



**ARTICLE 19**

**GLOBAL CAMPAIGN FOR FREE EXPRESSION**

## MEMORANDUM

on the

Ordinance Amending Some of the Nepal  
Act Relating to the Media, 2062 (2005)

London  
October 2005

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## 1. Introduction

On 9 October 2005, King Gyanendra of Nepal promulgated Ordinance 2062 – Amending Some of the Nepal Act Relating to the Media (the Ordinance). A copy of the Ordinance is provided in Annex A.<sup>1</sup> ARTICLE 19 is gravely concerned about this Ordinance which is in flagrant violation of international law and which is clearly designed to further the government’s control over the media and further restrict the distribution of news and information within Nepal. Given the recent seizure of power by the King and the imposition of a state of emergency in February for several months, the role of the independent media to inform the public could not be more crucial. The imposition of this Ordinance is a highly regrettable development in Nepal which, until recently, had a vibrant and independent media sector.

The Ordinance represents a continuation and intensifying of the repression of the media as imposed during the state of emergency from February 2005. During this period a number of newspapers and television stations were shut down, and FM and community radio stations were not allowed to broadcast any ‘news’, following a Notice given by the King on 3 February 2005.<sup>2</sup> The state of emergency was lifted on 29 April 2005 and the six-month ban imposed by the Notice expired on 2 August 2005. The ban on news broadcasting, however, continued to be enforced despite the fact that the Nepalese Supreme Court, on 10 August 2005, held that the government had no right to take action against Rainbow FM for defying the ban on airing news programs on FM radio.<sup>3</sup> Two days earlier, Rainbow FM had filed suit against the government for threatening to cancel its broadcast licence. The government is now using the Ordinance to prevent the broadcast of any news damaging to the King or members of the royal family. Police attacked the premises of Kantipur FM on 21 October 2005 and the government issued a 24-hour ultimatum on 26 October 2005 to Kantipur FM to produce a formal explanation for its failure to comply with the Ordinance or face revocation of its broadcast licence.<sup>4</sup> Further, the Ministry of Information and Communication issued a letter on 17 October 2005 which instructed that “all the F.M. stations are requested not to broadcast ‘news programme’ according to the newly issued government ordinance”.

The key provisions of the Ordinance are as follows:

- significantly extending restrictions on the importation of foreign publications;
- providing for the Press Council, a body appointed by the government, to recommend that the government cancel a journalist’s professional certification in the event of repeated violations of the professional Code of Conduct, which is adopted and applied by the Press Council;
- imposing new, retroactive rules which limit media ownership to two of radio, television and/or newspaper outlets;

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<sup>1</sup> For the preparation of this Memorandum, we have relied upon a translation of the Ordinance provided by the Office of the High Commissioner of Human Rights, the UN body with operational responsibility for promoting human rights (information about the office and UN human rights activities is available on their website: <http://www.ohchr.org/english/>). ARTICLE 19 takes no responsibility for the accuracy of this translation or for comments based on mistaken or misleading translation.

<sup>2</sup> [http://www.cpj.org/Briefings/2005/nepal\\_05/laws.html](http://www.cpj.org/Briefings/2005/nepal_05/laws.html).

<sup>3</sup> Asia Media, *NEPAL: Supreme Court ruling fails to allay the fears of FM radio stations*, 2 September 2005, <http://www.asiamedia.ucla.edu/nepal/article.asp?parentid=29334>.

<sup>4</sup> International Federation of Journalists, *Government threatens to revoke radio station’s licence*, 27 October 2005, <http://www.ifj-asia.org/page/nepal051027.html>.

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- prohibiting broadcasters from broadcasting from more than one location without government permission;
- extending wide-ranging prohibitions on what may be broadcast – including matters which aim to “create unusual fear and terror in the general public” and which “misinterpret, disregard, insult or undermine any caste or ethnicity, language, religion or culture” – from advertisements to all programmes; and
- substantially increasing penalties to a punitive level – often by ten-fold and, in the case of defamation by 100-fold for the media – for breach of a range of restrictions on media activities, thereby exerting a chilling effect on freedom of expression.

