by the government. The central committee of the Federation of Nepalese Journalists (FNJ), the largest umbrella association of journalists in Nepal, met on 27 November to assess the situation of the press under the newly imposed state of emergency. While calling for the release of FNJ members who had been arrested even before the declaration of the state of emergency and the reinstatement of civil liberties as soon as possible, it appealed to all journalists to be alert and practice self-restraint at work.³¹¹

The most influential newspaper in Nepal, *Kantipur*, argued in a special editorial on 27 November that the state of emergency had been declared to resolve the crisis brought about by the Maoists, who – through their action – had come to represent terrorism in Nepal.³¹² It added that the sole purpose behind the declaration of the state of emergency was to obliterate the organisation of the Maoists. It further stressed that for the long-term enjoyment of democracy, civil society had to voluntarily suspend its freedom and fundamental rights on certain occasions in history. In a subsequent editorial dated 2 December, *Kantipur* added that the press and civil society had accepted that the inevitable declaration of the state of emergency had been achieved under a national consensus to solely defend and protect democracy and the constitutional system. Hence it added that both were practicing “necessary self-restraint”.³¹³

In its editorial of 28 November, the influential English-language newspaper, *The Kathmandu Post* argued:

“With the ill-timed and ill-advised announcement of the breaking of the truce by Maoist strongman Prachanda last Wednesday and the resumption of violence two days later, it was just a matter of time before emergency was imposed in order to allow the security forces the much needed leeway to conduct their operations effectively and efficiently....The government which enforced the emergency must now be able to make the best use of the situation. This means that the government now

³¹⁰ The Kathmandu Post. 2001. NMS vows to be responsible. 28 November, pp.1.

³¹¹ Federation of Nepalese Journalists (FNJ). 2001. Press Release dated 27 November. Published in *Patrakarita*, Baisakh 2059, pp. 51.

³¹² *Kantipur*. 2001. Sankatmochanka lagi ‘Sankatkal’ (special editorial). 27 November, pp. 1.

³¹³ *Kantipur*. 2001. Maobadi Atanka, Shanti ra Atmasanyam (editorial). 2 December, pp. 6.

*has a chance not only to put down the Maoist rebellion, but also to address equally pressing national problems such as corruption, better monitoring of the Southern border from where criminal elements and illegal arms have been entering this country, and a host of other ills that have beset the country....This is why we believe that judicious and proper use of the emergency powers by the government will help not only in fighting the Maoist insurgency but also other wrongs facing the nation”.*³¹⁴

In the editorial statements of both *Kantipur* and *The Kathmandu Post*, there was no hint of a critical stance against the state of emergency or the RNA. Instead both newspapers conveyed the view that given the “resumption of violence” the declaration of the state of emergency was inevitable. When influential newspapers promote such positions, they stop being a forum for debate regarding alternatives to the government-justified need for the state of emergency. Not only did these newspapers have a resigned attitude toward this declaration, they also provoked the use of emergency powers to deal with issues for which the emergency was not declared in the first place.³¹⁵

The other papers were also generally supportive of the government. An editorial in *Rajdhani* emphasised that the state of emergency had been imposed in Nepal to save nationalism and democracy from terrorism.³¹⁶ It belaboured to make the point that unlike in 1960, this emergency was not declared to finish off democracy and hence the responsibility to highlight this point was very much with the press in Nepal. Another editorial in *Nepal Samacharpatra* argued that self-censorship was more effective, democratic and responsible than governmental censorship over the press.³¹⁷ This editorial also made it clear that by controlling the press or hiding information, democracy will not be strengthened nor would there be an end to terrorism in Nepal. Under the state of emergency, it declared, the Nepali press was with the government. In a press release dated 29 November, the Chairman of the Press Council Nepal,

³¹⁴ The Kathmandu Post. 2001. Judicious and proper use (editorial). 28 November, pp. 4.

³¹⁵ On 29 November, the *Post* introduced one line of caution in its editorial entitled “Combating terrorism” which said, “[The Emergency] should not by any means be a weapon to harass, torture and arbitrarily detain innocent people, in the name of combating terrorism, but should be aimed at putting an end to terrorism once and for all in this peaceful country”, The Kathmandu Post, 2001. *Combating terrorism* (editorial). 29 November, p.4.

³¹⁶ Rajdhani. 2001. Sarkar ra pressko dayitva (editorial). 29 November, pp. 6.

³¹⁷ Nepal Samacharpatra. 2004. Patrakar Thapako sikhra rihaike mag. 3 August, pp. 2.

Harihar Birahi urged “journalists to perform their role responsibly and cautiously” during the state of emergency in the country. Mr Birahi added that the “importance and dignity of the press would be further enhanced if it contributed to freeing the country from the present critical state it is now passing through”.³¹⁸

One would have to conclude that the imposition of TADA and other restrictions at the time of the declaration of emergency, largely met with approval or tame compliance because of a confluence of several factors. A society that had effectively resisted the imposition of TADA in 1997 had, by the end of 2001, experienced Maoist insurgency in such a scale that its erstwhile confidence in the civil government being able to tackle the insurgency had greatly diminished.³¹⁹ Hence, there was a willingness to give the benefit of doubt to the state’s own armed forces, the Royal Nepali Army, as it joined the war. In late November 2001, the RNA was the only untested institution as far as state responses to the Maoists were concerned. If it had conditionally joined the state’s effort, then the other sectors of the society seem to have digested those demands of the RNA in good faith. Second – patriotism and nationalism, never in short supply in Nepal – were marshalled to do away with any sense of doubt and scepticism regarding RNA’s ability to deal with the Maoists. RNA’s longstanding self-description as the last bastion of Nepali nationalism seems to have sufficiently influenced public opinion in its favour in the initial days after the imposition of the state of emergency.

State hindrance to freedom of expression

In this section I examine state policies and practices that have hindered freedom of expression in Nepal in recent times.³²⁰

³¹⁸ The Himalayan Times. 2001. Press Council plea. 30 November, pp. 3.

³¹⁹ Des Chene, Mary. 1998. ‘Black Laws’ and the ‘Limited Rights’ of the People in Post-Andolan Nepal: The Campaign Against the proposed Anti-Terrorist Act of 2054 v.s.. *Himalayan Research Bulletin* 18(2): pp.41-67.

³²⁰ As far as monitoring of media is concerned, on 29 November 2001, it was announced that the government had formed two cells in its Department of Information to monitor print and electronic (including the Internet) media. It was reported that these two cells would monitor news “related to emergency and Maoist terrorists.” The Kathmandu Post, 2001. *News monitoring cells formed*. 30 November, p. 1. The Director-General of the Department was quoted as saying that both the national and international press “would have to abide by the guidelines given to media personnel.” He was referring to the list of ‘doable’ and ‘non-doable’ reportage that

had been made public by the government a day earlier. Nothing much was made public about this monitoring exercise, but it is possible that it was continued throughout the nine-month period of the state of emergency and was the basis of some governmental action against the media as described below.

a) Killings:

During the year 2002, state security forces killed at least seven journalists, some of whom worked for publications close to the Maoists.³²¹ Some of these killings were described by the security forces as having taken place during ‘encounters’ but their claims were not supported by the available evidence. Others were killed after being first arrested and tortured.³²² Among them, the death of Krishna Sen, former editor of *Janadesh* weekly, received the most attention from the national and international press. The Nepali Government was pressured to form a committee to look into the matter. The committee did not explicitly acknowledge that the state had killed Sen, but indirectly hinted that he was dead by saying that someone who fitted Sen’s physique was killed in an ‘encounter’ with security forces. The body of such an individual was sent for a post-mortem and was later cremated, according to the committee, without it being photographed. Since the collapse of the ceasefire in August 2003, security forces have killed at least three more journalists.³²³ The security forces claimed that all three were killed during encounters, but this has been disputed by others.

b) Arrests:

State harassment of journalists actually predated the imposition of the state of emergency in late 2001. For example, during the one-year period starting from 3 May 1997, 27 journalists were reportedly arrested. In the year that followed, about the same number of journalists and press support staff were arrested.³²⁴ These included Krishna Sen, who was arrested in April 1999 and held in several prisons for almost two years.³²⁵ His colleague Chitra Bahadur Chaudhari was similarly arrested while another co-worker, Milan Nepali, was abducted by

³²¹ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists. Four were killed before the end of the state of emergency in August 2002 and three more between September and December 2002. Those killed included Kanchan Priyadarshi (on 29 April 2002), Yam B. K. Patel (on 5 May 2002), Krishna Sen (sometime in late May 2002), Dev Kumar Acharya (on 23 or 24 July 2002), Kamal A.C (on 1 October 2002), Kumar Ghimire (on 2 October 2002), and Rajkumar K.C (about 23 October 2002).

³²² *Ibid.* pp.23-30, see also for Human Rights and Democratic Studies (CEHURDES). 2003. *Status of Press Freedom and Freedom of Expression: Nepal Report 2003*. Kathmandu: CEHURDES.

³²³ Binod Sajana Chaudhari (Kshitij), a correspondent for *Janadesh* on 28 September 2003; Nagendra Pokhrel, who was said to be a reporter for the Maoist website *Krishnasenonline* on 23 December 2003; and Padma Raj Devkota, who was a correspondent for *Karnali Sandesh* on 7 February 2004 (FNJ 2004: *Op.cit.* pp.24-25).

³²⁴ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp.5-6.

³²⁵ Sen was released in March 2001. He was again arrested in May 2002 and as discussed above, was killed shortly thereafter while in custody. For one non-Nepali analysis of Sen and his work, see Ricchiardi, Sherry 2001. *Himalayan Heretic. American Journalism Review* 23(7): 58-61.

state authorities in May 1999 and most likely killed by the end of that year.³²⁶ Several other journalists and writers associated with various publications were also arrested during 1999 and 2000.³²⁷

During the year 2001, it was reported that at least 53 media workers were imprisoned.³²⁸ These included Yubaraj Ghimire, the editor of *Kantipur* – the most influential newspaper in Nepal – and two of its publishers. They were charged with crimes against the state for publishing an ‘op-ed’ piece by the Maoist ideologue Baburam Bhattarai shortly after the Royal Massacre of 1 June 2001.³²⁹ The start of the declaration of emergency in late November 2001 was marked by the arrest of at least nine journalists and staff members associated with three publications considered close to the CPN (Maoist) – the daily *Janadisha*, the weekly *Janadesh*, and the monthly *Disabodh*. They were held under preventive detention for months without trial.³³⁰ In mid December 2001, Gopal Budhathoki, editor of the weekly *Sanghu* and Bandhu Thapa, publisher of the weekly *Deshantar* were arrested in connection with materials published in their respective newspapers.

The number of arrests of media-related persons increased sharply during the state of emergency (November 2001 and August 2002). As mentioned above, more than 160 journalists were arrested by the security forces and about 70 of them were detained for at least three days. Many were held for several months without trial and were tortured while in custody.³³¹ In March 2002, the Reporters Without Borders (RSF) described Nepal as the “largest journalist jail in the world”.³³² Since neither the declaration of the state of emergency nor TADA allowed for illegal arrests and torture while in custody, the arrest of the journalists

³²⁶ Center for Human Rights and Democratic Studies (CEHURDES). 2000. *Status of Press Freedom and Freedom of Expression in Nepal 2000*. Kathmandu: CEHURDES, pp.12.

³²⁷ These included Amar Bahadur Budha, Shakti Lamsal, Bhim Prakash Sharma, Om Sharma, Rishiraj Baral, Dev Kumar Yadav and Nagendra Kumar Paswan (CEHURDES 2000: 12-14).

³²⁸ Reporters Without Borders (RSF). 2002. Nepal Annual Report 2002. Downloaded from www.rsf.org/print.php3?id_article=1455.

³²⁹ Bhattarai had rejected the notion that Crown Prince Dipendra was responsible for killing several members of his family and instead argued that this was a result of a conspiracy involving foreign intelligence agencies. He had also called for a rejection of the new king and exhorted the members of the security forces to rise up in revolt (Bhattarai 2001). The case against Ghimire and his colleagues was later dropped.

³³⁰ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp.55-56.

³³¹ For details see: Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists, pp.31-81.

³³² *Ibid.* pp.120.

and the torture inflicted upon them were clear violations of human rights by the Nepali state.³³³

During the eight months of the subsequent ceasefire (January to August 2003), some journalists who were still in prison at the end of 2002 were released as part of the effort to provide a congenial atmosphere for the holding of talks between the government and the Maoists. The harassment of journalists decreased. However when the talks broke down in late August 2003, journalists once again began to be targeted by both sides. According to an unpublished report prepared by FNJ, several journalists have been abducted, arrested, detained, harassed and threatened by security forces since then.³³⁴ At least six journalists were missing for several months after being arrested between October 2003 and March 2004.³³⁵ Among them, Dhan Bahadur Magar, who works for the Kathmandu branch of FNJ, was abducted by security forces in November 2003 and was held in solitary confinement for eight months until his release on 21 July 2004. More than 36 media persons were arrested between late August 2003 and March 2004. Some of them were detained for long durations and some were tortured while in custody.³³⁶

In 2004, many journalists were arrested for short durations (part of a day or held overnight) while covering the street protests launched by a coalition of five political parties against the king-led political 'regression'.³³⁷ In late June, security forces arrested and interrogated Rewati Sapkota in Kathmandu about his news sources. Sapkota – who works for *Rajdhani*, a major newspaper published from Kathmandu – had been arrested on two previous occasions, once in May 2002, when he was severely tortured by the police.³³⁸ After his latest arrest, Sapkota published an article in which he asked state authorities many questions. He asked, "What existing laws of Nepal have I broken to be arrested repeatedly and be mentally and physically

³³³ Many of the arrested journalists were only released after initiatives were taken by the Federation of Nepalese Journalists, its district branches and other human rights organisations on their behalf. From mid 2002, the FNJ led an effective campaign for the release of media persons held illegally by the state and warned the government of the day not to further harass its members (for details see Bista, Mahendra, ed. 2060 v.s. *Sankatkalma Nepali Press*. Kathmandu: Federation of Nepalese Journalists).

³³⁴ Dhakal, Sanjaya. 2004. Nepal's insurgency drives journalists from homes. *One World Spain*, 18 March. Downloaded from <http://es.oneworld.net/article/view/81869/1/>.

³³⁵ Federation of Nepalese Journalists (FNJ). 2004. *State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict)*. Unpublished report, pp.25.

³³⁶ *Ibid*, pp.26-28.

³³⁷ Shahi, Satish J. 2004. Muzzling the media. *Nation Weekly*, 2 May, pp.22-23.

³³⁸ Sapkota, Rewati. 2004. Hamilai bancna ra lekhna deu. *Rajdhani*, 29 June, pp. 11.

tortured? ...Which of the news I have published has jeopardised the state's peace and security? ...Do we not have the right to live by working? Is it a crime for me [as a journalist] to inform the masses by making public, information that some individuals would rather hide?"³³⁹ In late July, as he continued to file stories about the conflict, it was reported that Sapkota was considering quitting the profession, given the torture and harassment he had experienced.³⁴⁰

c) Harassment and threats:

Since 2001, many journalists, especially those working outside of Kathmandu, have often been harassed and threatened by local state officials (such as the chief district officer) and military officers. They have been chastised (by phone or in person) for publishing news reports that were critical of state officers and the security forces.³⁴¹ Some have been called to the military barracks and given lectures on how to do 'balanced' reporting,³⁴² while others have been ordered to file retractions of previously published stories. Still others have been interrogated about their news sources (for both the army and the Maoists) or have been drilled about the authenticity of the news they have filed or published. Many such interrogations took place during the period of emergency. Seven such interrogations have been reported for the period between October 2003 and February 2004, there were also others that were not reported.³⁴³ Print reporters in Western Nepal have faced interrogation from state authorities after returning from reporting trips to villages. Radio reporters working for independent FM radio stations in Western Nepal have reported that when they return from reporting assignments in relatively remote villages, security forces demand to listen to their tapes.³⁴⁴

Publishers and editors of newspapers and magazines have received threats over the phone for criticising the army for its poor human rights record; or for examining the dead-end politics of

³³⁹ Sapkota, Rewati. 2004. Hamilai bancna ra lekhna deu. *Rajdhani*, 29 June, pp. 11.

³⁴⁰ *Ibid.* In July 2004, four reporters were arrested by the district police office of Rukum, based on charges filed under the Public Offence Act, by a government official. The reporters were investigating the official's involvement in corruption and were assaulted by him. Charges were filed against them and not the official. The reporters were released two weeks later on bail of Rs 10,000.

³⁴¹ Mainali, Mohan. 2004. Kalamko Pida. *Kantipur*, 5 May, pp. 7.

³⁴² This paragraph is partly based on conversations with various journalists in Kathmandu and Pokhara.

³⁴³ Federation of Nepalese Journalists (FNJ). 2004. *State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict)*. Unpublished report, pp.34-35.

³⁴⁴ Gurung, Hasta. 2004. "Please tell the world about our suffering". *Nepali Times*, 9 July, pp. 17.

the king since he dismissed an elected prime minister on 4 October 2002.³⁴⁵ Columnists such as Hari Roka, who have been very critical of the post-4 October 2002 dispensation, have also received threats. It is now clear that many journalists are under constant surveillance of the security forces and their phone lines are tapped.³⁴⁶ Since the end of the ceasefire, at least 26 media persons have been displaced from their primary working location due to severe threats from either the state authorities or the Maoists. According to the FNJ, five of these individuals were displaced due to threats received from state authorities.³⁴⁷ Due to repeated threats from local administration or army officers, several journalists have quit the profession.³⁴⁸ Public forums such as Martin Chautari in Kathmandu have also been placed under surveillance by the security forces.

d) Secrecy:

Free flow of information was hampered by state secrecy and unwillingness to communicate regularly with the media. For instance, in August 2000, the Police Headquarters barred all regional police offices from releasing any information about police-Maoist clashes to the public, including the media. Such information, it was then said, could only be issued by the Police Headquarters in Kathmandu. This ban remained in force for only a few weeks, as police casualties increased by a large number due to repeated Maoist onslaughts, forcing regional police offices to provide information to the media about these attacks.³⁴⁹ While the army instituted a mechanism to hold press conferences in its headquarters in Kathmandu during the year 2002, such interaction outside of the capital was rare. This lack has been pointed out by the organisation Reporters Without Borders in its annual report on Nepal for the year 2002.³⁵⁰ The report noted that although the town of Nepalgunj in South-Western Nepal was “the country’s second largest military garrison and headquarters of the army’s second highest ranking officer, the army had not held a press conference for the local news media in Nepalgunj since the start of November 2001, and had no press service in the region,

³⁴⁵ Committee to Protect Journalists (CPJ). 2004. Attacks on the Press 2003 – Documented cases from Asia for 2003: Nepal. Downloaded from <http://www.cpj.org/attacks03/asia03/nepal.html>.

³⁴⁶ Sapkota, Rewati. 2004. Hamilai bancna ra lekha deu. *Rajdhani*, 29 June, pp. 11.

³⁴⁷ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report.

³⁴⁸ Lamichane, Raghunath. 2004. Aphain samacar bhaeka sancarkarmi. *Kantipur*, 26 March, pp. 7.

³⁴⁹ Center for Human Rights and Democratic Studies (CEHURDES). 2001. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES, p.25-26.

³⁵⁰ Reporters Without Borders (RSF). 2003. Nepal Annual Report 2003. Downloaded from www.rsf.org/print.php?id_article=6476.

the one most affected by the war.”³⁵¹ When asked why they were not forthcoming with detailed information related to the conflict, some government officials have pointed out that when they assume office, they take an oath of secrecy and not transparency.³⁵² Governmental proclivity to secrecy is also assisted by the Secrecy of Written Documents Act 1982, which allows the state to variously classify its documents and make them inaccessible to the public for five to thirty years.

e) Denial of access:

On several occasions, state authorities have restricted the movement of media personnel. In July 2001, more than 20 journalists were held for a day in Dang, in Western Nepal and prevented from going toward Holeri in Rolpa, from where the Maoists had abducted more than 70 police personnel.³⁵³ In mid-December 2001, several Nepali and foreign journalists were asked to leave Dang valley, from where they were trying to report about military operations against the Maoists. The army has not allowed journalists to accompany them during operations, but have allowed them to visit combat zones after major exchanges have taken place. Talking to representatives from Reporters Without Borders about this subject, a reporter said: “We know our requests for access to combat zones will be systematically refused....We can go to a locality where a clash has just taken place, in order to count the dead and take pictures of destroyed buildings. But the army won’t let us go with them into the field. Perhaps for fear that we will witness their weaknesses or the collateral damage on the civilian population”.³⁵⁴ Reports of denial of access have continued to come in since the end of the 2003 ceasefire.³⁵⁵ Denial of physical access has been accomplished without recourse to legal means. No laws or executive orders have been quoted on these occasions. More often than not, the state authorities have justified their decisions to deny access by saying they were doing this for the personal safety of the journalists.

³⁵¹ Reporters Without Borders (RSF). 2003. Nepal Annual Report 2003. Downloaded from www.rsf.org/print.php3?id_article=6476.

³⁵² This point was mentioned by several state officials in an interaction with media persons and human rights activists in Pokhara on 23 June 2004. The interaction was organised by SAFHR, INSEC and the Kaski branch of FNJ.

³⁵³ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp55.

³⁵⁴ Reporters Without Borders (RSF). 2003. Nepal Annual Report 2003. Downloaded from www.rsf.org/print.php3?id_article=6476.

³⁵⁵ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report, pp31.

Due to a lack of access to independent means of communication (a by-product of the destruction of communication infrastructure by the Maoists), journalists have had to face difficulties in dispatching their stories and reports. When using the only available fax machines in government offices to send their reports, they have had to face unnecessary hassles and censorship by local state and army officers.³⁵⁶ In one instance, when reporters in the far-Western district of Dadeldhura tried to file stories about the death of four students in a school in Mudbhara in the neighbouring district of Doti as a result of army operations, the police seized their story copies and photocopied them.³⁵⁷ Moreover, denial of access has also been practiced in the heart of state power in Kathmandu, where journalists have been denied entry into the premises of Singha Darbar, where many of the government's ministries are located. Journalists were not allowed in, even when they possessed legitimate identification from their media institutions and at times only entry passes issued by the Ministry of Communication were recognised. At other times, even journalists with such passes were denied entry. At the same time, various offices under different ministries often refused to provide information to journalists citing various ministry-based 'orders.'³⁵⁸

f) *Seizure of printed materials:*

State personnel have also seized print media products or have prevented them from reaching different parts of the country. Premises of newspapers and printing presses have been searched on many occasions and a variety of publication-related materials have been confiscated. For example, on 27 June and 28 November 2001, the police raided Paru Offset Press in Kathmandu, where many publications that are close to the Maoists were then printed. In June, the police seized copies of the monthly *Disabodh* (it had published an interview with a Maoist leader) and in the November raid, some printed matters were confiscated and 13 press personnel arrested.³⁵⁹ On 28 November 2001, the government confiscated copies of *The Kathmandu Post* because it had published a photo of some Maoists. During the early days of the emergency, press materials were seized from various locations in different parts of Nepal. In April 2002, the police raided the premises of a printing press where two Kathmandu

³⁵⁶ Mainali, Mohan. 2004. Kalamko Pida. *Kantipur*, 5 May, pp. 7.

³⁵⁷ *Ibid.*

³⁵⁸ The writer of this chapter owes this information to Rama Parajuli, chief correspondent for *Kantipur*.

³⁵⁹ Rajdhani. 2001c. Prahariidwara Paru pressma chapa. 29 November, pp. 12.

weeklies were being printed and seized printed materials.³⁶⁰ In 2003, an issue of the monthly magazine *Niscal* was seized for printing on its cover “two armies, two states, now war”. Its cover story discussed the failure of the talks between the government and the Maoists and tried to explain why the Maoists had returned to waging war again (Special Correspondent 2003). In November 2003, security forces seized news scripts from a reporter in far-Western Nepal.³⁶¹

g) Obstacles to circulation:

During 1999-2000, certain newspapers were illegally confiscated by state authorities as they were carried to different parts of the country. Newspapers close to the Maoists such as *Janadesh*, *Jana Aawhan* and *Mahima* (all published from Kathmandu) were often denied entry to areas in Western Nepal, which were said to be largely under Maoist dominance.³⁶² The police often stopped buses carrying these newspapers and offloaded them on the side of the highway. During the emergency, even magazines that are very critical of the Maoists such as *Mulyankan* were often offloaded from buses, resulting in a sharp decline in their circulation.³⁶³ Sometimes even regional newspapers were prevented from reaching nearby districts.³⁶⁴ After the imposition of the state of emergency, newspapers and magazines close to the Maoists have ceased publication in print form. This happened as a result of the arrest and detention of editors, reporters and support staff associated with these publications. When some of these publications appeared on the Internet, the Nepali Government requested Nepali internet service providers to block their sites.³⁶⁵

During the emergency and even after its official end, state authorities have harassed book sellers who sell ‘leftist’ literature produced both inside and outside of Nepal. Some booksellers were arrested during the fall of 2003 for selling literature produced by the Maoists or on the Maoists. Many of these items were published and made available to booksellers

³⁶⁰ Reporters Without Borders (RSF). 2003. Nepal Annual Report 2003. Downloaded from www.rsf.org/print.php3?id_article=6476.

³⁶¹ Federation of Nepalese Journalists (FNJ). 2004. *State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict)*. Unpublished report.

³⁶² Center for Human Rights and Democratic Studies (CEHURDES). 2001. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES, pp26.

³⁶³ Information received from members of the editorial collective of *Mulyankan*.

³⁶⁴ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp.69-70.

