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Freedom of Expression in Nepal in the Digital World

A Policy Review



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INTRODUCTION

As more and more Nepali people have access to the internet, they are expressing their thoughts on digital platforms. These platforms have become spaces for deliberation. There are many instances where citizens have been arrested for their expression in the digital world. The concern is growing that the digital space is shrinking in Nepal due to such arrests and censorships.

Broadly, there are three kinds of studies on freedom of expression in the digital world in Nepal. The first kind of studies consists of efforts to understand the state of internet freedom focusing on legal provisions, and legal practices. For example, researchers have studied the difficulties of assuring freedom of expression on the internet in Nepal and found that policies had grey areas that could be misused.¹ The second type of studies consists of commentaries made by civil society organizations on different bills. Usually, they point out the provisions which curtail freedom guaranteed by the constitution and suggest alternatives. For instance, many organizations brought out commentaries on the Information Technology Bill, 2019 from different perspectives.² The third kind of studies consists of efforts

¹ Dahal, Taranath and Narayan Ghimire. 2016. *Freedom of Expression on Internet in Nepal*. Kathmandu: Freedom Forum.

² Samriddhi Foundation. 2020. Information Communication Technology Bill. Available at <https://samriddhi.org/publications/information-communication-technology-bill-policy-brief/>; accessed May 19, 2021; Center for Media Research – Nepal. 2020. Review of the Information Technology Bill 2019. Available at www.mediapolicy.org.np/2020/01/media-policy-reviews-recommendations/2329/; accessed May 19, 2021; Body and Data. 2020. Information Technology (IT) Bill



to examine the implication of legal provisions on certain groups or communities.³

Though there are the above mentioned three kinds of studies, systematic research on freedom of expression in the digital world is lacking. In this brief, we analyze various policy documents that govern freedom of expression in Nepal. We also look into five cases in detail to know the nature of the violation of freedom of expression.

We have employed the lens of digital rights to make sense of this freedom. Scholars have discussed digital rights as the implications of digital technologies on existing rights such as freedom of expression, privacy, the right to access and “the right to be forgotten.”⁴ Recently scholars have presented the framework to understand digital rights through four kinds of discourses. The first discourse focuses on negative rights like the violation of freedom of expression and the breach of privacy by states/governments in the form of surveillance. Quite opposite to the first one, the second discourse understands digital rights in a positive way. It presents digital rights as the possibility of using the internet for positive outcomes such as equal access. The third discourse highlights the issues related to the concentration of power and protection of vulnerable groups. It not only counterbalances inequalities and challenges domination in the digital world, but also assures human rights, women rights and LGBTQI rights to enjoy and use digital space. The fourth focuses on the self-regulations that the digital platforms and digital intermediaries like Facebook and Google are following. It

2019: From a Feminist Lens. Available at <https://files.bodyanddata.org/nextcloud/index.php/s/etpDJAS7w7Poi3B>; accessed May 19, 2021.

³ Kayastha, Shubha and Mamata Pokharel. 2020. *Beyond Access: Women and Queer Persons with Disabilities Expressing Self and Exploring Sexuality Online*. Bhaktapur: Body and Data.

⁴ Pettrachin, Andrea. 2018. Towards a Universal Declaration on Internet Rights and Freedoms? *International Communication Gazette* 80(4): 337–353. doi:10.1177/1748048518757139.



includes community guidelines and content moderation.⁵ These four discourses are important. However, this paper understands digital rights mainly from the perspectives of national policies and it discusses digital rights as negative rights. This approach is taken because these national policies deal with the regulations related to the digital rights and responsibilities of citizens as well as to the power of state authorities to execute these regulations.

The brief suggests that although national policy documents guarantee freedom of expression, the provisions related to restriction are broad and vague and they can be interpreted to undermine the fundamental rights of Nepali citizens in the digital world. It will show that the state has used the legal provisions related to such freedom of expression to suppress expression of actors, journalists, general people, and activists. It also highlights reasonable restrictions mentioned in the Constitution of Nepal, 2015 that set ground for such restrictions included in other national policy documents. We have analyzed national policy documents and our method analyzes documents such as memos, meeting agendas and legal texts to understand intentions, interests, and visions of the people who prepared them.⁶ Besides these documents, we have also studied commentaries by civil society organizations on different bills, news and articles published on these policy documents. As the analysis of policy documents don't allow us to go beyond intentions of those who made these documents,⁷ few cases have been studied

⁵ Karppinen, Kari and Outi Puukko. 2020. Four Discourses of Digital Rights: Promises and Problems of Rights-Based Politics. *Journal of Information Policy* 10: 304–328. doi: 10.5325/jinfopoli.10.2020.0304.

⁶ Martin Chautari. 2014. *Universal Connectivity in Nepal: A Policy Review*. Research Brief No. 12. Kathmandu: Martin Chautari.

⁷ Karppinen, Kari and Hallvard Moe. 2019. Texts as Data I: Document Analysis. In *The Palgrave Handbook of Methods for Media Policy Research*. Hilde van den Bulck, Manuel Puppis, Karen Donders



in detail using other documents such as news, editorials, and court documents wherever they are accessible.

The next section discusses the main provisions of Nepali policy documents such as the constitution, policies, and laws related to digital rights, especially freedom of expression. This section is followed by a presentation of important cases that appeared in news media, and a discussion of these cases.