This Memorandum provides an analysis of the Ordinance, which we understand is the subject of litigation in the Nepalese Supreme Court.

Our analysis is based upon general international standards regarding freedom of expression binding on Nepal, as reflected, in part, in ARTICLE 19’s *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles),<sup>5</sup> a set of standards based on international law and practice, as well as comparative constitutional law and best practice in countries around the world. Reference will also be made to other standards, for example from regional systems for the protection of human rights, which, while not formally binding on Nepal, provide good evidence of generally accepted understandings of the nature and scope of the right to freedom of expression.

The next section of this Memorandum discusses the importance of freedom of expression and outlines Nepal’s international and constitutional obligations to ensure respect for this key right. Section Three analyses the Ordinance in the light of those obligations, identifying key areas where change is needed to bring the Ordinance into line with international standards and providing concrete recommendations to this end.

## 2. International and Constitutional Standards

### 2.1. The Importance of Freedom of Expression

It is difficult to overestimate the importance of freedom of expression to the well-being of a society. The happiness of a nation depends, in large measure, on the quality of its government, and the quality of government depends on the free flow of information and ideas. No government can help its subjects improve their lives if it does not know what their concerns and problems are. If citizens can speak their minds without fear, and the media can report what is being said without interference, the government will have an opportunity to adjust its policies to meet the concerns of the public.

The international community has repeatedly recognised the right to freedom of expression and information as key human right, as reflected in numerous declarations of international organisations and rulings of both international and national courts. In its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),<sup>6</sup> which states:

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<sup>5</sup> London, April 2002. Available at: [www.article19.org/docimages/1289.htm](http://www.article19.org/docimages/1289.htm).

<sup>6</sup> 14 December 1946.

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Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

At the international level, Article 19 of the *Universal Declaration of Human Rights* (UDHR)<sup>7</sup> contains the principal statement of the right. It reads as follows:

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 is a resolution of the United Nations General Assembly and, as such, is not directly binding on States. But large parts of the UDHR, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>8</sup>

The *International Covenant on Civil and Political Rights* (ICCPR),<sup>9</sup> a legally binding treaty which Nepal ratified on 11 March 1979, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, again in Article 19.

### 2.2. Broadcasting Freedom

The guarantee of freedom of expression is of particular importance to the media, including the broadcast media, whether private or public, due to their pivotal role in informing the public. Without due protection for media freedom, the public cannot fully realise its own right to receive information.

The special significance of the media, including broadcasters, has been widely recognised by national and international courts and tribunals. In the words of the Inter-American Court of Human Rights: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>10</sup> The Supreme Court of South Africa has held:

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 advance communication between the governed and those who govern. The press must act as the watchdog of the governed.<sup>11</sup>

The European Court of Human Rights has consistently emphasised the “the pre-eminent role of the press in a State governed by the rule of law.”<sup>12</sup> It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in [...] free political debate [...].<sup>13</sup>

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<sup>7</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>8</sup> See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit).

<sup>9</sup> UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

<sup>10</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5, para. 34.

<sup>11</sup> *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168 at 175-6 (Transvaal Provincial Division).

<sup>12</sup> See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>13</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

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Ensuring the freedom of broadcasters is thus key to the guarantee of freedom of expression. Two principles are key to effective broadcast regulation. First, any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity of broadcasting. The airwaves are a public resource and they must be used for the benefit of the whole public, including people with minority views or interests.

### 2.3. Independent Regulatory Bodies

Although some regulation of the broadcast sector is necessary, it is important that the purpose of regulation is always to promote broadcasting freedom, rather than to constrain it. For this to be possible, responsibility for broadcast regulation must lie with a body which is independent from both the government and the broadcast sector.

