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MEDIA AND FREEDOM

The Right to Information

In the aftermath of the 1 June 2001 Royal Massacre, two themes have concerned us a lot: our right to information regarding what happened on that fateful night inside the Narayanhiti Palace and freedom of the press. Almost every commentator of some worth has already expressed his (alas our public commentators are overwhelmingly male) views on these two themes. I wish to reiterate some of what has already been said by them. Then I want to suggest that our right to information and the freedom of the press are derivatives of a more fundamental right guaranteed by the Constitution of Nepal, 1990: our freedom of thought and expression.

First let us discuss our right to information. As has been correctly pointed out by several commentators, citizens of Nepal have the right to information regarding all aspects of what happened in the Narayanhiti Palace on 1 June. Article Sixteen of our Constitution gives every Nepali citizen the right to *demand*

and receive information about all subjects of public importance. Had the information bureaucracy of the Palace or the government been better managed, this right of the Nepali people would have been honoured through an initial announcement early in the morning on 2 June stating the known facts of the case. This announcement could have been made via all forms of the state-owned media and it could have encompassed details about who had been killed, who had been injured, and where they were being treated. Such an announcement could have also indicated where the event had taken place (the physical location and social occasion) and when. It could have also stated then that the details about how such an event unfolded would be made available to the Nepali people at a later occasion after the concerned constitutional bodies had had a chance to meet and decide the course of inquiry.

In the absence of such an announcement from relevant official quarters, Nepali people resorted to means that were accessible to them to exercise their right to information. Phone calls to sources in the know or just ones relatives, consumption of international electronic media (television, radio and the internet), face-to-face discussions to exchange information and similar activities must be seen in this light. When these activities too could not satiate demands for information, people came on the streets asking for more. Instead of calling these people *udanda* and *arajak* (aggressively extremists and anarchists as the government did) or rumour-spreaders (as some respectable media commentators have done), we should interpret their actions as sovereign agents seeking means to exercise their right to information. That both the Palace and the state did not have institutional capacity to respond to their demands can hardly be construed as the fault of the people who came on the streets. And those who quote the last seven lines of Bhupi Sherchan's

immortal 70-line poem on ours being a country of rumours on their way to a patronizing analysis of so-called rumour-spreaders, might want to reread its first 48 lines to think about how the best of our poets characterized the process that give rise to *hallas*.

Second let us now pay some attention to freedom of the press as a concept. There is no point in rehearsing all the arguments that have been made on behalf of or against the arrest of the editor and publishers of *Kantipur* following its publication of an article by the Maoist leader Baburam Bhattarai related to the Narayanhiti massacre. However for the purposes of this analysis, it is important to divide what has been said in some broad categories. The first set of pro-state commentators have said that *Kantipur* does not have the right to publish an opinion-piece in which “objectionable” conclusions have been drawn regarding what caused the events of 1 June. They add that such writings could generate grave actions from the people and hence to protect them, freedom of the press must be limited. The second set of commentators have said that freedom of the press must not be limited but the editor of *Kantipur* made a mistake in publishing Bhattarai’s article at a time when the “nation was undergoing a crisis.” The third set of commentators has defended *Kantipur*’s right to publish even objectionable opinion pieces as an instance of the freedom of the press.

There might be other ways to evaluate these three positions but I would like to suggest that the most pertinent way to do so is to ask what in fact is the basis for the freedom of the press. Although I am not a lawyer or a student of constitutional niceties, it seems to me that the freedom of the press is a derivative of the more fundamental freedom that guarantees our freedom of thought and expression. This latter freedom emanates, in my opinion, from the constitutional location of the sovereignty of Nepal with its people. Interpreted this way, the first two of the above positions

are hardly tenable. The provision regarding freedom of thought and expression, to be of any worth, must guarantee the freedom to say the most absurd, outrageous, illogical, and stupid of things, irrespective of the timing. People's sovereignty means that their intelligence must be respected. They must be trusted to judge how convincing or stupid anyone's argument is and any attempt to patronizingly offer them "protection" from such arguments must be construed as a violation of their position as sovereign agents guaranteed by our Constitution. The people must be expected to challenge the soundness of any analysis through alternate analyses and any legal arrangements that qualify this position must be seen as unconstitutional and challenged as such.