NATIONAL POLICIES AND PROVISIONS

To get a sense of digital rights (especially freedom of expression) envisioned by the Nepali state, we have studied some important policy documents. These documents are the Constitution of Nepal, 2015; Digital Nepal Framework 2019; Information Technology Policy, 2015; Electronic Transactions Act (ETA), 2008;⁸ National Penal (Code) Act, 2017; Electronic Transactions Rules, 2007; and Information Technology Bill, 2019. Among these documents, the bill is yet to be approved by the parliament and is going through different levels of consultations and deliberations. These documents are hierarchical. On the top of them sits the constitution which is the supreme law of the nation describing rights and responsibilities of citizens and other organizations. To materialize various provisions of constitutions, the legislative bodies prepare Acts. Rules, guidelines, directives and bylaws are prepared on the basis of Acts. Bills are presented in the federal parliament for approval and after their approval they become Acts.⁹ Frameworks are often made to prepare

and Leo van Audenhove, eds., pp. 249–262. Basingstoke: Palgrave Macmillan.

⁸ This Act was authenticated on December 8, 2006, but Nepal Law Commission has named this law as “The Electronic Transactions Act, 2063 (2008).” We have used the same English date here.

⁹ For this review, the documents were taken from publicly available authorized websites. It will be wrong to assume that the Information



plans so they are less binding legally in comparison to other kinds of documents analyzed here.

Though the Constitution of Nepal, 2015 guarantees freedom of expression, it also includes few important “reasonable restrictions.” These restrictions govern the expression in both real and the digital worlds. As in previous constitutions made after 1990, the present constitution assured freedom of opinion and expression in article 17(2)(a). The reasonable restrictions can be divided into eight broader categories: national integrity, harmonious relationship among people (religious groups, castes), caste-based discrimination, disrespect of labor, defamation, contempt of court, incitement to an offence, and acts against public decency and morality.¹⁰ These limitations set the boundaries of the freedom of information of citizens in the digital spaces as often the laws that contradict the provisions to the constitution can be challenged in courts.

There are also some policies that demonstrate that the state assures freedom of expression principally. For example, the Information Technology Policy, 2015 that aims to address the policy related to the challenges created by the continuous growth of the information technology sector has accepted freedom of expression as a principle which needs to be promoted.¹¹ Similarly Digital Nepal Framework 2019 which was prepared to use digital technologies

Technology Bill will be approved without revisions. It is possible that revised versions of this bill are circulating among legislative actors, but they are not publicly available.

¹⁰ Nepal Government. 2015. The Constitution of Nepal. Available at www.moljpa.gov.np/wp-content/uploads/2021/01/Constitution-of-Nepal-Revised-and-re-edited-English-version-as-amended.pdf; accessed May 19, 2021.

¹¹ Suchana Tatha Sanchar Mantralaya. 2072 v.s. Suchana Tatha Sanchar Prabidhi Niti, 2072. Available at http://mocit.gov.np/application/resources/admin/uploads/source/Policy/6.ict_policy_2072.pdf; accessed May 18, 2021.



in different sectors such as agriculture, health, education, energy, finance, and urban infrastructure also mentions that there should be no unnecessary violation of freedom of expression and the state should start policy reform to assure this right.¹² The policy and the framework are important as they contain visions of the regulations that Nepali State has about the internet in Nepal.

There are legally binding laws such as the Electronic Transactions Act (ETA), 2008 which regulates the freedom of expression in the digital world in Nepal. Though the main aim of this Act is to create legal provisions to authenticate and regularize digital transactions, it also contains one article (47) that deals with online speech under, “Publication of illegal materials in electronic form.” This article has been used to regulate freedom of expression as illustrated by the legal cases discussed in the next section. The article puts many aspects of expression under illegal materials and prohibits the publication and display of such materials. These expressions can be divided into three categories: 1) public morality or decent behavior, 2) spread of hate or jealousy towards individuals, and 3) jeopardy of harmonious relations among communities. These categorizations are vague and can be interpreted differently. This law has made a provision to punish citizens who violate this article, with a fine not exceeding NRs. 1,00,000 or imprisonment not exceeding one year or both. Furthermore, the law also contains the provision of increasing the punishment by one and half times each time the same crime is repeated.¹³ The Electronic

¹² Ministry of Communication and Information Technology. 2019. *Digital Nepal Framework: Unlocking Nepal's Growth Potential*. Available at <https://mocit.gov.np/application/resources/admin/uploads/source/EConsultation/EN%20Digital%20Nepal%20Framework%20V8.4%2015%20July%20%202019.pdf>; accessed May 18, 2021.

¹³ Nepal Government. 2008. The Electronic Transactions Act, 2063 (2008). Available at <https://doit.gov.np/en/resource/download/the-electronic-transactions-act-2063-english>; accessed May 18, 2021.