The importance of regulatory independence in the broadcast sector has been recognised in international instruments, the practice of States and in ARTICLE 19's Principles. The need for protection against political or commercial interference was, for example, stressed in a recent Joint Declaration by the three specialised mandates for the protection of freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – who stated:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>14</sup>

### 2.4. Pluralism

The broadcast media are a key vehicle through which the public exercises its right to freedom of expression. As discussed above, governments have an important obligation not to impede the work of the media. But mere non-interference is often not enough to guarantee the public access to a wide variety of sources of information. Positive measures are necessary, for example, to prevent monopolisation of the airwaves by one or two players. Article 19 of the ICCPR mandates the implementation of such measures, a point stressed by the United Nations Human Rights Committee in its General Comment on that article:

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

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”<sup>16</sup> The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more

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<sup>14</sup> Adopted 18 December 2003.

<sup>15</sup> Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), U.N. Doc. HR/GEN/1/Rev.1 at 11 (1994).

<sup>16</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.

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precisely, that there be no individuals or groups that are excluded from access to such media.”<sup>17</sup> This implies that the airwaves should be open to a range of different broadcasters and that the State should take measures to prevent monopolisation of the airwaves by one or two players. However, these measures should be carefully designed so that they do not unnecessarily limit the overall growth and development of the sector.

### 2.5. 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 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

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.

A similar formulation can be found in the European, American and African regional human rights treaties.<sup>18</sup> This has been interpreted as requiring restrictions to meet a strict three-part test.<sup>19</sup> International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>20</sup>

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>21</sup> Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>22</sup>

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<sup>17</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.

<sup>18</sup> The *European Convention on Human Rights* (ECHR), adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953, the *American Convention on Human Rights*, adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978 and the *African Charter on Human and Peoples’ Rights*, adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>19</sup> See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

<sup>20</sup> See, for example, *Thorgeirson v. Iceland*, note 12, para. 63.

<sup>21</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

<sup>22</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

## 2.6. Constitutional Guarantees

The right to freedom of expression is enshrined in Article 12(2)(a) of the Constitution of Nepal as follows:

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

However, the same article provides that this right may be restricted as follows:

[N]othing 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 jeopardize the harmonious relations subsisting among the peoples of various castes, tribes or communities, or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality;

This proviso has been used by the King and government to introduce legislation, including the Ordinance, which seriously undermines media freedom. At the same time, the requirement that any restrictions be reasonable could be interpreted as being very similar to the requirement of necessity under international law and similar terms have indeed been interpreted in this way by national courts.<sup>23</sup>

## 3. Analysis of the Ordinance

The Ordinance amends the Radio Act 2014 (1957), the National News Agency Act 2019 (1962), the Press and Publications Act 2048 (1991), the Press Council Act 2048 (1992), the National Broadcasting Act 2049 (1993) and the Defamation Act 2016 (1959).

### 3.1. Radio Act 2014 (1957)

The Ordinance amends the Radio Act only by extending the categories of persons who do not require a licence under that Act because they already hold a licence under the Telecommunications Act 2053 (1997).

We note, however, that, together, the Radio Act and the Telecommunications Act bestow on the government sweeping powers to control the ownership of radio and telecommunications services and equipment. The Radio Act prohibits anyone from holding, making and using a “radio machine” without a licence. The term “radio machine” is broadly defined to include items such as radio transmitters, television transmitters, amateur radios, cordless microphones, radio controlled toys and models, and walkie talkies. The power to grant licences is given to the government, thereby enabling it to control who owns a very wide variety of telecommunications equipment.

The Telecommunications Act, in turn, requires all persons operating telecommunications services to obtain a licence and also places the power to approve licences directly in the hands of the government controlled telecommunications agency. It also gives the Government wide powers to take control over the running and monitoring of the telecommunications services.

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<sup>23</sup> See, for example, *Chavunduka and Choto v. Minister of Home Affairs and Attorney-General*, 22 May 2000, Judgment No. S.C. 36/2000 (Supreme Court of Zimbabwe).