To conclude then, I want to emphasize that if we want to preserve some of our hard-own rights as citizens of Nepal, we need to go back to debating and promoting the fundamental bases of those rights and not be caught in the war of words regarding their relatively less important derivatives.

Exercising the Right to Information

Nepal still does not have a Right to Information Act. About four years ago, there was a lot of discussion regarding a draft Act that had been prepared by some media-related organizations. However our parliamentarians never passed a bill on this theme when they had a chance. In the absence of such an Act, a Supreme Court (SC) decision of 10 years ago provides legal guidelines for media practitioners and activists to secure information from the State. This short essay highlights the SC guidelines and the draft Act.

By actively searching for information about development projects that had been shrouded in governmental secrecy and by filing cases of public interest litigation (PIL) that has forced the SC of Nepal to make decisions impacting the citizen's right to know, certain Nepali activists and NGOs have contributed to the legal and social opening up of Nepali society. An example of this would be the case between Gopal Siwakoti 'Chintan' and

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others versus His Majesty's Government (HMG), Ministry of Finance and others filed in 1993.

This case is known in general parlance as the Arun III case because it refers to a hydroelectric project that was going to be developed on the Arun River in eastern Nepal with the financial participation of the World Bank and some donor countries. 'Chintan' and his colleagues had asked for information regarding this development project from the Ministry of Water Resources and other relevant government offices. When they were stonewalled, they filed a PIL against the concerned HMG ministries by invoking Article 16 of the 1990 Constitution which states that "Every person shall have the right to demand and receive information on any matter of public importance."

By referring to the Directive Principles of the State as elaborated in Articles 24 through 26 of the Constitution, the SC judged in 1994 that the particular project was of public interest and hence it was a matter of public importance. In other words, the petitioners were correct in seeking the SC's help in exercising their right guaranteed by Article 16. But since there was no provision in the Constitution with respect to the procedures regarding the exercise of this right, the SC provided an eight-point guideline to obtain information from government offices until the Parliament passes specific legislation on this subject. Since such legislation had not been passed by the time the last House of Representatives was dismissed in May 2002, the SC's guidelines are still valid today.

These guidelines are (in my rough translation from the original Nepali): 1) the interested individual can ask for a list of written documents (from any government office) related to the subject of interest; (2) the office has to make available such a list within seven days and the interested individual can then make a request to have a look at the relevant documents; (3) if such a request is

received, the office has to, within three days, inform the interested individual the date, time and location where such an inspection of the documents can be held; (4) after such an inspection/reading occurs, the interested individual can note down points from the documents or if s/he is interested in obtaining a duplicate of the documents concerned, a request to that effect can be made to the designated official; (5) if there are no rules regarding how duplicates are to be made available, then the office can charge the interested individual the actual cost of preparing the duplicate copies and certify them as such; (6) if the office has reasons to not make available either a partial or complete list of relevant documents to the interested individual or has reasons to not make such documents available for inspection/reading and for duplication, it should explain the reasons to the interested individual within three days after receiving the initial request; (7) if the interested individual is not convinced by the fact of denial or the reasons given for them as per (6) above, s/he can approach the Supreme Court within seven days of receiving such notice of denial of access; and (8) the procedure to be applied to such requests will be according to the rules of the Supreme Court.

Gopal Siwakoti 'Chintan' says that he and his colleagues have used these guidelines repeatedly to seek information about other development projects they have scrutinized since 1994. Given the frequency of lamentation regarding the unwillingness of government authorities to provide needed information to the public, it would be interesting to find out how many other individuals (and organizations) have used the same guidelines to ask for information from government sources in the past 10 years.

Now we move on to the second theme of this essay, the draft Right to Information Act. One version was prepared about four years ago by the NGO Nepal Press Institute (NPI which offers various types of training to potential and working journalists)

and the Federation of Nepalese Journalists (FNJ), the largest elected body of journalists in Nepal. After some public discussions with legal activists and others, its initial text was revised and that version has been published in NPI's bulletin *Khabar* (vol 5, no. 4, August 2003).

