UNS#ACKLING EXPRESSION

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UNSHACKLING EXPRESSION

A study on laws criminalising expression online in Asia

This report was prepared by Body & Data. Body & Data is a movement that integrates feminism, technology, internet rights, gender and sexuality. The organisation is based in Bhaktapur, Nepal.

Unshackling Expression: A study on laws criminalising expression online in Asia

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About the report

"Unshackling Expression: A study on criminalisation of freedom of expression online in Nepal" by Body & Data, in collaboration with Association for Progressive Communications with the support of the CYRILLA, is a study in continuation of the 2017 report – Unshackling Expression: A study on laws criminalising expression online in Asia.

This report was prepared by Body & Data. Body & Data is digital rights organisation in Nepal working to increase women and queer persons's engagement in digital spaces through suitable strategies for expression, autonomy and agency. It believes in creating free, open and just internet through advocacy, campaigning and adoption of suitable strategies.

Freedom of expression is a basic human right. This right extends to the digital space too. This report provides insights on how the laws and policies in Nepal surrounding freedom of expression is operationalised and implemented; either to protect and promote freedom of expression or to restrict it. This report also examines the case laws relating to freedom of expression and the rationale behind the judgements. This report provides a comprehensive scenario of freedom of expression online with Nepalese laws and policies and the problems surrounding it. The report is divided in order to legally assess the fundamental law, Penal Code and sectoral laws. The report also deals with the issues surrounding draft laws that are currently under consideration in the parliament that can be used to restrict freedom of expression online.

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Shubha Kayastha

I. Background

In Nepal, 96% of household owns mobile phones and can access the internet via mobile networks. [1] Meanwhile, 21 million mobile broadband subscriptions are reported until November 2019.[2] A 2020 media survey shows zero to 60% growth in YouTube usage in the last two years.[3]

With the rise of mobile internet users, people are expressing themselves on different socio-cultural and political issues on different digital platforms. They choose various means such as poems, memes, vlogs, social media status and every possible ways of self-expression. In which, people from different class, caste, gender identities, background, profession and ideologies are seen using different platforms to express themselves whether it is political opinion, personal thoughts or sexual expression. Thus, people's choices to express themselves have greater access and reach both online and offline.

However, the authorities are not affirmative towards these expressions especially those that express criticism against government and their officials. Therefore, the abrupt shutdowns of those sentiments online and custodial operations under the cybercrime is significantly increasing. There are several incidents of people including national figures such as journalists, singers, comedians and former government officers being detained for exercising their right to free speech. Reports indicate that 106 cases have been filed at Nepal Police, Cyber Crime Cell between 2016-2019 for posts on social media.[4]

Rapper Samir Ghising (Vten),[5] singer Durgesh Thapa[6] and comedian Pranesh Gautam[7] are some of the popular names who were detained for promoting "immoral" content and disrupting social harmony in the past. While former government secretary Bhim Upadhyaya was taken into custody for writing against the Prime Minister on his Facebook page.[8] He was charged for cybercrime under Electronic Transaction Act (ETA) of Nepal. The recent detention of Rita Rijal[9] or Toran Raj Poudel[10] for sharing their thoughts and images respectively questioning the government authority also proved the misuse of the law by authority.

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1 Nepal Telecommunication Authority. (2020). MIS Report. *National Telecommunication Authority* https://nta.gov.np/wp-content/uploads/MIS-2076-Mangsir.pdf

2 Ibid.

3 Dixit, K. (2020, 5 March)., Mobile Network is hooked on YouTube. Nepali Times. https://www.nepalitimes.com/banner/mobile-nepal-is-hooked-on-youtube/

4 *The Kathmandu Post.* (2019, 15 February). Nepal Government's new Information Technology bill draws battle lines against free speech. *The Kathmandu Post*.https://kathmandupost.com/national/2019/02/15/nepal-governments-new-information-technology-bill-draws-battle-lines-against-free-speech

5 Chhetri, S. (2019, 22 October). Rapper VTEN arrested for allegedly promoting 'anti-social' values. *The Kathmandu Post*. https://kathmandupost.com/art-culture/2019/10/24/rapper-vten-arrested-for-allegedly-promoting-anti-social-values