³⁶⁵ Bhat, Bhojraj. 2004. Censorshipma Maobadi Internet. *Khabar* 6(1): pp.12-13.

during the eight-month period of the ceasefire of 2003 or before the state of emergency was declared in November 2001.³⁶⁶ The state has also attempted to prevent the showing of a documentary critical of the security forces' killing of about 17 labourers from Jogimara in the Dhading district, in an airport construction site in Kalikot (in far Western Nepal) claiming that they were Maoists. The scheduled showing of *The Living of Jogimara* made by Mohan Mainali during a major documentary film festival in Kathmandu organised by the NGO Himal Association in December 2002, was interfered with by state authorities. Although eventually the organisers were able to show the documentary, they did so by agreeing to diminish the soundtrack at a critical juncture in the film.

h) *Fear of arbitrary interpretations:*

Materials generated or published by journalists during periods of ceasefire have become potential evidence (of association with the Maoists) that could be used against the concerned journalists themselves under TADA.³⁶⁷ Such has been the fear among journalists who have reported on the conflict that some of them have deliberately stored their reference printed materials in locations other than their own dwellings. This was done to protect both the materials from confiscation by state authorities during searches and to protect themselves from being falsely considered 'accomplices' of the Maoists based on those materials.³⁶⁸ Security forces have also illegally seized books and other printed materials from the residences they have searched. For instance, when the residence of two colleagues of the writer of this chapter, was searched in the fall of 2003 in Kathmandu, members of the search party took away some books related to social movements published by the Kathmandu NGO, Martin Chautari, and some books by a well-known Nepali 'leftist' writer. On that occasion, these individuals – who are both social science researchers – were asked why there were so many books in their apartment.

i) *Suspect executive designs:*

There were other attempts to control both the print and the electronic media. For instance, in the year 2000, there was an attempt to revise the law regarding the registration of newspapers.

³⁶⁶ A well-known bookseller in Kathmandu told the writer of this chapter, that in late 2003, he removed all books on the Maoists from his shop and stored them in his house. Among customers who came looking for these books, only those who were well-known to him were supplied copies.

³⁶⁷ Dhungel, Binod. 2003b. Madhyasthakartako bhumikama press. *Khabar* 5(5): pp.9-10.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

In the existing system, after a newspaper gets a permanent registration there is no need to renew it and under no circumstances can its registration be revoked. In the proposed revision, newspapers would have been required to renew their registration every two years. This would have given the state an opportunity to not renew the registration of any newspaper that it considered ‘unfriendly’ toward its policies and executive actions. This threat would have compromised the degrees of editorial freedom available to the print media. Fortunately, a parliamentary committee meeting in late July 2000 decided to drop this proposed amendment.³⁶⁹

In January 2001, the government issued a directive to independent FM radio stations, restraining them from – among other things – broadcasting news processed from their own sources. This was an attempt to tighten governmental control over the degrees of freedom exercised by the independent FM stations.³⁷⁰ Fortunately, this directive was challenged in the Supreme Court of Nepal by two lawyers. The Court ruled that the governmental directive arbitrarily restricted the constitutionally guaranteed right to information and the freedom of thought and expression. It thus repelled it, assuring for broadcast media the same freedoms explicitly guaranteed for the print media in the Constitution.³⁷¹ However, this did not stop governmental ministers from talking tough against FM radio stations from time to time. For instance, during 2003-04, the then Minister of Communication, Kamal Thapa, accused FM radios of broadcasting pro-Maoist contents. No charges were brought against specific radio stations.³⁷²

³⁶⁸ This is based on conversation with two reporters who have extensively covered the Maoist conflict. To ensure their personal safety, they cannot be named here.

³⁶⁹ Center for Human Rights and Democratic Studies (CEHURDES). 2001. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES, pp.25.

³⁷⁰ In 1999, the Maoist insurgency was rarely discussed over independent FM radio. When I hosted a discussion on this topic on 6 October 1999 over the talk programme *Dabali*, which I used to run in Radio Sagarmatha at that time – with a left politician who was critical of the Maoists and a reporter who had written extensively about the Maoists as my guests – the Ministry of Communication demanded that the station provide a tape of the programme for review. The station manager, in consultation with members of the board that oversaw the station’s management, decided to provide a recording of my programme to the Ministry which later informed us that although there was nothing ‘objectionable’ in its contents, it wished that Radio Sagarmatha had not broadcast it during a week when the Maoists had called for a general ‘bandh’ (strike).

³⁷¹ For details see: Onta, Pratyoush. 2004. Independent news in FM radio. *The Kathmandu Post*, 8 July, pp. 4.

³⁷² An army officer in the central Southern town of Chitwan instructed local reporters and FM radio stations (in January 2004) not to broadcast news about the ongoing students’ movement. He told them that this was an order from ‘above’ and those not following it will realise the consequences at the right time. Bista, Mahendra. 2060, v.s. Sancarma Sanya Hastaksep. *Mulyabodh* 1(3): 22.

All of the above practices have been used by the state to throttle the freedom of media and by extension, depreciate the conditions for freedom of expression in Nepal. The evidence exhibited above and recorded more fully by organisations such as the Federation of Nepalese Journalists (FNJ), the Center for Human Rights and Democratic Studies (CEHURDES), Reporters Without Borders (RSF) and others help us reach this conclusion. However, state and security officials have continually denied that this is the case. Even as he was claiming that some media were boosting the morale of the Maoists, the then Information Minister Kamal Thapa claimed in early 2004 that the government was “respectful of press freedom and freedom of expression and has no intention of muzzling the press”.³⁷³ The Royal Nepali Army also denied that it was targeting media persons. The then RNA spokesperson, Colonel Deepak Gurung had told a reporter: “It is not our policy to target journalists. Only those found hobnobbing with the rebels are being investigated.”³⁷⁴

j) State-media:

In the meantime, state-owned print and electronic media mostly report in pro-government and pro-security forces mode. The RNA runs its own programmes in Radio Nepal and Nepal Television, where the overall objective seems to be to portray the Maoists as terrorists whose violence alone is responsible for the present state of Nepal. The army’s ‘reporters’ often show material evidence of the claimed success of operations against the Maoists within an ethos of how its men are responding to the nation’s call to save the motherland against the ‘atrocities’ committed by the ‘terrorists’. The tone of these reports often gives the impression that what is being said and shown is authoritative and is the ‘truth’ (as the army has no other interests but ‘to defend the nation against the terrorists’) while what is circulating in the private media is suspect for various reasons (such as its ‘intention to make the army and by extension the state look bad’).³⁷⁵ State-owned television has also broadcast interviews with former Maoists (either those who have been captured or who have surrendered) who are mostly questioned about the contradictions within the CPN (Maoist) party organisation. This is being done to discredit the Maoists and further establish the state’s view of them as ‘terrorists’.

³⁷³ Dhakal, Sanjaya. 2004. Nepal’s insurgency drives journalists from homes. *One World Spain*, 18 March. Downloaded from <http://es.oneworld.net/article/view/81869/1/>.

³⁷⁴ *Ibid.*

³⁷⁵ South Asia Forum for Human Rights (SAFHR). 2004. *National Workshop on Media, Democracy and Human Rights in Nepal*. Kathmandu: SAFHR.

Maoist policy and practice

How have the Maoists used the mainstream media and their own media to further their cause? What has been the Maoist policy and practice regarding freedom of expression? These questions shall be considered in this section.³⁷⁶

When the Maoists began their campaign in 1996, the Nepali political establishment was quick to condemn their acts (such as murder of political workers and other individuals, looting of banks and arson) while offering little serious political analysis of the forty-point demand that Baburam Bhattarai had placed in front of the then prime minister, Sher Bahadur Deuba. As the mainstream political leaders debated the nature of Maoist violence – whether it was ‘political’ in nature or just simply ‘criminal’ – while still disagreeing on how to solve the problem, the Nepali media began to report incidents of murder and other ‘actions’ by the Maoists. At that time, it was hard to say what the Maoist policy was with respect to the mainstream Nepali media. As the insurgency grew and the government responded with brutal police repression in some areas of mid-West Nepal, the mainstream Nepali media could not adequately cover ground-level events.³⁷⁷ Instead, they began to criticise successive governments for allowing the Maoist problem to fester. No matter what the objective conditions claimed for a ‘revolution’ might be, the Nepali mainstream media consistently avoided any serious analysis of the links between socio-economic conditions and the rise of armed insurgency in the early days of the Maoist campaign. This happened partly because of the poor state of social science research on this linkage in Nepal. As advocates of what the Maoists would call the *sudharbadi* (reformist or gradualist) school of social change, it is no surprise that, in the beginning, the Nepali media deprecated the Maoists.

But, as Rajendra Dahal has argued, this type of coverage slowly gave way to more sympathetic reporting on the Maoists, for several reasons.³⁷⁸ As the Maoist campaign grew, media persons began to be more directly affected by the violence and the simultaneous inefficacy of successive governments. The latter state of affairs, according to Dahal,

³⁷⁶ The following seven paragraphs have been adapted from Onta, Pratyoush. 2004. Democracy and duplicity: the Maoists and their interlocutors in Nepal. In *Himalayan ‘People’s War’: Nepal’s Maoist Rebellion*. Michael Hutt, ed., pp.136-151. London: Hurst and Co.

³⁷⁷ Thapa, Deepak. 2001. Day of the Maoist. *Himal South Asian* 14(5): pp.4-21.

³⁷⁸ Dahal, Rajendra.2000. Maobadi andolan, sarkar ra nepali press. *Swatantra Abhivvyakti* (Pus) pp. 1-2.

engendered a resigned attitude on the part of the media ('if the government can't do anything to check the Maoists, why should the media take any risks?'). This feeling was heightened by the explicit and implicit threats the Maoist ideologues and cadres started to deliver to media persons who had written negatively about them. Under these circumstances, the Nepali mainstream media felt safe to report on government inefficiency and to appear 'soft' on the Maoists. 'Going soft' meant in part that repetitive coverage of Maoist activities such as their open meetings (*janasabhas*) was provided. One journalist who covered such a meeting has defended this practice as a by-product of the curiosity regarding Maoist activities – unprecedented as they were on Nepali soil – on the part of the media people.³⁷⁹

'Going soft' also meant providing ample space in the op-ed pages for long essays by Maoist leaders and ideologues about party activities and positions and commentaries on other events and processes in Nepal. For instance, when Baburam Bhattarai's article on the Maoist interpretations of the Royal Massacre was published by *Kantipur*, its editor and those who defended his view when he was arrested, argued that its printing was justified, as it allowed the reading public a chance to understand the point of view of the Maoists on a very important happening.³⁸⁰ Those who did not agree with this view pointed out that the article (which claimed that there was a foreign conspiracy behind the Royal Massacre) was illogical, highly speculative and incendiary. They also pointed out that such column space was often not forthcoming for other political commentators and hence – while the public's right to know was the reason given for the editorial decision to print such an article – capturing the market was really what *Kantipur* was after.³⁸¹

Following the Maoist attack on the Dolpa district headquarters of Dunai on 25 September 2000 (the first among many such attacks on different district headquarters) the Maoists were even more able to dictate terms to the mainstream media. As the morale and the recruitment drive of the Maoists increased, they invited members of the mainstream press to visit territories under their control. In terms of the tactics of information politics, this was a brilliant move on the part of the Maoists. These Maoist-sponsored visits resulted in a new

³⁷⁹ Luitel, Gunaraj. 2002. Maobadi ra press: utsukta ra bhayako sambandha. In *Mediako Antarvastu: Vividh Vishleshan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., pp.43. Kathmandu

³⁸⁰ Bhattarai, Baburam. 2001 Naya 'Kotparba' lai manyata dinu hundaina. *Kantipur*, 6 June, pp. 4.

³⁸¹ This paragraph is based on many conversations with journalists in which the writer has participated.

genre of ‘travel reportage’ by reporters of the mainstream press.³⁸² Except for one or two write-ups, most of these reports of ‘guided tours’ were overtly sympathetic to the Maoists. Typically, the journalists mentioned being met by tour guides who later turned out to be Maoist guerrillas of various ranks. They described long walks through unfamiliar territories, some with several ‘martyrs’ gates’. They narrated conversations with Maoists in some ‘shelters’ or ‘restricted areas’ and the performance of ‘revolutionary’ cultural programmes that, more often than not, lasted through the night.

These writings, often accompanied by photographs showing Maoist guerrillas posing with their weapons, peaked between mid 2000 and the mid 2001. While interesting to read as an account of an individual scribe’s encounter with the Maoists, these reports generally failed to inform the reading public about new developments within the Maoist movement and their immediate impact on specific localities and communities visited by the journalist. This was in part a reflection of the guided nature of the trips, whereby journalists could not exercise their freedom of inquiry liberally enough to gather adequate information, upon which they could base their reports about general developments within the Maoist movement and its local and regional manifestations. It was also a reflection of the mainstream media’s inability to identify ways to seriously engage with Maoist activities, both at an ideological level and at a practical level. Despite these failings, these reports provided generous publicity to the Maoists. The Maoist leaders who participated in the talks with the Nepali Government during the second half of 2001 recognised this point. At the conclusion of the second round of talks, Maoist leader Krishna Bahadur Mahara publicly stated that media persons had acted as *utprerak shakti* (inspirational force) for the erstwhile success of the movement and thanked journalist “friends” for the “help they had rendered to the movement”.³⁸³

But even before Mahara’s appreciation of the mainstream press had become public, reportage on the Maoists had begun to change after most of the mainstream newspapers printed photographs of the Maoist-induced carnage at Naumule, Dailekh in early April 2001. In

³⁸² Aryal, Prashanta 2002. Nepali chapama dunai kandapachiko maobadi bidroha. In *Mediako Antarvastu: Vividh Vishleshan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., pp. 19-37. Kathmandu: Martin Chautari, Centre for Social Research and Development.

³⁸³ Luitel, Gunaraj. 2002. Maobadi ra press: utsukta ra bhayako sambandha. In *Mediako Antarvastu: Vividh Vishleshan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., Kathmandu: Martin Chautari, Centre for Social Research and Development, pp.45.

particular, the photo of the wife of a policeman killed in that attack weeping over her husband's body, taken by Chandrasekhar Karki (*Kantipur*, 8 April 2001), generated a mood in which tame travel reportage could no longer make good copy. Instead, the *swajanko bilap* ('Lamentation of the victims' relatives') genre of reporting, stories on the bereaved victims of Maoist violence, which already existed, took off after Naumule.

During the 'tame' reporting phase, the Maoists took advantage of the mainstream press, and at other times they have been generally able to put their agenda on the front pages of Nepali newspapers. As mentioned, they have had almost unlimited access to the op-ed pages of mainstream newspapers and magazines both before and after Baburam Bhattarai's famous article about the royal massacre appeared in *Kantipur* (except during the nine-month period of the emergency). Subsequently, as disruptions in Kathmandu schools by Maoist-backed students became routine, mainstream newspapers began to assume a more aggressive stance towards the Maoists.³⁸⁴ After the state of emergency was declared in November 2001, the relationship between the Maoists and the mainstream media definitely took a non-friendly turn and increasingly media persons came under 'fire' of the Maoists in various ways as discussed below.

a) *Killings:*

The Maoists killed Navaraj Sharma 'Basanta' some time after abducting him on 1 June 2002. He was the editor/ publisher of *Karnali Sandesh*, apart from being the president of the Kalikot (in far-Western Nepal) branch of FNJ. Reportedly, Sharma came under Maoist fire for refusing to make his newspaper a mouthpiece for the Maoists. The Maoists also charged him for spying against them and helping the army in an operation at Kalikot airport, which claimed the lives of about two dozen workers.³⁸⁵ The Maoist leader Prachanda, however, denied that this killing was the work of his party cadres³⁸⁶ It is possible that this statement of denial was issued because the time of Sharma's murder coincided with the movement launched by FNJ against the government regarding the death in custody of Krishna Sen, former editor of *Janadesh* weekly, a publication close to the Maoists. The Maoists killed

³⁸⁴ Aryal, Prashanta 2002. Nepali chapama dunai kandapachiko maobadi bidroha. In *Mediako Antarvastu: Vividh Vishleshan*. Pratyoush Onta, Ramesh Parajuli and Rama Parajuli, eds., pp. 19-37. Kathmandu: Martin Chautari, Centre for Social Research and Development.

³⁸⁵ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists, pp.25-26.

Ambika Timilsina in December 2002 near the south-eastern town of Biratnagar. As an Eastern Nepal correspondent for publications close to the Maoists, Timilsina reportedly went underground after the state of emergency was declared. He is reported to have ‘surrendered’ to the security forces some time in early fall 2002. On the night he was killed, he was abducted from his residence by the Maoists. The Maoists accused him of leaking information about them to the army.³⁸⁷

Within days after the end of the ceasefire, on 7 September 2003, the Maoists killed Gyanendra Khadka in the Eastern district of Sindhupalchowk for allegedly doing a whole host of things detrimental to their cause. Khadka worked as a reporter with RSS, the government news agency. The Maoists abducted him from a school where he used to teach. He was taken to a nearby field, his hands were tied to a pole, the entreaties of his wife were ignored and his throat was slit. However, the CPN (Maoist) later declared that Khadka’s killing was a mistake.³⁸⁸ In late June 2004, the Maoists abducted Dekendra Raj Thapa who was the Dailekh correspondent for Radio Nepal and he was later killed.³⁸⁹ The Maoists kidnapped broadcaster Dhana Bahadur Rokka Magar in August 2002 and until late 2004, he was believed to be in their custody. However it has now been revealed that he was killed sometime by spring 2003.

b) *Detention and abductions:*

Prior to May 2000, the Maoists had kidnapped Bidur Dhungel from Ramechhap. In early September 2001, several journalists from major media houses in Kathmandu were detained by the Maoists in Rolpa. They were on their way to cover an important meeting of Maoist leaders. They were asked to show their ‘passports’ when they set foot beyond Rolpa’s district headquarter of Libang and were eventually held in captivity for three days (Shahi 2001), suggesting that the Maoists are wary of independent reporting. In April 2002, they abducted Ngenling Lama, Sindhupalchok correspondent of a Kathmandu newspaper, and tortured him.³⁹⁰ Dipak Bahadur Thapa, Accham correspondent of *Nepal Samacharpatra* was told not

³⁸⁶ Kafle, Chiranjibi, *Op.cit.* pp.81.

³⁸⁷ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists.

³⁸⁸ Sharma, Om and Manarishi Dhital. 2004. Sansarbharika patrakarlai suchana, samrajyabadka biruddha naya andolan sristi garna ahwan gardachu (Interview with Prachanda, Chairman, NCP (Maoist). *Sanghu*, 10 May, p.6.

³⁸⁹ Rajdhani. 2004b. Rukumma car patrakar pakrau. 15 July, pp. 1.

³⁹⁰ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES., pp.65,67.

to leave his village in November 2002. He was accused of reporting against the Maoists.³⁹¹ Maoists abducted Kul B Malla of *Karnali Sandesh* in June 2003 and he was still missing in March 2004.³⁹²

In late July 2004, they abducted Durga Thapa, correspondent of a major Kathmandu newspaper *Nepal Samacharpatra* in the mid-western district of Surkhet. Thapa was accused of working against the ‘people’s government’ and was given a written note stating he was to be ‘imprisoned’ for 25 days (Nepal Samacharpatra 2004a). A rescue mission consisting of journalists and human rights workers was able to secure Thapa’s release eventually. The chairman of CPN (Maoist), Prachanda, has acknowledged that based on specific reports, his party has taken control of some journalists to find out specific things from them but these individuals have been “released with honour once the truth has been determined.” Prachanda has added that his party has never abducted journalists.³⁹³

c) *Physical action and threats:*

Bharat K Shahi, who was a reporter based in the far-Western district of Kalikot for a major newspaper published from Kathmandu, was warned not to write about Maoist activities.³⁹⁴ In April 2001 the Maoists attacked Bhimnidhi Hamal, a correspondent for *Spacetime* daily in the remote district of Jumla for “working as a spy for police (sic)”.³⁹⁵ In 2002, the Maoists threatened to take physical action against Rabindra Mishra, a journalist who works for the Nepali Service of BBC in London. In columns he had written for the Kathmandu newsmagazine, *Nepal*, Mishra had argued that the solution to the current conflict could be found through a military victory over the Maoists. The Maoists beat Rekhraj Dahal, a journalist working in the eastern district of Sindhuli, in November 2002. In September 2002, they bombed the house of Jaya Bahadur Rokaya, a correspondent in the far-western district of

³⁹¹ Center for Human Rights and Democratic Studies (CEHURDES). 2003. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES., pp.63.

³⁹² International Federation of Journalists (IFJ). 2004. *The Story Behind the News: Journalists and Press Freedom in South Asia. Second Annual IFJ Press Freedom Report for South Asia 2003-4*. Downloaded from www.ifj-asia.org/files/sa_sapress_freedom_report2003-2004.pdf.

³⁹³ Sharma, Om and Manarishi Dhital. 2004. Sansarbharika patrakarlai suchana, samrajyabadka biruddha naya andolan sristi garna ahwan gardachu (Interview with Prachanda, Chairman, NCP (Maoist). *Sanghu*, 10 May, pp.6.

³⁹⁴ Center for Human Rights and Democratic Studies (CEHURDES). 2000. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES., pp.15.

³⁹⁵ Center for Human Rights and Democratic Studies (CEHURDES). 2001. *Status of Press Freedom and Freedom of Expression: Nepal Report 2001*. Kathmandu: CEHURDES., pp.33.

Humla for *Kantipur*.³⁹⁶ The Maoists gave death threats to Rabin Prasad Thapalia, a reporter for *Naya Rooprekha* published from Nuwakot in early 2003 for writing an article about the widows of security officers killed by the rebels. In a two-page letter sent to Thapalia by a local Maoist leader, he was asked to (i) publish an article criticising each and every sentence of his original article and told to send it to the CPN (Maoist) office; (ii) make lots of posters criticising the article and hang them in public places; (iii) ask for forgiveness for the last time from all the people publicly; (iv) make a commitment to not repeat such work in the future and (v) live his life as a common citizen.³⁹⁷ The Maoists also threatened Resham Birahi in Nepalgunj in August 2003 for “writing against them”.³⁹⁸

After the end of the ceasefire in late August 2003, two Dhading-based journalists, Dinesh C Thapaliya and Keshav Adhikari were threatened by the Maoists and the former was also asked to donate money.³⁹⁹ The house of the Dhading journalist Rajendra P Shah was set on fire in September 2003.⁴⁰⁰ Machhindra Acharya of *Naya Rooprekha* weekly was threatened in November 2003 for doing “anti-people” journalism. One hundred thousand rupees was demanded from his family.⁴⁰¹ Chitranga Chaulagain, Shyam Krishna Dahal and Netra Luintel of *Bhojpur* weekly were threatened over the phone in February 2004. They were accused of working against the ‘people’s war’ and were told to close their newspaper. In July 2004, the Maoists threatened two journalists, Bhupendra Shahi and Kamal Neupane, in the far-Western district of Dailekh. They were accused of filing stories regarding extortion by the Maoists and were warned that if they filed any further anti-Maoist stories, their hands would be amputated and they could even be killed.⁴⁰² Around the same time, in South-central Nepal, two journalists were almost shot at by the Maoists who thought they were out-of-uniform soldiers.⁴⁰³ On different occasions, the Maoists have also vandalised private printing presses,

³⁹⁶ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists, p.83.

³⁹⁷ Dhungel, Binod. 2003. Lekheko ‘aparadh’ma ‘jahan bhetincha, tyahan saphaya garne’ cetawani. *Nepal Samacharpatra*, 25 February, pp.1.

³⁹⁸ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report. p.37.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*, pp.33.

⁴⁰¹ *Ibid.*, pp.30.

⁴⁰² Kantipur. 2004. Patrakarko hat katne cetawani. 3 August, pp. 1.

⁴⁰³ Tamang, Khumansingh. 2004. Jhandai marenan Maobadile. *Kantipur*, 2 August, pp. 7.

bombed the offices of state-owned print media, and damaged a vehicle belonging to Radio Nepal. They have also looted the property of some journalists and publications.⁴⁰⁴

d) Dislocations:

As a result of threats from the Maoists, more than 20 journalists have been dislocated from their primary working location since the end of ceasefire in August 2003. These include Bir B Singh, who was displaced to the district headquarters from his village in Dailekh district. The Maoists had sought a huge donation from him.⁴⁰⁵ Chitra B Singh ‘Gaunle’ of Kalikot who is a reporter for a major paper in Kathmandu, was dislocated from his village for marrying the daughter of a local leader belonging to the Rashtriya Prajatantra Party (RPP) against the warnings of the Maoists. The Maoists also looted money he had from the selling of a piece of land and they also locked his house.⁴⁰⁶ Dambar Bahadur Thapa, a reporter for *Kankrebihar* in Surkhet was also dislocated with his family when they were unable to fulfil Maoist demands for a big donation.⁴⁰⁷

e) Secrecy and denial of access:

Maoists ‘banned’ Harihar Singh Rathor, a reporter for *Kantipur*, from collecting news in the district of Jajarkot in August 2001. He was accused of selling photographs of Maoist rebels.⁴⁰⁸ Ishwari Neupane, a *Kantipur* reporter and Kishorjung Shah, a reporter with the state-owned newspaper *Gorkhapatra*, were prevented from news-gathering in Gorkha in November 2003.⁴⁰⁹ Three journalists were stopped by the Maoists at Jipu Pipal in Rukum in March 2004 and were prevented from collecting news about the “situation of teachers and students who were abducted one and half months” earlier.⁴¹⁰ In mid-2004, the number of reports of denial of access by the Maoists to journalists who were on the move in different parts of Nepal as part of their professional work began to increase sharply. For instance, one team of journalists including some documentary producers was stopped in the far Western district of Mugu in

⁴⁰⁴ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp73-74.

⁴⁰⁵ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report, pp.29.

⁴⁰⁶ Paudel, Kamal. 2004. Lekhinasaknucha lekhaneharukai pida. *Nepal Samacharpatra*, 28 April, pp. 1.

⁴⁰⁷ Paudel (2004), FNJ (2004), and Lamichane (2004a) provide details on others who have also been dislocated.

⁴⁰⁸ Center for Human Rights and Democratic Studies (CEHURDES). 2002. *Status of Press Freedom and Freedom of Expression: Nepal Report 2002*. Kathmandu: CEHURDES, pp71.

⁴⁰⁹ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report, pp.31.

⁴¹⁰ *Ibid.*

late May.⁴¹¹ In July it was reported that the Maoists had asked all journalists who wanted to visit the district of Rolpa to seek prior permission from their party. This decision was reportedly executed because the Maoists suspected that journalists were also working as spies for the state. “Any journalist who does not follow this rule”, it was reported, could face “physical action”.⁴¹² In late July a team of reporters was prevented by the Maoists from reaching its destination in the North-Eastern district of Terhathum. The journalists had hoped to talk to conflict victims at the Sankranti bazaar.