Looking at the published draft Act, we can say that there are many positive aspects in it. First, the definition of public authorities as conceived by this draft Act is very broad and includes governmental offices, councils, commissions, working committees, political parties, non-governmental organizations, and any other institutions that influence public welfare. Second, the draft Act requires public authorities to publish, from time to time, a whole variety of information of public importance. It also requires such authorities to store information in an orderly manner and make them available to those who request them. Third, the draft Act requires public authorities to identify an 'information officer' who has the obligation to store and provide information immediately to those who seek it. This would prevent the 'passing of the buck' between officials in any given office as so often happens. Fourth, the draft Act contains a public interest override in the form of Article 8 in which information officers are required to provide information that would show negligence or illegality on the part of public authorities or their abuse of authority. Information officers are also required to provide information regarding possible harm to the health of individuals and the public at large as well as the environment. They are also required to divulge information regarding the misuse of public funds. Fifth, the draft Act clearly spells out the process that needs to be followed when an application seeking information is received.

However the draft Act is still inadequate in many ways. Article 7 of the draft Act provides for a set of exceptions for public authorities who are not required to reveal, among others,

information that would adversely affect national security, criminal investigation, Nepal's sovereignty and integrity. Other exceptions include premature disclosure of information related to the budget, customs, currency exchange rates, interest rates and other taxes that could have a negative effect on the national economy or result in illegitimate profit or loss to any individual or organization. Additional exceptions are also listed regarding the disclosure without consent of information related to the personal privacy of third parties and also regarding their trade and commercial rights protected by other laws.

Some analysts feel that the set of exceptions listed in the draft Act is too broad and hence it can be misused to deny information rather than facilitate an environment of information flow to serve the public interest. As journalist Shiva Gaunle has noted, a bureaucracy noted for its ability to hide information can use the smallest of excuse (within the exceptions provided by Article 7 of the draft Act) to not provide information. Hence it is possible that the 'space' for the flow of information opened up by the 1994 decision of the SC and its subsequent application could be inadvertently diminished by this set of exceptions. In addition, as in the case of many other Acts currently in use, Article 7 of the draft Act is non-specific regarding the process of interpretation that could lead to the conclusion that a listed interest had been adversely affected. For instance, how are the information officers to conclude that if the information requested is disclosed, it would adversely affect Nepal's national security or its sovereignty? Or what constitutes 'premature' information about the budget?

In 2003, it was rumored that King Gyanendra's government was going to issue a Right to Information ordinance that would be some revised version of the draft Act. Given the deficiencies noted above and more importantly, given the present political

context, it would be rather futile to issue such an ordinance without further public debate on its contents. Nepal certainly needs a Right to Information Act but not one that is issued surreptitiously by a government that is not accountable to the people of Nepal.

Media and the 2001 Emergency: Curtailment of Freedoms

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. On 25 November, the Maoists attacked the district headquarter of Solukhumbu in eastern Nepal, killing about 35 security personnel. After the attack in the army barracks in Dang on 23 November, the government headed by Prime Minister Sher Bahadur Deuba quickly moved to mobilize the army against the Maoists for the first time. On 26 November 2001, Prime Minister Deuba's Cabinet decided to impose a state of emergency in Nepal. On the same day King Gyanendra issued an order of a state of emergency. On the same day, King Gyanendra approved the mobilization of the Royal

An excerpt from Onta (2005)

Nepal Army and promulgated the Terrorist and Disruptive Acts (Control and Punishment) Ordinance (TADA), 2058 v.s. (2001).

On 26 November 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*.

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.

As mentioned above, the Terrorist and Disruptive Acts (Control and Punishment) Ordinance was promulgated on 26 November 2001. On the same day, citing Section 7(3) of the ordinance, the government declared as “terrorist the Nepal Communist Party (Maoist) group and any person, organization or group, who is directly or indirectly involved in, or renders assistance in, the activities carried out by that group” (Order from the Ministry of Home Affairs, 26 November 2001).