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Both of these provisions fail to meet the standards noted above, namely that licensing procedures should be overseen by an independent regulatory body.<sup>24</sup>

### **Recommendations:**

- Oversight of licensing should be done by a body that is independent of government.
- No licence should be required simply to own the equipment noted above. The need for a licence should be restricted to broadcasters and telecommunications services providers.

### 3.2. National News Agency Act 2019 (1962)

The National News Agency was established under this Act. This agency is State owned and subject to government control, and it is mandated to distribute news “with the national viewpoint in mind”. It is not allowed to distribute news that may undermine Nepal’s friendly relations with other nations or world peace, or news reports which are inspired by party feelings. In practice, the News Agency, as a State body, distributes news that has a pro-government stance. Pursuant to section 32(1) of this Act, no other news agency may “collect or distribute news items about the Kingdom of Nepal inside the Kingdom of Nepal.” Foreign news agencies may, however, collect news for foreign distribution.

Pursuant to the original section 32(2) of this Act, foreign news agencies could sell or distribute news within the Kingdom only through the National News Agency or government. The Ordinance, among other things, amends section 32(2), so that foreign news agencies may sell or distribute news items within Nepal upon obtaining permission the government. Although this is a slight improvement over the previous situation, these provisions nevertheless remain seriously problematic and in clear breach of international standards. The right to establish media outlets, including news agencies, is part of the right to freedom of expression and is respected in most other countries.

### **Recommendation:**

- Section 32 of the National News Agency Act should be repealed in its entirety.

### 3.3. Press and Publication Act 2048 (1991)

This amendment is one of the most far-reaching and most concerning provisions of the Ordinance. The Press and Publications Act (PPA), among other things, sets out restrictions in section 14 on the content and distribution of printed material, including newspapers and magazines. Section 15 grants the government wide-reaching powers to restrict the publication of information relating to subject, incident or region, in the “with the interests of the nation in mind”. When the state of emergency was declared on 1 February 2005, the government used its powers under the PPA to ban the publication of news, information or other printed material which it deemed necessary to protect national security, a term it interpreted extremely widely. The ban was due to remain in place for six months but, although the state of emergency has since been lifted, from reports ARTICLE 19 has received, the extensive ban on news coverage under the PPA remains largely in place.

<sup>24</sup> See Principle 19 of the ARTICLE 19 principles.

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The Ordinance makes minor amendments to section 14 of the PPA, which prohibits, among other things, the publication of any material which foments “hatred or disrespect, contempt or malice” towards the King or a member of the royal family, which undermines “the integrity and sovereignty of the Kingdom of Nepal” or which creates “animosity and spread communal ill-feelings”. The Ordinance also significantly extends the scope of the prohibitions in section 16, controlling the import of foreign publications, by making this activity subject to the restrictions on sections 14 and 15, and by adding another ground for prohibiting the import of foreign publications, namely “assisting, supporting or encouraging terrorist, terrorism and destructive activities”.

ARTICLE 19 considers that the prohibitions set out in sections 14-16 of the PPA, as amended, are both unduly vague and vastly overbroad. The ICCPR only permits restrictions on freedom of expression that are clearly set out in law. This has been interpreted to mean not only that the restriction is based in law, but also that the relevant law meets certain minimum standards of clarity and accessibility so that individuals may be able to foresee what is prohibited.

The scope of these restrictions is extremely unclear given the vague terms they use. It is not possible for individuals to know in advance whether a particular statement might fall foul of these provisions, a requirement of the provided by law part of the test for restrictions on freedom of expression. This is exacerbated by the failure to define the terms “foment hatred”, “disrespect”, “contempt”, “malice” and “ill-feeling”.