Why are the Maoists wary of independent reporters? We can only guess at their reasons. Symbolically, the Maoists want the reporters to seek their permission to suggest that they have succeeded in introducing a visa or passport-like system for ‘outsiders’ to enter territories under their control.⁴¹³ Substantively, perhaps they are afraid that independent reporting could unearth information that would challenge their claims of achievements in the areas under their *janasarkars* (‘people’s government’). Are schools functioning better in Maoist-controlled territories? Do people have access to better primary health care? Are ‘cultural changes’ (such as a ban on alcohol) sustainable without the backing of arms? Are women, dalits and ethnic minorities really better off in Maoist base areas? Independent reporters could seek answers to these and other related questions. Their findings could better inform the Nepali public about the ethos of the Maoists and the capacity (or lack thereof) of their institutions beyond the threat of armed violence. I suspect that the Maoists fear this possibility and hence will do everything to make the work of independent reporters impossible in the areas under their control. The Maoist leadership of course would not agree with this interpretation. For instance, in a recent interview, the Maoist leader Prachanda claimed that independent journalists had always been welcome even in the ‘base-areas’ of his party. Moreover, he added that many Kathmandu-based journalists had hesitated to travel to the base areas of the ‘new regime’ and reveal the truth. However, in the same interview, Prachanda emphasised that if individuals recognised as journalists by the ‘old feudal regime’ were proven to have

⁴¹¹ Mainali, Mohan. 2004. Afainlai marera phaleko sapana. *Kantipur*, 18 July, pp. 7.

⁴¹² Dangi, Kashiram. 2004. Patrakar lai rok. *Nepal*, 1 August, pp. 32.

⁴¹³ This point has been emphasised by independent journalist and documentary producer Mohan Mainali, whose team was stopped by the Maoists in Mugu in mid-2004 (Mainali, Mohan. 2004. Afainlai marera phaleko sapana. *Kantipur*, 18 July, pp. 7.)

been involved in “conspiracies to murder the people and revolutionary guerrillas, it would be suicidal to not take action against such individuals just because they are called journalists”.⁴¹⁴

f) *Obstacles to flow of printed matters and communication:*

The Maoists have prevented the flow of printed matters, both directly and indirectly. They have prevented the passage of print media critical of them on several occasions. For example, they censored an issue of the monthly magazine *Narayani Today* in the Autumn of 2001 because of its ‘offensive’ cover. More indirectly, their bandhs (strikes) and blockades have prevented the flow of any print media to areas in Western Nepal that are under their control. For instance residents of Rolpa have not had access to newspapers for months since early 2004 due to a blockade called by the Maoists. Hence residents often ask reporters about current news.⁴¹⁵ A van delivering a nationally prominent daily published from Kathmandu (*Annapurna Post*) to the western town of Pokhara, hit a Maoist booby trap in a major highway during a bandh called by them in May 2004. The van was severely damaged and its driver was killed on the spot.⁴¹⁶ The Maoists have also detained newspaper vendors. One such individual, Mutuklal Biswakarma was briefly detained and interrogated by the Maoists in July 2004 near the southern town of Lahan, on suspicion that he might be a government spy.⁴¹⁷

The Maoists have blown up radio, television and communication relay towers in different parts of the country as part of their effort to destroy the communication infrastructure of the state. This has not only damaged the broadcasting capacity of the state and media owned by it, but has also disrupted the communication channels of journalists working for private sector media. Due to the lack of adequate number of telephones, these journalists have had to rely more on government offices (with VSAT communication facilities) to dispatch their stories and as discussed above, that has introduced opportunities for state officials to try to censor copies before they are dispatched.⁴¹⁸ After a telephone repeater tower was destroyed in a Maoist attack more than two years ago, reporters in Rank in Rolpa district used to send their

⁴¹⁴ Sharma, Om and Manarishi Dhital. 2004. Sansarbharika patrakarlai suchana, samrajyabadka biruddha naya andolan sristi garna ahwan gardachu (Interview with Prachanda, Chairman, NCP (Maoist). *Sanghu*, 10 May, pp.6.

⁴¹⁵ Budha, Khembahadur. 2004. Aprakasi samacar pani padhera sunau bhanchan Rolpalihari. *Rajdhani*, 11 July, pp. 1.

⁴¹⁶ Annapurna Post, 2004. Patrika bokeko gadi dharapma. 28 May, pp. 1

⁴¹⁷ Annapurna Post. 2004. Patrika bitarak cha ganta Maobadiko niyantranma. 22 July, pp. 5.

⁴¹⁸ Mainali, Mohan. 2004. Kalamko Pida. *Kantipur*, 5 May, pp. 7.

stories by bus. But due to the Maoist blockade, no buses have plied in the area since early 2004. The delivery of the postal services in the area has also been stopped.⁴¹⁹ This report also mentions that these difficulties have forced some correspondents in Rolpa to quit the profession of journalism altogether.

g) Maoist media:

We need to also recognise the presence of the Maoist media – pamphlets, newspapers, magazines, books, internet site(s) and mobile FM radio – and its attempt to accost readers with pro-CPN (Maoist) contents and rebuttals of anti-Maoist arguments. The CPN (Maoist) had taken good advantage of Nepal’s press freedoms to foster its own cause through various newspapers and magazines. The most well-known of these was the weekly *Janadesh*, which was categorised as a Class A newspaper by the state nominated body Press Council Nepal. In 2001 its circulation exceeded 25,000 copies. Before the imposition of the emergency in November 2001, there had been some attempts by the government to curb Maoist media through use of force. Some Maoist newspaper offices were raided but specific charges were not brought against them for their pro-Maoist coverage or their glorification of violence. Their existence was guaranteed by the fundamental rights protected by the Constitution of Nepal, 2001. When the emergency was imposed, most of the print media close to the Maoists stopped being published mainly due to governmental action against their staff. Some of these publications subsequently appeared from India. However during the period of the ceasefire in 2003, they again appeared from within Nepal. After the ceasefire collapsed in late August 2003, most of the persons editing these publications have gone underground and the Maoist print media is not being published openly inside Nepal.

Some of these publications have been available on the Internet, where the CPN (Maoist) also run a news site called *Krishnasenonline.com*. The Maoists have become quite cleve in their use of the digital mode of communication and have ‘war reporters’ of their own.⁴²⁰ Apart from using sophisticated communication media for their own purposes, they extensively use the digital medium to communicate their points of view to the press. For instance, their press releases are routinely made public through email which they also use to send articles to

⁴¹⁹ Budha, Khembahadur. 2004. Aprakasi samacar pani padhera sunau bhanchan Rolpalihari. *Rajdhani*, 11 July, pp. 1.

⁴²⁰ Pradhan, Tika Ram. 2004. Perfecting mission journalism, and how! *The Himalayan Times*, 14 August, pp. 4.

newspapers or magazines. Email has also been used by some Maoist leaders to answer interview questions from journalists. Email has also been used to deliver complaints and threats against individual journalists. Maoist spokesperson Krishna Mahara has contacted BBC Nepali Service several times by satellite phone. This service has often been used as a forum to deny negative rumours about the CPN (Maoists) or to elaborate some of their own concerns.

Since 2002 or so, the Maoists have also used a mobile FM radio called 'Radio of the People's Republic of Nepal', through which they broadcast their news, commentary and revolutionary entertainment programmes.⁴²¹ The Maoist radio has been heard in various parts of the country at different times, suggesting that they are operating several mobile stations concurrently. In a recent interview, Chairman of CPN (Maoist), Prachanda, mentioned that, given the complexities of the ongoing civil war in Nepal, he is satisfied with the publication and broadcast of media close to his party. However, he has added that there is room for further development and refinement.⁴²²

4.6 The Negative Effect of Restrictions and the Case for Openness

Negative effect on media

What has been the result of the dual efforts on the part of the state and the Maoists to control the production and flow of information related to the conflict via the mass media in Nepal? We can perhaps try to answer this question by looking at both the psychology of fear that is pervasive in the environment in which media persons have had to do their work since late 2001 and the contents of the media products themselves. The impact of threats from the security forces and the Maoists on members of the journalistic fraternity can be guessed from the discussions in the earlier sections. Nevertheless it is also clearly demonstrated in the following quote by Sharad K.C., a stringer for the BBC Nepali Service then located in the

⁴²¹ Shrestha, Navaraj. 2004. Radio Janaganatantra Nepalma kam gardako anubhuti. *Sanghu*, 9 August, pp. 6.

South-Western city of Nepalgunj.⁴²³ Talking to representatives from the organisation, Reporters without Borders in the year 2002, Sharad K.C. said:

*“Our field access is very limited. The threats from the military make us fear for the worst if we go to investigate reports of abuses. We have ended up practicing a large degree of self-censorship.... The army and the government have nothing but contempt for provincial journalists and yet we are the ones who are close to what is going on. What’s the good of reporting from the field if our editors in Kathmandu just reproduce the communiqués issued in the capital by the Ministry of Defence?”*⁴²⁴

The term Maoist could be suitably inserted in the above quote and the fear induced by them would also be captured by the same quote.⁴²⁵ The fear regarding one’s own security has forced journalists to be very cautious about what they write, say, and show in their media outputs. As has been demonstrated in the previous sections, this fear is induced by the spectre of emergency laws and executive orders brought into existence by the state since late 2001. It has also been generated by the concomitant practices of the state security forces and those of the Maoists, both of whom have done much to target media persons. The field of journalism has taken a severe beating from which it will take a while to recover. It has not only lost some of its practitioners by death or desertion, thanks to the excesses of the conflict protagonists. The job of trying to retain its skilful members and recruit new ones into its fold has been made all the more difficult. The dislocation of skilful media practitioners from regional or smaller centres of media production has slowed the process of the decentralisation of media capacity.

The environment of fear and confusion has not served the final constituency of the media as well. The existing analyses of how the media has performed with respect to the coverage of the conflict have all reached the conclusion that while there were some positive elements, the

⁴²² Sharma, Om and Manarishi Dhital. 2004. Sansarbharika patrakarlai suchana, samrajyabadka biruddha naya andolan sristi garna ahwan gardachu (Interview with Prachanda, Chairman, NCP (Maoist). *Sanghu*, 10 May, pp.6.

⁴²³ K.C. has since moved to Kathmandu where he reports for the news magazine *HimalKhabarpatrika*.

⁴²⁴ Reporters Without Borders (RSF). 2003. Nepal Annual Report 2003. Downloaded from www.rsf.org/print.php3?id_article=6476.

⁴²⁵ Mohan Mainali in Afainlai marera phaleko sapanu. *Kantipur*, 18 July, pp. 7., recounts how a man accompanying a group of journalists in Mugu district in the far-Western region dreamt of being killed in front of his sister. The entire group had been held by the Maoists for a whole day a day earlier.

list of failures was much longer. One such study of the performance of the print media during the first six months of the emergency (November 2001 to May 2002) concluded thus: “In the final analysis, however, it was clear that under pressure the mainstream papers failed to fulfil their responsibility”.⁴²⁶ Bhattarai reached this conclusion by borrowing the criteria of ‘good journalism’ deployed by media analyst Ross Howard (2003a) in his handbook on conflict-sensitive journalism. The basic building blocks of good journalism anywhere are accuracy, impartiality (balance) and responsibility. During the period studied by Bhattarai, Nepali mainstream media was particularly wanting in terms of both accuracy and impartiality. Relying mostly on government sources, the reporting in the first months of the emergency was both inaccurate and obviously pro-state in its contents. Near the end of the six month period, source diversification had happened but factual errors continued to plague the reporting. Except for an occasional daring report during the entire nine-month period of the emergency, the mainstream print media did not fulfil its ‘watchdog’ function on behalf of the people of Nepal. While the situation has gotten better since the end of emergency in August 2002, the list of non-delivered expectations continues to be long.

The negative effect of restrictions/information control on other sectors

It is often argued that information control or restrictions produce much negative effect on various other social sectors including the state troops and Maoist fighters directly involved in the conflict, the public at large including women and children and the business sector. It is even suggested that information control has been counter-productive, even in relation to the objectives of those controlling the information. While this is a view that is quite sound theoretically, it also remains the case that it is not so easy to prove this linkage with the use of definitive evidence. Locating specific evidence (that can be isolated from a whole gamut of other occurrences) which shows that the conflict has been rendered worse due to the restrictions on freedom of expression alone is difficult.⁴²⁷ Given the brutal nature of repression on the part of the state and the Maoists, the rule of law has become a big joke in Nepal. There is lack of information on the specific application of laws brought into existence to deal with the Maoist insurgency, chiefly because brute force applied with vague reference

⁴²⁶ Bhattarai, Binod. 2004. *Nepali Press under Emergency: A Survey of the First Six Months*. Lalitpur: Himal Books, pp.53-55.

⁴²⁷ For general accounts of the cost of the conflict, see Kumar, Dhruva. 2003. *The Necessity of Choice: Demobilization, Demilitarization and Democratization*. Nepali Journal of Contemporary Studies 3(1): pp.1-20.

to such laws has been the chief mechanism of the state's attempt to squash freedom of expression in Nepal.

While it has been noted in this paper that there has been a deterioration in the state of freedom of expression in Nepal due to the doing of the Nepali state and the Maoists, no definitive evidence can be brought forth to make the argument that the conflict has been exacerbated by these restrictions alone. The conflict has worsened but the main factors responsible for this state of affairs lie somewhere else. Hence we can only guess how the restrictions on freedom of expression *might* be responsible for the worsening situation in Nepal *without* being able to prove it.

Control over the flow of information and the freedom of expression reduces the possibilities of third party monitoring of the actions of both the state troops and the Maoist guerrillas. In other words, such control directly contributes to a culture of impunity for perpetrators of all kinds of human rights violations. Such violations, at one level, contribute to bad social images of both the security forces of the Nepali state and the armed Maoist rebels. It is noteworthy that with the escalation of the conflict since late 2001, the public image of both the army and the Maoists has nose-dived in terms of respectability.

At another important level, such violations perpetuate a culture of violence (and the breaking of law) over a hapless population, alienating its trust and on the process, losing the moral basis to be representatives for the security of the present and the visionary of the future. This much is quite clear from the criticism bestowed on the security forces and the Maoist guerrillas in the recent past. In addition, the flow of controlled and distorted information contributes toward a misreading of the strength and weaknesses of the armed protagonists, even possibly leading to ambitious plans that rely on an unrealistic military solution to the present conflict. Here, it is worth to recall the unofficial claims made by the army prior to November 2001 that it could defeat the Maoists within months of being asked to engage with them militarily. Looking back at such a claim in August 2004 reveals its complete vacuity given the fact that the Maoist organisation is far from being 'finished' in any sense of the term. Similarly, the claim by the Maoists, doing the rounds in mid-2004 that they are on the verge of capturing Kathmandu (and then Delhi) falls in the same category of non-credible

threats.⁴²⁸ I can only guess that such gross distortions of one's military abilities and the lack of same on the part of the 'enemy' creates a situation of unfulfilled hopes among the Maoist cadres and the soldiers of the Royal Nepali Army.

Restrictions on freedom of expression also contribute toward the lack of proper social monitoring of the distress felt by the public at large caught in the conflict. This public includes the relatively better off business sector and socially disenfranchised communities of men, women, children, dalits and ethnic janajatis. For instance, while there have been some reports on the impact of economic blockades called by the Maoists since early 2004 in central and Western Nepal, we are at a loss regarding the full registration of their impact on businesses that cannot move their goods, and in turn, cannot pay their own creditors.⁴²⁹ Such blockades tend to have multiplier effects whose full impact can only be recognised if one were to trace all the linkages in the chain. Restrictions on freedom of expression also tend to provide an atmosphere where the incidence of violence against the socially disenfranchised groups of Nepali society is likely to increase. In particular sexual violence against women and caste violence against dalits and janajatis have probably been recorded at higher levels since 2001. Also, children have become unintentional targets of the violence.⁴³⁰

The challenges of openness and peace processes

The past experiences of ceasefire and peace processes in Nepal allow us to make the claim that both the 2001 and 2003 talks between the Nepali Government and the Maoists were conducted in a spirit imbued with lack of transparency. The selection of the government side of negotiators was done in a secretive way (especially in 2001) and there was hardly any attempt to mobilise public participation in the actual negotiations. It was even unclear how those individuals who were described as 'facilitators' of the talks got placed there to play those roles. If it can be assumed that when peace processes are more transparent and provide for larger degrees of democratic participation, it is usually more difficult for the armed

⁴²⁸ Sanghu. 2004. Kathmandupachi Dilli hanne dhamki! 2 August, pp. 1, 8.

⁴²⁹ The owner of one FM radio station in Pokhara told this writer that due to such blockades, some Pokhara noodle manufacturers had not paid for the ads that had run on his radio because they had not been able to send their product to the rural areas erstwhile served by them and hence did not have the cash to pay the radio station.

⁴³⁰ Institute of Human Rights Communication Nepal (IHRICON). 2003. *Children in Armed Conflict in Nepalese Print Media: A Media Monitoring Report* (2001 to 2003). Kathmandu: IHRICON.

protagonists to walk away from the peace table, then the Nepali experience allows us to say that given the style in which the talks were conducted, they were doomed to fail.

There is no doubt that what Nepal needs is a peace process that is more transparent and inclusive in terms of public participation. In other words, what is needed is permanent peace that is based on true respect for human rights including freedom of expression and the right to information. Given this desire, it is quite clear that restrictions on freedom of expression severely weaken conflict management and resolution. In the absence of correct information and informed analyses based on such information, unnecessary commentary will thrive and will allow a lack of trust to flourish between the two sides and the society at large.⁴³¹ Such a situation makes the challenge of managing the conflict even more formidable. Hence current restrictions on freedom of expression imposed in the name of ‘national security’ are misplaced and ought to be lifted. A capable independent and free media will help society understand the nature of the conflict through its reports and open debates and contribute towards solving the conflict, even when it does not set out with that intention.⁴³²

However this is much easier said than done for the following reason. The conflict in Nepal – like many other conflicts in various parts of the world – thrives on the active manipulation of information. The major players in the conflict in Nepal – the monarch, the Royal Nepali Army, Maoists and political parties – all conduct their politics by actively manufacturing information (or disinformation) and analysis that serve their own objectives and ends. They also try and control, as far as possible, access to means and avenues that would generate and disseminate accurate and impartial accounts of the conflict, ideas, information and analysis that would challenge their ‘mono-truths’. It is no surprise that these players have embedded communicators in almost all types of media institutions in Nepal to filter out detrimental coverage and promote self-serving content. Hence, while championing true respect for human rights including freedom of expression is a theoretically sound idea, advocacy by a relatively weak Nepali civil society is a difficult project to accomplish.

The primary practical challenge for civil society is this: those controlling information see their action as an effort to produce results that serve their own ends and purposes and even have a

⁴³¹ Bose, Tapan K. 2004. Sancar, abhivyakti swatantrata ra dwanda. *Rastrabani*, 30 June, pp. 5.

⁴³² *Ibid.*

rhetorical repertoire regarding how their practice is beneficial to the people of Nepal. From their particular locations, they seldom share the social calculus of costs and benefits that might occur to other folks such as media practitioners or human rights activists who put great value on the freedom of expression. The logic of those who control information is not hard to understand: they would love to externalise the costs and internalise the benefits of information control. Those who see the costs and benefits differently are usually not in a position to challenge that logic personally. These individuals have to resort to various types of institutional practices in an effort to do just that. However, since institutions are complex entities with their own politics, posing challenge is easier said than done.

How can civil society in Nepal and the international community help?

Given the scenario described above, the situation regarding freedom of expression in Nepal is likely to get better only if the present level of impunity for perpetrators of human rights violations decreases drastically. That is only likely to happen if demonstrably effective measures are taken to prevent or stop unlawful arrests, torture and abductions of media persons and associated rights activists by the protagonists of the conflict. It would also be necessary to punish those who abuse power. Even if the situation is somewhat bleak, it can be argued that we can learn some insights and lessons from existing practices and build up on experiences that have worked elsewhere. Some ideas for activism, a few of which are based on current practices, are given below.

a) Recording and dissemination work by media and human rights organisations:

With the hope that the illiberal logic of both the state and the Maoists will be defeated in the long-run through certain practices, organisations such as the FNJ and CEHURDES have been documenting violations of freedom of expression and more general human rights violations against media persons. They are doing this partially in collaboration with other Nepali media and human rights organisations and with the help of some international organisations. With help from the Danish aid agency, DANIDA, the FNJ has already published two books, one each in English and Nepali, which document these violations for the period 2001-2002.⁴³³ It has also recently prepared an unpublished report of such violations for the seven-month

⁴³³ Kafle, Chiranjibi, ed. 2003. *Nepali Press during State of Emergency*. Kathmandu: Federation of Nepalese Journalists.

period since the end of the last ceasefire in August 2003.⁴³⁴ CEHURDES has prepared an annual report on the 'Status of Press Freedom and Freedom of Expression' in Nepal since the year 2000. These documents in turn have been the bases for reports prepared by international organisations such as RSF, IFJ, Committee to Protect Journalists (CPJ) and others that have also sent their own fact-finding missions to Nepal in recent years.

Such documentation is absolutely necessary to first record the situation of violations against specific individuals and to seek justice on their behalf. Secondly, documentation is necessary for all kinds of subsequent activism, including the preparation of special reports for dissemination or the holding of informed public discussions to raise a voice against actions that have curtailed freedom of expression in Nepal. Such documentation is also necessary to build national and international networks that would advocate for the rights of the victims by creating moral pressure against the perpetrators of injustice in Nepal. This kind of documentation is also part of an active monitoring process of the situation regarding freedom of expression in Nepal to create pressure against future excesses by parties to the conflict. However, more rigour could be used in the current practices of documentation to make them more complete and effective.

Beyond textual documentation, other activities are also necessary and some of them are already being done by FNJ. For instance, since autumn 2003, FNJ has been running a 24-hour telephone hotline to promote prompt action on behalf of any of its members who might become victims of state or Maoist excesses. The hotline, established through the financial support of International Media Support (IMS), a Denmark-based organisation, has made a difference.⁴³⁵ In addition the FNJ is also conducting continuous dialogue with the government and the rebels to secure the release of its members who have been illegally abducted or arrested by either of the two conflict protagonists.

b) Rights activism, legal recourse and law reform:

To confront rights violations, it is also important for media practitioners to be aware of their rights and have recourse to legal help. With respect to the first of these items, the newly

⁴³⁴ Federation of Nepalese Journalists (FNJ). 2004. State of journalists, media and press freedom in Nepal (A Situation assessment of the post-ceasefire conflict). Unpublished report.

⁴³⁵ *Ibid.*

established Centre for Media Rights in Kathmandu aims to provide help through the setting up of a resource centre that would house necessary information regarding the rights of the media. The Centre's work – it remains to be seen what it will encompass – is being supported by a Canadian organisation, the Institute for Media, Policy and Civil Society (IMPACS) with a grant of Canadian \$40,000.

With respect to legal help, CEHURDES helped about 20 journalists who had been illegally detained, to file a compensation suit with the district courts of Kathmandu, Sunsari and Morang. Compensation amounting to about Rs. 100,000 each has been demanded, citing reference to the relevant legal provision. One petitioner, Shyam Shrestha, editor of *Mulyankan* monthly was quoted as saying, “We want to set a precedent that the state must bear responsibility for violating people's fundamental rights, even during the state of emergency”.⁴³⁶ However, nine of the cases filed have been dismissed somewhat arbitrarily, while the remaining cases are continuing.⁴³⁷

Self-education of the legal bases for restrictions and rights ought to be an integral part of media/human rights activism for the future of freedom of expression in Nepal. This kind of education will enable the activists to devise ways to continuously challenge existing and future draconian legal measures and illegal detentions by the state. It will also contribute towards the realisation of a legal environment in which necessary progressive legislation can be passed in the form of a Public Information Act, a Whistleblower Protection Act, etc.⁴³⁸ National and international networking would obviously be necessary for rights activism to succeed, but robust ways of realising such networks have to be devised.

c) *Scholarship:*

Promotion of good academic studies on the subject of freedom of expression in Nepal is absolutely necessary. We need historically rich studies of the power constellations in Nepali society that have traditionally worked against freedom of expression. We also need broad and comparative studies that give us the benefit of insights developed from scholarly work done elsewhere. We also need specific studies by legal experts that analyse the scope of abuse of

⁴³⁶ Center for Human Rights and Democratic Studies (CEHURDES). 2003. *Status of Press Freedom and Freedom of Expression: Nepal Report 2003*. Kathmandu: CEHURDES, pp.18.

⁴³⁷ This information was gathered from Pradip Ghimire of CEHURDES.

the emergency laws and executive orders in Nepal since November 2001. For this to happen, long-term collaborative studies between media practitioners, legal scholars, social scientists and human rights activists will be necessary. Such efforts will strengthen the social foundations of pro-freedom of expression environment in Nepal. I am afraid that the present mode of ‘conflict tourism’ – whereby Nepali journalists and rights activists are being herded for a fast tour of some other conflict (past or present) regions in the world (e.g., Sri Lanka, Northern Ireland or South Africa) – will not produce much scholarly work or insights. More long-term collaboration of an academic nature among analysts in South Asian countries is needed even though the environment for such collaboration is not so encouraging at the moment.⁴³⁹

d) Resources:

Doing all of the above will require resources, both financial and human. Hence it would be necessary to secure financial resources from Nepal’s international friends to support the above discussed activities. In terms of financial resources, the tendency to provide piecemeal funding support will not work. Also the funding dynamics ought to shift from the individual donor-recipient type to a coalition-recipients model in which discussions regarding comparative cost-benefit advantages of such support become a routine part of the grant-giving exercise. It would also be important to generate financial and non-monetary resources within Nepal to do much of the work described above. For instance, Nepal’s major media houses ought to invest resources that can fund activism and scholarship that support a pro-freedom of expression environment in Nepal. After all, they will benefit the most from such an environment. Networking costs between scholars and rights activists could also be internally generated and shared by interested NGOs and informal groups.

4.7 Post-script

One of the biggest safeguards against the loss of freedom of expression in the present conflict would be a return of the representative form of democracy in Nepal. For that to happen, a political resolution of a kind that accommodates the desires and demands of the Maoists is

⁴³⁸ Onta, Pratyoush. 2004. The Right to Information. *Nation Weekly*, 5 September, pp. 30-31.