Section 3 of the Act provided for a wide ranging definition of activities that qualified as terrorist and disruptive crimes. As summarized by a 2002 fact-finding mission of the International Bar Association (IBA):

A terrorist and disruptive crime is defined in section 3 of the TADA as any activity against the sovereignty, integrity, peace and security of Nepal through intentional disturbance or damage to property, lives or health using weapons, bombs or explosive substances or poisons. It is also an offence to threaten to do any of these things, or to produce or distribute weapons, bombs or explosive or poisonous substances, or to train people in these activities, or to collect or loot cash, goods or property for the purpose. A person is deemed to have committed this crime if he or she attempts or conspires to do so, or encourages others to do so. All of these crimes are proceeded with and punished under the TADA rather than under other applicable law.

Section 3(e) in the original ordinance 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.” Section 3(2) 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.” 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. Again to cite the summary of the report prepared by the IBA:

Under section 5, the TADA allows the Government or any security officer (ie any member of the police or the army – section 2(f)) to arrest anyone sufficiently and reasonably believed to be involved in terrorist and disruptive activities; to search any person’s house, store, vehicle or any place at any time on suspicion that weapons or terrorists may be found; to search any person; to use necessary force to carry out any of these activities or if a person or group tries to harm members of a security force carrying out these activities; and to suspend the passport or bank account of any person reasonably thought to have been involved in terrorist and disruptive activities. Orders for these purposes may be made ‘notwithstanding anything contained in the prevailing law.’

According to section 7, the government can declare any person, organization, association or group involved in any crime punishable

under TADA as a terrorist. Section 9 delineates the power of preventive detention. There it is stated:

If there is reasonable ground to believe that anybody may be prevented from doing anything that causes terrorist and disruptive activities, the Security Official can issue an order to detain such a person in any human inhabitable place for a period not exceeding ninety days.

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)). With respect to punishment as summarized by IBA:

The punishment for murder under the TADA is life imprisonment and confiscation of all property for activities that have resulted in the crime. For crimes under the TADA not involving someone's death, the punishment is life imprisonment (section 10).

Section 18 allows HMG 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 opinion 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 recognizes that the freedom of opinion and expression is not annulled by TADA. 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 sub clause was removed when the ordinance was revised as an Act in April 2002.

Section 2(i) defines an “accomplice” in a terrorist and disruptive act as

1. A person who is in contact or involved with any person or group involved in the terrorist and disruptive act,
2. 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.
3. Any person who gives financial or any other kind of assistance directly or indirectly to the person or group involved in the terrorist and 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 (mentioned above), section 2 could produce an effective chilling effect on the media against reporting about Maoist activities.

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 v.s. (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 v.s. (1991).

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 v.s. (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 existing two 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 but there is no doubt that these notices contributed to the amassing of fear against which media persons had to work.

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, 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.

In these existing laws, the prohibition is 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. 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, as far as I know, 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.

On 27 November 2001 the Royal Nepal 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 Nepal 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” (*The Rising Nepal*, 28 November 2001, p.1). 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 Police forces only after getting them confirmed with the spokesperson of the Home Ministry.

On 28 November the then Minister of Information and Communications issued an order containing a list of do’s 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 which he could have. In other words, as discussed above, the prohibition of coverage of Maoist activities as delineated in the Nepal Gazette was legally based on previously existing laws whereas the directives issued by the Minister were first announced in a manner suggesting their legal origin in the TADA ordinance.

Among the doable in these 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 Nepal Army, the police and civil servants, and news obtained from His Majesty's Government and other official governmental sources. The list of non-doable was long and included items that are already part of the existing laws. However it also included the following: news that might spread ill feelings against and demoralize or tarnish the image of the Royal Nepal 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. In reference to this order, the then Minister of Information and Communication, Jayprakash Prasad Gupta, said in an interview to *Nepali Times*: "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."

In addition, the Defence and Home ministries issued various 'requests' to the media for its cooperation. While the legal bases of these directives and requests were questionable they went unchallenged because of the emergency environment in the country. 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 referred to in various 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 TADA ordinance and later the TADA Act sections 2 and 7.

Restrictions on the media with respect to its possible coverage of Maoist activities was done 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. 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. This had a chilling effect on the work and mindset of Nepali journalists and others engaged in public commentary right after the imposition of the state of emergency in 2001.