Furthermore, these terms are vastly overbroad and could be read as encompassing a vast range of expression. They may be contrasted with the much more specific language that the ICCPR employs in the context of hate speech, which permits restrictions only on expressions which actually incite hatred: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.<sup>25</sup> The use of the term “encourage” in the new provision on terrorism is particularly problematic, failing to meet the standard of incitement. Indeed, these provisions make it difficult to report on matters of great public interest to know. Reports have been received, for example, that since February 2005, villagers in the Pokhara district have been unable to get any news and that local radio stations were only playing music and newspapers were not publishing any news.<sup>26</sup>

#### **Recommendation:**

- Sections 14, 15 and 16 of the PPA should either be repealed in their entirety or substantially amended so that they are much more clear and narrow in scope.

### 3.4. Press Council Act 2048 (1992)

This Act establishes the Press Council, which serves as a government-controlled watchdog over the media. ARTICLE 19 considers the whole thrust of this Act to be inconsistent with the protection of freedom of expression, which requires the media to be protected from political interference. The Ordinance amends this Act by giving the Press Council the power, among other things, to recommend that the government cancel a journalist’s professional

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<sup>25</sup> Article 20(2).

<sup>26</sup> See *Coups, Kings & Censorship*, International Federation of Journalists, February 2005, p. 8. Available at: [www.ifj-asia.org](http://www.ifj-asia.org).

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certification in the event of repeated violations of the code of conduct adopted by the Press Council.

ARTICLE 19 notes that the practise of journalism is at the heart of freedom of expression and that no one should be barred from access to this profession.<sup>27</sup> Unlike other professions, such as law or medicine, the practise of journalists involves a fundamental right and it is not for the authorities to control access to it through licensing or any other means.<sup>28</sup>

### **Recommendation:**

- The provision in the Ordinance providing for the possibility of cancellation of professional certification should be repealed.

### 3.5. National Broadcasting Act 2049 (1993)

The National Broadcasting Act (NBA) establishes the broadcast regulatory regime, placing the government firmly in control of both broadcast licensing and programming standards. The Ordinance introduces a number of amendments that further restrict broadcasting.

#### *(i) Rules Relating to Ownership*

A new section 6(a) has been added to this Act to the effect that anyone involved in more than two media sectors – defined as radio, television and publication – is required to choose only two sectors and to divest themselves to bring their holdings into line with this. No new licences will be issued which may bring about a breach of this rule.

As discussed above at Section 2.5, Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know. An important aspect of the State’s positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media.

Controlling undue concentration of media ownership may be part of States’ positive obligation, noted above. However, it is incumbent on States’ to fulfil such obligations in a manner that is appropriate and that encourages the development of as diverse a media as possible. Imposing crude restrictions such as that described above does not meet this standard and applying such rules retroactively can be highly problematic. It may be noted that anti-monopolisation rules should not only address cross-ownership but also monopolisation within a sector. If, for example, someone controls all of the national television stations, this clearly undermines the public’s right to receive a diversity of information. Similarly, ownership of very small outlets, even if one is owned in each of the three sectors, hardly represents a threat to pluralism.

<sup>27</sup> See *De Becker v. Belgium*, 27 March 1962, Application No. 214/56 (European Court of Human Rights).

<sup>28</sup> See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10.

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#### (ii) *Restrictions on Broadcasting Content*

The original Section 15 of the NBA imposed a number of very wide-ranging restrictions on the content of advertisements, including material “adversely affecting political parties”, material “of such a nature as to create unusual fear and terror in the general public” and material “contrary to the non-aligned foreign policy of Nepal”. The Ordinance vastly extends their application by making them applicable to all broadcast material.

At least as applied to all broadcasting, these restrictions violate all three of the parts of the test for restrictions on freedom of expression under international law. First, they are too vague to comply with the requirement that restrictions on freedom of expression be prescribed by law. The phrases “unusual fear and terror”, “adversely affecting” and “contrary to” are not defined and susceptible of wide interpretation. Second, the restrictions do not meet a legitimate purpose as required under Article 19(3) of the ICCPR. Criticism of political parties may adversely affect them but its suppression does not serve any of the aims listed in Article 19(3). The same is true of statements contrary to the non-aligned policy of Nepal. Finally, they are vastly overbroad, covering a wide range of legitimate discourse on matters of great public interest. Indeed, the breadth of material that could be caught within the scope of this section could lead to a stifling of public debate and discourse on a range of public interest issues.