⁴³⁹ See Onta, Pratyoush. 2001. Regional Area Studies in South Asia: Dark Days Ahead. *Nepali Journal of Contemporary Studies* 1(2): 60-89, for a detailed discussion regarding this topic.

necessary. An opening toward a constituent assembly that would draw up the next Constitution of Nepal might be one of the more realistic avenues towards reaching such a solution. However, it is unlikely that this will happen. After experimenting with a set of hand-picked prime ministers since the sacking of an elected one in October 2002, King Gyanendra of Nepal assumed full control of the Nepali state on 1 February 2005, with the help of the Royal Nepali Army. The Constitution of Nepal, 1990 does not envisage such a scenario. Nevertheless, the King has declared a new State of Emergency and has illegally detained many political leaders, social activists, academics, and journalists, all in the name of saving the country from the Maoists. A new round of detention and harassment of journalists has begun and the environment for freedom of expression has further deteriorated.

4.8 Case example: The Fiasco at Holeri: Misleading a Prime Minister

On 12 July 2001, the Maoists attacked the Holeri police post in the Western district of Rolpa and abducted 71 policemen who had surrendered after their ammunition ran out. This was the largest single case of the abduction of policemen by the Maoists and hence it became main news for the national media on 13 July. On 14 July, Kathmandu media outlets, quoting government and army sources, informed the public that the army had gone into action against the rebels to secure the release of the abducted policemen and recapture the looted weapons. It was reported that the soldiers had surrounded the rebels in the village of Nuwagaon, some six hours walk from Liwang, the district headquarter of Rolpa. It was reported that all the exits had been blocked and there was no way the rebels could escape. On 15 July, the public was informed that the army was “consolidating its position” and that a “decisive operation” was imminent.

On 16 July, two contradictory developments were reported. Quoting Defence Ministry sources, journalists reported that the Royal Nepali Army had strengthened its position by surrounding Rolpa from all sides. It was also reported that the same source had “claimed that the rebels have offered to release the captured policemen and hand over even the arms in exchange for safe passage out” (*The Kathmandu Post*). However, it was also noted that the Maoists denied that their armed members were surrounded by state security forces. In a press

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release signed by the Maoist leader Prachanda, it was “claimed that the army mobilisation has boomeranged on the government and that it was the rebels who had held the army troops in captivity for the past two days and mercifully released them today.”

On 16 July, it was also revealed that a group of journalists was prevented by state authorities from travelling towards Nuwagaon and that a leader of the opposition, Khadga Prasad Oli, had accused the Nepali Congress government led by Girija Prasad Koirala of “releasing false news” regarding the surrounding of the Maoists by security forces. On 17 July, quoting Home Ministry sources, the public was told that the encirclement of the rebels continued and that unless they released the abducted policemen, the security forces were ready to take immediate action. On 18 July, quoting local villagers, it was reported that the rebels and the army had moved away from Nuwagaon and the much reported ‘encirclement’ had not taken place at all. However, on the same day, Prime Minister Koirala reportedly said that the “army was only repositioning to safer locations” and it had not been withdrawn.

As it became obvious that the situation on the ground had been different from what had been reported and what had been told to him, Prime Minister Koirala resigned on 19 July. It was later revealed that Koirala realised he had been taken for a ride by the army during his meeting with the King on the evening of 18 July. While he and the Nepali public in general had been made to believe that the army had encircled the rebels in Nuwagaon, no such thing had actually happened. This was further confirmed on 20 July by a team of human rights activists who had visited the site. Koirala’s resignation initially paved the way for the appointment of his fellow party member Sher Bahadur Deuba as the Prime Minister and the first round of ceasefire and talks between the government and Maoist rebels. However those talks failed and when the Maoists resumed their attacks, Deuba imposed a state of emergency on 26 November 2001, claiming that there were no other alternatives but to use the army against the insurgents. The level of violence has gone up by many folds since that date, as can be seen in the total death toll of the conflict.

This example goes to show the extent of the politics of misinformation that is played out in the fractured realms of Nepal’s ruling class. By misleading Prime Minister Koirala, the army (and the Royal Palace) was able to fast forward his departure and facilitate the arrival of Sher Bahadur Deuba as Prime Minister. Deuba, known to be more pliable to the interests of the

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army and the Palace, was subsequently responsible for emphasising the military solution to the conflict (under the state of emergency and TADA) and creating the environment for the monarch to dispense with representative forms of government on 4 October 2002. In the absence of the Parliament (prematurely dismissed by Deuba who then failed to hold national elections), democracy and an enabling environment for freedom of expression continued to suffer from the excesses of the security forces and the Maoist guerrillas in the years since mid-2001.⁴⁴⁰

⁴⁴⁰ Source: various issues of *Kantipur*, *The Kathmandu Post*, *Nepal Samacharpatra* and *Himalaya Times*.

5 COUNTRY STUDY: INDIA

“I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or a regulated press”

Jawahar Lal Nehru

5.1 Introduction⁴⁴¹

The free flow of information strengthens ‘public spheres’⁴⁴² and enables the polity to respond to the challenge of differences, grievances, inequities and injustices, in non-violent ways. However, it is when freedom of expression is particularly vital, i.e. in conflict situations that it is most at risk. Here the apparent contradictions between commitment to freedom of expression and the safeguarding of ‘public order’, national security and sovereignty come to the fore. However, it is my contention that in situations of conflict, openness actually has served the public interest and suppression of information has harmed it.

In mapping the framework of legal and non-legal restrictions on freedom of expression and conflict in India, I will try and demonstrate that restrictions feed rumours and are likely to exacerbate cycles of violence, while a culture of transparency and accountability creates credibility and encourages a deeper understanding of political violence and consequently, non-violent political ways of resolving conflict.

Historically, the colonial experience of the suppression of rights and freedoms had made the new ruling elite of independent India particularly sensitive about protecting the fundamental rights of citizens. Article 19 (1) of the Constitution guarantees as a fundamental freedom to all citizens “freedom of speech and expression”. However, the very First Amendment to the Constitution expanded the ‘permissible restrictions’ to include the broad phrase ‘public

⁴⁴¹ This Chapter was written by Rita Manchanda, consultant for South Asia Forum for Human Rights.

⁴⁴² The concept of the public sphere derives from Jurgen Habermas *Between Facts and Norms*, Cambridge MIT Press 1998 pp.360. It is being used here to refer to a network of communication and points of views of freely debating citizens.

order’, though with the caveat of ‘reasonable’ restrictions. Constitutional expert Rajeev Dhavan summed up this U-turn in the liberal sentiments of the constitution-makers, as “British laws and policy settled a law and order paradigm (in relation to the press) that was gratefully adopted by the Constituent Assembly drafting India’s Constitution”.⁴⁴³

Since then, a burgeoning cauldron of socio-economic protests, communal and secessionist violence, armed insurgencies and inter-state wars have reinforced that law and order paradigm rather than a democratic engagement with the social and economic roots of protests. The two Press Commissions (1952 and 1982) set up to define the role of the press in a democratic polity have endorsed this concern about a law and order society. Democratic rights were to be subordinated to maintaining national unity and integrity, especially as the concern about ‘public order’ got fused with a national security state pathology.

It has produced social sanction for an elaborate scaffolding of ‘special laws’ that imposed restrictions instead of punishing violations under the general laws for specific offences. From the Punjab Special (Press) Powers Act (1956) and the Disturbed Areas Act & Armed Forces Special Powers Act (1958) it expanded to Terrorist and Disruptive Activities Act (1985-1993) and the Prevention of Terrorism Act (POTA) (2002-2004). These broadly worded national security and anti-terrorist laws – enacted largely in response to conflict situations – have been substantially abused to stifle dissent and restrict freedom of expression. For example, under POTA section 21, expression of sympathy or verbal support for a ‘terrorist’ organisation was sufficient to send to jail (up to 10 years) the high profile Tamil Nadu politician Vaiko for speaking in support of the Sri Lanka militant group, the LTTE. An archaic law like the Official Secrets Act (OSA) (1923) was invoked to throw Kashmiri journalist Iftikar Geelani in jail for seven months until the Courts threw out the charges as baseless.

The Indian judiciary – which has played such a critical role in mediating the inherent tension between freedoms and restrictions – is increasingly legitimising a steady erosion of democratic rights through these special laws that foster a culture of impunity. The judiciary – like the Constitution – rests on a national consensus that is sanctioning the shrinkage of democratic space for dissent and freedom of expression.

⁴⁴³ Rajeev Dhavan, *Only the Good News*, New Delhi, Manohar 1987.

Across the political spectrum, there is a growing propensity to use legal and non-legal means to suppress freedom of expression. The online news agency Tehelka.com exposed corruption in defence deals during the previous government, led by the Bharatiya Janata Party and found itself in a welter of legal cases from OSA to violating the Wildlife Act. The Communist government in West Bengal banned Tasleema Nasreen's book *Dwikhandito* in the interest of public order. The Bhandarkar Research Institute in Pune (Maharashtra) where James Laine researched his book – *Shivaji: Hindu King in Islamic India*, was vandalised; the painter M F Hussain's creations (that transcend any simplistic Hindu-Muslim cultural divide) have been attacked; playwright Habib Tanvir's productions have been stopped.⁴⁴⁴ In the wave of intolerance that spewed forth in the Gujarat violence against Muslims, in cosmopolitan Mumbai in 2000, a private screening of Anand Patwardhan's film "War and Peace" was cancelled and the local police stopped a screening of two documentary films on Gujarat. It is a disturbing pattern of official censorship converging with unofficial mob censorship.

In conflict situations with the information war forming the third front, the stakes are much higher and armed protagonists on 'both sides' are manipulating information and intolerance of independent forms of expression. Regional secessionist movements have put the media in the sight of both state and insurgents and aggressively denied the mass media any neutral space. The local media, in particular is under pressure to be 'embedded' on one side or the other.

Non-state actors have evolved elaborate press codes involving pre-censorship and co-opted the 'local' media in the publication of 'press notes'. Failure to comply has proved fatal. State agencies view the local press as captive of the insurgent groups and denounce reports of human rights violations as propagandist. Indeed an indicator of freedom of expression is the 'tolerance' of the human rights story and state agencies have used both legal and non-legal means to undermine freedom of expression.

Special laws have been promulgated involving pre-censorship and prohibitory orders in conflict situations in NorthEast, Punjab and Kashmir. The Directorate of Audio-Visual Publicity (DAVP) has withheld advertisements, striking at the structural (financial) vulnerability of the 'local' press in conflict regions. The Executive has disrupted the delivery

⁴⁴⁴ For details Sarai Reader 04 Media/Crisis, Delhi CSDS,2004; Ranjit Hoskote 'The mob as Censor' in The Hindu, Feb.11, 2004

of newspapers, obstructed licences for importing newsprint, chemicals and machinery and even the supply of electricity. There is systematic pressure on journalists (owners, editors and producers) to conform. It includes intimidation and even displacement, denial of access to 'hostile' or 'anti-national' (i.e. independent) journalists to press briefings. Also, local journalists who crucially mediate public opinion in the area of conflict are discriminated against as unreliable and preference is given to the national 'mainstream' media.

Ironically, this shrinking of space for democratic discourse on conflict is taking place in the unfolding of a hugely democratic impulse – the expansion of the print and audiovisual mass media in India. In the 1980s, there was a mass media revolution, especially in the regional language newspapers that for the first time penetrated small towns and villages. The audiovisual media revolution took off a decade later via satellite and cable television networks. Twenty-four news channels provided live coverage of conflicts – Kargil (1999) and Gujarat (2002) – making the mass media even more important and significant to control.

The latest entrant is the 'New Media' – Internet websites, SMS, e-mail chains, etc. Already, the means of regulation and control are being devised to keep pace with the emerging new media as in recent experiments to block access to certain sites. The government has floated a new agency, the Computer Emergency Response Team (CERT-IN) and its first intervention has been to block the internet site of *Kyunhumn*, a banned separatist group in Meghalaya.

While the media revolution has fed the impulse for democratisation and the breaking down of national monopolies, the growth of regional publication and broadcasting centres has not produced the idealised 'public spheres' of Habermas. On the contrary, these are often sites of subversion of plural values and exacerbate communal and caste tensions. This is evident in the role of the leading Gujarati dailies in fanning the Gujarat 2000 violence and the Hindi dailies in Uttar Pradesh in whipping up the hysteria and driving communal violence in the October 1990 confrontation over the Babri Mosque - Ayodhya temple dispute.

Changes in the pattern of ownership and the growth of a corporate culture in the media, has made the media more closely reflect the powers and interests of dominant groups. The Indian media that grew out of a framework of having responsibility for state-building has now come

to acquire a closer relationship with those holding power. “Cronyism” has subtle implications for enforcing conformity and suppression of information.

Also, senior journalists have been made more economically insecure by the growth of the contract system in the media, crimping further scope for dissent. Producing news for media that is big business, means tailoring reports to target a ‘mainstream’ audience profile that excludes space for viewpoints of the ‘minorities’, women, *dalits*, the poor and the socially marginalised.

Apart from legal, executive and market constraints, a major challenge to freedom of expression in an expanding media environment, comes from prejudices and biases in the mindsets of media practitioners. In conflict situations, the patriotic conspiracy of silence overrides fairness and factual accuracy. In particular, ‘national’ interest is confounded with government interest. In the name of protecting ‘public interests’ bureaucratic interest is protected.

5.2 Sites of resistance

While the environment for freedom of expression has been under attack, there are also significant sites of resistance. In the Gujarat violence – despite the irresponsible role of two Gujarati language dailies – overall, the ‘Editors Guild’ fact-finding team found that “prompt and extensive portrayal by sections of the local press and the national media of the untold horrors visited on innocent people in the wake of the Godhra carnage was a saving grace. The exposure of the supine if not complicit attitude of the state and manifest outpourings of communal hatred stirred the conscience of the nation and compelled remedial action ...and activated the National Human Rights Commission, the Minorities Commission and other safety mechanisms.”⁴⁴⁵

A watchdog body, like the statutory Press Council of India (PCI) has resisted pressure to ban publications coerced or co-opted into becoming vehicles of militant propaganda in the conflict sites of Jammu and Kashmir, Punjab and Assam. However, when it comes to human rights

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violations by the security forces, the Press Council has in the interest of ‘national security’ been co-opted in covering up human rights violations. Trade union bodies like the Indian Federation of Journalists and state bodies (such as the Delhi Union of Journalists) that once were out on the streets in defence of press freedoms have been greatly weakened by new structures of employment and editorial control.

Whereas high-profile cases of abuse against freedom of expression have catalysed campaigns, the arrest of local journalists under the National Security Act or their routine intimidation by insurgents and state agencies rarely prompts public protest. An example of the former was the campaign in favour of *The Hindu* group against the Tamil Nadu state government’s abuse of parliamentary privilege.

Still, there have been myriad sites of public resistance. When the Mumbai International Film Festival of Documentary Films (2004) got mired in controversy relating to pre-censorship and the silencing of dissents through a discriminatory process, filmmakers across the country decided to have an alternate film festival called *Vikalp*.

Democratic mobilisation has produced the Freedom of Information Act (Bill 2002), which though passed by Parliament, failed to be implemented as rules were not framed. Instead, the Right to Information Bill was tabled in Parliament on December 23, 2004 but it suffers from similar weaknesses as the 2002 Act, especially in the exclusion of the security forces and establishment from its purview. The culture of secrecy is deeply entrenched in the functioning of government and nowhere more so than in the security sector.

Ironically, perhaps, a breach in the culture of secrecy and suppression of information could come from within the armed forces (and retired civil servants). Increasingly, retired Generals have been using their memoirs to lash out against the curbs on information which have given army operations a bad press. The armed forces have come to recognise that an independent witness is necessary for credibility. Arguably, there has been an institutional learning curve i.e. from the blanket ban on information on army operations in Punjab in Operation Bluestar (1984) to the embedded media access in Operation Black Thunder (1988). However, there

⁴⁴⁵ Aakbar Patel, Dileep Padgaonkar, B G Verghese ‘Rights & Wrongs: Ordeal by Fire in the Killing Fields of Gujarat’. Editors Guild Fact Finding Mission Report, New Delhi May 2002; pp.1

was a knee-jerk slide back to censorship in the siege of Charar I Sharief in Kashmir (1994) and then a limited openness in the Kargil conflict (1999). The new ‘openness’ being advocated from within the armed forces as evinced in the setting up of a high-powered Army media liaison cell, is more a function of ‘Psy-Ops’ than a victory for the right to know as a resource in preventing conflict. In the end, openness becomes a question of the odds being on your side, i.e. when faced with a volatile situation, the army gags the media.

Finally, the judiciary remains a bulwark, though increasingly a limited one, against the arbitrary exercise of executive or legislative powers against fundamental freedoms and mob pressure, as in the case of the POTA review petition. The provision for judicial review has enabled the courts to challenge executive orders banning books, disallowing telecasting of films and media censorship.

5.3 Historical Background

A longitudinal view of freedom of expression in India reveals a map that follows many contours of the British *Raj* structure of laws and ideologies. For example, there is continuity rather than a break in the domination of the law and order paradigm. Also there is a continuing uneasiness about the multitudinous vernacular press as a site of mischief and subversion. It is reminiscent of the colonial attitude of suspicion and distrust about the local language media which – as Robin Jeffrey in his insightful *India’s Newspaper Revolution* observed – “appeared to hold secrets and potential which ought to be watched”.⁴⁴⁶

To understand the pattern of control, it is useful to track the historical markers of the legal and regulatory frameworks for press, public speech and theatre in colonial times and trace the shadow they continue to cast on the contemporary scene. The first newspaper dates to *Hicky’s Gazette* (1780), a rambunctious irreverent romp through Calcutta polite society that soon earned the Governor-General’s displeasure. Its English editor was arrested and finally deported, a fate that was to befall the editors of the English language publications. Indian editors, however could not be deported. The first local language publication was the Bengali

⁴⁴⁶ Robin Jeffrey, *India’s Newspaper Revolution*, Delhi, OUP; pp 185

weekly *Sambaud Kaumudi*, edited by Raja Ram Mohun Roy. There followed, a clutch of Hindu social reformist publications, aimed at countering the Christian missionary press.

The *Asiatic Mirror* episode highlights restrictions imposed in relation to conflicts. Its editor, Charles Bruce, provoked the Marquis of Wellesley's wrath by writing about the relative strength of the European and Indian forces engaged in a campaign against Tipoo Sultan. Within a month, the Governor-General issued – on May 1799 – his notorious Press Regulations, requiring newspapers – under pain of penalty – to print the name of the printer, publisher, proprietor and editor and to submit all material for pre-censorship. The regulation was abolished by his successor, Warren Hastings. After independence, pre-censorship regulations were revived under special laws for border areas declared 'disturbed' – e.g. the Punjab Special Powers (Press) Act 1956 – and under Emergency provisions enacted during wars, but remaining afterwards on the statute.⁴⁴⁷

The 1857 Rebellion ('Mutiny') prompted the introduction of the Press Act 1857 and imposed rigorous control on the possession of printing material, granting of printing licences and the power to prohibit publication or circulation of printed matter. Hardest hit was the Urdu press. In 1853, the number of Urdu newspapers was 35, whereas, by 1858 it was down to 12. In 1858, Maulvi Md Baqar, editor of *Daily Akhbar*, was arrested and killed for writing in favour of the rebellion.

In 1860, the landmark Indian Penal Code was passed and of particular interest for this paper are the amendments – S.124A on Offences of Sedition (1870); S.153A Promoting Enmity between Classes (1898); S.295A Outraging Religious Feelings (1927) and S.153B Imputations or Assertions Prejudicial to Unity and National Integrity (1972). The technique of introducing specific provisions to prevent disorder and promote loyalty to the government began with the introduction of the sedition section - "those will be guilty of sedition if implicit in their words or acts is a tendency to create public disorder".

From the late 19th century onwards, there was a period of nationalist ferment that produced a clutch of laws to suppress freedom of speech and expression – the Dramatic Performances

⁴⁴⁷ J. Natrajan *History of the Indian Press*, Delhi, Asia Publishing House, 1962; Jeffrey; pp 183-190

Act 1876⁴⁴⁸, the Vernacular Press Act 1878, the Seditious Meetings Act 1907 and the Rowlatt Act 1919. The launching of the civil disobedience movement in 1931 prompted the government to pass the Press (Emergency) Powers Act (1931), which imposed tight controls on the press at the will of the Executive. After independence, it was replaced by the Press (Objectionable Matter) Act 1951.

In the case of theatre, *The Dramatic Performances Act* (DPA) vested in the executive total power to impose – without a hearing – charges of sedition or obscenity. It imposed pre-censorship of scripts. After independence, the DPA (1876) was extensively used in 1949 to suppress the public dramatic performances and songs with a left leaning performed by the Indian Peoples Theatre Association (IPTA) and Progressive Writers Association.⁴⁴⁹ The Act was repealed after the states issued their own DPAs, which in some cases were even more constraining. The Bombay Act empowers the police to be the cultural arbiter.

Popular agitation enabled West Bengal to rid itself of the DPA. However, in 1974, the state used the Indian Penal Code Section 124A to impose sedition charges against Utpal Dutt for his play *Dushwapaner Nagari* on police atrocities in Calcutta. Earlier, in 1966 under the *Defence of India Rules*, Utpal Dutt was imprisoned for six months for his play *Kallol*, which dealt with the rebellion of the naval ratings in 1946.

The Vernacular Press Act 1878 focused on the British government's anxiety about the capacity of the local language publications – read aloud in bazaars – to create mischief among the ignorant and unenlightened. The Act was short-lived but long enough to threaten the survival of the Bengali daily, *Amrit Bazar Patrika*, the first Indian paper to acquire national status. Overnight, it transformed itself into an English daily to escape the law.

⁴⁴⁸ The Dramatic Performances Act (1876) was aimed at stamping out the theatre's cultural interventions in the nationalist discourse. The stage in Bengal, Andhra Pradesh and Maharashtra had emerged as a powerful platform for voicing anti-colonial sentiments. Heralding the theatre's anti-colonial crusade, were the plays *Neeldarpan* (*Mirror of Indigo*) staged in 1872 and *Cha ka Darpan* (*Mirror of Tea*) in 1874. Both were withering indictments of the cruel treatment of the peasants in the indigo plantations and the tea gardens run by the British.

⁴⁴⁹ In 1956, four members of IPTA were prosecuted for staging Premachnd's Idgah in Lucknow and appealed to the Allahabad High Court. The Court declared that the DPA in the absence of reasonable procedure to enforce its substantive provisions is "ultra vires of the Constitution since in its operation it places 'unreasonable restrictions' on the rights of citizens guaranteed under Art19..." .

The *Patrika*'s encounters with the government of the day's displeasure were to continue. Lord Landsdowne took offence to the publication in the *Patrika* of a document said to be Mortimer Durrand's minute on the Kashmir frontier. The Official Secrets Act 1923 was passed in the same year. However, Lord Landsdowne cited the *Patrika* disclosure as an example. Interestingly, *Amrit Bazar Patrika* appealed to the authorities in 1925 to remove it from the blacklist, on the grounds that it "was a genuine friend of the government in that it let it know what the people were thinking".⁴⁵⁰

5.4 The Contemporary Media Scene

In a country like India, the field of freedom of expression is mediated by multiple forms and levels – street theatre, songs, handbills, public speeches, *jan sunwai* (people's tribunals) fact-finding reports, books, pamphlets, cassettes and videos, documentaries, popular cinema and the institutional mass media – over and above print and broadcasting. In tracking the role of the media's participation in the build-up to the *Babri* mosque-Ayodhya temple dispute,⁴⁵¹ a catalysing role was of the ubiquitous recorded cassettes of a woman ascetic, Sadhvi Ritambhara. It produced a hysterical frenzy that drove the mob and was part of the media-stoked 'national consensus' that condoned the destruction of the mosque in 1992. The emphasis placed here on the institutional media is because of its growing power and reach by laying out regionally and linguistically multiple 'public spheres' in India. But also, because legal and regulatory frameworks are particularly focused on controlling the media and it is a significant site of resistance.

Newspaper Revolution

Today, the medium of daily print is four times more available than it had been to an earlier generation. Rates of literacy are pushing upwards – 63% – and many of the new broadsheets cater for neo-literates. India publishes more than 55,000 newspapers and growth has been

⁴⁵⁰ *Op. cit.*, Jeffrey pp.186.

⁴⁵¹ The Hindu nationalist forces spearheaded the 'Hindutva' campaign to build a Ram temple in the claimed birthplace of the Hindu god on the site of the Babri mosque, a 16th century mosque built by the Mughal emperor Babur. It left in its wake Hindu-Muslim communal violence, the discrediting of 'secularism' and pluralism and the undermining of the Muslim (13% of the population) as equal citizen of India. The Bharatiya Janata Party rode this campaign to capture political power in 1990s.

phenomenal in regional and linguistic markets and especially in the Hindi speaking states. In India, newspapers are published in over 100 languages.

The 1980s newspaper revolution saw a transformation in the growth and structure of the media as a vehicle for freedom of expression and more important as a commercial business.⁴⁵² It was spurred on by a conjunction of certain developments. For example, the shift of the site of politics from the centre to the states of India's federal polity created the potential for new 'publics', i.e. citizens participating in political affairs. These citizens were also emerging as consumers with buying capacity. An advertising-driven commercial media was pursuing them into district towns and villages. The digital revolution in communications made it technologically possible to do so.

The result has been a broad-basing and fragmentation of the Indian press. Even the big publishers have had to fragment their production bases and segment readership and advertising markets. The large dailies that dominated the 1960s have given way to the proliferation of medium sized dailies.⁴⁵³ Also, there is a diversity of ownership that has stemmed from the variety of languages in which the newspaper business is conducted. Increasingly, the regional rejection of 'outsiders' controlling the dominant newspaper of the area has made it difficult to run an outstandingly successful newspaper in more than one language area. It has seen the erosion of the earlier domination of the industry by the 15 Common Ownership Units⁴⁵⁴ (COU) in multi-linguistic markets. Their decline has been accompanied by the rise of powerful regional COUs, publishing large newspapers in the regional languages. The shift from the domination of the English language papers to the regional language press reflects a template shift in the profile of the power elite. From the 1960s to 1990s, English language dailies have slipped from 30 to 13 % of national circulation and Hindi dailies are up from 14 to 43%.

The ownership pattern is mediated by state support, capitalism and social status. The weakness of the Urdu language press and the non-existence of the *Dalit* (40% of the

⁴⁵² Tara Nair 'Growth and Structural Transformation of News paper industry in India' *Economic and Political weekly* Sept 27, 2003 pp. 4182.

⁴⁵³ RNI Press in India 2001 'Big' 42.24% of circulation (75,001 and above); Medium 34.60% (25,001-75,000) Small 23.10% (up to 25,000)

population) press⁴⁵⁵ reveal exclusionary and marginalising structures. Only one English daily – *Midday* (Mumbai) – is owned by a Muslim.