Early Media Responses to the 2001 Emergency

This essay looks at the early response of the media and media-related organizations to the declaration of the state of emergency in late November 2001. Even before the imposition of the state of emergency, the media exhorted for decisive action on the part of the government. It went further and even supported the forthcoming curbing of fundamental rights as part of the government response without pausing to explain to its readers why such curbing was absolutely necessary for the government response to be ‘decisive’. It was assumed that an imposition of a state of emergency was necessary to let the army deal with the Maoists but the media forgot to ask why it was natural to assume as much. For instance, on 25 November 2001, in a special front-page editorial, *The Kathmandu Post* wrote,

The government might have to take some unpleasant but temporary measures including curbing of civil liberties to bring the situation to normalcy.... The

An excerpt from Onta (2005)

government must take necessary steps to allow the security forces to deal with the situation.

Anybody reading the above quoted passage will have to wonder if the said newspaper was providing a realist reading of the Nepali political landscape by suggesting that the government must make room for the army to operate *as if* the army was a separate entity that the government had to plead into action under terms negotiated by the former (i.e. army).

After 26 November, the media gave full-support to both the State of Emergency and Terrorist and Disruptive Acts (Control and Punishment) Ordinance (TADA). That government-owned media peddled this line is not surprising but what does need some explanation is the way in which the private and independent sector media tamely accepted the state's logic in the beginning of the period of Emergency. On the day after the Emergency was imposed, an editorial in *The Kathmandu Post* (27 November 2001) blamed the Maoists for the situation and said, "Now that a draconian order is upon us, however temporarily, there is little point in carrying on about civic rights and nuances thereof. It's a wholly different ball game altogether, and it is only to be hoped that any abeyance of a democratic dispensation that we have grown used to will be mercifully short lived."

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. The Society, it was reported, "agreed to responsibly write in favour of parliamentary system and democratic constitution" and "to write against all kinds of terrorism" (*The Kathmandu Post*, 28 November). 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 (FNJ press release dated 27 November 2001).

On 28 November, the *Post* reported at length about Deuba's speech justifying his decision to impose the State of Emergency and about the provisions in the TADA Ordinance without much criticism or critical stance (*The Kathmandu Post*, 28 November 2001). In the editorial for that day, the *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 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.* The task is no doubt difficult but it will be worthwhile for the Deuba government to at least initiate steps that can finally in the long run solve these problems. 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* (*The Kathmandu Post*, 28 November 2001, my emphasis).

There was no hint of a critical stance against the state of emergency. Instead this newspaper exhorted the government to “judiciously” use the powers it had to address “a host of other

ills,” provoking the use of emergency powers to deal with issues for which the emergency was not declared to begin with. On the following day, while reiterating the logic given by Deuba, the *Post* introduced one line of caution in its editorial entitled “Combating terrorism” and said, “Emergency has been declared to quell the Maoist activities. However, it 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*, 29 November 2001).

The other papers were also supportive of the government’s decision. An editorial in *Rajdhani* (29 November) emphasized that the state of emergency had been imposed in Nepal to save nationalism and democracy from terrorism. It belabored 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 Samacarpatra* (30 November) argued that self-censorship was more effective, democratic and responsible than governmental censorship over the press. This editorial also made it clear that by controlling the press or hiding information, democracy would 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, the then Chairman of the Press Council Nepal, 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” (*The Himalayan Times*, 30 November).

One would have to conclude that the imposition of the state of emergency and TADA largely met with approval or tame compliance because of a confluence of several factors. First, a society that had effectively resisted the imposition of TADA in 1997 had, by the end of 2001, experienced Maoist activities in such a scale and brutality that its erstwhile confidence in the civil government being able to tackle the insurgency had greatly diminished. Hence there was a willingness to give the benefit of doubt to the state's own armed forces, the Royal Nepal Army, as it joined the war. In late November 2001, the RNA was the only untested institution as far as state responses to Maoist activities 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 marshaled to do away with any sense of doubt and skepticism (hallmarks of good journalism anywhere) regarding RNA's ability to deal with the Maoists. RNA's own rhetoric about itself – the last bastion of Nepali nationalism and unity – seem to have sufficiently influenced media opinion in its favour in the initial days after the imposition of the state of emergency and TADA in 2001. Third and finally, we would have to say that our media practice is insufficiently grounded in the domain of fundamental rights, even while championing those rights as slogans.