6 Republica. (2019, 22 October). Singer Durgesh Thapa Arrested. *Republica*. https://myrepublica.nagariknetwork.com/mycity/news/singer-durgesh-thapa-arrested

7 Shrestha, S. (2019, 12 June). Nepal has press freedom but no freedom after press. *The Nepali Times*. https://www.nepalitimes.com/opinion/nepal-has-press-freedom-but-no-freedom-after-press

8 The Himalayan Times. (2020, 24 April). Former Secretary arrested for cyber offence. *The Himalayan Times*. https://thehimalayantimes.com/kathmandu/former-secretary-arrested-for-cyber-offence/

9 Freedom Forum. (2020, 29 April). ‗Rita Rijal, A student Leader arrested for writing in Social media under Cyber Crime. *Freedom Forum*. http://nepalpressfreedom.org/main/issue-single/1165

10 Freedom Forum. (2020, 14 May). ‗Police arrest citizen for sharing image on Facebook. *Freedom Forum*. http://nepalpressfreedom.org/main/issue-single/1174

The same legal provision under which these people are detained is applied differently when it comes to citizen appealing for justice. A study (unpublished) by Body & Data shows cases of online violence against women and girls under ETA are not taken seriously by the authorities and the perpetrators are barely punished. On the other hand, the same law is applied hurriedly when the offense takes place against any person with power and position. While punishment is not the solution, the imbalance in the use of laws when it comes to citizens v. citizen and citizen v. authority is noticeable. This shows that freedom of expression is being infringed upon and laws regulating it is misused in the hand of power. It is also an indicator of a totalitarianism and mockery of the rule of law within a democratic republic state.

Some human right activists mostly working in the area of gender, sexuality, press freedom and freedom of expression opined that this infringement of free speech started escalating from the imposition of a ban on pornography[11] followed by a ban on PUBG, a popular video game[12] in Nepal. It is suspected that the porn ban, said to be a public stunt to curb sexual violence, was actually the government's pilot step to curtail citizen's freedom of expression. The government decided to impose the ban as it anticipated less resistance because the majority of people think pornography as "dirty" or "immoral" subjects and an addiction.[13] After which, the abrupt arrests and threats seemed to increase against the individuals who criticise the government on social media. The situation is likely to escalate in the future again, given the ratio of government sponsored custodies even during the pandemic and the upcoming bills in the parliament which are likely to create further restriction on digital rights.

This study on criminalisation of freedom of expression online focuses on the legal foundation that are used and could be used to suppress people's right to speech along with the relevant cases of the freedom of expression and infringement that took place in Nepal.

II. Methodology

This study was primarily based on secondary data collection in which various laws and regulations of Nepal were reviewed using the guidelines provided by the Association of Progressive Communication along with the registered cases around freedom of expression in the cybercrime department of Nepal Police.

The Constitution of Nepal, related acts, bills, news coverage and research reports by different organisations working on digital rights including freedom of expression, right to information and privacy were primarily gathered for this research purpose. The respective acts, bills, cases were sourced from Nepal government's official sites such as the Nepal Law Commission, House of Representatives, Office of the Attorney General, along with national media's

11 Kayastha, S. (2020, 1 October). The problem with Nepal's Porn ban. *The Record*. https://www.recordnepal.com/perspective/policing-sexuality-porn-ban-in-nepal/

12 The Himalayan Times. (2019, 20 April). Supreme Court stays govt ban on PUBG. *The Himalayan Times.* https://thehimalayantimes.com/kathmandu/supreme-court-stays-govt-ban-on-pubg/

13 Sharma, B & Scultz, K. (2018, 12 October). Nepal's Solution to more rape classes? Ban Pornography. *The New York Times*. https://www.nytimes.com/2018/10/12/world/asia/nepal-porn-ban-sex-rape-sexual-assault.html

websites. The laws were put into different categories such as existing laws, draft laws and case laws during the analysis.