Broadcast Media

All India Radio, the national broadcaster, has a reach of 99% of the population and broadcasts in 24 languages and 134 dialects. Until 1967, it carried no commercial advertising. In March 2000, the government granted licences to private radio stations. However, there is a ban on independent news and current affairs programming.

As in other countries such as Britain in WWII, the propaganda needs of conflict have driven the expansion of broadcasting. During the 1971 Indo-Pakistan war, the ‘propaganda’ vulnerabilities of the border areas to Pakistani broadcasts made Indira Gandhi’s government alive to the power of radio and television and therefore the need to assume direct control. Consequently, after the war and 13 years after the setting up of the first TV station, a second TV station was set up in Bombay, followed by the border districts of Amritsar (Punjab) and Srinagar (Kashmir). Community sets were provided to hundreds of villages.

Until the 1980s, Indian TV remained largely an urban phenomenon confined to the more wealthy in society. The breakthrough came in 1982, with the decision to telecast the Asian Games, which brought in colour TV and advertising. It saw a growth in manufacturing technology and the spread of colour TV sets. Programming reached a new threshold in the 1990s, with the telecast of the Hindu epics the *Ramayan* and *Mahabharata*. Coverage by the national broadcaster extended to more than half the area of India containing three quarters of the population.

The Prasar Bharti Act (1990) paved the way for a reluctant government to give a degree of autonomy of function of AIR and Doordarshan and the Prasar Bharti Corporation was set up in 1997. In 2004, the state TV Doordarshan’s monopoly of terrestrial up-linking was broken, and a local private broadcaster – Ananda Bazar Patrika’s Media Communications Centre – and Rupert Murdoch’s News Corporation began Star TV News telecasts.

⁴⁵⁴ See Tara Nair *op cit*. COU’s comprise: 1.chains – multi-centres, 2.groups – multi-pub from a single centre; 3.multiple units-multiple publications – multi centre.

⁴⁵⁵ See Chandra Bhan Prasad Dalit Diary, Pondicherry, Navayana,2004; Jeffrey, *Op.cit*. pp.160-170

It was the satellite communications revolution that drove the growth and transformation of television from a limited, lacklustre medium dominated by a government monopoly and brought it into the market place as the defining medium of the country. It began in 1990, with *Asia Sat* from Hong Kong making available a range of channels of the Star network that revealed a huge Indian market for international channels. It included the hugely successful experimental Hindi language channel, *Zee TV*, for the mass Indian market. It was a trail-blazer for the Hindi language transformation of Star and Sony channels and a series of regional language channels. A special feature of India's induction into the global TV broadcasting market has been the richness of the regional programme variants within India. The National broadcaster had tended to reinforce the dominant language (Hindi) producing centre-state tension and neglecting regional cultures and concerns.⁴⁵⁶

The local language channels further boosted the cable TV networks which grew from a cottage industry to a national media presence. From barely 1.2 million homes in 1992 the cable market grew to 42 million in a decade. By 2002, TV had arrived in 80 million homes (67 TV sets per thousand, population). Television audiences are estimated to be over 331 million (1998) with urban audiences making up 185 million and rural 146 million.⁴⁵⁷

The Indian Media has become big business and in 2002 revenues were estimated to be Rupees (Rs.) 246 billion. Television advertising and subscription earnings were 100 billion and print counted for Rs. 50 billion in revenues. In India, television has not eclipsed print as is evident in the robust growth of print in the regional markets, both urban and rural. This is reflected in the share of ad spend. In 2002, ad spend for TV was 48% and for the press 42%.⁴⁵⁸

Media proprietors have become capitalists to survive, thus reinforcing the media's relationship with the political groups in power, producing a dangerous cronyism and a vulnerability to the interests of advertisers. Indeed, it is the brand manager who determines what goes in from the front to the last page of the newspaper. Editors have been downgraded

⁴⁵⁶ David Page and William Crowley, *Satellites over South Asia*, New Delhi Sage 2001 pp.62-64

⁴⁵⁷ Doordarshan Audience Research Unit 1998 cited in, *Satellites over South Asia*, *Ibid.* pp.102

⁴⁵⁸ Vanita Kohli, *The Media as Business*, New Delhi Response Books pp.3; 1988-1989 Ad expenditure increased five times and 1990-96 again quintupled.

and many proprietors have assumed the mantle. The battle for circulation and thus ads in the highly competitive market environment has driven sensationalism in reporting, especially of communal violence, as is evident in the coverage of the Gujarat riot in 2002, sparked by tensions between Hindus and Muslims, by the two most influential Gujarati dailies. *Sandesh* has a circulation of 705,000 ‘lakhs’⁴⁵⁹ and *Gujarat Samachar* 810,000 ‘lakhs’.

The Editors’ Guild report on Gujarat suggests that because of its pro-Hindu stand, *Sandesh’s* circulation increased by 150,000 copies at the time of the riots.. Falgun Patel, the editor of *Sandesh* is quoted as saying that “Hindu protection is my duty”.⁴⁶⁰ Presumably, driving up the circulation were sensational headlines such as – “Hajjis return to Gujarat with arms and RDX to take revenge”; “BrEasts of two Hindu women chopped off by mobsters in Godhra”.

5.5 Plural ‘publics’

The horizontal spread of the media into the remote corners of the country and in particular the emergence of regional and linguistically differentiated media markets has provided an opportunity for ever widening circles of democratic participation in the expanding regional locus of politics. Earlier, there had been a disjunction between the ‘national’ mainstream media and regional aspirations and cultural assertions. In particular the centralising (and linguistically homogenising) thrust of the national broadcaster, *All India Radio*, and *Doordarshan*, had alienated and even exacerbated tensions in relations between the centre and the states.

However, in these regional ‘publics’, the media – as a political actor – did not necessarily foster liberal rational discourses; it could equally support superstition, prejudice, oppression and communalism. Robin Jeffrey in *Media Revolution & ‘Hindu politics in North India 1982-99’*⁴⁶¹ suggests a possible link between the upsurge in the growth and circulation of the Hindi dailies in 1980-1990 and the rise of the ‘Hindu politics’ represented by the Bharatiya Janata

⁴⁵⁹ Traditional Indian numbering system equal to a hundred thousand.

⁴⁶⁰ Akbar Patel et al, *Rights and Wrongs*, Editors Guild Report pp.7-8

⁴⁶¹ Himal South Asia, July 2001

Party's takeover of political power. Charu Gupta and Mukul Sharma ⁴⁶²consolidate this 'causal link' to argue that these Hindi dailies were portrayed as being in the control of upper caste Hindu families belonging to the trading castes (the BJP's base). They saw to it that their views of events were reflected in the pages of their newspapers. Consequently, there is a tendency to exclude experiences, memories and modes of living not authorised by upper caste and upper class Hindu elites.

Arvind Rajagopal demonstrates in an extensive study, "*Politics After Television*"⁴⁶³, how the Hindu nationalists used the contradictions between India's 'split publics', inhabited by different languages and cultures of politics, to reshape a Hindutva public in the mid 1980s. Rajagopal argues that the broadcast of the *Ramayan* serial on national Television provided for the first time a single field of social connectivity across the nation and brought into salience the differences in India's "split publics". However, it was the linguistically divided print media that provided the context in which the contradiction was worked out. The public of the 'mainstream' national English language press was denounced as pseudo-secular as opposed to the authentic publics of the regional language media. This contradiction between two antithetical stereotypical publics inhabiting different linguistic spaces, continues to produce a defensive discourse in influential sections of the English language media,⁴⁶⁴ as evinced in the condoning as 'retaliatory' the violence against the Muslims in Gujarat. In February 2002, a compartment of a train, carrying 'karsevaks' (Hindu devotees) returning from the Ram temple campaign in Ayodhya, caught fire in Godhra in Gujarat. A Muslim conspiracy was insinuated and with the complicity of Gujarat state agencies, a pogrom was unleashed against the minority Muslim population there.

5.6 Minority Media

The 'national' mainstream media assumes that their major audience and readership is Hindu and Muslims do not form part of that readership/audience or at least that part of it which it

⁴⁶² Charu Gupta and Mukul Sharma 'Communal Construction: media reality vs real reality' *Race & Class* vol 38,1, 1996 pp.1-20; Rita Manchanda 'Militarised Hindu Nationalism and Mass Media' *South Asia* vol xxv no 3, Dec 2002 pp. 301-320

⁴⁶³ Arvind Rajagopal, *Politics After Television : Hindu Nationalism and the Reshaping of the Public in India*, Cambridge, Cambridge University Press, 2001

⁴⁶⁴ The Hindustan Times (Delhi) March 1, 2002

considers worth catering for.⁴⁶⁵ However, if we use as an index the coverage of a communal confrontation or of a community issue (Muslim Women's (Divorce) Act 1986), it becomes evident that the 'mainstream' (national and regionally dominant) media tends to forget that it has a Muslim readership. Defending the decision to go in for a pro-Hindu coverage of the Gujarat 2002 violence, *Sandesh* Editor Falgun Patel said to the visiting Editors Guild team, "The Hindu reaction is so strong that we have to be cautious. I get 200 calls a day." Their Report continues, "Yet the paper did have a Muslim readership and was not anti-Muslim per se".⁴⁶⁶

From the 1980s on, respected editors of 'national' Hindi dailies were publicly saying that they had to take into account that more than 80% of the Indian population was Hindu. Charu and Mukul, analysing the Hindi language press in 'Print Media and Communalism', concluded: "The prevailing attitude seemed to be that Muslims were not part of a wider audience, the community and the religious consciousness of the newspapers was such, that they classified the audience in these categories only and thus assumed that they did not have any interest in news about Muslims. The fears frustrations, tensions and feelings of the Muslim minority were not news."

The 'Muslim' viewpoint was ghettoised in the Urdu language press that according to a Muslim critic was "prone to reinforce a sectarian and emotional outlook among readers".⁴⁶⁷ The number of people who could read the Persian-Arabic script was said to be dwindling. However the RNI figures quoted ever rising figures, with the Urdu press having the fourth highest number of newspapers. By contrast, the Audit Bureau of Circulation that monitors actual sales, showed a negative trend. The seeming paradox may be explained by a plethora of newspapers registered to benefit from secondary sale of newsprint quotas, accreditation privileges and even blackmail possibilities. Robin Jeffrey in an insightful analysis of the Urdu press sees its dwindling fortunes as a result of absence of state support and capitalist interest. Nowhere is Urdu the official language for government, education or business and as it is associated with Muslims, who are seen as a poor segment. Advertising agencies do not

⁴⁶⁵ Charu and MKS 'The Muslim and the News' *Mainstream* February 13, 1993; Charu Gupta and Mukul Sharma *Print Media & Communalism*, Delhi pub by Mukul, 1990

⁴⁶⁶ Aakbar Patel, Dileep Padgaonkar, B G Verghese '*Rights and Wrongs*': Editors Guild; pp.7

⁴⁶⁷ Ather Farouqui quoted by Robin Jeffrey '*Urdu: Waiting for Citizen Kane*' *Economic & Political Weekly* March 29, 1997. pp.632

advertise in the Urdu press. What sustains the Urdu press is a readership that is coming out from those who opt for Urdu as the second language in schools (trend in the South). Moreover, as the Urdu reading public is dispersed, weeklies like *Naiduniya* (circulation 150,000) have been more successful.

The media has chased conflicts and especially international conflicts involving Muslims, for example the Arab-Israeli conflict. Shahid Siddiqui, now editor of *Naiduniya* found to his cost that “you cannot take your audience where they do not want to go”. In 1971, Shahid, then still a college student and member of the Communist Party Marxist (CPM) launched an Urdu magazine that failed because of his reports on the Bangladesh struggle. “I went to Bangladesh ...wrote the truth which was not acceptable to Muslims because ... (it was) the destruction of the idea of Pakistan, the two nation theory”, he said.

It is not only from his readers that *Naiduniya* has had to face pressure, but also from the government. The founder of *Naiduniya* (1950), Shahid’s father, Maulana Abdul Wahid Siddiqui, was outspoken about the marginalisation of Muslims in the ruling Congress party. The declaration of his paper was cancelled as he could not come up with security of Rs. 100,000. The paper shut down in 1964. Shahid Siddiqui who is today a Member of Parliament (Upper House) also fell foul of the government in October 1986 and was charged under TADA. “The real reason for my arrest was my position on Kashmir. The ‘official reason’ given was that I had interviewed Jagjit Singh Chauhan, the self-styled President of *Khalistan*, in London”. Shahid claims that the government uses a different yardstick when it comes to censoring the Urdu press. Kuldip Nayar, the veteran columnist, published the same story on the Meerut riots as *Naiduniya*. A case was lodged against him, not Kuldip Nayar.⁴⁶⁸ Moreover as the Urdu press is overly dependent on government advertisements, the government has used this power as an indirect means to discipline the press.

Foreign Media

In 1955, the Union Cabinet passed a resolution debarring foreign companies from launching Indian editions of their print brands. Foreign news agency copy is channelled through the Indian news agencies – Press Trust of India and United News India. Within the industry, there is fierce opposition to the entry of the foreign media and foreign investment in the media

industry. There are restrictions on the exchange of print media between Pakistan, Bangladesh, Sri Lanka and India. The Internet has breached many of these regulatory barriers.

Satellite television via cable network has made available to the Indian audience international channels. Pakistan Television and Bangla Television can be seen in the border areas. However, on occasion, during the siege of the Hazratbal shrine in Srinagar in 1993, and Kargil in 1999, the administration pressured cable operators to block Pakistan television. As mentioned earlier, in 2004, the national broadcaster's monopoly was broken when a private broadcaster Media Communication Centre began telecasting Star TV news and entertainment channels. The company is jointly owned by the Ananda Bazar Patrika group and Murdoch's News Corporation.

During conflicts, foreign radio – in particular the BBC services – have been hugely influential in providing an 'alternative' flow of information, especially in Punjab, North East and Kashmir. It also explains why the government has on occasion sought to restrict the foreign media. In January 1990, on the eve of India's Republic Day in anticipation of massive anti-Indian demonstrations and retaliatory action by the security forces in Srinagar, Satish Jacob of the BBC was summarily taken to the airport in Srinagar and asked to leave while his colleague Mark Tully managed to go underground. Other Indian journalists, including the author, were restricted to the Broadway hotel premises. Curfew and broad prohibitory orders were in place, but no enactment of specific legal restrictions.

In print media too, foreign correspondents have left their mark in contesting the 'official version' purveyed by the national papers. The news reports of Neville Maxwell on the 1962 conflict provided an alternate reading of 'India's China War'. Indian journalists covering the 1962 war complained of lack of access and being dependent on foreign news dispatches for information.

Several of the major news breaks about human rights violations, including the Kunan Poshpara rape story, were broken by the foreign media. In early 1990, when the Indian security forces hit out with excess force at the populist upsurge in the Kashmir valley, turning

⁴⁶⁸ Shahid Siddiqui interviewed by Subhashri Krishnan March 2004.

it into armed militancy, the Indian press chose to maintain a patriotic silence. Indeed several Indian journalists with the tacit connivance of their editors began reporting at a distance from Jammu, while using a Srinagar dateline.

The veteran columnist, Khushwant Singh, upbraided the Indian media. “We are not being told the truth about what is happening in the valley of the Jhelum. I have come to this sorry conclusion after comparing what has been reported in our papers and our radio with reports published in the British papers and broadcasts over the BBC”.⁴⁶⁹ However, his contemporary, S Sahay, in *The Tribune*,⁴⁷⁰ defended the need for a patriotic filter. “As long as J&K (Jammu and Kashmir) is a declared and accepted part of India the national perspective cannot be overlooked,” he wrote. On the expulsion of the BBC and other foreign correspondents from Kashmir, he added, “No-one – far less a journalist – would approve of restrictions and, that too, not legally announced in the Press. But a journalist is also a citizen and he cannot altogether lose sight of the realities prevailing on the ground. The administration was dealing with an extraordinary situation, involving nothing short of the physical integrity of the nation and, if certain foreign journalists were asked to leave the State, it is in this writer’s view, understandable, especially when there is a tendency to exaggerate and concoct news”. It begs the question - did the patriotic silence observed by the Indian ‘national’ media serve Indian public interest? The history of the Kashmir insurgency suggests otherwise.

Alternate media

In the fault lines of the institutional mass media, flourishes the myriad forms of the alternate media – in print, video, cassettes, street theatre, cartoons and posters, poems and songs. India’s democratic rights tradition has spawned a school of fact-finding reports, hand bills and pamphlets that have set the trend for investigative reporting in the institutional media. Documentary videos like ‘An Indian Story’ have created a new grammar of portraying state power, violence and abuse of authority that has shaped the language of commercial cinema in India. The tradition of *The Little Magazine* can be seen in the fiercely independent reports in *Frontier* (Calcutta) and more recently in *Communalism Combat*. Alternative perspectives are made available week after week in *Mainstream* and in *Economic & Political Weekly*.

⁴⁶⁹ *The Hindustan Times* 17 February 1990.

⁴⁷⁰ *The Tribune* 20 February 1990.

The story of the Gujarat violence and the state's complicity got saturated in mass media coverage in print and television. However, the work of a series of independent filmmakers, writers and artists has expanded the field of political and humanitarian engagement and deepened our understanding of the developments in Gujarat. Today, with the commercialisation of the media and structures that promote 'sound bite' culture, the independent documentary film is a vital democratic space for exploration. However, the institutional channels for showing these films are extremely few and informal screenings are suppressed when the mob becomes censor. The real danger is the convergence of official and unofficial censor. Rakesh Sharma's award winning film '*Final Solution*' on Gujarat is rejected for screening at the Mumbai International Film Festival (MIFF). The alternate film festival, *Vikalp*, provides space for screening 250 films.

Alternate media internet sites like *Chowk*, 'South Asia Citizens Web' and scores of other informal channels of communication between Indians and Pakistani speak volumes of the role of the Net in transcending formal information divides.

This is particularly so in conflict situations. During a phase of the Kargil conflict when Indian armed forces were suffering retreats, the Indian administration directed the internet service provider, Videsh Sanchar Nigam Ltd (VSNL) to block access to the website of Pakistan newspaper *Dawn*. Alternate internet media sites stepped in to breach the censor's divide.

However, as the Second Press Commission (1982) warned "the test of a community's opportunity for freedom of expression rests not so much on the abundance of the alternate media, but rather on the abundance of opportunities for securing expression in the media which has the largest impact". And as our narrative attests, there is a narrowing of the spectrum of acceptable perspectives especially, when it comes to conflict situations.

5.7 Legal Framework

Constitutional Foundation of Freedom of Expression

Article 19 of the Constitution states:

(1) All citizens shall have the right...a) to freedom of speech and expression

(2) ...such law imposes reasonable restrictions on the exercise of the rightin the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order decency, or morality or in relation to contempt of court or incitement to an offence.

It is an indication of the commitment to protecting fundamental rights and civil liberties that, while the First Amendment of the American Constitution asserts the absolute right of freedom of speech and expression, the First Amendment of the Indian Constitution (1951) derogates from the freedoms enshrined in Article 19 of the Constitution. It expands the scope of the restrictions to include in Article 19(2) three significant additions - i) 'reasonable' before restrictions, ii) 'friendly relations with foreign states' and iii) 'public order'.

Indian nationalists who had spent their lives protesting against the British Raj's restrictions on the press voted to expand the scope of the control regime, to include the omnibus notion of 'public order'. The Supreme Court's order in 'Crossroads vs. State of Madras' (1950), and the Patna High Court's decision in 'Brij Bhushan vs State of Bihar' (1951), striking down restrictions on the media as in violation of Article 19, prompted the national leaders to erode the sweeping freedoms guaranteed in the Constitution. The First amendment was soon followed by the Press (Objectionable Matter) Act (1951). It set the tenor for special laws, imposing restrictions instead of leaving them to be punished under general law for specific offences.

In the aftermath of the 1947 partition of British India – which produced two nation states, India and Pakistan – the ruling elite was nervous and intolerant of the pull of other loyalties. Communal tension, peasant insurgency, communist resurgence and linguistic and secessionist pulls, prompted the states of the Indian union to introduce laws for maintenance of public order. For example, under the Madras Maintenance of Public Order Act (1949), the state of

Madras banned the circulation of the left-leaning monthly *Crossroads*. Similarly, the state of Bihar imposed pre-censorship of all materials on the English weekly *Organiser*, for printing inflammatory materials on Partition. Meanwhile, in the border state of Punjab by 1951, the Sikh leader, Master Tara Singh had virtually called for the assassination of Nehru because of the government's refusal to create a Sikh majority state.⁴⁷¹ This prompted imposition of independent India's first special law - The Punjab Special Powers (Press) Act 1956.

Special Laws

Agitations in the border states of Punjab, Assam (Nagaland), Jammu and Kashmir, reinforced the law and order paradigm as the defining perspective. Social tensions were increasingly operating outside the constitutional framework. These ranged from histories of caste oppression to Hindu-Muslim tensions; the Naxalite (Maoist) movement against socio-economic oppression; identity assertion struggles in Punjab and Assam; regional self-determination aspirations by Naga peoples in the North East and in Kashmir. The state's response was to resort to laws that suspended normal safeguards and gave arbitrary powers to the law-enforcing apparatus. These broadly worded laws to safeguard public order and national integrity were used to impose severe restraints on freedom of expression.

- ***The Punjab Special (Press) Powers Act (1956)*** was enacted to counter the Akali Dal (party) demand for the partition of the territory of Punjab along communal and linguistic lines to make the Sikh population the dominant political force. Section 2(1) Act imposed pre-censorship.
- ***Armed Forces Special Power Act (1958)*** provides the basic legal framework for the use of armed forces during counter-insurgency. Under Section 3, an area has to be declared 'disturbed' to bring into force the broad ranging provisions of the act, which include shoot-on-sight orders with virtual impunity. It provides for broad-ranging prohibitory orders.
- ***Assam Special Power Act (1960)*** was modelled on the Punjab Act. In January 1983, the provision of "prohibition of prejudicial publication" was even more restrictive as it was an absolute bar against publication of any material relating to the agitation against 'foreign nationals'.

⁴⁷¹ Jeffrey, *India's Newspaper Revolution*, *Op.cit.* pp.183,195.

- *Assam Maintenance of Public Order (Autonomous Districts Act) 1953* gave the government wide powers to prohibit and restrict public meetings and speeches and processions in the Naga-populated areas of the then undivided state of Assam.
- *National Security Act 1980* Section 3 empowers government to make an order of preventive detention of a person with a view to preventing him from acting “in any manner prejudicial to the defence of India; relations with foreign powers; security of India or of a state; maintenance of public order; maintenance of supplies and essential services”. The words “in any manner” includes by means of writing. Hence, the press should be careful not to publish anything that can be deemed to incite violence or create hatred between different communities. It also applies to anyone who addresses assemblies of persons and incites them to lawlessness.
- *Terrorist and Disruptive Activities Prevention Act (TADA) 1985-1993*. Under Section 4 (2) Disruptive Activities includes ‘any action taken whether by act or speech or through any other media or in any manner whatsoever. Under Section 4 (3), mere expression of an opinion not accompanied by violence is ‘disruptive’. Under Section 4 (1), anyone who merely holds a different opinion about India’s federal structure “shall be punishable [sic] with ... imprisonment”.
- *Prevention of Terrorism Act (POTA) 2002–2004*. Section 21 (3), reads that a person commits an offence if he “addresses a meeting for the purpose of encouraging support for a terrorist organisation or to further its activities”. Under Section 14 (1), there is an obligation to furnish to an investigating officer any information requested – this applies also to journalists and lawyers and overrides professional confidentiality. Section 36 & 38 provide for interception of wire, electronic or oral communications.

Case example: Punjab Media Under Fire

Following the 1947 Partition, a truncated Punjab became a member of the Indian Union. The history of the state’s politics has hinged on the struggle of the Sikh community to establish and sustain the political and economic dominance of the landed Sikh farmers who grew prosperous with the green revolution. The Sikhs claim a distinct religious identity separate from the country’s Hindu majority. The linguistic reorganisation of the Indian Union saw the Sikhs demand a Punjabi speaking state, a demand that eventually produced a communal divide along Sikh-Hindu lines. From being 40% of the population the Sikhs rose to 60% in

the new Punjab. A pattern of political interference by the Centre (New Delhi) and growing pressures from within the predominantly agrarian state to establish control over its river water resources, prompted the Anandpur Sahib revolution of 1973, on remodelling federal relations. Prime Minister Indira Gandhi resisted the Sikh political agitation for a radical measure of political devolution.

On June 4 1984, the army attacked the Golden Temple, the holiest of the Sikh shrines, to crush the agitation by physically wiping out the Sikh leader Bhindranwale, who had become the rallying point of the agitation. Bhindranwale and his followers were entrenched in the shrine complex. The army assault and destruction dealt a major psychological blow, alienating the Sikh community. The agitation turned violently separatist and was ruthlessly crushed by the Indian forces, leaving in its trail an assassinated Prime Minister, anti Sikh riots in Delhi, and gross human rights abuses – disappearances, extra judicial killings and a culture of impunity that required muzzling the press.

Media Censored

The Punjab Special (Press) Powers Act (1956) had been enacted to counter the Sikh agitation for the linguistic partition of the territory of Punjab. Prime Minister Nehru opposed the demand as communal. In the 1980s, as the Sikh agitation for greater political devolution grew, the Armed Forces (Punjab and Chandigarh) Special Powers Act (1983) (AFSPA) was promulgated. Under section 3 of the Act, Punjab was declared a disturbed area. The AFSPA act was enforced from June 1984 to July 1985 and again from November 1991 to 1993.⁴⁷²

On the eve of Operation Bluestar on 3 June, all communication links with Amritsar were severed, curfew was imposed and journalists were restricted to the Hotel Ritz. Under the new regulations brought in by the army, all journalists were debarred from Punjab and on the morning of 4 June – the attack began – were taken by bus across the border.⁴⁷³ On 11 June, the Punjab Special Powers Act was used to empower the government to prohibit printing and publication of news relating to the agitation and the movement of the security forces.

⁴⁷² Ram Narayan Kumar *Reduced to Ashes: The Insurgency and Human Rights in Punjab*, Kathmandu, SAFHR 2003; pp. 35-37; 83-84;192-193.

⁴⁷³ Mark Tully and Satish Jacob *Amritsar: Mrs Gandhi's Last Battle* London, Jonathan Cape, 1985 pp.153.