Transactions Rules, 2007 was prepared based on the ETA. Due to its vagueness and the stringent punishment provisions, many practicing communities such as journalists, lawyers and activists have suggested that this law should be amended.¹⁴

Similarly, the National Penal (Code) Act, 2017 contains provisions related to the freedom of expression. Three issues are important. First, article 50, under “sedition” makes the use of any means to do baseless criticism of the government or to bring hatred/contempt to the government punishable by imprisonment of up to three years or fine not exceeding NRs. 30,000. Second, article 121 prohibits the production, distribution, import and export of obscene materials, and if somebody engages in such acts he or she can be imprisoned for one year or fined up to NRs. 10,000 or given both sentences. However, these provisions don’t apply to the content prepared from the perspective of art, literature, education, research and religion. Third, under Part 3, Chapter 2, the Act discusses defamation and prohibits damaging the reputation or lowering the morale of a person without any evidence; the Act however allows the publishing of facts for good faith in case of public officeholders and to put forward an opinion in good faith. This law has provisions for punishment and compensation. If such crimes are committed, a person can be sentenced to jail for at least one year or a fine not exceeding NRs. 10,000 can be imposed. In addition, the offender shall be ordered to pay reasonable compensation and the litigation cost to the libeled person.¹⁵ Civil society organizations, including the Federation of Nepali Journalists, objected to these provisions and

¹⁴ Acharya, Ujjwal. 2012. *Online Media in Nepal: Need for Policy Intervention*. Kathmandu: Alliance for Social Dialogue.

¹⁵ Nepal Government. 2017. The National Criminal Procedure (Code) Act, 2017. Available at www.moljpa.gov.np/en/wp-content/uploads/2018/12/Criminal-procedure-code-Revised.pdf; accessed May 18, 2021.



provided suggestions to the government.¹⁶ Though the government had assured that such provisions would be amended, this has not yet been done.¹⁷

The Information Technology Bill¹⁸ made public in 2019 and still under consideration in the federal parliament is meant to scrap the ETA. It has more draconian provisions than what the ETA contains. Chapter 12 under “provision related to cyber security” discusses different provisions related to the freedom of expression. For example, article 83 deals with cyber bullying (“harass, tease, demean, discourage, insult or scold another person”), article 84 with cyber terrorism (“disturb Nepal’s national security, sovereignty, territorial integrity or national unity, freedom, self-pride or cordial relations between the federal units, or to create obstructions or cause adverse impact to the country’s security or data system”), and article 86 with pornographic materials. Article 88 mentions the provisions similar to the reasonable restriction mentioned in the constitution. About the misuse of electronic system, this article prohibits the use of electronic system to use against national sovereignty, to create hatred among people from different communities, to incite discrimination, to disrespect labor, to motivate people to commit crime, to disseminate matters not allowed by the law, or do activities against public good conduct and morality, among other things. This bill also intends to regulate social media. Article 94 mentions the things that are prohibited on social media. If one goes through the provisions, one will see that the bill cites the similar restriction on

¹⁶ Pokharel, Bipul, ed. 2076 v.s. *Press Svatantra ra Patrakar Suraksha: Varshik Prativedan*. Kathmandu: Nepal Patrakar Mahasangh.

¹⁷ Nepal Patrakar Mahasangh. 2077 v.s. *Press Svatantrata ra Patrakar Suraksha: Varshik Prativedan*. Kathmandu: Nepal Patrakar Mahasangh.

¹⁸ English translation of this bill is not publicly available; we were able to get it from Body and Data.



digital platforms. This bill not only makes it mandatory for social media organizations to register inside Nepal, but authorizes the Department of Information Technology to give directions to these organizations to remove the contents if they are against the Nepali laws.¹⁹ There are concerns that this bill contains tougher punishment than when a similar crime is committed offline; hence, various stakeholders have criticized this bill.²⁰ It has also been argued that the regulation of social media could curb freedom of expression.²¹ Likewise, the provision related to curbing sexual expression has been criticized from feminist perspectives.²²

The laws prepared based on the provisions of Acts often expand the prohibition. For example, using the authority provided by article 62 of Telecommunications Act, 1997, Nepal Telecommunication Authority brought out a bylaw for internet service providers in June 2020. One of the points mentioned among the 14 conditions that these service providers have to follow is this: “The service provider

¹⁹ Nepal Government. 2075 v.s. Suchana Pravidhiko Sambandhama Vyavastha Garna Baneko Vidheyak. Available at <https://hr.parliament.gov.np/uploads/attachments/eucmqwyeyg3nf9ov.pdf>; accessed May 18, 2021.

²⁰ International Federation of Journalists. 2021. Truth in a Time of Contagion: The Viral Frontline Nepal Country Report. Available at <http://samsn.ifj.org/SAPFR/wp-content/uploads/2021/05/Nepal-Country-Report-SAPFR-2020-2021.pdf>; accessed May 16, 2021

²¹ Samriddhi Foundation. 2020. Information Communication Technology Bill. Available at <https://samriddhi.org/publications/information-communication-technology-bill-policy-brief/>; accessed May 19, 2021; Center for Media Research – Nepal. 2020. Review of the Information Technology Bill 2019. Available at <http://www.mediapolicy.org.np/2020/01/media-policy-reviews-recommendations/2329/>; accessed May 19, 2021.

²² Body and Data. 2020. Information Technology (IT) Bill 2019: From a Feminist Lens. Available at <https://files.bodyanddata.org/nextcloud/index.php/s/etpDJAS7w7Poi3B>; accessed May 19, 2021.



should make arrangements to prevent the distribution of the contents which promote obscenity, spread evils in society, and undermine national interest.”²³ But the notions related to obscenity and national interest are not defined precisely. Their vagueness can be misused.