Meanwhile, a desk review was conducted to determine the provisions that has prospects of curtailing freedom of expression including violation of digital rights online. Alongside some significant media reports, case laws were gathered as a proof of infringement of freedom of expression happening in the country. Finally, key people were interviewed to cross check the facts and analysis presented in the report.

III. Limitations

There are some limitations in this research in regards of established precedent by the Supreme Court relating to freedom of expression online. There are police cases filed in the cyber bureau of the police department relating to freedom of expression in Nepal. Many of these cases are gathered from news portal and organisations working in digital rights. Although the perception of the Nepali society towards, obscenity, blasphemy and sexual expression are quite conservative, there seems to be an absence of precedent established by the court to guide the jurisprudence on these issues based on the law.

IV. Assessment of the legal framework

a) Constitution[14] and freedom of expression

The legal foundation to freedom of expression is laid by the Constitution of Nepal 2015, through various articles and sub articles in chapter three relating to Fundamental Rights and Duties.

Right to freedom[15]

Article 17(a) explicitly guarantees right to freedom of express and opinion. This article is the core for ensuring freedom of expression and opinion for the citizens of Nepal.

Right to communication[16]

Article 19 of the Constitution guarantees right to communication. This article ensures the information dissemination through any means of media is disseminated without any censorship from the authority; valuing press freedom. Likewise, the Constitution has ensured that no equipment that is necessary for the dissemination of information will be seized and cancelled because of the content of that information. It also guarantees that there will not be an interruption in any means of communication including the press, electronic broadcasting and telephone.

Contrary to these provisions, the Constitution gives the power to restrict freedom of expression in the name or

14 Constitution of Nepal. (2015). http://www.moljpa.gov.np/wp-content/uploads/2017/11/Constitution-of-Nepal-_English_-with-1st-Amendment_2.pdf

15 Ibid. Article 17(a)

16 Ibid. Article 19

reasonable restrictions on any act which undermines sovereignty, territorial integrity, nationality of Nepal or the harmonious relations between the federal units or the harmonious relations between various castes, tribes, religions or communities, or on any act of treason, defamation or contempt of court or incitement to an offence or on any act which may be contrary to public decency or morality, on any act of hatred to labour and on any act of incitement to caste-based untouchability as well as gender discrimination.

Though these kinds of restrictions on the said subject may be deemed to be necessary for maintaining peace and order, the vague or overbroad nature of the provision is a significant is threat to legitimate expression deemed inconvenient.

Right to information[17]

is an important fundamental right upholding democracy, maintaining accountability and transparency. The provision in Article 27 of the Constitution reads: "Every citizen shall have the right to demand and receive information on any matter of his or her interest or of public interest. Provided that no one shall be compelled to provide information on any matter of which confidentiality must be maintained in accordance with law."

Right to privacy[18]

The Constitution in Article 28 states: "The privacy of any person, his or her residence, property, document, data, correspondence and matters relating to his or her character shall, except in accordance with law, be inviolable."

The right to privacy has been a fundamental right to exercise bodily autonomy, protect privacy and a way to express and explore in the offline space but in Baburam Aryal v Government of Nepal, the law was extended to the digital space by protecting its citizen from surveillance from the state in digital space. The case is further discussed below.

Right to language

Article 32 of the Constitution includes right to language[19] which is interlinked to freedom of expression. One can easily express their opinion in their mother tongue rather than their second language. The Constitutional provision regarding the right to language and culture guarantees the citizen's right to use their own language and to participate in the cultural life of their communities, right to preserve and promote its language, culture, cultural civilisation and heritage.

Importance of right to language

Historically, aside from the Khas Nepali language, every other indigenous language in Nepal were not given importance. The study of those languages was optional and limited to the respective indigenous groups or region, which endangers the culture and language of other indigenous groups. Since the indigenous movement, the importance and preservation of these languages are taken into consideration. The Constitution guaranteed the preservation and promotion of these language through making it a fundamental right.

17 Constitution of Nepal. (2015). Article 27
18 Constitution of Nepal. (2015). Article 28
19 Constitution of Nepal. (2015). Article 32

Language in itself is a very important form of expression. Having these rights preserved and promoted helped people of indigenous groups to access the internet in their own language, find their communities and discuss the issues they face.