#### (iii) *Prohibition on Broadcasting From Other Places*

A new section 11(a) has been added to the NBA, prohibiting the broadcasting of programmes from places without permission from the government or simultaneously from more than one place without permission from the government.

It is not entirely clear to us what this means but we presume that it means that a licensee cannot transmit broadcasts from more than one location without government permission. While it is common for licences to stipulate the location and power of transmitters, to purport to limit these to one is quite unrealistic and will unduly limit the reach of many broadcasters, particularly in a very hilly country like Nepal. Instead, the authorities should operate on the presumption that broadcasters will broadcast from as many locations as they are legitimately able to (for example, in terms of having access to locations and equipment), within the geographic scope of their licence.

#### **Recommendations:**

- The provisions on owning media in more than two sector should be repealed and, as necessary, replaced with carefully tailored provisions that seek to prevent the emergence of unduly monopolistic control over broadcasting in Nepal.
- The extension of the restrictions in section 15 of the NBA from advertising to all programming should be repealed.
- The provision effectively establishing a presumption that broadcasters may only broadcast from one location should be repealed.

### 3.6. Libel and Defamation Act 2016 (1959)

International law recognises that freedom of expression may be limited to protect individual reputations, but defamation laws, like all restrictions, must be proportionate to the harm done.

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It is clear that unduly harsh sanctions, on their own, represent a breach of the right to freedom of expression even if, in all other respects, a particular rule is legitimate.<sup>29</sup>

The Ordinance amends the penalties provided for in the Libel and Defamation Act in two key ways. First, the term of imprisonment for defamation outside of the media is reduced from two years to one year. Second, separate rules are provided for in relation to defamation in the media, and these maintain the possibility of a sentence of two years' imprisonment and dramatically increase the maximum fines by 100-fold to 500,000 Rs. (approximately US\$7,000); even the minimum fines are 40-fold higher than the previous maximum.

ARTICLE 19 is of the view that criminal defamation laws *per se* violate international standards because they do not meet the requirement for the restriction to be proportionate to the legitimate aim. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression and is disproportionate to any harm done. Furthermore, less restrictive civil law penalties are adequate to redress any harm done. The threat of custodial sentences for defamation even more clearly breaches the right to freedom of expression.

Numerous international statements attest to this fact. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concerns over the possibility of custodial sanctions for defamation.<sup>30</sup> The UN Special Rapporteur on Freedom of Opinion and Expression has asserted that imprisonment is not a legitimate sanction for defamation.<sup>31</sup> In his report to the UN Human Rights Committee in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.<sup>32</sup> Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel".<sup>33</sup>

Furthermore, the very dramatic increase in fines for defamation penalties also has serious consequences for the protection of freedom of expression, exerting a serious chilling effect on the publication of material for fear of attracting substantial punitive provisions. Dramatic ten-fold increases in fines have also been put in place for other laws, including the PPA, the National News Agency Act and the NBA.

### Recommendations:

- All criminal defamation provisions should be repealed and replaced, where necessary, with appropriate civil defamation laws. At a minimum, imprisonment should be removed as a possible sanction for defamation.
- The dramatic increase in fines for defamation and other breaches of the law should be reconsidered; where appropriate (particularly in the context of

<sup>29</sup> See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No.18139/91.

<sup>30</sup> For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).

<sup>31</sup> *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

<sup>32</sup> See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001, para. 47.

<sup>33</sup> See, for example, Resolution 2000/38, 20 April 2000, para. 3.

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defamation), non-pecuniary remedies should be emphasised.