SOME CASES

This section presents five cases. It would be wrong to think that these cases represent all kinds of cyber crimes booked under laws in Nepal such as fake ID, use of social media to defame, website hacking, to deform photos of individuals, explicit photos and videos etc.²⁴ The issue of national sovereignty/security is a thorny issue. Not only Nepali citizens even a foreigner was arrested on this charge.²⁵ A document made available by the cyber bureau of Nepal Police to journalist Aditya Dahal clearly confirms that 3,241 complaints have been registered in the bureau from Saun 2075 to Bhadra 2077.²⁶ Similarly, an ongoing research by advocate Ashankan Malla has found that 253 cases have been filed in the Kathmandu District Court from 2063 v.s. to 2077 v.s. under the ETA.²⁷ In this section we

²³ Nepal Telecommunication Authority. 2077 v.s. Nepal Dursanchar Pradhikaranko Internet (Email Sahit) Sewa Sanchalan Sambandhi Viniyamawali, 2077. Available at <https://nta.gov.np/wp-content/uploads/2021/02/ISP-Bylaws-2077-Final-Version-with-annexes.pdf>; accessed May 18, 2021.

²⁴ Dahal, Aditya. 2078 v.s. Cyber Aparadh ra Manav Adhikar. *Nagarik*, Baishakh 12. Available at <https://nagariknews.nagariknetwork.com/opinion/508851-1619-327308.html>; accessed June 17, 2021.

²⁵ For details see, Sha, Sohan and Mathieu Quet. 2020. From Expression to Expulsion: Digital Public Spaces as Theatres of Operations in Nepal. *Science, Technology and Society* 25(3): 386–403.

²⁶ This data was shared by Aditya Dahal.

²⁷ Information shared by advocate Ashankan Malla, during the discussion organized by Martin Chautari on “Status and Trends of Cybercrime Cases in Nepal,” June 22, 2021.



will discuss one case each under the given headings: public decency and morality, journalism, film review, political speech (expression about politicians), and national sovereignty/security.

PUBLIC DECENCY AND MORALITY

On September 21, 2018, the Ministry of Communication and Information Technology issued an order to Nepal Telecommunication Authority to ban online pornography according to article 121 of the National Penal (Code) Act, 2017 and other existing laws. The logic put forward at that time was that such content was against the norms of social cohesion, and was a source of sexual violence. These views were challenged by right activists and the media. On October 4, 2018, it was reported that lawyer and rights activist Baburam Aryal called this ban as “ridiculous” as total ban was not possible, and women’s rights activist Mohna Ansari argued that this ban was not a solution to control violence against women.²⁸ Similarly, on November 5, 2018, an English daily *The Kathmandu Post* published an editorial on the government ban calling it “misguided, myopic and diversionary.” It countered the claims by highlighting that the link between pornography and sexual violence is disputed and the values and moral the ministry alluded to alienated the majority of people.²⁹

Subsequently, many sites were banned. By October 11, 2018, the Rastriya Samachar Samiti (RSS) news based on the data provided by Nepal Telecommunication Authority mentioned that 21,000 websites

²⁸ Press Trust of India. 2018. Nepal Orders Crackdown on Porn Websites. *Economic Times*, October 4. Available at <https://telecom.economictimes.indiatimes.com/news/nepal-orders-crackdown-on-porn-websites/66072047>; accessed July 31, 2021.

²⁹ The Kathmandu Post. 2018. Dry Spell. October 5. Available at <https://kathmandupost.com/national/2018/10/05/dry-spell>; accessed May 16, 2021.



were banned.³⁰ By December 17, 2018, the ministry had already banned 250,000 websites. The then Minister for Communications and Information Technology Gokul Prasad Baskota claimed that he wanted to ban 300,000 websites.³¹ In spite of these measures, it has been reported that the violence against women did not decrease.³² This blanket ban has not been lifted. As discussed in the next section, civil society organizations have also criticized such bans and restrictions in sexual expression.

JOURNALISM

On April 15, 2021, Ujyalo Network Online broke a news story based on the presumed four points agreement between the then Prime Minister K.P. Oli and the Chief of the Research and Analysis Wing (RAW) of India, Samant Goel. The news also contained a scan of an unofficial translation of the agreement with the signatures of the Prime Minister and the Indian chief.³³ This news was also carried out by other online portals. Due to the controversial nature of the content, this created a sensation and drew the attention of the Council.

³⁰ RSS. 2018. 21,000 Porn Sites Banned in Nepal: NTA. *Onlinekhabar English*, October 11. Available at <https://english.onlinekhabar.com/21000-porn-sites-banned-in-nepal-nta.html>; accessed September 22, 2020.

³¹ The Himalayan Times. 2018. I Will Ban 3 Lakh Porn Sites, Says Baskota. April 17. Available at <https://thehimalayantimes.com/nepal/i-will-ban-3-lakh-porn-sites-says-baskota/>; accessed September 22, 2020.

³² Manandhar, Akriti. 2019. (Banned) Porn More Popular Than News. *The Annapurna Express*, November 10. Available at <https://theannapurnaexpress.com/news/banned-porn-more-popular-than-news-2008>; accessed September 22, 2020.

³³ Ujyalo Network. 2075 v.s. RAW Pramukh ra Olibich Lipulekko Kura Nauthaunedekhi MCCma Modile Saghaunesammako Sahamati (Patrasahit). Baishakh 2. Available at <http://archive.ph/rGZac>; accessed June 11, 2021.