Right of Dalits in the Nepalese context

Casteism in Nepalese society is rooted to the Hindu religious belief. The system categorised Dalits: persons belonging to certain castes as untouchable and systematically oppressed them for centuries. The term, 'Dalit', is generally used to identify those on the lowest rung in the caste hierarchy. [20] They are treated inhumanely and their rights were close to none. The present Constitution guarantees right to equality in Article 18, right against untouchability and discrimination in Article 24 and the right of Dalits[21] in Article 40. The right to Dalit guarantees the right to participate in bodies of state, access to education, health and social security. Explicitly guaranteeing their right in the Constitution is also giving them freedom to express themselves by upholding their dignity. However, there still are lacunas while implementing and guaranteeing these rights in offline space. Online spaces have been a safe place for Dalit peoples to access the internet without being subjected to inhumanity. It has helped them to voice out their concerns and is being used for educational purpose. The internet is also used for movement-building and activism to resist the systematic oppression. Hashtags like #DalitLivesMatter have been very effective tools in amplifying their voices on digital spaces over the injustice and oppression that they have been facing in day-to-day life. These tools have been also important for the non-Dalits to learn about the issue and educate themselves.

Right to constitutional remedy

The Constitution of Nepal not only provides the right guaranteeing freedom of expression but also provides right to Constitutional remedy[22] in Article 46 if rights are violated somehow. It also directs the state to develop necessary instruments to ensure the maximum protection and promotion of the fundamental rights.[23]

b) National Penal (Code) Act 2017[24]

After repealing the Country Code 1963, the new Criminal Procedure (Code) Act 2017 has attempted to amend and unify the existing scattered criminal laws into one consolidated instrument for comprehension. While assessing the criminal code from the lens of freedom of expression, we found out the code could curtail free speech on following basis.

Prejudice to harmonious relation

Section 65 of the Penal code prohibits acts that is prejudicial to harmonious relationship between different classes, regions or communities either spoken or written or by signs on the ground of religion, colour, ethnicity, race/ caste, community or language. A person

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20 International Labour Organisation. (2005). Dalits and Labour in Nepal: Discrimination and Forced Labour. *International Labour Organisation*. https://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-kathmandu/documents/publication/wcms_112922.pdf

21 Constitution of Nepal. (2015). Article 40

22 Constitution of Nepal. (2015). Article 46

23 Constitution of Nepal. (2015). Article 47

24 National Criminal Code. (2017). http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf

who commits, or causes to be committed, the offence of such nature shall be liable to a sentence of imprisonment for a term not exceeding one year and a fine not exceeding ten thousand rupees. An additional sentence of two years will be added if the offence is committed in any shrine or place of worship or prayer or in any assembly engaged in the performance of a religious or cultural festival or ceremony.

"Harmonious relationship between different classes, regions, or communities" can also be used against the ones who are already marginalised in terms of their caste, class, language and culture. Often times the marginalised community questions the systematic oppression of the privileged group and demands upholding of their rights. They are often portrayed as groups trying to disrupt the harmonious relationship between different classes. One recurring event regarding the media and the state citing disruption of harmonious relation to arrest and prosecute people of the minority group is the Madhesh Movement. The Madhesh Movement is the movement of the Southern Pains of Nepal where Madhesi political parties and the citizens demanded representation and equal rights in the Constitution. There are several cases of enforced disappearances and violence relating to Madhesi movements. What does harmonious relation mean? Is it the act of remaining idle even when you are stripped of your basic rights or is it not daring question the status quo?

Obscenity

Section 121 of the Penal Code states that nobody shall produce, sell, publish and promote (through electronic medium) obscene books and brochures publicly, which promotes immorality and eroticism. It also prohibits the purchase, rent, display, advertise or keep oneself to display to other people.

However, the section is not applicable to any work which is of importance to science, education, art, literature, research and learning or made for religious purposes. Yet again, there arises a question of what actually obscenity is because obscenity in itself is subjective and open to interpretation. This clause has the possibility of being used to oppress sexual expression from gender diverse people.