## **Annex -The Ordinance**

### **Ordinance Amending some of the Nepal Act Related to Media**

**No. 55) Kathmandu, 9 October 2005 (Additional Issue 40)<sup>34</sup>**

***Preamble:***

Whereas it is expedient to amend some of the Nepal Acts related to media and as parliament is in recess at present;

His Majesty King Gyanendra Bir Bikram Shah Dev has promulgated this Ordinance in accordance with Article 72 of the Constitution of the Kingdom of Nepal 2047 (1990).

***1. Short Title and Commencement***

(1) This Ordinance may be called the ‘Ordinance designed to amend some of the Nepal Acts related to Media, 2062’.

(2) This Ordinance shall come into force immediately.

***2. Amendment to Radio Act 2014 (1957):*** Proviso of Section 3 of Radio Act 2014 (1957) has been replaced with the following proviso:

“Provided that a person licensed to operate telecommunications services under the Telecommunications Act, 2053 or a customer using the telecommunications services through such persons or any person or corporate body licensed to broadcast programs through satellite, cables or other communication means, air educative, entertaining and information-oriented programs by establishing frequency modulation broadcasting system or broadcast any programs by establishing a satellite station transmission center or a customer using this broadcast through such licensed person or corporate body shall not be required to obtain license under this Act to hold, make or use radio machine regarding telecommunications or broadcasting.

***3. Amendment to National News Agency Act, 2019 (1962):*** The National News Agency Act, 1962 has been amended as follows:

1. Subsection ‘5(a)’ has been added after Section 30 (5) as given below.

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<sup>34</sup> English translation of The Ordinance, provided by the UN Office of the High Commissioner for Human Rights, 26 October 2005.

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“5(a) In case any person is found to collect or disseminate news violating Section 32, they will be punished with a fine ranging from Rs 10,000 to Rs 500,000.”

2. Section 32 (2) has been replaced with Subsection (2) as below:

(2) News Agencies pursuant to Subsection (1) shall be entitled to sell their news throughout the Kingdom of Nepal with permission from His Majesty’s Government.

Provided that there is no need to obtain permission from His Majesty’s Government for selling or distributing news to Agency.

**4. Amendment to Press and Publication Act, 2048:** The Press and Publication Act, 1991 has been amended as below:

(1) In Section 14,

(a) The words “of His Majesty” in Clause ‘a’ has been replaced with “of His Majesty or members of royal family.”

(b) The following ‘C(1)’ has been added after Clause (C)

“c(1) ‘encouraging acts that are deemed as crimes under current laws.”

(2) In Section 16 (1),

(a) The words “matters, news, information or other reading materials banned or prohibited for publication under Section 14 and 15 or” have been added to the beginning.

(b) Clause (d) has been replaced with the following Clause (d)

“(d) “assisting, supporting or encouraging terrorist, terrorism and destructive activities,”

(c) Clauses (b) and (e) have been removed.

(3) The words “a fine of not more than Rs. 10,000” have been replaced with “a fine from Rs 10,000 to Rs 100,000” in Section 27.

(4) The words “a fine of not more than Rs 5,000” mentioned in different places of Section 28 have been replaced with “a fine from Rs 5,000 to Rs 50,000.”

(5) The words “a fine of not more than Rs 5,000” have been replaced with “a fine from Rs 5,000 to 50,000” in Section 29.

(6) The words “a fine of not more than Rs 5,000” have been replaced with “a fine ranging between Rs 5,000 and 50,000” in Section 30.



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**5. Amendment to Press Council Act, 2048:** In Section 12 (2) (d) of the Press council Act, 1992, the words “or to cancel his press representative certificate or temporary press representative certificate” have been added after “for suspension, in whole or part, of.... “

**6. Amendment to National Broadcasting Act 2049:** The following amendments have been made to National Broadcasting Act, 1993:

- (1) The words “or television” have been removed from Clause (c) of Section (2)
- (2) The words “news-based programs” have been replaced with “informative programs” in Section (5) and the following explanation has been added.