Concluding that the news was based on an unofficial document and unverified information, on the same day, Press Council Nepal sought clarifications from seven onlines including Ujyalo Network regarding the news.³⁴ A notice released by the Council the next day clearly mentioned that the news violated journalists' ethics as it was sensational and could also have "an adverse impact on international relations." Ujyalo Network Online published an editorial on April 15 apologizing for committing the mistake by believing in the source.³⁵

Even after this, the police started to look for two people (the journalist who wrote the news and the managing director of the Online). The Federation of Nepali Journalists (FNJ) filed a complaint in the Appellate Court asking for a hold on such an arrest. On April 23, 2021 the Court ordered that no one should be arrested since the Ujyalo Network Online had already published an apology. Yet by acting on the warrant order issued by the Kathmandu District Court on April 19, the police arrested the editor of Online Anish Tamang and its Managing Director DL Tamang on April 25. The document that was handed to the editor clearly mentioned that he was being held under the ETA and on the case related to sedition.³⁶ The FNJ and the Federation of Nepalese Indigenous Journalists (FONIJ) condemned the action by claiming that the arrest of the two concerned was an assault on press freedom. To arrest the journalists

³⁴ Press Council Nepal. 2078 v.s. Press Council Nepalko Gambhir Dhyanakarshan. Available at www.presscouncilnepal.gov.np/np/2021/04/16/4592/; accessed August 25, 2021.

³⁵ Ujyalo Network. 2078 v.s. Bhulsudhar Sambandhama. Baishakh 2. Available at www.ujyaalonetwork.com/archives/105095; accessed June 11, 2021.

³⁶ The Walker Online. 2021. Journalist Tamang and Lama of Ujyalo Network Arrested. April 25. Available at <https://thewalkeronline.com/journalist-tamang-and-lama-of-ujyalo-network-arrested/>; accessed June 11, 2021.



after the Press Council had taken action was equated with a politically motivated vendetta.³⁷ It was reported that the journalist wrote this news motivated by propaganda against the prime minister as the document on which the news was based was not authentic.³⁸ The two journalists were released on May 7, 2021 under the order of the Supreme Court.³⁹ On his Facebook status on the same day the editor mentioned that they were kept in custody due to the order given by the prime minister.⁴⁰ This case shows that the police arrested the journalists even though they published an apology as instructed by the Press Council.

FILM REVIEW

One of the widely publicized legal cases in Nepal related to the freedom of expression is about a review of a film. Comedian Pranesh Gautam posted a review of the film *Bir Bikram 2* on the YouTube channel of meme Nepal on May 22, 2019. Two days later, the director of the film Milan Chams filed a complaint against meme Nepal and Pranesh Gautam two days later. Chams, in his complaint, claimed that this video defamed his film and its actors, and further stated that the video was made after he did not agree to promote his film

³⁷ Baral, Rabi Raj. 2078 v.s. Bhulsudhar Gari Mafi Magisakeko Avasthama Patrakarmathi Kina Dharpakad? *Media Kurakani*, Baishakh 12. Available at <https://mediakurakani.com/news/83>; accessed June 11, 2021.

³⁸ Baral, Rabi Raj. 2078 v.s. Pradhanmantri Oli Viruddhako Propagandabata Patrakarle Siknuparne Sat Path. *Media Kurakani*, Baishakh 4. Available at <https://mediakurakani.com/news/76>; accessed June 11, 2021.

³⁹ Khula Mancha. 2021. SC Orders Release of Two Journalists. May 7. Available at <https://khulamancha.com/english/news/19714>; accessed June 11, 2021.

⁴⁰ Tamang, Anish. 2021. <https://www.facebook.com/shyam.dong.33/posts/2746972322229802>; accessed June 12, 2021.



on meme Nepal's YouTube channel. However, meme Nepal made a public statement on Facebook emphasizing that the review of the film was a fair one.⁴¹ In a video uploaded on *Ramailochha.com*, the director Chams demanded a compensation of ten million rupees. Several filmcritics criticized the meme Nepal team for making such a video with the intention of increasing its viewership.⁴²

On June 7, 2019, the police arrested Pranesh Gautam and Aadarsh Mishra under the ETA, 2008 and a fierce public debate ensued. Though Aadarsh Mishra, an artist associated with meme Nepal was released on a general date, Gautam was kept in custody for about nine days. Many netizens supported Gautam arguing that it was a comedian's job to make fun of everything and not allowing this would infringe his freedom of expression. Others justified the director's annoyance. It was reported that ten associations of filmmakers issued a joint statement claiming that in the name of film reviews, no one should indulge in character assassinations and misuse digital platforms with ulterior economic motives.⁴³ The supporters of Gautam equated such a statement by the filmmakers as the show of might.⁴⁴ On June 9, the court granted five days of

⁴¹ Nepal Sansar. 2076 v.s. Kalakarko Apaman Gareko Bhandai 'Meme Nepal' Viruddha Ujuri. Jeth 12. Available at <https://nepalsansar.com/story/17456>; accessed June 13, 2021.

⁴² Ramailochha. 2019. Milan Chams Puge Police Station (video). May 26. Available at www.ramailochha.com/post/23944; accessed June 13, 2021.

⁴³ Salokya. 2019. Comedianlai Patrakaritako Path Padhaune 'Chap' Sanghasahit 10 Sansthako Vigyapti Chhutaunu Bho Ki? Adha Jindagi Kher Jala! *My Sansar*, June 13. Available at <https://www.mysansar.com/2019/06/36192/>; accessed July 24, 2021.