Slander/defamation

Section 300 of the Penal Code prohibits writing letters, pamphlets or documents through electronic means or otherwise with dishonest intention of causing fear, terror, pain, annoyance, insult, tease or defame. A person who commits, or causes to be committed, an offence of slander shall be liable to a sentence of imprisonment for a term not exceeding one year or a fine not exceeding ten thousand rupees or the both sentences.

Section 305 of the code prohibits committing slander using degrading words, spoken with the intention of lowering the reputation or undermining another person. A person who commits, or causes to be committed, defamation shall be liable to a sentence of imprisonment for a term not exceeding one year or a fine not exceeding ten thousand rupees or the both sentences.

Often time these sections are used to quiet down or threaten civilians when they question the abuse of authority and corruption about politicians, governments or other renowned and

powerful public figures. One recent example is when a Nepali actress Samraghi Rajya Laxmi Shah was sued using Section 300 and Section 305 when another veteran actor Bhuwan KC was accused of sexually harassing her.[25]

Section 306 of the Code prohibits committing defamation by writing, signs or visible representation or knowingly selling or distributing anything which is used as a means of committing libel. The punishment for defamation is a sentence of imprisonment for a term not exceeding two years or a fine not exceeding twenty thousand rupees or both.

These articles show the lawmakers attempts and intentions to address cybercrime or online violence or any other types of crimes through the law. But the legal grounds such as obscenity, immorality, annoyance, pain, defamation and others are subjective and open to interpretation. In short, the state and the authorities could misuse these provisions to curtail individual's right to express including political and sexual expression.

Blasphemy

Section 156 of the Criminal Code prohibits outraging religious feelings of any caste, tribe/ethnic group either spoken or written or by gestures. A person who commits, or causes to be committed, the offence of blasphemy shall be liable to a sentence of imprisonment for a term not exceeding two years and a fine not exceeding twenty thousand rupees. Although Nepal has been an exclusive Hindu country for decades, The Interim Constitution of Nepal 2007 declared it secular. The people of Nepal are known to have religious tolerance among themselves. It is important to note that during the unification of Nepal in the 20th century, indigenous and ethnic people were forced to become part of Hinduism through Hindu Cultural Imperialism[26]. Cow slaughter is also seen as an act of blasphemy in Nepal.

c. Existing acts on digital technologies

Electronic Transaction Act (ETA)

The ETA, [27] which commenced in 2006, legalised all forms of electronic transactions and digital signatures and regulated various computer-based records, data and activities.

Section 47 of the ETA is the only provision so far that deals with electronic media including the internet. Though Nepal is yet to pass an Information Technology Bill, ETA has been the only act instrumental against technology-related offenses. This act prohibits publishing or display of any material that are prohibited by the prevailing law or which may be contrary to the public morality or decent behaviour or any types of materials which may spread hate or jealousy against anyone or which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes and communities on any electronic media including the internet.

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25 My Republica. (2020, 24 July). Bhuwan KC files defamation suit against actress Samragyee. *My Republica*. https://myrepublica.nagariknetwork.com/news/bhuwan-kc-files-defamation-suit-against-actress-samragyee/

26 Limbu, S. (2016, 9 January). Prithvi Narayan Shah's cultural imperialism. *Indigenous Voice*. https://www.indigenousvoice.com/en/prithvi-narayan-shahs-cultural-imperialism.html

27 Electronic Transaction Act. (2008). http://www.tepc.gov.np/uploads/files/12the-electronic-transaction-act55.pdf

The section however is vague and not well defined. The criminalisation of right to expression through this section is at a higher chance citing public decency and courtesy as an excuse. In an attempt to address online gender-based violence, this act follows blanket approach to address it. As a result, it invalidates the person's consent in the name of public morality, indecency and obscenity. This law restricts the individual's freedom of expression including sexual expression.