Brahma Chellaney of the Associated Press managed to enter on 4 June and stay on. His reports of the army's devastating tank attack and destruction of the shrine complex made headlines in the foreign press. Scenes showed the killing of hordes of innocent pilgrims many whose bodies showed they had been shot with their hands tied behind their backs. An enraged Indian government in October 1994 instituted a process to charge him for violating press censorship and threatened to charge him under TADA. Above all, he was under pressure to reveal his military sources. However, as he had filed his reports after he was outside the state, technically, the censorship regulations did not apply. Eventually, the persecution process was abandoned, but in the process, the opportunity for testing freedom of expression in the Supreme Court was lost.

Rumours spread Panic and Alienation:

During Operation Bluestar, with the mass media kept out, there were no independent witnesses to corroborate the official version of the story, which attributed the blame for the desecration of the holy shrine to Bhindranwale and his followers, who allegedly had converted the Akhal Takht into a garrisoned fort, making a tank assault necessary. Instead, there was rumour and speculation. The maverick Member of Parliament Subramaniam Swamy wrote in the magazine *Imprint* that the government had masterminded a misinformation campaign to make out that the Golden Temple was a haven of criminals, a store of armoury and a citadel of the nation's dismemberment conspiracy.⁴⁷⁴

In a cover story, *Surya Magazine* – quoting an Indian intelligence source – claimed that most of the arms inside the Golden Temple had been smuggled in under the supervision of a special agency, created out of the outfit and controlled directly by the Prime Minister's Office. Indeed, Operation Blue Star has become an object lesson of "Psychology operations" (Psy-Ops) - in the need for openness or rather, enabling 'embedded' journalists to report. "The army needs an independent witness", said Ram Mohun Roy, who has been the government gatekeeper of information in the national broadcaster and the Defence PRO and media advisor in Kashmir. "The public should have been told; the damaging fallout would have been less," he said.⁴⁷⁵ The Press Council – commenting on the news curbs – observed that rumours

⁴⁷⁴ 'Creating a Martyr', *Imprint* July 1984 cited in Ram Narayan Kumar pp.34

⁴⁷⁵ Sondeep Shankar, one of the first batch of journalists to enter the Golden Temple surreptitiously, took a shot of the destroyed Temple and sent it by radio photo. "It was not stopped", he said.

multiplied and were embroidered to the detriment of truth and national interest. By the time of “Operation Black Thunder” (1987), the media was invited to witness militants being flushed out of hiding. Perhaps what made for greater openness in this operation was the certitude of the success of the activities.

Information war

Subsequently, with Punjab sucked into a civil war situation, the ‘public sphere’ became a hotly contested and bloody terrain of the ‘information war’. The militant groups were manipulating information, no less than the state. The mass media, writers, intellectuals and the theatre were ideologically co-opted, bribed or coerced; as a neutral space to be ‘fair’ ‘accurate’ and ‘independent’ came under increasing pressure. By 1990, about 65 journalists had been killed and more than 50 were associated with the *Hind Samachar* chain, which had positioned itself on the front line against the demand for a Sikh sovereign state – ‘Khalistan’. The largest Punjabi language newspaper, *Ajit* – owned by a Sikh family – was often accused by opponents of being sympathetic to the insurgents, but, while it printed the announcements of the militants, *Ajit* was careful to maintain a position in favour of the Indian state and unity. That did not prevent hostile Punjabi governments to cut off advertisements and seize editions deemed too solicitous of the militant cause.

Caught in the middle of a war, these major newspapers were limited in what they could or could not do. Robin Jeffrey in *India’s Newspaper Revolution* analyses three constraints. First, successful newspapers reflect what their readers are interested in. Second, successful newspapers are large ponderous targets if politics dissolves into gunfire; three, proprietors of substantial newspapers have learnt key lessons –in order to survive, they need readers, advertisers and the state.⁴⁷⁶

The Press Council in its report *Media’s Role and Response* (6 February 1991) – taking cognisance of the extremely difficult circumstances for the press to operate between the censorship regimes of the state and the militants – opposed a blanket ban, but supported pre-censorship by official agencies. On 11 June 1984, the state government invoked provisions of the Punjab Special Powers (Press) Act to arm itself with pre-censorship powers.

⁴⁷⁶ *Op.cit*, Robin Jeffrey pp.133-134.

The Punjab police tended to dismiss most publications in the Punjab as mouthpieces of militants that published every *bandh* (strike) call, *bhog* (funereal) advertisements eulogising known criminals and murderers as martyrs. For example, *Ajit* on Jan 5, 1991 carried three large displays of the 2nd *bhog* anniversary advertisement of the assassins of Prime Minister Indira Gandhi. Media organisations or journalists who resisted were intimidated, threatened and eliminated. *The Tribune* dared to edit the 21-page letter of Sukha and Jinda, the killers of the ex-army chief, General Vaidya. The next day it carried the full text.

The militant Sohan Singh Panthic committee drew up an elaborate press code of conduct and – given the widespread insecurity – even the national broadcaster (Jullandhar) conformed to it for a time. Editors complained that the government, by withholding government-related advertisements, sought to punish the media for not toeing the official line. That ‘official line’ of both censors meant turning a blind eye towards gross human rights violations.⁴⁷⁷

Emergency Provisions

The Constitution provided for the proclamation of emergency under Article 352 on grounds of war and external aggression. Article 358 suspends fundamental freedoms and Article 359 suspends recourse to the Court.

- **First Emergency (1962-1968)**, promulgated during the Indo-China War (1962) and continued until after the Indo-Pakistan War (1965). A warning system was introduced through a Central Emergency Press Advisor Committee and resulted in cessation of government advertising. The Defence of India Act 1962⁴⁷⁸ Section 3 was enacted to prevent publication of prejudicial reports and entailed forfeitures of security of printing press. By this Act, the Criminal Law Amendment Act (1961) could not be challenged and ‘any expression (by word, writing or visible representation) that questioned the territorial integrity of India in a manner prejudicial to the ‘safety or security’ of India has been made punishable. Following the war with China in 1963, the 16th amendment with specific reference to the ‘sovereignty and integrity of India’

⁴⁷⁷ For documentation on human rights violations see Ram Narayan Kumar *Reduced to Ashes: The Insurgency and Human Rights in Punjab*.

⁴⁷⁸ Civil Defence Act 1968 replaced it.

was introduced. It was to counter the cries of secession from organisations such as the *Dravida Kazhagam* in the South and the plebiscite front in Kashmir. It was felt that it could not be brought under ‘defence of security of the state’.

- **Second Emergency Proclamation on 3 December 1971**, was introduced due to strained India–Pakistan relations over East Pakistan and war, and subsisted after the war. MISA or Defence of India Rules was the primary tool of suppression during the internal emergency 1975-1978. Under Section 158A no one could make imputations and assertions prejudicial to national integration or the allegiance of any religious, racial, language or regional group, caste or community to the Constitution of India.
- **Third Emergency Proclamation** was introduced on grounds of ‘internal disturbance’ on 26 June 1975. Article 19 was suspended, a press censorship order passed, 2500 publications were suppressed under the Press and Registration of Books Act (1867), and 250 journalists arrested under MISA and Press Council abolished.

After the Emergency and the holding of democratic elections, the 44th amendment (1978) confined the proclamation of Emergency to war or external aggression.

5.8 Other permissible restrictions

Official Secrets Act (1923)

Its genesis lies in the enactment of the Indian Official Secrets Act (1889) to address spying by citizens in British India and was influenced by the 1911 Official Secrets Act (UK).

The act was used sparingly for the first five decades with some 70 cases brought under the Official Security Act (OSA). All that changed and between 1999 and 2002, some 35 people were charged under the Act, reportedly on grounds that were reportedly unsubstantiated.⁴⁷⁹

⁴⁷⁹ PUDR *Freedom Fettered* Sept 2002, Geelani ‘*Story of my Arrest*’, Vidura Sept 2003 pp.10-13

Case example: Iftikar Geelani Arrested for Spying

Iftikar Geelani is the Delhi Bureau Chief of *The Kashmir Times* (Jammu) and the Indian correspondent of *The Nation* (Lahore). Geelani, a Kashmiri journalist and the son-in-law of the pro-separatist Hurriyat leader Ali Shah Geelani, was generally treated with suspicion by the authorities, although it was well known that he did not sympathise with his father-in-law's *pro-jihad* stance. Geelani represented the 'rejectionist' platform of the *Hurriyat* Conference, a broad front of Kashmiri political leaders advocating for the Kashmiri peoples' right to self-determination.

On 9 June 2002, the police raided Iftikar Geelani's home reportedly on grounds of income tax offences. During the search, the police found on his computer what was later termed a 'highly sensitive' document – "*A Review of Indian Repression in Kashmir*" by Dr Nazir Kamal, published by the Indian Institute of Strategic Studies, Islamabad (1996). Subsequently, Geelani was charged under Section 3 of the OSA for spying; Section 4 for passing or attempting to pass on this classified document to Pakistani agents; and Section 9 for abetting. Branded a traitor, in police custody he was reportedly beaten up by 'other' prisoners and on the day of his appearance before a magistrate for bail, a section of newspapers carried stories alleging ill-gotten possession of properties.

Subsequently, he was charged under Indian Penal Code Section 120B for sedition because the police had also found in his possession a press release of the Balwaristan National Front protesting human rights abuses by the Indian authorities.

Yet, the publication that was regarded as a 'highly sensitive document' had been widely circulated in human rights conferences and sent to the government-funded Indian Council of World Affairs and the MOD think-tank, Institute for Defence Studies and Analysis. Excerpts had appeared in the Indian press and could be readily downloaded from the Net, as Geelani had done. According to the Directorate of Military Intelligence the documents were "of negligible security value" but the Home Ministry (11 December 2002) quoted military intelligence saying that the document was a detailed "order of battle" of the Indian Army Northern Command in Jammu and Kashmir. The information contained was said to be prejudicial to security and useful to the enemy. Consequently, Iftikar Geelani was detained for seven months and was eventually released on 13 January 2003.

The OSA was also used by government agencies against journalists working with the online Tehelka.com news agency. On 27 July 2003, an investigation for possessing ‘secret documents’ harmful to the state was initiated against journalists working with Tehelka. The ‘secret’ documents were in relation to a story placed on the website on 9 October 2000 concerning missionary activities in the North East province. At the time of writing, the case against Tehelka had not been heard in court.

Several successive governments (the Janata and the National Front governments) have called for a review of the Act, but the bureaucracy has steadfastly opposed it. On 3 December 1992, the government informed Parliament, that appropriate steps towards openness and transparency in the functioning of government “would necessarily take time”. The Press Council in 1993, advised journalists to avoid a conflict with the OSA. The culture of bureaucratic secrecy is so entrenched that although popular mobilisation succeeded in getting the Freedom of Information Bill (2000) passed in Lok Sabha, plans for its actual implementation were not developed. Moreover, Section 8 of the Freedom of Information Act, exempted from disclosure seven categories of information, including information prejudicial to the conduct of international relations. Its successor, the Right to Information Bill, was introduced in Parliament on 23 December 2004 but, it fails to address the problems of a culture of bureaucratic secrecy, especially in conflict situations.

Ironically, in recent years, a number of distinguished soldiers have pleaded for reform in the OSA and for open government, especially those associated with the Indian Peace-Keeping Force Operation (IPKF) in Sri Lanka, wherein information dissemination was strictly centralised and highly restricted. In addition to the OSA – which legalises suppression of information – army (and Navy and Air Force) rules specifically prohibit communication with the media. Field Marshal Sam Manekshaw in the foreword to Lt-Gen Depinder Singh’s book - “*The IPKF in Sri Lanka*”, argued strongly for freedom of the press. Manekshaw, deplored the high level of secrecy in Assam and Kashmir. “We in India have been stupidly secretive in this respect, with the result that sins we have not committed have been highlighted and we have invariably got a bad press.”

The confusion between government interest and state interest, and bureaucratic interest and national interest, has ensured that the official histories of India’s wars remain locked away

from public scrutiny. The history of the First Kashmir war, edited by S N Prasad (1969), was the only one to see the light of day and that too required Prime Minister Rajiv Gandhi's intervention in 1987. The Henderson Brooks Committee Report of the 1962 war, the Official History of the 1965 and 1971 wars have yet to be made publicly available. In the 1990s, a review committee nearly approved the release of the Official history of 1971, only to have the Ministry of External Affairs deny it, lest its publication hurt certain public figures in Bangladesh.⁴⁸⁰

Contempt of Court

Contempt of Court comes under the permissible reasonable restrictions under Article 19 on freedom of speech. The right to question misconceived judicial verdicts and official policies is essential for the survival of the democratic system. However, the weakening of the independence of the institution of the judiciary and the shift in national consensus with regard to tolerance of dissent, has found expression in the Supreme Court's readiness to 'misuse' contempt of court restriction to muzzle freedom of speech. In March 2002, the Supreme Court found Booker prize-winning novelist and social activist Arundhati Roy guilty of "a destructive attack on the reputation and credibility of the institution". She was fined and sent to jail for a day for addressing activists of the *Narmada Bachao Andolan Coalition*, a coalition of environmental activists, who were demonstrating over plans to build a dam.

Parliamentary Privilege

Permissible restrictions under parliamentary privilege have been widely abused to silence and punish journalists. Where high profile journalists are involved – as in the November 2003 case of the Tamil Nadu state assembly's order against eminent editors and journalists from *The Hindu* and *Murasoli* newspapers – resistance has been possible, including enlisting the Supreme Court and national political leaders. However, little interest or solidarity is shown when journalists writing for local papers are victimised to stifle dissent.

Restrictions on Maps

An Indian citizen is not free to publish a map that does not conform with the maps issued by Survey of India. Under the Criminal Amendment Act 1990 a dissenting map is forbidden and

⁴⁸⁰ Maj-Gen Arjun Ray's *Kashmir Diary* was released by the Army Chief, but his press conference at the Foreign Correspondents' Club, New Delhi, was peremptorily cancelled by MOD.

punishable. Map-making – like history-writing – is regarded as a political activity. In 1950, the Survey of India depicted as undefined the Northern boundary of the entire Western sector, while the MacMohan line, in the Eastern sector had been defined. Maps from 1954 onwards show the whole of the Northern boundary as delimited. The rationale for the 1990 amendment was that the publication of incorrect maps depicting boundaries of the country amounted to indirectly questioning the frontiers of India and its territorial integrity.

5.9 Judicial Review & Shrinking Space for Dissent

In 1989, the Supreme Court held that freedom of expression comprehends freedom to produce and exhibit films critical of government policy. “The State cannot prevent open discussion and open expression, however hateful to its policies”. (*Rangarajan vs P. Jagjivan Ram* 1989)⁴⁸¹ Fifteen years later, the defence of that democratic sentiment has been overwhelmed by the national security state pathology. Political ferment erupting into violence – from *adivasi* (tribal) land and environment struggles to demands for democratic rights, autonomy and secession – is being met with violence that ignores the socio-economic and historical contexts of the protest movements. The phenomenal expansion of the field of freedom of expression, that should have boosted a democratic transformation in India, is being hindered by concerns over national security.

The 13 December 2002 terrorist attack on the Indian Parliament brought the violence of India’s threatened borders home. It built up a national consensus in support of yet another national security law – Prevention of Terrorism Act (POTA), disregarding the evidence of abuse and inefficacy that led to the rejection of its predecessor, Terrorist and Disruptive Activities (Prevention) Act (TADA).

Under TADA (1985-93), Section 4 covered ‘disruptive activities’ whether by act or speech or through any other media. Seventeen journalists, four writers and artists were charged, including Shahid Siddiqui, editor of *Nai Duniya* for publishing an interview of the pro-Khalistan Sikh separatist Jasjit Singh Chauhan. Any statement or expression in any form on the right to self-determination or any question of the federal structure of India could be liable

⁴⁸¹ Constitution of India, SCDD 1981-1990; pp. 500-501

to be charged under TADA. The Courts have on occasion upheld a liberal interpretation of these special laws. In *'Niranjan Singh Punjab vs Jitendra Bhimraj Bijja'* (1990), the Supreme Court directed that mere statement does not constitute an offence. Earlier, with regard to the use of the National Security Act (1980) against those who address an assembly of persons and incite them to lawlessness, the Court in *'Fazal Ghosi vs state of UP'* (1987), directed that if there was no material to show that detainees would repeat the misconduct or do anything prejudicial to public order, the order of detention is liable to be set aside.

When POTA was being reviewed, the media successfully campaigned for the exclusion of a clause that made journalists liable to reveal sources, documents and other relevant materials. However, under the broad wording of its general provisions – Section 14, for example – although the media is not mentioned, journalists are still liable.

5.10 Prevention of Terrorism Act, (POTA) 2002

Under section 21 (3), a person commits an offence if he 'addresses a meeting for the purpose of encouraging support for a terrorist organisation or to further its activities'. Under section 14 (1), there is an obligation to furnish at the request of the investigating officer information and it covers journalists and lawyers and overrides professional confidentiality. Under section 36 & 38, clauses provide for interception of wire, electronic or oral communications.

The two-judge Supreme Court judgement on the POTA review petition, upheld the constitutional validity of these sections. In the case of Section 21, the Court held that "support – verbal or monetary – was causing new challenges and nurturing terrorist activities". However, its application was limited to only those who "have the intention of encouraging or furthering or promoting or facilitating the commission of terrorist activities". The judgement emphasised that "support per se or mere expression of sympathy, which is not intended or designed and which does not have the effect to further activities of any terrorist organisation" would not be covered under Section 21.

The POTA record of Tamil Nadu state government shows the blatant misuse of Section 21 to settle political scores. The General-Secretary of the MDMK political party, Vaiko, was

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among the first to be charged under POTA. Vaiko, a public sympathiser of the LTTE (listed as banned under POTA) was arrested in connection with a public meeting on 29 June 2002. At the meeting, Vaiko had referred to an intervention he had made in Parliament, in which he had supported talks with the LTTE. Vaiko and eight of his party were charged under POTA. Despite the Supreme Court ruling and the POTA Central Review panel declaring there was no case against him, the state government continued to oppose bail. He was released after more than a year in jail.

Also in jail under POTA, was P. Nedumaran, President of the Tamil National Movement and three of his associates. In July 2002, they were charged under POTA for statements made at a meeting a couple of months before. Nedumaran's writings were sympathetic to the LTTE. After 525 days in custody, Nedumaran and his three associates were released on bail after a long legal battle in various courts. The Madras High Court said, "We have scanned the whole charges only to find that the complaint is only against the speeches". The charges contained nothing about a nexus between the accused and the terrorist organisation. The Court nonetheless imposed a gag order on Nedumaran and his associates.⁴⁸²

R.R. Gopal, editor of the Tamil bi-weekly *Nakkheeran*, was the first journalist arrested under POTA on 11 April 2003. He was accused of aiding banned Tamil militant groups because he allegedly possessed some of the group's leaflets when he was arrested.

The Courts eventually provided relief to Vaiko, Nedumaran, Geelani and Gopal. The limits of the freedom of the press largely depended on judicial determination of constitutional validity and 'reasonable restriction'. Writing in 1971, legal luminary A. G. Noorani described judicial inventions as "not a perfect remedy but it is vastly superior to leaving them at the whims of the Executive or for that matter the Legislature".⁴⁸³ Looking back on the functioning of the judiciary, especially in the past couple of decades, Noorani has reason to be more critical of the role of the judiciary in shrinking the space for democratic rights. The Courts have upheld the validity of NSA, TADA and POTA, laws that have been manifestly

⁴⁸² See Testimony before the Peoples' Tribunal on POTA in 'The Terror of POTA' A Report of the Peoples Tribunal edited by Preeti Verma, New Delhi, March 2004. pp.29-31; *Frontline* January 16,2004, *The Hindu* February 20,1994

⁴⁸³ 'Freedom of the Press and the constitution' in A G Noorani, edited Freedom of the Press in India, Asia Pub House, Bombay 1971

abused to curb peoples' civil rights. The judiciary, too, after all is a part of society and respect for civil liberties and democratic rights depends on a national consensus that respects dissent and mandates fair play.

5.11 Regulatory Framework

Press Commissions & the Press Council

The architects of the new India entrusted to two Press Commissions (1954) and (1982) the task of interpreting the relationship between government and the media in a developing country. The Press Commissions saw the media as playing the role of 'constructive critic', maintaining 'public order' and promoting communal harmony. It was this fundamental socially responsible role of the media that was to temper the fundamental right of freedom of expression and the media as a business enterprise.

Press Monopoly

The discussion on the role of the press and its performance remained fixated on concerns about the monopoly power exerted by the large publishing firms and their consequent increase in influence over economic and political processes. Only 19% of the total circulation of national dailies was made up of newspapers owned or controlled by families, individuals or companies whose primary interest was the newspaper business.⁴⁸⁴

The debate around the press ownership concentration gave rise to a regulatory framework, including the Registrar of India Newspapers, the Audit Bureau of Circulation and interventions such as the 'price and page' (see below) and newsprint quota policy. There was reason to believe that the government used these regulatory powers as an alibi to contain the press. Some of the regulations were struck down by the Supreme Court, as was the case with the 'price and page' policy (1962) in the interest of the right to circulation and communication. In the Bennett Coleman case (1986), the Supreme Court held that the provisions of the Monopolies and Restrictive Practices Act (1969) did not apply to newspaper concerns. Today, that debate has been overtaken by an aggressive redefinition of the media as business.

The Press Commissions endorsed the concern about maintaining a law and order society at the expense of democratic rights. The Second Press Commission (1982) advocated a proactive role for journalists to promote communal harmony and the “subordination of sectional interests to the interests of national unity and integrity.” It warned journalists “against attempts by the authorities or by landlords to pass off agrarian revolts as Naxalite or other politically motivated violence”. Struggles against historical oppression and social justice were cast as law and order problems, denuded of politics. The role of the press in all this was to ensure the continued maintenance of a “law and order” society, to advocate adherence to lawful methods of airing grievances and to take a “forthright stand against unconstitutional methods of agitation.”⁴⁸⁵

The Press Council of India

The First Press Commission (1952-54) recommended the setting up of a Press Council as a watchdog structure from within the Press. It was duly set up as a statutory body under the Press Council Act (1965). Its autonomy was compromised by its financial dependence on the government.⁴⁸⁶ Also, it had no penal authority. It emerged as a means for mediating between the government and the press. A survey of its system of complaint jurisdiction reveals that it was the government that made most use of it to “defend itself from attacks and to discipline the press to keep in line with the government’s notion of public order, communal harmony and morality.”⁴⁸⁷ The case law shows that it was the virile but vulnerable local and regional press that was targeted.

The Press Council’s ideological frame as articulated in its Code of Ethics’ (1968) sought to balance safeguarding press freedom and national unity and integrity. Increasingly, the social ferment produced by myriad mutinies was taking violent forms and the state response was to emphasise the ‘law and order’ paradigm and enact anti-democratic laws that empowered the armed forces to act contrary to fundamental rights, including freedom of expressions. Professional associations like the Editor’s Guild and regional bodies like the Assam Journalists Association opposed these restrictions.

⁴⁸⁴ Until the 1970s, the top 15 COUs accounted for more than half the circulation of national dailies; and the top five [accounted for] a third. See, Tara Nair, *Op.cit.*

⁴⁸⁵ Dhavan, *Op.cit.* pp24-27; pp. 11

⁴⁸⁶ ‘Pressures on Press Council *Vidura* vol32,no3, Oct 1995 p5-13 and Dhavan pp. 395-441

⁴⁸⁷ *Ibid.*

The Press Council upheld them as necessary in the national interest. Its 1980 Annual Report states that safeguarding press freedoms does not “preclude those in authority from taking such action...to prevent publication of material which encouraged anti-national movements like secession or disintegration or spread communal disharmony or violence but this must be done without resorting to pre-censorship.” However, in the case of separatist and ‘terrorist’ violence in Punjab, the Press Council endorsed pre-censorship and recommended the same for Assam. The Press Council in September 1992 issued guiding principles on dealing with militant ‘Press Notes’, using Punjab as a model. Given the widespread suppression of information about state complicity in systemic human rights violations by the Punjab Police⁴⁸⁸ and the security forces in Assam, the abuse of the procedures for censoring publication of ‘objectionable matters’, is evident.

Case example: North East - ‘India Against Itself’

Separatist agitations in the border states of Punjab, Kashmir, Nagaland and Assam are rooted in the tension between a sub-national identity and a pan-Indian identity; and the Indian state’s failure to politically manage these tensions. India’s North-Eastern periphery is tenuously linked with the Indian mainland – geographically, ethnically, culturally and historically. The contradictions have produced discrimination and alienation from the ‘majority’ resulting in a relentless cycle of ‘ethnic’ identity assertion and conflict. Assam is at the core of the NorthEast now carved into seven states.⁴⁸⁹

The politics of Assam, having an ‘ethnic’ Assamese public identity, in the seventies began to revolve on the explosive (Bengali-Bangladeshi) immigration and enfranchisement issue. The failure of the Assam movement spearheaded by the Asom Gana Parishad to deliver a political settlement that protected the interests of the ethnic Assamese, saw its radicalisation and its takeover by the militant United Liberation Front of Assam (ULFA) in the 1980s-1990s. The Indian state’s war on ULFA and the use of special laws has seen gross human rights violations in the name of suppressing ‘terrorist activities’ and produced popular disaffection and sympathy for radical politics. ULFA in the areas where it virtually ran a parallel

⁴⁸⁸ Punjab Cremations case, to cite one example, involved the enforced disappearances of more than 2000 people. The civil liberties activist investigating the case, Jasjit Singh Kalra, was killed.

⁴⁸⁹ SANJIB Baruah, *India Against Itself: Assam politics*, New Delhi, OUP, 1999.

government also showed little tolerance for dissent and human rights, alienating its support base.

Media between two censors:

On one side, there is Wasbir Hussian (*The Telegraph*) held by the Naga rebels⁴⁹⁰ because he wrote a story based on defence sources that a special aircraft had flown a group of Naga leaders for talks. And on the other, there is Haider Hussian (*Asomiya Protidin*), held by the police as he had visited an ULFA camp in Bhutan.⁴⁹¹

Earlier in July 1990, the press in Assam warned that it faced the death penalty if it infringed the militant group ULFA's code for coverage of events in the state. Indeed, ULFA demanded prior approval before publication of material to do with ULFA. The Assam journalists' association roundly denounced the code.⁴⁹² The Press Council of India (PCI) observed that "publication of 'press notes' demoralises the public and affects public policy and security", but the media had "little room for manoeuvre". The PCI recommended as a "workable expedient useful in Punjab" – a form of pre-censorship by the government."⁴⁹³ However, it acknowledged that there was the risk of the administration using the restriction against the publication of what it defined as 'objectionable material' to muzzle the press.