⁴⁴ Republica. 2019. People Demonstrate Demanding Release of Comedian. June 13. Available at <https://myrepublica.nagariknetwork.com/news/public-demands-release-of-arrested-comedian-gautam/>; accessed June 13, 2021.



remand to interrogate Gautam. On June 12, a rally was organized in Kathmandu demanding the release of Gautam.⁴⁵ On June 16, 2019 he was released on a general date.⁴⁶ Later, in an interview to an online media, he accepted that he made a cheap joke in the film review by highlighting the skin color of an artist.⁴⁷ This case ended with a decision by the Patan High Court on March 1, 2021. The Court found that Gautam did not violate any provisions of the Electronic Transactions Act by reviewing the movie and his intention was not to defame anybody.⁴⁸ The decision of the court highlighted that the act of reviewing movies can't be termed as an attempt in character assassination and that the ETA can't be used to claim compensation for economic losses.⁴⁹

POLITICAL SPEECH

On April 22, 2020, a former secretary was arrested by the cyber bureau of Nepal Police for his online expression and was charged under the Electronic Transactions Act, 2008. According to *Onlinekhabar*, the cyber bureau arrested Bhim Upadhyaya from his

⁴⁵ The Himalayan Times. 2019. Rally Held in Capital Demanding Release of Comedian Pranesh Gautam. June 12. Available at <https://thehimalayantimes.com/kathmandu/rally-held-in-capital-demanding-release-of-comedian-pranesh-gautam>; accessed June 13, 2021.

⁴⁶ New Spotlight. 2019. Pranesh Gautam Released on Court Order. June 16. Available at www.spotlightnepal.com/2019/06/16/pranesh-gautam-released-court-order/; accessed June 13, 2021.

⁴⁷ Gautam, Pranesh. 2019. 2076 v.s. Dhanyabad Milan Chams, Tapaiko Jhonkle Malai Famous Banayo. *Deshsanchar*; Asar 2. Available at <https://deshsanchar.com/2019/06/17/211272/>; accessed June 13, 2021.

⁴⁸ We thank journalist Umesh Shrestha for giving access to this verdict.

⁴⁹ Salokya. 2021. 'Film Samikshale Charitra Hatya Hundaina': Pranesh Gautamko Muddhama Dui Tahako Adalatko Phaisala. *My Sansar*, June 13. Available at www.mysansar.com/2021/06/43891/; accessed July 24, 2021.



home for writing “reckless criticism” on his social media account.⁵⁰ However, news portal *Himalkhabar* mentioned that the police arrested him for disseminating rumor about COVID-19.⁵¹ These two news stories make clear that the news media and the cyber bureau did not have clear information on why he was arrested. The next day, Nepali Congress (NC) Party and Tarun Dal, a youth wing of NC, demanded that he be released without any conditions.⁵² On April 23, the court allowed the police to remand him for three days in judicial custody for further investigation. On April 23, *Onlinekhabar* informed that he was being investigated for harshly criticizing the then Prime Minister K.P. Oli.⁵³ On April 26, he was also accused of attacking religious harmony and social harmony by blaming the Muslim community for the spread of the corona virus.⁵⁴ He was

⁵⁰ Onlinekhabar. 2077 v.s. Purvasachiv Bhim Upadhyaya Pakrau. Baishakh 10. Available at www.onlinekhabar.com/2020/04/857334; accessed June 12, 2021.

⁵¹ Himalkhabar. 2077 v.s. Purva Sachiv Upadhyay Pakrau. Baishakh 2. Available at www.himalkhabar.com/news/113387; accessed June 12, 2021.

⁵² Onlinekhabar. 2077 v.s. Purvasachiv Bhim Upadhyayalai Riha Garna Tarun Dalko Mag. Baishakh 11. Available at www.onlinekhabar.com/2020/04/857481; accessed June 12, 2021; Onlinekhabar. 2077 v.s. Purvasachiv Upadhyayalai Tatkali Riha Garna Congressko Mag. Baishakh 11. Available at www.onlinekhabar.com/2020/04/857576; accessed June 19, 2021.

⁵³ Onlinekhabar. 2077 v.s. Purvasachiv Upadhyayalai Tin Din Thunama Rakhna Adalatko Anumati. Baishakh 11. Available at www.onlinekhabar.com/2020/04/857632; accessed June 19, 2021.

⁵⁴ Shrestha, Unique. 2020. Case against Ex-Secy Upadhyaya Charging Him of Attacking Religious Faith. *Setopati*, April 26. Available at <https://en.setopati.com/political/152762/>; accessed June 12, 2021.



released on April 27, 2020 under a bail amount of NRs. 25,000 set by the Kathmandu District Court.⁵⁵

This case shows that the authorities have taken action against citizens for criticizing politicians on the internet. The cyber bureau officials of Nepal Police seemed clueless in the beginning about charges to press against Upadhyaya.

NATIONAL SOVEREIGNTY/SECURITY

On June 1, 2014, Mohammad Abdul Rahman, a businessperson from Portaha of Saptari was arrested by the police under the ETA for writing a comment on a Facebook post. On May 31, journalist Jitendra Jha posted a news story published in Nepali daily *Nagarik* with the title “Saptarima Sudhrindo Suraksha” (Improving security situation in Saptari) on his Facebook page and tagged the page of the District Police Office, Saptari. Responding to this post, Rahman commented, “How can one say the security is improving when I had to pay Rs. 50,000 to get back my looted motorcycle?” Then the police filed a case in Saptari District Court, and on June 16 Rahman was presented before the Court seeking a detention order. According to the ETA, he was to be brought before the Kathmandu District Court within 24 hours, excluding the travel time. However, he was presented to the Kathmandu Court only on June 19.⁵⁶ On July 16, the court released him.⁵⁷

⁵⁵ The Kathmandu Post. 2020. Former Secretary Bhim Upadhyay Released on Bail. April 27. Available at <https://kathmandupost.com/valley/2020/04/27/former-secretary-bhim-upadhyay-released-on-bail/>; accessed June 12, 2021.