Here, it is also important to mention that the penalty for similar law violation is different for online and offline offences and between two legal documents as well. The Penal Code and ETA have different penalties for the same offences. According to the Penal Code, which is mostly binding for offline offenses, unless mentioned in the electronic medium used, the person who tries to jeopardise harmonious relationship between different classes, regions or communities either through spoken or written or by signs on the ground of religion, colour, ethnicity, race, caste community or language is liable to a sentence of imprisonment for a term not exceeding one year and a fine not exceeding ten thousand rupees. Compared to this, ETA mentions of the punishment with the fine not exceeding one hundred thousand rupees or with the imprisonment not exceeding five years or both for the same nature of offence.

This clearly shows that there lies contradiction between two similar provisions within different legal documents. Thus, online-related crimes have more punishment compared to the same crime done offline.

An interesting contradiction when it comes to how unevenly the laws are applied becomes apparent, especially based on the proximity to power. Section 46 of the ETA penalises an act where anybody destroys, damages, deletes, alters or disrupts any information of any computer source by any means or diminishes value and utility of such information or affects it injuriously or causes any person to carry out such an act with a malicious intention to cause wrongful loss or damage to any institution.

This provision underlays the grounds of penalising anyone who damages any computer or its information system. However, in the recent incident, Asgar Ali led a company named Siran Technologies and illegally removed a news article from Kathmandu Express[28] that consisted of an alleged involvement of relatives of senior government officials in purchase of medical kit from China during COVID-19 response. In this incident Asgar Ali and his company was not taken into custody or even questioned for deleting the news information illegally because he happens to be an IT advisor of the Prime Minister. The incident was condemned by many as an attempt to clampdown press freedom and freedom of expression in Nepal.

Individual Privacy Act 2018[29]

As an extension to the right to privacy is guaranteed in the Constitution and to operationalise it, Individual Privacy Act 2018 was enacted. There are a couple of provisions in the Privacy Act that could be used to stifle people's right to expression and press freedom.

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28 The Kathmandu Post, (2020, 2 April). _Kathmandu Press accuses its site developer of removing a news article without consent. *The Kathmandu Post*. https://kathmandupost.com/national/2020/04/02/kathmandu-press-accuses-its-site-developer-of-removing-a-news-article-without-consent

29 Individual Privacy Act. (2019). http://www.lawcommission.gov.np/en/archives/category/documents/prevailing-law/statutes-acts/the-privacy-act-2075-2018

Similar to the Penal Code, the Individual Privacy Act in Section 6 A and C prohibit taking or selling photographs.

The Privacy Act has provisions for protecting one's character. In which Section 15B and C [30] prohibit commenting on anybody's character, take any action that affect the character of any person, defame or insult or harm their self-esteem unless in case of taking action under law. This provision has the possibility of being misused by the state and other individuals by suing people for defamation for legitimate expression; especially the kind that is critical of individuals.

Similarly, there is another provision in the Privacy Act that could violate press freedom. Section 18[31] of the act, restricts the disclosure of any matter obtained relating to the conduct of anyone from any other person in the course of their professional duty except where the concerned person has so consented or an order has been made by the authorised official to that effect. This causes journalists to worry about their action when reporting on issues learnt through their investigation.

Section 19[32] of the act states that any notice, information or correspondence may be listened to, marked or recorded, or cause to be listened to, marked or recorded with the consent of the concerned person or order of the authorised official essentially authorises surveillance and interception of communications. It is important to note that a judicial order is not mandated for the interception of communications nor do detailed regulations exist for appeal or reparations.

Section 34[33]E of the Privacy Act provides some guarantees for press freedom by allowing the press, newspapers and national broadcasting to publish or broadcast or make public any notice, information, data news or picture by maintaining public welfare and transparency or conducting investigative journalism without making it contrary to the basic norms of privacy of the person. But again, this can backfire against the press freedom if the authority deemed certain news or pieces of information contrary to the basic norms of privacy of the person even if they could be guilty of some misconduct.

National Broadcasting Act 1993

National Broadcasting Act is enacted to regulate the television and radio broadcasting in Nepal.