Promoting Media Freedom

Since 2001 the incidence of rights violations against media practitioners in Nepal has deteriorated to such an extent that national and international rights bodies have expressed grave concerns about both the nature and volume of such violations. Media institutions, practitioners and their products have been regular targets of suppression and harassment by the security forces of the state and armed members of the Maoists. These violations by both sides have occurred in the form of unlawful killings, abductions, arrests, harassment, threats, and forced dislocations of journalists from their primary location of work. Media persons have been routinely denied access to locations they have wanted to visit as part of their professional reporting exercise. Seizure of printed materials, obstacles to circulation of print media or the broadcast of programs, and the fear of arbitrary interpretations of one's reference materials have all contributed to an atmosphere of fear amongst media practitioners.

Legal instruments such as the Terrorist and Disruptive Acts (Control and Punishment) Ordinance (TADA) that have been made effective by the state since late 2001 and the subsequent practices of the two main protagonists of the present conflict in Nepal are chiefly responsible for creating the present state of affairs. 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. Nepali 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 in 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 de-centralization of media capacity.

The violations mentioned above have been recorded by organizations such as the Federation of Nepalese Journalists (FNJ), Center for Human Rights and Democratic Studies (CEHURDES), Reporters without Borders (RSF), and International Federation of Journalists (IFJ). The situation 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 and hence media's role in exposing these abusers can not be overemphasized.

The present situation demands many kinds of appropriate action on the part of all who cherish media freedom in Nepal. With that in mind, some ideas, restricted to rights monitoring and activism, are discussed below.

a. *Record and dissemination work by media rights organizations:* With the hope that the illiberal logic of both the state and the Maoists will be defeated in the long-run through certain practices, organizations such as the FNJ and CEHURDES have been documenting rights violations against media persons. They are doing this partially with the support of some international organizations. With help from DANIDA, the FNJ has already published two books, one each in English and Nepali, which document these violations for the period 2001-02. It has also recently prepared an unpublished report of such violations for the seven month period since the end of the last ceasefire in August 2003. 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 organizations such as RSF, IFJ, Committee to Protect Journalists (CPJ) and others who have also sent their own fact-finding missions to Nepal in the 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 such 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 voice against actions that have curtailed media freedom. 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. Such documentation is also part of an active monitoring process of the situation regarding freedom of expression in Nepal, an arena of rights which is larger than those available to the media alone. More rigour could be used in the current practices of documentation.

Beyond textual documentation, other activities are also necessary and some of them are already being done by FNJ. For instance, since fall 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 organization, has made a difference.

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 established Centre for Media Rights 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 is being supported by the Canadian organization, Institute for Media, Policy and Civil Society (IMPACS).

With respect to legal help, CEHURDES had 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 Rs. 100,000 each has been demanded citing reference to the relevant legal provision. One petitioner, Shyam Shrestha, editor of *Mulyankan* monthly was quoted in the 2003 report by CEHURDES 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." However nine of the cases filed have been dismissed somewhat arbitrarily while the remaining cases are ongoing.

Self-education of the legal bases of restrictions and rights ought to be an integral part of rights activism for the future of media freedom. This 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 toward the realization of a legal environment where necessary progressive legislation can be passed in the form of a Public Information Act, etc. National and international networking would obviously be necessary for rights activism to succeed but robust ways of realizing such networks have to be devised.

c. *Scholarship*: Promotion of good academic studies on the subject of media freedom in Nepal is absolutely necessary. We need studies of the power constellations in Nepali society that have traditionally worked against media freedom. We also need broad and comparative studies that give us the benefit of insights developed from scholarly output elsewhere. For this to happen, long-term collaborative studies between media practitioners, legal scholars, social scientists and rights activists will be necessary. Such efforts will strengthen the social foundations of pro-media freedom environment in Nepal. I am afraid that the present mode of conflict tourism – whereby Nepali journalists and rights activists are herded for a fast tour of Sri Lanka, Northern Ireland or South Africa – will not produce much scholarship or insights.

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. As I have argued in the past, 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 a large part 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-media freedom 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.

Is anybody listening?