⁵⁶ Freedom Forum. 2014. Nepalese Businessman’s Arrest over Facebook Comment an Attack on Free Expression. *IFEX*, June 20. Available at <https://ifex.org/nepalese-businessmans-arrest-over-facebook-comment-an-attack-on-free-expression/>; accessed June 14, 2021.

⁵⁷ The Kathmandu Post. 2014. Rahman Who Wrote Comments on Facebook Given Clean Chit. July 16. Available at <https://kathmandupost.com/>



This case demonstrates that state authorities can use the provisions of the ETA to misuse their power. In the verdict, the court stated that Rahman's arrest showed that the police misused their power. The verdict also highlighted that the message was not intended to malign the reputation of the police.⁵⁸ As mentioned in the verdict, the police could have taken citizens' comments as suggestions for improvement of their services.

DISCUSSION AND CONCLUSION

These cases help us to understand the state of digital rights, especially freedom of expression in the digital world in Nepal. The five cases make evident that though the government arrested people on different charges especially under the ETA, the courts often tried to give justice. We also find the use of legal provisions arbitrary. The above cases clearly show that different policy documents have been used to shrink the digital space for deliberation in Nepal.

The case of obscenity highlights the challenges of blanket ban. Some civil society organizations and rights activists have criticized the ban on internet pornography as the ban has curtailed citizens' fundamental rights. For instance, Shubha Kayastha from Body and Data, pointed out this kind of ban can infringe the freedom of expression and right to information of people by limiting the space of women and queer people for exploring their sexualities.⁵⁹ According to such advocates, porn is also a medium of expression

[com/national/2014/07/16/rahman-who-wrote-comments-on-facebook-given-clean-chit](https://www.recordnepal.com/national/2014/07/16/rahman-who-wrote-comments-on-facebook-given-clean-chit); accessed June 14, 2021.

⁵⁸ Salokya. 2014. Adalatko Phaisala: Samajik Sanjalma Rajya Samyantrale Niyantran Garna Paudaina. *My Sansar*, July 14. Available at www.mysansar.com/2014/07/13816/; accessed July 18, 2021.

⁵⁹ Kayastha, Shubha. 2018. The Problem with Nepal's Porn Ban. *The Record*, October 1. Available at www.recordnepal.com/the-problem-with-nepals-porn-ban; accessed May 16, 2021.



and a way to seek pleasure. Hence, governments can't decide what adults can and can't watch.

The logic given by the government for the ban is not based on evidence. Mainly the government argued that the ban would decrease violence against women. The findings of studies on the relationship between the consumption of porn and violent behavior, however, is not conclusive.⁶⁰ There is no doubt that the porn depicting violence has increased and intimate videos of Nepali citizens have often ended up in the cyberporn world without their consent. However, it should not be forgotten that even though there is a blanket ban on pornography in Nepal, people are consuming such contents using TOR Browser or virtual private network (vpn) that allow people to circumvent censorship.⁶¹ Since the price of banning porn is heavy, activists are proposing that online pornography can be tackled through digital literacy.⁶² Parents could be made aware of ways to prevent children from adult content, and even adults could be made literate about the working of the online porn industry.

In case of political speech, there is no doubt that those in power should be monitored by audiences or citizens. If citizens don't become vigilant, there are chances that powerful people can misuse their authority. Therefore, the criticism of netizens is important for the democratization of society. Such spaces for criticism are being limited by using different provisions arbitrarily. The action taken

⁶⁰ West, Caroline. 2021. Pornography. In *The Oxford Handbook of Freedom of Speech*. Adrienne Stone and Frederick Schauer, eds., pp. 477–498. Oxford: Oxford University Press.

⁶¹ Manandhar, Akriti. 2019. (Banned) Porn More Popular than News. *The Annapurna Express*, November 10. Available at <https://theannapurnaexpress.com/news/banned-porn-more-popular-than-news-2008>; accessed September 22, 2020.

⁶² West, Caroline. 2021. Pornography. In *The Oxford Handbook of Freedom of Speech*. Adrienne Stone and Frederick Schauer, eds., pp. 477–498. Oxford: Oxford University Press.



against Bhim Upadhyaya seemed both arbitrary and politically motivated.

The case related to journalism shows that the government frequently disregards the general agreement it has with the Press Council Nepal that allows that entity to look after such violations first. The police did not listen to the Press Council and ignored the stay order of the court while arresting journalists.

The case related to national sovereignty proves that people can land in custody merely for making comments about security agencies. Mohammad Abdul Rahman was kept in custody for writing a comment about the fact he came to know. In the court, he informed that he was unaware that he was writing on the wall of the Facebook page of the district police office. According to a news report, he did not write on the wall of the police office; the post was only tagged to the Facebook page of the office.⁶³ It is clear that he did not use hateful words and was arrested for just sharing his thoughts. This case also highlights how certain communities and groups can be targeted by misusing the power authorized by the laws.