Section 15 of the National Broadcasting Act prohibits broadcasting matters adversely affecting political parties, of vulgar type, of such a nature as to create unusual fear and terror in the general public, matters contrary to the non-aligned foreign policy of Nepal, materials with seek to oust the elected government by using violent force and materials misinterpreting disregarding, insulting and devaluing any tribe, language, religion and culture. This provision also could be used to suppress press freedom in Nepal because political parties possess excessive power within the country in terms of access, control and regulation over resources, information and networking. It is common knowledge in Nepal that political leaders and

30 Ibid. Section 15

31 Ibid. Section 18

32 Ibid. Section 19

33 Individual Privacy Act. (2019). Section 34

their associates leverage their connections to power and could initiate action against individuals. This could happen irrespective of whether there are legal grounds for them to do so. As a result, there has been shutdowns of programs[34] or self-censorship at state-run media in terms of content production or broadcasting relating to the ruling party or the government.[35]

National Information and Communication Policy 2015[36]

The National Information and Communication Policy brought by the Ministry of Information and Communication to reduce the developmental divide by using Information Communication Technology (ICT). Even though the policy is about the terms and technicality of information technology and cybercrime, it does not mention the phrase freedom of expression online or otherwise in it. Internet, according to this policy, is more like a form of service from the government rather than a space for general public or their rights.

Broadband Policy 2015[37]

The Broadband Policy has been formulated in response to the need of to create a conducive environment for stimulating growth of broadband infrastructure and services throughout the country. It is also silent about guaranteeing or protecting freedom of expression. The policy is technical and mostly mentions the expansion of internet for accessibility.

The key aspects that the policy seeks to work towards are as follows:

8.1. Broadband service with at least 512 kbps (download) will be made available and if demanded in the urban area the broadband service up to 10 mbps speed will be made available.
8.2. By 2018, 45%of households in Nepal will be guaranteed access and coverage of broadband 8.4. By 2018, all district headquarters will have optical fibre networks.
8.5. By 2018, a total of 1,500 VDCs will be developed as the e-VDC by building broadband infrastructures and service.
8.10. By 2020, all VDCs of Nepal will have e-centres.

Expanding internet use is a commendable act in terms of accessibility but it is also important to protect the freedom of expression online to mark internet as a safe space for marginalised groups. It would be a significant step if these policies are evolved with a rights-based approach.

Online Media Operation Directive 2017[38]

Online Media Operation Directive 2017 was brought into force by the Ministry of Information and Communication. The preamble of the directive states: "this directive was introduced by clause 45 of Good Governance (Management and Operation) Act-2007 for registration, operation, renewal and monitoring of online media. Introducing this directive

34 My Republica. (2018, 14 June). _NTV shuts down program 'after presenter grill minister'. *My Republica*. https://myrepublica.nagariknetwork.com/news/ntv-shuts-down-program-after-presenter-grills-minister/

35 My Republica. (2020, 28 April). Govt intervention in state-run media is not new. *My Republica*. https://myrepublica.nagariknetwork.com/news/gov-t-intervention-in-state-run-media-is-not-a-new-phenomenon-in-nepal/

36 National Information and Communication Policy. (2015). http://www.youthmetro.org/uploads/4/7/6/5/47654969/ict_policy_nepal.pdf

37 Broadband Policy. (2015). http://mail.nta.gov.np/old/en/component/joomdoc/Broadband%20Policy-.pdf

38 Online Media Operation Directive. (2016). http://research.butmedia.org/wpcontent/uploads/2016/06/OnlineDirective2073.pdf

under Good Governance Act means the government has taken online media as a government entity to deliver service rather than as a vibrant medium to boost the practice of freedom of expression and bring citizen's voice in the main stream."[39]

Article 11 of the Directive reads:
11. Publication and broadcasting to be prohibited: The following materials shall not be allowed to be published and broadcast from the online media:
(a) Causing harm to Nepal's sovereignty, territorial integrity, nationality or good relations among the federal units, various caste, ethnic groups, religion or communities,
(b) Amounting to treason, defamation or contempt of court or inciting commission of crime,
(c) Act against public protocol or morality,
(d) Abuse of labour, inciting racial untouchability and gender discrimination,
(e) Without authorised source, that could create illusion and have an adverse impact on international relations.