*“Explanation: For the purpose of this Section “informative programs” denotes any programs designed with a view to providing information or raising people’s awareness on health, education, population, environment, weather, road transportation or those related with development activities.”*

- (3) Section 6(a) has been added after Section (6).

“6(a) **No license or certificate shall be provided:** Notwithstanding anything contained in prevailing laws or elsewhere in this Act no person or corporate body shall be provided with a license or certificate for more than any two of radio, television and publication either at a time or time by time.

(2) Notwithstanding anything contained in prevailing laws or elsewhere in this Act, in case any person or corporate body has obtained a license or certificate of radio, tv and publication prior to the commencement of this Section, such person or corporate body has to opt for any two of the radio, television and publication for broadcasting or publication within a year from the commencement of this Section and a separate individual, institution or management should take care of broadcasting or publication in terms of the remaining.

(3) In case any person or organization with a license or certificate fails to opt for broadcasting or publication of any two of radio, television or publication within the period stipulated in Subsection (2) or fails to make arrangements for broadcasting or publication by a separate person, corporate body or management, HMG shall revoke the license of the person or corporate body issued for broadcasting of radio or television.”

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(4) The words “any corporate body, or a native or foreign person in joint investment” in Section 9 (1) have been removed.

(5) Section 11(a) has been added after Section 11.

“11(a) No one shall be allowed to broadcast programmes from other places without permission: No broadcasting agency shall be entitled to broadcast its programs simultaneously from other than one place without obtaining permission from His Majesty’s Government.”

(6) Section 15 has been replaced with following Section 15.

“(15) **Shall not be entitled to broadcast:** No one shall be entitled to broadcast any materials listed below:

- a. Matters adversely affecting political parties.
- b. Materials of vulgar type.
- c. Materials with object to remove government by using violent force.
- d. Materials aimed to create unusual fear and terror in the general public.
- e. Materials which misinterpret, disregard, insult or undermine any caste or ethnicity, language, religion or culture.
- e. Materials which discriminate, humiliate, disrespect or undermine any caste on the basis of their living in a particular place.
- g. Matters contrary to the non-aligned foreign policy of Nepal.
- h. Matters or materials banned or prohibited for publication under current laws.”

(7) The words “a fine of not more than Rs 10,000” have been replaced with “a fine from Rs. 10,000 to Rs 100,000” in Subsection (2) of Section 17.

#### 7. **Amendment to Libel and Defamation Act, 1959:** In Libel and Defamation Act, 1959,

(1) The words “if published” have been replaced with “If published or broadcast” in Section 3.

(2) Section 5 has been replaced with following Section 5.

“(5) Penalties for defaming, or broadcasting or publishing any matter which may defame others:

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- (1) In case any person defames others, he shall be punished with a fine of not more than Rs 5,000, or imprisonment for a term not exceeding one year, or both.
- (2) Notwithstanding anything contained in Sub-Section (1), if any person broadcasts or publishes through electronic or other mass media knowing or with reasonable grounds to believe that such action may cause the defamation of others, he shall be punished with a fine ranging between Rs 200,000 and Rs 500,000, or imprisonment for six months to two years, or both.
- (3) The words “printed or inscribed” mentioned in several places of Section 6 have been replaced with “published or broadcast” and the words “a fine of not more than Rs 100” have been replaced with “a fine ranging between Rs 5,000 and Rs 50,000.”
- (4) The words “a fine ranging between Rs 5,000 and Rs 50,000” have replaced in prevailing laws or elsewhere in this Act “a fine ranging between Rs 100 and Rs 5,000” in Section 7.
- (5) The words “a fine ranging between Rs 5,000 and Rs 50,000” have replaced “a fine ranging between Rs 100 and Rs 5,000” in Section 8.
- (6) In Section 10, the words “a fine ranging between Rs 5,000 and Rs 50,000” have replaced “a fine ranging between Rs 500 to Rs 5,000” and “a fine ranging from Rs 100 to Rs. 1,000” has been replaced with “a fine ranging between Rs 10,000 and Rs 100,000.”