In January 1983, under the Assam Special Powers Act, the state empowered itself with the "prohibition of prejudicial publication" against any material relating to the agitation against 'foreign nationals'. Subsequently, TADA and NSA were also used to intimidate and harass the press. In particular, two editors of Assamese language newspapers, Parag Kumar Das and Ajit Kumar Bhuyan were repeatedly arrested for publishing material sympathetic to ULFA.⁴⁹⁴ The lapse of TADA saw journalists caught under NSA as in the case of the editor of the Assamese language newspaper *Saadin*. Although struck down by the Courts, the TADA/ NSA process itself was punishment aimed at intimidating them.

⁴⁹⁰ The Naga (tribal) peoples of the North-East have been waging an insurgency against the Indian state since the 1950s. The Nagas claim a distinct historical and cultural identity and have been fighting for recovery of their independence. They were part of the territory of Assam before it was divided to create the state of Nagaland in 1963. The Armed Forces Special Powers Act (1958) was first promulgated to deal with the Naga insurgency.

⁴⁹¹ We are not seeking to equate the two. The state is bound by the rule of law, the Naga rebels are outside the law though they are vulnerable to public opinion as is the state.

⁴⁹² *Times of India*, 27 July 1990.

⁴⁹³ PCI Annual report 1992 pp.18-19.

⁴⁹⁴ *Op.cit.* PUDR TADA.

In the national media, there was little solidarity for what was deemed ‘anti-national’ sentiments of a section of the Assamese media. George Verghese, former editor and leading defender of press freedom – referring to the proscription of Parag K. Das’s book, *Proposal for Freedom*, in which he argues for constitutional recognition of the right to secession – emphasises the need to make a distinction between “the actions of a citizen as a journalist/ editor or an activist. The latter cannot be protected under the rubric of freedom of the press.”⁴⁹⁵ Parag Kumar Das was gunned down in Guwahati in May 1996 allegedly by pro-government hit men. He received an overwhelming ‘hero’s’ memorial in Assam, but the national press barely mentioned his killing.

The Press Council and Human Rights

An indicator of the system’s capacity to safeguard freedom of expression in conflict situations, is the space available for the human rights story in the media. Human rights violations thrive when there is no transparency. Arguably, the human rights front is an important propaganda terrain of the conflict and both sides are manipulating the ‘atrocities story’. However, the media’s responsibility in being able to pursue that story is vital. Media exposure of human rights violations undermines the culture of impunity that drives these violations. The denial of acknowledgement and justice for human rights violations drives cycles of revenge and alienation.

The Press Council chose to echo the state’s dismissal of human rights violations as propagandist. The Chairperson, Justice Sawant, while emphasising that “people have the right to know how power is being exercised”, spoke out against human rights groups that get “their briefings from one side” to “malign the army”.⁴⁹⁶ Commenting on the situation of the press and conflicts in the NorthEast, he said, “The police, the army and the administration are at the receiving end most of the time at the hands of insurgents and of the press and the human rights groups. The often unverified and un-authentic (sic) accounts of the deeds of the three (police, army and administration) have not only been demoralising them, but also giving an indirect impetus to the insurgency and their violent and divisive activities.”

⁴⁹⁵ George Verghese *India’s NorthEast Resurgent* Konark, Delhi, 1996, pp. 56-57 cited in Sanjib Baruah, *India Against Itself* OUP, Delhi, 1999 pp. 170-172.

⁴⁹⁶ Justice P B Sawant, *Mass Media in Contemporary Society* 1999 pp.190-193.

The Press Council's role in not only turning a blind eye to human rights violations but also in actively participating in a cover-up, is illustrated by its report '*Crisis and Credibility* (1991). It focused on army excesses and in particular the allegations of mass rape by the Army in the village of Kunan Poshpara in Kashmir valley. The Kunan Poshpara rape story had been broken by an international news agency, UPI, and made a big impact within the international media. Videos were made of the testimony of the raped women and sent all over the world. The details of this incident are as follows:

On the night of 23 February 1991, some 32 women were allegedly raped by troops of the Rajputana Rifles of the 68 Mountain Brigade during a search and cordon operation. The army's internal inquiry dismissed the accusation as "malicious and untrue".

The Army invited a team of the Press Council, headed by B. G. Verghese, an editor known for his liberal values and independence. The two-member team came by army helicopter to Kupwara, had lunch at the army camp, went to the village for a couple of hours and went back to the army camp for dinner. In the brief time spent in the village, Verghese dismissed the allegations, not least – as he noted – because the girls when interviewed giggled and seemed 'unashamed'.

The committee's findings were as follows: "The Kunan rape story on close examination turns out to be a massive hoax orchestrated by militant groups and their sympathisers and mentors in Kashmir and abroad".⁴⁹⁷ Subsequently, the Women's Initiative Report (1994) revealed that "no marriage has taken place in this village for three years. All girls raped and un-raped are single".⁴⁹⁸ Kunan Poshpara still labours under the stigma of the 'village of raped women'.

For the army, Kunan Poshpara became a lesson to be taught in defence colleges on how to "avoid manipulative human rights propaganda". But for the people it signalled a pattern of impunity on rape by the security forces.⁴⁹⁹ Those who reported rape or assisted in filing a

⁴⁹⁷ Rita Manchanda, "*Crisis and Credibility*", *Economic and Political Weekly* August 17, 1991, pp. 122-129.

⁴⁹⁸ Committee for Initiative on Kashmir, *Kashmir Imprisoned* July 1990; *Women's Testimonies from Kashmir* Women's Initiative, New Delhi 1994 pp. 10-11

⁴⁹⁹ The state government ordered inquiries into 87 incidents of rape, custodial killings and arson. None resulted in criminal prosecution. The *Kashmir Times* Jan 14, 1993.

complaint were allegedly intimidated and medical practitioners were threatened and even reportedly abducted by the security forces.

Reporting Communal Violence

Any audit of the Press Council would have to emphasise its sustained and steadfast stand in dealing with communal writing. A high mark was set by the Press Council's investigation into the coverage of the dispute over the Babri Mosque site, as the place where the Ram temple was to be built. In October 1990, the state government decided to prevent the proposed 'kar seva' (devotees contributing labour to build the Ram temple), but thousands managed to break through the blockade and about 19 were killed in the confrontation on 2 November 1990. The Press Council censored four Hindi dailies that 'spread panic and confusion in an already tense and polarised situation'.⁵⁰⁰ For example, *Swatantra Chetna* of Gorakhpur, originally published a figure of '15' dead, but subsequently added a '1' before it to read '115' in its afternoon edition.

Broadcast Media

When it came to radio and subsequently television, Prime Minister Nehru who had supported freedom of the press, was emphatic that the vast majority of India's illiterate masses needed to be protected from the 'wrong use of freedom'. Government monopoly over the air waves was maintained through *All India Radio* and *Doordarshan (Television)*, which was run as a Department of the Information and Broadcasting Ministry. Successive committees set up to look into the functioning of the broadcast media – The Chanda Committee (1966) and the Verghese Committee (1978) – recommended the setting up of an autonomous body to look after broadcasting. Finally, in 1997 the Prasar Bharati Corporation was set up.

As broadcasting was monopolised by the national broadcaster, it was not felt necessary to have a legal structure of regulations and controls. There was the colonial Indian Telegraph Act 1885, which was said to cover the broadcast of signals. Radio and subsequently television, were perceived as tools of public policy. The internal 'Emergency' of 1975-1977 was to carry to its logical conclusion the perception of the media as a tool to propagate government policy. V. C. Shukla, then Minister of Information and Broadcasting, told a

⁵⁰⁰ See 'Press on Ayodhya 'karseva'', Asghar Ali Engineer *Economic & Political Weekly* May 18, 1991 pp.1263-1266

meeting of station directors, “This forum is not run by the government to have a debate on various kinds of ideologies or various kinds of differences of opinion.”⁵⁰¹

During the heyday of controls, broadcasting as a tool of the central government got caught in the growing crisis of centre-state relations and indeed participated in and exacerbated it. Page and Crowley in their analysis, argued that “National broadcasters helped to increase alienation by acting as propagandists for the ruling parties, by denying space to opposition politicians and critics of government policy and by neglecting regional cultures and concerns”.⁵⁰² Moreover, central control tended to reinforce the dominant language (Hindi), producing more tension. Consequently, in the 1980s and early 1990s, when the crisis of the centre-state relations worsened in Punjab, Assam and Kashmir, militants singled out broadcasters.

The video news magazine in the 1980’s, was an experiment to breach the monopoly of the national broadcaster. The video news magazine was dependent on Doordarshan for mass dissemination and consequently subject to preview before telecast under the Cinematography Act (1951, 1981). It was a protracted procedure and dilatory tactics of review and appeal were used to suppress content, especially coverage of the destruction of Babri mosque and the communal frenzy that followed.⁵⁰³

Broadcasting regulation took a positive turn when, in 1994, the Supreme Court ruled that the national broadcaster could not monopolise the air waves; they were public property, but it warned against their domination by big business. Efforts to regulate satellite channels found expression in the Cable Television Network regulation Act 1995, which places the responsibility to monitor content programming on the cable operator. The programme code prohibits criticism of friendly countries, attacks on religions or communities or anything affecting the integrity of the nation and criticism by name of any person.

⁵⁰¹ David Page and William Crowley *Satellites over South Asia*, Sage 2001, *Op.cit.* pp. 52.

⁵⁰² *Ibid.* pp.62-64.

⁵⁰³ A G Noorani “Censoring Video Magazines’ *Economic & Political Weekly* Jan 30, 1993 pp.149; ‘Censoring Kashmir’ *Economic & Political Weekly* Dec 19, 1993, pp. 2765.

Case example: Censor Board

The Constitution lays down as criteria for curbing freedom of expression ‘reasonable restrictions’, but much depends on the bodies created by the Executive to implement the law. In the case of the Cinematograph Act (1952, 1981), the reasonableness of the restrictions depends on the independence of the Central Board of Film Certification (CBFC) and the content of the censorship code. The protracted process of pre-censorship for video news magazines effectively kills the news magazine. The three-tier structure of the screening committees – the examining committee, the revising committee and the Appellate Tribunal Board – should in principle provide for safeguards against misuse. However, as film maker Anand Patwardhan’s experience with his documentary film *War and Peace* shows, this process is no guarantee of fair play. The examining committee recommended six cuts, the reviewing committee twenty-one cuts and at the time of writing, it was before the Appellate Tribunal. Patwardhan claims the CBFC has shown a partisan attitude.

The award-winning documentary filmmaker, Tapan Bose, has set a record of challenging the censorship process and guidelines under the Cinematograph Act. Three of his major films were initially banned. In *An Indian Story* (1981), the first film to explore human rights violations in the country, the Censor’s Board decision was successfully challenged in the Bombay High Court and the ban lifted after three years. The Censor Board did not challenge it because by then its top official was a filmmaker, who was opposed to censorship. The second film, *Beyond Genocide*, on the Bhopal Gas Tragedy (1986), was also denied certification, largely because it had criticised the USA as being responsible. The appeal went to the Supreme Court, which directed the national broadcaster Doordarshan to telecast the film. Doordarshan did so on a Saturday night at 11 pm. The third film, *Behind the Barricade* (1993), examined the Punjab insurgency. It was branded anti-national, promoting the cause of terrorists and subsequently banned.

The Film Certificate Appellate Tribunal’s objections to *Behind the Barricade* are revealing of the framework within which the tribunal and the film censors work. For example, the cuts sought the following: to delete “the black and white stills of the burnt and charred bodies before the title of the film as it ‘offends sensibilities’; to delete scenes of blood marks and blood stains on the walls of the Golden Temple and the visuals of the demolition of the Akal

Takht because it will “hurt sensibilities” and “revive memories”; to delete visuals of the tortured corpses of Sant Bhindranwala and General Shahbeg Singh.⁵⁰⁴

The censorship process is dominated by the partisan politics of the party in power as reflected in the nominations to the Board. Consequently, after the Gujarat violence – faced with a number of critical documentaries – the censorship apparatus went into overdrive. For the bi-annual Mumbai International Film Festival (MIFF), the Ministry of Information and Broadcasting introduced for the first time a requirement of pre-clearance of entries by the Censor Board. When independent filmmakers banded together under the banner Campaign Against Censorship, the organisers withdrew the censorship clause. However, backdoor censorship was introduced and a discriminatory process of selection ended up excluding all films on Gujarat. Rakesh Sharma’s film, ‘*Final Solutions*’, which won two prestigious awards at the Berlin International Film Festival was rejected by the MIFF. A couple of well respected filmmakers resigned from the jury in protest.

Filmmakers organised a parallel ‘unofficial’ film festival, *Vikalp*. The confrontation between the official and the unofficial festivals was over censorship, control and subversion. The importance of the independent documentary film is particularly significant today, as the space for critical, complex explorations has rapidly shrunk in the commercial print and electronic media.

5.12 Official Policy and Practice: State & Non State

Constitutional guarantees of freedom of expression have long been distorted and sacrificed through a variety of direct and indirect controls, especially on the mass media – the primary means of mediating the public sphere in which political affairs are articulated and public opinion shaped. In India, as in other developing countries, the media is cast in a state-building role. But, as our narrative shows, when state interests are conflated with government interests, and national interests with bureaucratic interest, it is the public interest that is sacrificed.

⁵⁰⁴ A G Noorani Censoring Behind the Barricade’ *Economic and Political Weekly* Sept 4, 1993 pp.1843-1844.

Moreover, as India becomes more integrated into the processes of globalisation, it is the policing role of the Indian state that is becoming more predominant to stifle dissenters deemed enemies of progress. It is against this backdrop of shrinking space for dissent that we need to examine the use and abuse of restrictions in policy and practice by state and non-state actors.

The Second Press Commission (1982) had identified five restrictions – physical attacks on editors or the offices of the newspaper or its employees; interference by advertisers, obstruction to expression of political opinions by trade unions of newspaper employees, interference in editorial autonomy by proprietors to promote business interests or on behalf of political parties; interference by functionaries of the government through selective and politically motivated exercise of powers under the law or through extra-legal means, such as discrimination in the selection of newspapers for advertisements and /or in the rates fixed for such advertisements; delay in payment of advertisement dues; or denial of facilities for obtaining machinery or other inputs necessary for newspaper production or wilful obstruction to the distribution of copies or denial or suspension of services such as supply of water and electricity.

Two decades later, most of these restrictions remain valid, though there is a shift in relative strengths, i.e. the diminished power of labour unions and the increase in cronyism and the power of commercial advertisers to shape the environment for freedom of expression. The emergence of the media as ‘big business’ has made it more powerful but also more vulnerable, fostering cronyism with political groups that wield power. Indeed the National Democratic Alliance government (1999-2004), established a new record for rewarding journalists by nominating them to the Rajya Sabha (Upper House) and other influential bodies, and its successor, the Congress led United Progressive Alliance is following that trend.

Structural/financial Vulnerability

In 1964, Kuldip Nayar, then General Manager of the news agency, *United News of India* (UNI) discovered the financial consequences of defying the government. Negotiations on a political settlement to the Naga insurgency were taking place in New Delhi. UNI had carried an interview with a visiting key Naga leader stating that there could be no compromise on

sovereignty. The Prime Minister's office asked him to withdraw the item. He refused. UNI at the time was facing financial difficulties and hoping that they would be bailed out by an increase in the subscription paid by one of their major subscribers (the national broadcaster *All India Radio*). Instead of the promised Rs. 300,000, the amount was cut to Rs. 200,000, as Nayar was told because of Prime Minister Shastri's displeasure.

Since then successive Annual Reports of the Press Council of India are replete with complaints about the central and state governments arbitrarily denying advertisements or juggling the rates to punish smaller publications critical of the government. Smaller newspapers and especially 'local' publications that are not positioned to attract commercial advertising, depend on government advertisements issued by the Directorate of Audio-Visual Publicity (DAVP). In conflict situations in particular, the DAVP has used this structural dependence to discipline the media.

Greater Kashmir, an English language Srinagar, daily fell foul of this financial vulnerability when it published a 'press note' of the *Hurriyat* (a platform of pro-separatist Kashmiri leaders) announcing a boycott of the 26 January 2004 Republic Day parade. As a consequence, Government advertisements were halted.

In particular, *The Kashmir Times*, the leading paper of the state, has also intermittently been subject to arbitrary denial of central and state government advertising and discriminatory rock bottom rates. Its critical stand towards the Farooq Abdullah state government in the 1980–1990s, saw government advertisements virtually dry up until a change in government in 2003. Also, *the Kashmir Times'* stand in support of Kashmiri people's right to self-determination, prompted the withholding of central government advertising. As recently as September 2004, *The Kashmir Times* was 'punished' for hosting a delegation of visiting Pakistani journalists on a first ever exposure tour of Jammu and Kashmir. In mid 1990s, *The Kashmir Times* put on hold its expansion plans - involving the import of new machinery. Its initial request for clearance to import chemicals was cold-shouldered. It was at the height of state repression in Jammu and Kashmir and *The Kashmir Times* had been exposing human rights violations.

Denial of Media Access

There is a history of accreditation facilities being misused in states, but even more disturbing is the trend towards political partisanship in the functioning of the Committee on Accreditation. The balance between professional and government representation has been changed making it much more vulnerable to pressure. (Iftikar Geelani's accreditation was revoked, although today he is a member of the Committee.)

In Kashmir and Assam, local journalists have had their accreditation and curfew passes ignored, and access has been denied to dissenters. Major-General Arjun Ray, in his book *Kashmir Diary* approvingly notes "27.5.95: Seshan (Chief Election Commissioner) struck a blow today. He started his press conference at Raj Bhawan by ordering out the BBC's local representative Yusaf Jameel Having a stringer known for his anti-Indian and pro-militant leanings as well as underground contacts – does not help the BBC establish credibility". The government action indirectly led the BBC to drop him.

Television and the demands of a 24-hour news feed, makes TV journalists particularly dependent on state agencies for getting access (including heavy audio-visual equipment) to distant conflict sites. This vulnerability raises the stakes against non-conformity and independence.

Case example: Kargil Conflict

In an escalating conflict situation, an independent witness is vital to dispel rumours and establish credibility; transparency is necessary to expose abuse of authority, human rights violations and establish accountability and win peoples' confidence. It is at such a time that state agencies tend to deny access or seek to manipulate information. The exclusion of the media in Punjab during Operation Bluestar (1982) has already been mentioned. But even during the Kargil conflict (1999), India's first television war in which the army hailed the media as a force multiplier, access suddenly dried up when the media reported a lack of preparedness, army retreats, casualties and even army 'atrocities'.

The Kargil conflict in the disputed Jammu and Kashmir was a territorial conflict to drive out Pakistani soldiers disguised as militants, who had occupied the heights in the Kargil sector. Gaurav Sawant, then a journalist with the *Indian Express*, recounts in *Dateline Kargil* that

journalists were soon no longer welcomed in the area. Earlier, the public relations officer of the Northern Command Srinagar, freely distributed passes to journalists to visit the conflict areas. TV crews were blamed for giving away strategic locations. Sawant quotes a senior officer telling him, “you chaps are sending wrong signals to the entire community and the world at large. How can you dream of writing about our setbacks and casualties? You are anti-national”.⁵⁰⁵ Orders were issued to unit commanders to stop the entry of journalists. Journalist Sankarshan Thakur, in the compilation ‘*Guns and Roses*’, corroborates that the military authority stopped honouring its own media permits to allow journalists to return to the operations field. Military personnel and local police were sent to harass journalists staying at Hotel Siachen.⁵⁰⁶

During the news blackout, interregnum Sawant was one of three journalists who managed to stay behind. “The army could not throw us out because the area had not been declared disturbed and the police remained in charge of law and order. But the army practiced its own brand of censorship by denying access to army units”. The curbs that were suddenly imposed upon the media were just as suddenly lifted once the war was turning in the central government’s favour. The military authorities now decided to try and use the media as a force multiplier and escorted trips were laid on for ‘embedded’ journalists. Foreign journalists had restricted escorted access to the war zone, though Indian journalists, writing for the foreign media, did make their own way to the front.

Restrictions on Delivery of Publications & Suppression of TV Channels

State agencies have used both legal and non-legal means to dislocate delivery of newspapers. In October 1990, in the state of Uttar Pradesh, the Mulayam Singh government directed the administration to seize newspaper bundles, search printing presses and arrest hawkers. The District Magistrate, the administration head in Benares, blocked the supply of newspapers on a critical night. The Hindi language papers were carrying sensational reports about the bloody confrontation in the wake of the Ayodhya temple campaign between the state police and the ‘karsevaks’ (Ram devotees). The Press Council in its report came down strongly against the authorities, claiming that instead of taking the press in confidence, the authorities both in the

⁵⁰⁵ Gaurav Sawant *Dateline Kargil*, New Delhi, Lancer Publishers.

state and the district, first kept quiet and then adopted a totally negative attitude. They didn't allow the press to see for themselves.

Routinely, in sensitive situations, the police have invoked extra legal powers to suppress the broadcasting of news by cable operators. During the Hazratbal crisis (1993), over the siege of the shrine in Srinagar by militants, Bombay Police Commissioner, A. S. Sarna, sent the police to cable operators in the city directing them not to show Pakistan Television broadcasts. The rationale was that it would inflame Muslim feeling. Ironically, Lt-Gen Saklani, the Advisor to the Jammu and Kashmir government took pride in enabling media access during the crisis. "It was only because of the open policy of the government that the newspapers have started accepting and publishing government press releases.

During the Kargil conflict, zealous government officials again pressured Cable operators to remove the Pakistan Television channel. *Videsh Sanchar Nigam Ltd* (vsnl) the gateway for the Internet server was told to block access to the *Daily Dawn* website. The Kargil Review Committee Report is very critical of these "ill-considered reactions". Pakistan was able to portray these as acts of Indian censorship for fear of the 'truth'.

Intimidation & harassment

State agencies have used or rather misused an armoury of laws, regulations and procedures to harass and discredit the media as evinced most recently in the 'criminalisation' of the online company Tehelka.com. On 13 March 2002, Tehelka.com exposed in the cover story 'Sleaze, senseless greed and dirty heroes' a system of corruption in defence procurement deals. It was based on a sting operation and caught on videotape the ruling Bharatiya Janata Party President, putting a bribe of Rs. 100,000 in his drawer, and the President of the Samata Party (Defence Minister George Fernandes' party) reportedly accepting Rs. 200,000.

The government used the CBI Enforcement Directorate, Income Tax Company Affairs and the Intelligence Bureau to harass Tehelka's investors, wasting their time in raids, legal cases and finally imprisonment under the defunct Foreign Exchange Regulation Act. Tehelka's

⁵⁰⁶ *The Kargil Review Committee Report* notes that passes issued by the Defence Ministry were not always honoured or not promptly. Delhi Sage, Dec 1999 p214; see Geeta Seshu, 'Media and Kargil', *Economic and Political Weekly* October 9 1999 and *Indian Express* edit "Let the media witness the mess", July 14 1999

reporting staff were caught up in various legal disputes – for example over alleged violations of the Official Secrets Act, another for infringing the Wild Life Act because a leopard poacher caught by the authorities had the reporter’s number on his mobile phone. Tehelka was charged rather than the poachers. “We spent 35,000 man-hours combating cock and bull charges”, said Tehelka head Tarun Tejpal. Tehelka.com was destroyed. In 2004, Tehelka transformed itself into a fortnightly broadsheet.

No Neutral Space

Conflict is front-page news. Regional secessionist struggles have fuelled a huge outcrop of publications (videos and cassettes) in the affected zones. Moreover, insurgencies are fought on the propaganda plane as much as on the ground and need of the local media. The state and the insurgents are busy manipulating information. Journalists are at risk from both sides as the space for being ‘neutral’ disappears. Either they become the mouthpiece of the militants or of the security agencies. In Jammu and Kashmir, 401 newspapers are registered, making for a density of penetration to 25 per 1000 population. Militant groups use the local media as their main channel of communication. Kashmiri militants were paid by Pakistani agencies on the basis of the publication of their exploits. There were reports of threats, attacks and killings, if the militants’ press notes were not published.

In Kashmir, publications like *Aftab* and *Srinagar Times* reacted by shrinking pages and dropping editorials. Others like Shaban Vakil editor, *Al Safa* – who dared to fall foul of the militants – were killed. The popular *Chaatan* weekly carried a letter to the editor that was highly critical of the chairman of the pro aazadi group JKLF, Yasin Malik. The office was ransacked and the editor had to be rescued by the police.

The agencies of the government, for their part, use legal and extra-legal means from arrests under special laws to withhold government advertising and physical intimidation and elimination of independent journalists. For example, Yusaf Jameel, then with the BBC, was physically targeted. An unidentified woman and man left a parcel bomb in his office, which killed cameraman Mustaq Ali. Zafar Meraj a veteran Kashmiri journalist was shot and left for dead by ‘unidentified’ gunmen after an interview with the ‘surrendered’ militant (co-opted by government agencies), Kuka Parray. The Kashmir Times, Delhi Bureau Chief, Iftikar Geelani was charged under the OSA on a reportedly trumped-up charge.

Journalists' accreditation cards are not always a protection; the police at a checkpoint reportedly beat up Rafiq Maqbool when they spotted photo equipment in the car. Recognition of curfew passes is at the discretion of the security forces.

Routines of newsgathering: official sources

The 'national' mainstream media's coverage of the conflict in the 'border areas' is overly dependent on official sources. Teresa Joseph in a content analysis of three English language dailies – *The Hindu*, *Times of India* and *Indian Express* (1 December-29 February 1992) – noted that out of a total of 423 reports on Kashmir, 230 were based on official statements/press releases. An overwhelming number of these (78%) were sourced to Indian government officials and leaders of mainstream Indian political parties. Only 7% were based on Kashmiri sources, 8% on Pakistani sources and another 7% on other sources including those from other countries. Reports on the actual situation in the valley, quoting ordinary people or militant sources are rare and headlines drawn from official statements do not bear quotation marks.