In these cases, we find that people in authority are misusing the restrictions outlined in national policy documents. These provisions are being misused as the laws don't contain the provisions for compensations to the victims in case they are misused.⁶⁴

The discussed cases also show that the ETA and the National Penal (Code) Act, 2017 are often used to arrest citizens violating their freedom of expression online. However, it should be stressed that issues such as national security, public order or morality,

⁶³ Salokya. 2014. Adalatko Phaisala: Samajik Sanjalma Rajya Samyantrale Niyantran Garna Paudaina. *My Sansar*, July 14. Available at www.mysansar.com/2014/07/13816/; accessed July 18, 2021.

⁶⁴ Information shared by advocate Ashankan Malla, during the discussion organized by Martin Chautari on June 22, 2021 on “Status and Trends of Cybercrime Cases in Nepal.”



jeopardy of harmonious relationship among communities are drawn from the reasonable restrictions mentioned in the Constitution of Nepal, 2015. Activists and scholars have argued that these terms are vague. In a review of the provisions of the constitution, researchers have raised that these restrictions don't follow the principles of international human rights especially those discussed in the International Covenant on Civil and Political Rights (ICCPR),⁶⁵ of which Nepal is a signatory. Article 19 of this covenant allows the violation of freedom of expression in some cases such as the rights or reputations of others; and the protection of national security or public order. However, the covenant clearly mentions that these rights can be violated only according to law and only when it is absolutely necessary. Based on this idea, commentators have argued that the reasonable restrictions of the constitution are vague and can be interpreted arbitrarily.⁶⁶ These provisions of laws can be misused by the government as they can be interpreted differently and can be used with political and personal motives.

These cases also highlight the need to further safeguard the fundamental rights of citizens related to freedom of expression as a way to deepen democracy in Nepal. Such safeguards allow citizens to pursue truth/knowledge and demand public accountability. If fundamental freedoms are compromised through a narrow interpretation of national policy documents such as the ETA and the National Penal (Code) Act, 2017, overall chilling effects will be produced in the society. However, this does not mean that freedom of expression is an absolute right and there should not be any limitations.

⁶⁵ Center for the Study of Human Rights. 1992[1976]. International Covenant on Civil and Political Rights. In *Twenty-Four Human Rights Documents*, pp. 18–30. New York: Columbia University.

⁶⁶ Acharya, Ujjwal and Santosh Sigdel. 2016. *Press Freedom in Constitution of Nepal 2015*. Kathmandu: Center for Media Research-Nepal.



As suggested by others,⁶⁷ there should be a balance between rights and limitations, and these limitations should only be used when it is absolutely needed. Yet it is difficult to maintain a balance between rights and restrictions. As argued by the constitutional law expert Bipin Adhikari, reasonable restrictions mentioned in the constitution do not guide the state in its interpretations as even courts can have multiple interpretations. One way is to follow the principle of proportionality⁶⁸ when the courts interpret these reasonable restrictions. The principle of proportionality will obligate a public authority to show that the restriction was strictly necessary. This principle checks unlimited use of regulations to restrict fundamental rights.⁶⁹ Public deliberations on the fundamental rights guaranteed by the constitution, reasonable restrictions mentioned in the constitution and other provisions of national policy documents could be helpful in promoting digital rights in Nepal.

⁶⁷ Adhikari, Bipin. 2020[2016]. *Salient Features of the Constitution of Nepal*, 2015. Kathmandu: Nepal Consultancy Lawyers Inc.

⁶⁸ Some scholars argue that the principle of proportionality is a false promise as this principle is being used in different ways. See, Weber, Gregoire. 2021. Proportionality and Limitation on Freedom of Speech. In *The Oxford Handbook of Freedom of Speech*. Adrienne Stone and Frederick Schauer, eds., pp. 173–192. Oxford: Oxford University Press.

⁶⁹ Adhikari, Bipin. 2020[2016]. *Salient Features of the Constitution of Nepal*, 2015. Kathmandu: Nepal Consultancy Lawyers Inc.



Martin Chautari (MC) began as an informal discussion group in Kathmandu in 1991, allowing development professionals and academics to meet every two weeks to share insights and experiences. In 1995, the name ‘Martin Chautari’ was adopted after the late Martin Hoftun, one of the founders of the original discussion group. After being managed by the Centre for Social Research and Development for six years, in 2002 MC became registered as a separate non-government organization in Kathmandu.

Since its inception, MC’s core objective has been to enhance the quality of public dialogue and the public sphere in Nepal. Started at a time in which Nepal had little, if any, culture of informed public discussion, MC is now nationally known for its discussions which are held two times a week. Chautari also conducts research focused on governance and democracy, media, education, health and livelihoods with cross-cutting themes of gender and social inclusion. A rigorous mentoring program of young researchers is in-built into MC’s work.

Till date MC has published 104 books. MC is also the editorial home of the journals *Samaj Adhyayan* [formerly *Media Adhyayan*, established in 2006], and *Studies in Nepali History and Society* [SINHAS, published by Mandala Book Point since 1996]. Since 2006, MC has opened its research library and media documentation center to the public. The library’s holdings total around 25,000 books.

All five components—the discussions, research, mentoring, publications and library—feed into each other and form an intrinsic part of MC’s primary objective: strengthening the social contract between the state and citizens and expanding and making inclusive the public sphere by promoting informed dialogues and analytically rigorous research.

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