Human rights violations are viewed through the patriotic prism of "my country right or wrong" as articulated in an Indian Express editorial. "The obvious need [is] to counter Pakistan's propaganda blitz over Kashmir, which is magnifying out of all proportions the alleged excesses by the armed forces on the civilians in the Valley." Most Delhi-based papers denounce human rights reporting as propaganda aimed at demoralising the forces. Fact-finding reports by independent groups in India; condemnation by other countries of human rights violations in Kashmir; and calls for discussion on self-determination is very often blacked out in the Indian press. The mismatch between the experience of the people and what is reported in the national press has made the people altogether disbelieve what they read. Further, as journalist Tavleen Singh in her book *Tragedy of Errors* observes, this 'deliberate miss-reporting' is one of the main reasons for the alienation of the Kashmir people.

Wars Through a Patriotic Prism

If we were to condense the field of India at war – the 1962 Sino-Indian conflict; the India–Pakistan wars of 1947-1948, 1965, 1971, the Siachin conflict 1986, the India Peace Keeping Force operation in Sri Lanka 1987-1990, the Kargil conflict 1999, and Operation Parakrama

during 2002-2003 – it would show a high dependence on official sources for the story line; a lack of field access; intolerance of dissenting voices; and exclusion of opposition voices. It would be marked by a disciplining of journalists deemed ‘anti-national’ by fellow journalists; self-censorship in the ‘national interest’; a militarised ‘patriotism’; suppression of reports of human rights violations and as well as the disregard for and down-valuing of humanitarian concerns.

Ajit Bhattacharjea, a former editor and Director of the Press Institute of India, taking stock of the (lack of) humanitarian reporting of armed conflicts, observed that the suffering of civilians in the border areas caught between the two armies of India and Pakistan was not recognised by the media. “In the 1965 war, the damage done to the standing crops in the battlefield was noticed incidentally in reports describing tanks using them for cover”. It was only in Operation Parakrama (2002-3), in the face-to-face confrontation between the armies of India and Pakistan that civilians uprooted from border farmlands became a news story for the media. The civilian suffering in conflict finds little space in the framing of the news story. Indeed few media reports, if any, focus on the costs of conflict, including the human costs. It perhaps accounts for the propensity with which military options are deliberately favoured instead of political ones.

Partha Basu, in a study of the English language press’s handling of three crises – Sino-Indian 1962, Indo-Pakistan 1971, and the IPKF 1987 – notes the exclusive dependence on government sources and the lack of effort made to seek alternative sources of information. “The press turned into a vehicle promoting the official viewpoint.” Statements of the ‘enemy’ were largely filtered or framed within the interpretation of the Ministry of External Affairs.

Patriotic Complicity of Silence

During the 1971 war, there was a classic case of the patriotic complicity of silence on India’s role in arming, training and supporting the Mukti Bahini – the East Bengal freedom fighters. (Only the ‘little magazine’ Frontier from Calcutta breached that patriotic silence). The Times of India commenting on Pakistani President Yahya Khan’s charges about interference in Pakistan’s internal affairs, quoted ‘informed sources’ vouching for the capacity of the Awami League (political party that led the struggle) to put up effective resistance. Columnist Kuldeep

Nayar, who was then General Manager of the news agency, described how stories of Mukti Bahini's clashes with Pakistani forces were disseminated.

This same patriotic complicity of silence prompted even a radical journalist like Sumanta Banerjee – reporting on the war for *The Statesman* – to suppress information about senior army officers and soldiers looting properties abandoned by Bangladeshis who had fled during the war. He also saw that unscrupulous Indian traders were exploiting the situation and indulging in smuggling and black marketing. In hindsight, he reflected, it was a mistake not to have exposed it. “It explains why in Bangladesh the popular sentiment so quickly turned anti-Indian.”

The absence of a critical public discourse on India's foreign interventions becomes more pertinent in the case of the country's policy of covertly arming the Sri Lankan Tamil militants from the 1970s. Sri Lanka's aggressive politics of the Sinhala majority discriminated against its Tamil minority, producing alienation and resistance. The 1983 anti-Tamil pogrom in Colombo was a turning point that radicalised the struggle. Thousands of Sri Lankan Tamils fled to the South. The Sri Lankan Tamil issue became a key issue in the Tamil majority state of Tamil Nadu; and for New Delhi, an opportunity to bring pressure on the Sri Lankan Government.

Sam Rajappa, then correspondent with *The Statesman*, acknowledges that, “in the South, we all knew about the arming and training of the Tamil militants, but nobody went public on it,” as we felt it was in Tamil interest and in the national interest. The Research & Analysis Wing (RAW) of the Indian intelligence agency, was publishing stories of exaggerated Western penetration of Sri Lanka and there were few in the media to articulate an independent assessment.

The intervention destabilised neighbouring Sri Lanka and pulled India into a disastrous diplomatic and military adventure. The Tamil militant terrorist arm reached out to assassinate former Prime Minister Rajiv Gandhi. The mastermind behind his assassination, Sivasaran, was trained in the use of arms, ammunition, explosives and intelligence by RAW. Rohan Gunaratna in his book *India's Intervention in Sri Lanka: the Role of India's Intelligence Agencies* (1991) claims that under Indira Gandhi, a supra covert organisation comprising

operatives from RAW was created for subversive operations in Punjab and for the training and arming of Tamil militants. India's Sri Lankan misadventure was the consequence of covert agencies hijacking foreign policy, or rather, of policy being pulled several ways – by RAW, the Ministry of External Affairs and the Army. (The Ministry of External Affairs brokered the accord and RAW opposed it.)

Left in the dark, the Indian public was at a loss to understand why the Indian Peace Keeping Force, which had been 'invited' as the saviour of the Tamils to restore peace, should be at war with the LTTE, the self-styled spokesperson for the Sri Lankan Tamils. The media has a responsibility for failing to provide a better understanding of the majoritarian politics of the Sri Lankan state. It also underestimated LTTE's aspirations and its military strength. The influential Chennai-based *The Hindu*, which translated Sri Lankan reports for the national media, downplayed the violent opposition to the accord. When the IPKF was asked to quit, *The Hindu* reported it as a victory, because it was a withdrawal without conditions.

Tight controls on media access and coverage left the Indian public ignorant of human rights violations by the IPKF, especially the rape story. Former commanding officers of the IPKF in Sri Lanka have in their memoirs gone on record to condemn the policy of secrecy in which the security of the state was confused with the security of the government and the latter with the interests of the military, bureaucratic and political complex.

Privileged Sources

Typically in 'war journalism', privileged perspectives – i.e. non-verifiable intelligence agency reports – are purveyed as established facts using phrases that have come to be classics of journalists' language i.e. 'said to be', 'it is understood'. Whether it is in the reporting of North East (internal) conflicts; the 2001 Indo-Bangladeshi border clash; or the activities of the ubiquitous ISI-RAW networks in Nepal and Bangladesh – privileged perspectives are presented as fact. The information may or may not be false, but the process of reporting clearly is flawed. It is reporting at a distance, based on non-verifiable input from intelligence agencies. In such reporting, the reliance on official versions of the parties in the conflict or on shadowy intelligence sources trap media practitioners in becoming mouthpieces for sides in the conflict.

5.13 In the Public Interest

In the narrative above we can identify various strands that demonstrate why an environment that enables freedom of expression helps, rather than hinders, the prevention, control and transformation of conflicts. Earlier, the case of *Operation Blue Star* (Punjab), demonstrated how a media blackout spread rumour and panic, destroyed credibility, aggravated the crisis – driving cycles of violence. Its corollary are the ‘mistakes’ of the media that drive communal violence, such as ‘local’ print media sensationalising the restraints on the ‘karsevaks’ (Ram temple devotees) in Uttar Pradesh (1990); in promoting the theory of a Muslim conspiracy in setting the train compartment on fire in Godhra and in fanning the anti-Muslim pogrom (2002). ‘National’ media exposure of the Gujarat State’s complicity in the violence moved central institutions like the National Human Rights Commission, political leaders and civil society groups to intervene.

Within the army, there is consensus that the news blackout during the army crackdown on Sikh militants in the Golden Temple, *Operation Blue Star* (1984), was counterproductive. The embedded media show of *Operation Black Thunder* (1988) was a much better management of public opinion. The trajectory from *Operation Blue Star* to *Operation Black Thunder* is publicly reported by spokespersons of the armed forces as exemplifying an institutional learning curve. The relatively open media policy during the Kargil conflict is cited as illustrating the armed forces’ maturity in recognising the role of the media in a confident democracy and the media’s value as a force multiplier. Traditionally, the defence sector has been viewed as the ‘holy cow’, subject to less scrutiny in the ‘national interest’. However, there are voices for a degree of openness coming from within the armed forces.

Security Forces: A learning curve?

Here, we want to examine the credibility of the claim of an institutional learning curve. Can an organisation whose culture is hierarchical, authoritarian and steeped in practices of secrecy, engage with openness and tolerate critical, dissenting views, especially when facing uncertain odds or reverses? Moreover, in an overall system where national interest is often equalled with little more than the interest of political groups in power or the defence establishment, how much space for real openness can there be? Let us revisit some of conflict sites to examine the resilience of the learning curve.

a) Siege of Charar- I- sharief

During the militants' siege of the Hazratbal shrine in Srinagar (1993), there was controlled access for the media. The Hazratbal shrine has significant symbolic importance for Kashmiris and Muslims all over India and in the sixties the 'disappearance' of the Prophet Mohammad's hair from the shrine sparked off violence fanned by rumours. The advisor to the government, Lt-Gen Saklani, who authorised access, explained "if some checks or bans had been imposed on the press, there would have been protests and unregistered pamphlets would come out. Rumours would take over." Before Hazratbal, the government was losing the information war, the local press was not carrying any of its press releases, he added. Hazratbal changed that. It was a clean and smoothly managed operation, with an enabling exit strategy for the militants and political closure.

Two years later, the lesson about an 'independent witness' was ignored during the siege of the *Charar i Sharief* (1995). The Charar shrine is dedicated to Kashmir's holiest Saint, Nund Rishi. Initially, the media was allowed access and there was extensive coverage of the statements and activities of Mast Gul and his band of foreign mercenaries in the shrine town. The atmosphere became steadily more heated and peaked when the pro-separatist Hurriyat leaders visited. Mast Gul's fiery speeches from the shrine, the 'anti-Indian' slogans and the victory sign by the Hurriyat leaders were repeated in print and shown on television. General Zaki, the military advisor, 'overreacted', observed Major General Arjun Ray. On 17 March, restrictions were placed on the entry of all outsiders including journalists.

More than seven weeks later, on 12 May, the first group of journalists was allowed back in. By that time, the *Charar I Sharief* shrine had been destroyed, the residential area around the shrine gutted, and the militants had vanished. To make matters worse Mast Gul reappeared in Pakistan on 26 May and gave the militant's version of the story. As Kashmiri journalist Zafar Meraj noted, the only information available was propaganda from both sides.

The Committee for Initiative on Kashmir (CIK) in their fact-finding report *Heat and Mast* (1995) exposed the difficulty of verifying the claims and counter claims of who actually set fire to the shrine. Was it the army or Mast Gul? Why were the fire-tenders not let in? Was it a deliberate decision to set fire to the *basti* (colony) around the shrine and drive the militants

into the shrine? Did the militants set fire to the shrine? How did they escape? With no independent witness it was a field for rumours. Moreover, as the CIK team observed, the exclusion of the media “reduced the chances of bringing about a peaceful solution by building up popular pressure on the militants to quit *Charar I Sharief*”.

Ram Mohun Roy, press advisor, in a candid aside said, “We never thought they would blow up the shrine?” With the media excluded, “the militant was thus free to do what he pleased, including destroying the shrine,” wrote Major-Gen Arjun Ray in *Kashmir Diary*. “Tight controls such as banning the media from entry in a particular area led to bizarre reporting that army helicopters flew over the town spraying the shrine with inflammatory [sic] white powder before setting it on fire.” General Ray concluded: “We should learn from *Blue Star* and *Tsrar e-Sharif* and never ever forget the price the country paid for blanketing out information. In sharp contrast, the Second Golden Temple Operation, *Black Thunder* was carried out under the full glare of the media and extensive coverage was encouraged. Even the Hazratbal crises in October-November 1993, was extremely well handled by urging media involvement and keeping journalists in the complete picture.”

b) India’s Sri Lankan misadventure: Cover up

Earlier, we had mentioned the critical observations of the local commanders about the secrecy and lack of an open information policy on the IPKF intervention. The excess of caution on the control of information meant that the Indian troops were also victims of confusion. First, they believed they were invited, then the Sri Lankan Prime Minister asked that they leave (and the Indian Prime Minister V. P. Singh concurred). Major-General Ashok Mehta, who was posted there as field commander, said that he realised how ‘confused’ and demoralised the soldiers were only after reading their comments in the reports of Indian journalists who had breached the curbs on media access to the field. Again, it was through journalists Anita Pratap and Rita Sebastian’s interviews with LTTE head Prabhakaran that he came to understand “what he was thinking”. In militarised conflicts, often the only channel of communication is the media. Silence it, and you will get jingoistic stereotypes of the ‘enemy’, which are useful for propaganda, but clearly not intended to ensure there is an informed understanding of the adversary. It forecloses political ways of resolving the conflict and reinforces militarist and ‘anti-terrorist’ responses.

Had the Sri Lankan and Indian media been given access, they might have given early warning about the “visible flaunting of authority (on the part of the IPKF) and a growing arrogance of power in the behaviour of the jawans and the officers”.⁵⁰⁷ It might have alerted decision makers to the dangers of alienating the very people the IPKF had come to help. Had the media broken the complicity of patriotic silence and discussed in the public sphere the supposed ‘national interest’ of arming and training the Tamil militants, Sri Lanka’s history might have been different. The media – led by ‘official’ sources – deliberately underplayed the reaction of the Sri Lankan people to the 1987 ‘peace accord’⁵⁰⁸ and went along with the official underestimation of the LTTE’s strength.

Major-General Sardesande, who was the Divisional Commander in Jaffna in Sri Lanka, was frustrated by a distant central command that did not understand the value of “Psy-Ops”. “The media bosses in Delhi spiked and canned everything”, he stated. Furthermore, Delhi would not countenance a word that was critical. “Without freedom of expression, the people (of Jaffna) would not feel and accept normalcy (sic) and there would be no credibility”, he wrote in *Assignment Jaffna*.⁵⁰⁹ Without freedom of expression the culture of impunity remained unchallenged.

c) Kargil Conflict: Self Censorship

During the Kargil conflict (1999) – except for a brief interregnum of a news blackout – there was a relative open media policy. The media was taken on ‘escorted’ trips to the front, but even the non-embedded media, largely reported a patriotic discourse. Not surprisingly, the army chief hailed the media as a ‘force multiplier’. There was an acceptable field of coverage of the Kargil conflict. Excluded – by official policy and practice and by the patriotic mindset of journalists and their viewers and readers – was the other story of the cost of the conflict. Media reporting was dangerously intolerant and demonising of the ‘other’ Pakistan, cast as ‘rogue state’ and all Pakistanis as ‘enemy’. It branded as anti-national dissenting voices that pointed to failures at the highest level of the decision-making process.

⁵⁰⁷ Maj-Gen Sardeshpande, *Assignment Jaffna*, New Delhi, Lancer 1992.

⁵⁰⁸ P Basu, *Indian Foreign Policy and the Media*.

⁵⁰⁹ *Op.cit.*

Given the militarism paraded by the television, calls for a ceasefire and peace were derided and – worse – denounced as unpatriotic. Ultimately, ‘victory’ was a diplomatically negotiated one of ceasefire and safe passage. The closure or “deliberate lies”⁵¹⁰ about this diplomatic line of engagement produced demoralisation among the troops. There was a mismatch between the experience of the jawans and the statements put out by the defence establishment which made the jawans even more sceptical of the mass media.

Kargil was fought as a territorial war with the media compliantly de-linking Kargil from the politics of the Kashmir dispute and ignoring the situation of the people of Kashmir, thus alienating further fellow citizens of India.⁵¹¹ The Vajpayee government de-linked Kargil from Kashmir for obvious political reasons. Was it in the public interest for the media to have uncritically endorsed that decision?

The foreign media re-discovered the forgotten story of the alienation of the people of Kashmir and the alleged excesses by the security forces. *The Independent* (London) reported on the torching of villages in Bandipur, Khargam and Nathpora by the Indian forces. The Indian media chose to ignore it. A well known Indian TV producer explained “I wouldn’t touch the story at this time, because the viewers wouldn’t like to see the army portrayed in a negative light. A post-mortem would be alright”.⁵¹²

No critical scrutiny was acceptable and the media competed with each other to stir up hysteria over the recovery of the allegedly ‘mutilated’ and ‘tortured’ bodies of Indian soldiers. A journalist who discovered similar desecration – the decapitated heads of two Pakistani soldiers hung at an army camp – found that her valid pass to travel back to the field area, had become worthless. The army denied her access.

Was it a question of protecting troop morale? Is troop morale protected by ‘cover up’ or by transparency in exposing and punishing wrongdoing? At a gun position in Drass, an army officer upbraided Sankarshan Thakur (*The Telegraph*) for not supporting the war and referred to a report he had written from the front about the terrible odds that the jawans were up

⁵¹⁰ A G Noorani ‘Kargil Diplomacy’ *Frontline* August 13, 1999.

⁵¹¹ Rita Manchanda ‘Kargil Conflict: war in a media society’ in *Kargil and After* edited by Amitabh Matoo, Afsir Karim, Kanti Bajpai, New Delhi, Har Anand 2000 pp. 73-191.

⁵¹² *Outlook Magazine* July 12, 1999.

against. “It has hurt national interest. It has hurt the *jawans*’ morale,” he was told. “The only thing that the report had probably hurt was the defence establishment because it showed them up as unprepared for the enemy and uncaring for its own soldiers. The officer spoke as if the interests of the defence establishment were the same as the national interest, just as the government tried to confuse their interest with national interest,” wrote Thakur in *Guns and Roses*.

The Kargil discourse was an orchestrated one with distinct closures. In June 1999, at the height of the Kargil conflict, a group of senior officials issued a joint statement to say, “it is essential that political parties, their leaders, analysts... suspend for the time being any focus on the inadequacies and failures that have led to the crisis situation.”⁵¹³ Subsequently, the process of public accountability was to be realised in The Kargil Review Committee.

d) Transparency and Human Rights: reporting on rape as a weapon of war

India’s internal wars in Kashmir, Punjab and Assam are lessons on the costs of a climate of non-accountability and lack of transparency, resulting in the alienation of the hearts and minds of the people. Nowhere is this more evident than in dealing with human rights abuses. Human rights are the propaganda front of internal conflicts, and can be manipulated by both sides. However, public space for exposing human rights abuses is vital for credibility, transparency and accountability. Indeed there is a symbiotic relationship between freedom of expression and human rights violations. Transparency undercuts the culture of impunity that produces human rights violations that in turn drive cycles of revenge.

A human rights audit would reveal the continuing intolerance of the authorities towards seriously engaging on the issue of human rights violations in Kashmir, Punjab and the North East. The rape story is a testimony to the limits of the new openness.⁵¹⁴ The Indian security forces have reportedly routinely used rape in the counter-insurgency campaign against the Naga insurgency in the Naga Hills of North East India.⁵¹⁵ The custodial rape and killing of

⁵¹³ Quoted in A G Noorani ‘*The Kargil Report*’ in *Citizens’ Rights, Judges and State Accountability*, OUP, New Delhi 2002 pp.167.

⁵¹⁴ Wartime sexual violence is now recognised by the International Criminal Court as a war crime.

⁵¹⁵ This was exposed in a petition filed by the Naga Peoples Movement for Human Rights before the Supreme Court, challenging the Armed Forces Special Powers Act. During the army operation ‘Bluebird’ 1987, in Oinam village, Manipur, 11 women were allegedly raped. It was but one instance in a pattern of sexual abuse in India’s ‘periphery’ and therefore ignored by the mainstream national press.

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Manorma Devi (suspected of being a militant with one of the multiple armed groups operating in Manipur) in June 2004 and the Manipur women's naked protest – 'Indian Army, Rape Us' outside the Assam Rifles camp, is testimony to a widespread abusive practice under the regime of the Armed Forces Special Powers Act (AFSPA). Indeed for four years, Irom Sharmila, has been on hunger strike in protest against the AFSPA. The media's indifference reflects insensitivity not only to human rights issues but to gender as well.

During the deployment of the Indian Peace Keeping Force in Sri Lanka (1987-1990), in the Sri Lankan media there were several reports of rape by the Indian troops. Major-General Sardeshpande, the former Divisional Commander (Jaffna) of the IPKF, has acknowledged that rape, looting and needless destruction happened. After March 1988, the General claimed the occurrence dropped to zero. But there was no public process of acknowledgement or accountability for victims. Dhanu, the suicide bomber who killed former Prime Minister Rajiv Gandhi, was one of the women alleged raped by the IPKF and reportedly chosen by LTTE chief Prabhakaran specifically because of that.

Sri Lanka was an out-of-country operation and the NorthEast too, was on India's periphery and not in the consciousness of the national media, but Kashmir was in the national and international media's eye. In Kashmir, the army engaged in counter-insurgency operations, was forced to consider the issue of human rights violations. Accordingly, a Psy-Ops strategy was devised. In 1995 an ad hoc media liaison cell was created within the army. The allegations of rape were pivotal to this process. The security forces denied allegations of rape as "wild". Lt-Gen Krishan Pal, Commander of the 15th Corps, Srinagar, maintained that 9 out of 10 rape allegations were false. "You hear stories of molestation and custody killings every time any unit is effective against militants," he said.⁵¹⁶ Yet, there is also a history of documented reports of rape by the security forces and a pattern of impunity.⁵¹⁷

⁵¹⁶ For details see interview with General Krishna Pal, Rita Manchanda "Lies, Damn lies" *Sunday Magazine*, 1999

⁵¹⁷ See Committee for Initiative "Kashmir Imprisoned" Jul 1990; Human Rights Watch Global report on Women's Human Rights "Rape in Kashmir" 1995, Women's Initiative 1994 "The Green of the Valley is Khaki".

Investigations have been little more than a cover-up, rather than an inquiry and those responsible are rarely, if ever, held to account.⁵¹⁸ Nonetheless, reports in the international press, the alternate media and by human rights organisations have kept the pressure on and can lay claim to some credit in countering the abuse. In a rape incident near Pattan, the Army promptly put out a press release about a summary court martial, “Such openness and promptness takes the sting out of militant propaganda.”⁵¹⁹

So have the Armed Forces become aware of the need to communicate with the public, to involve the media, especially in a situation of internal conflict or civil war? In terms of structure, the ad hoc media liaison cell, created in August 2003, has been made permanent and upgraded. The new policy is rapid response and interaction with all journalists, not only the ‘friendliest’,⁵²⁰ “...because we are not doing the wrong thing”, explained Lt-Gen Deepak Summanwar, spokesperson for the Army Public Information Unit. The test for openness is transparency in determining possible wrongdoing. It is important to remind ourselves that the Psy-Ops framework was not designed to promote democratic accountability, but to manipulate information.

Ceasefire & Peace Processes

The various ceasefire and peace processes have been used, by the protagonists, over the years, to limit freedom of expression. Negotiations carried out under a veil of secrecy have resulted in non-democratic and often unsustainable peace accords. Peace accords are negotiated between two armed protagonists and often get reduced to new alignments for power-sharing rather than a restructuring that supports a rights- and justice-based agenda. Where the process is more open and enables an environment of informed public discussion, there is a much greater possibility of a sustainable peace accord and a more democratic peace agenda.

For example, in the case of the five-decade old Naga (self-determination) insurgency, the peace process between the government of India and the National Socialist Council of Nagalim

⁵¹⁸ National Human Rights Commission (NHRC) claims about 20% of the allegations of excesses by the security forces are baseless. Of 552 complaints received by the army from January 1990 to March 1997, 528 were found to be baseless. *The Hindu*, April 29, 1997. See also Army Public Relations Office Release, “Human Rights Record of Army (undated).

⁵¹⁹ Maj-Gen Arjun Ray: *Kashmir Diary: Psychology of Militancy*; see also the acquittal of a Major accused of raping a Mother and daughter in rural North Kashmir in November 2004. DNA tests cleared him. *The Himalayan Times* January 21, 2005.

⁵²⁰ Subir Bhaumik ‘Soldier, Journalists, Rebels’ in *Reporting Conflicts* SAFHR Paper no 9 May 2001.

(NSCN-IM) has been sustained over the past eight years to a large extent because of the emergence of plural stakeholders in the peace process, i.e. the Naga social organisations, especially the women's groups. Their ability to participate in the peace process and democratise the peace agenda, hinges on the degree of openness of the process. For example, the continuing absence of representatives of Naga social organisations in the ceasefire monitoring mechanism has exacerbated misunderstandings over claims and counter claims of violations.⁵²¹ Greater transparency and openness keeps both sides accountable to the people in whose name they speak and provides a check against a 'deal' being struck behind the people's back. Naga history has been full of accords that divided the people and led to more violence.

The journey towards opening up the field of freedom of expression is one full of detours marked by restrictions introduced in the interest of 'public order' and 'national security. Once incorporated in the legal frameworks, they are rarely dropped and cumulatively serve to encroach on fundamental freedoms in conflict and peace situations. Many of the restrictions on the statutes are a legacy of colonial rule, left intact by post independence regimes in the region.

More disturbing, as we have noted, is the overall climate of criminalisation of dissent that has produced a 'mainstream' social consensus that makes unacceptable or illegitimate protests and criticism, such as 'poor' people's struggle for land rights and protests against processes of development and globalisation that dispossess and displace them; protests against histories of social and economic injustice; and discussion of claims for self-determination.

Five decades after independence, India's democratic culture faces the challenge of an increasing climate of intolerance. Most worrying is an emerging social consensus that passively accepts the criminalisation of dissent. Archaic laws like the Official Secrets Act have been brought back into use along with new forms of anti-democratic laws like POTA. Still, political resistance to POTA and its eventual repeal; popular mobilisation for a Right to Information Bill (2004) and collective protests against censorship and the shrinking space for dissent, indicate that the popular forces for defending freedom of expression are present. They

⁵²¹ Rita Manchanda, *We Do More because We Can: Naga Women in the Peace Process*, Kathmandu ,SAFHR, 2004

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need to be strengthened. There is a need to build national support and to seek regional and international solidarities, for the challenges are growing.

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‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of all frontiers.’

Article 19 of the Universal Declaration of Human Rights

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