The provisions prohibiting publication is ambiguous and vague. It remains open to interpretation and hence there is a great chance for abuse which again is a threat to freedom of expression online.

IV. Beyond the legal framework

Beside legal provisions, there are several socio-cultural and economic factors that impact and suppress one's freedom of expression including sexual expression. These are the factors which limits people's expression online even before the state reaches out to them and criminalises their expression in the name of obscenity or morality. Hence these legal grounds are enacted through political forces. Such restrictions have more potential of criminalising expression of women, queer or marginalised communities both online and offline.

Factors like accessibility, access to technology and resources also limits people's right to express themselves online. As mentioned earlier, Nepal has a record of 96% of households accessing the internet via mobile devices, however there is no separate data of women, queer, people with disabilities or marginalised communities having access to internet and technology within this record. Those who are able to have access on a cell phone might face accessibility barriers in terms of language and technological aspects which will again limit their ways of expression and their access to information.

Moreover, sharing phones and devices with other members within the family is another practice which women or girls or marginalised people practise within households. In which, censorship and surveillance is imposed upon them which

39 Freedom Forum. (2017, 24 March). Concern over Online Media Operation Directive 2017. *Freedom Forum*. http://freedomforum.org.np/concern-over-online-mass-communications-operation-directive-2017/

results into their lack of privacy, agency and autonomy on digital spaces ultimately limiting their voices and sexual expression online. Even though they are able to break these sorts of barriers on their own, they are most likely to face trolls, online harassments, bullying and many forms of online violence. Because online misogyny is a replica of offline misogyny and patriarchal values where women and queer bodies are not free on their own. The sense of entitlement by men and the society over their bodies, minds and expression is always there. Women and queer people who freely express themselves online are taken as public property and they are targeted with hate comments from the same patriarchal mindsets.

Additionally, consent is a factor that is mostly overlooked and dismissed in our socio-cultural as well as legal domain. The conversation about consent in socio-cultural values and practices is missing. It is neither incorporated properly in legal documents. That is why sexual expression is criminalised through laws in the name of obscenity, decency and public morality.

Recording and sharing of intimate images and videos with consent is part of sexual expression thus, our laws curbs freedom of sexual expression of an individual. It limits one's practice of exploring and expressing their sexuality. Here, consent should be the premise of criminalising someone instead of the act itself. Creating and sharing of sexual content without the consent of people involved should be criminalised rather criminalising activities related to sexuality itself with blanket approach. A blanket approach in developing such kinds of laws does not serve its purpose to provide justice and further restrict the victim/survivor to access legal services including their right to sexually express themselves online. Furthermore, freedom of expression is curtailed in an individual level because of concerns pertaining moral backlash. Self-censorship among individual is at rise. It is because there is a fear of moral backlash when individuals post things relating to their sexuality and the backlash continues if the posts are questioning the established status quo. Individual expression on their own body and sexuality is mostly questioned and shamed in the Nepalese society. A recent example is women posting photos wearing backless blouses were shamed because their backs were shown. In retaliation, women on social media used hashtag #Regulated Backs/DignifiedBacks. This kind of shaming of a minority group in name of morality or religious policing is in reoccurrence which results in self-censorship of self-expression on social medias.

e. Case laws/precedent

Case laws or precedent refers to the important decisions that are given by the judiciary while interpreting the existing legal text or to fill up the legal loopholes. Case laws are as important as any other source of law in Nepal. Although there are news reports of the arrest of artists, journalists, civilians for exercising their freedom to expression by posting their status, images, opinion and artistic work online, the cases are resolved through mediation or bail and not taken to court. Hence, even though there is an abundance of instances of violation of the right to freedom of expression online, there are a few court cases in Nepal. Some of the landmark cases relating to freedom of expression are discussed below.

In_Baburam Aryal v GoN (NKP 2074, D.N 9740)[40] the court discussed and deliberated on the right to privacy. A news report titled Someone May See Your Text Messages in Kantipur Daily published that during the investigation related to the late Justice Rana Bahadur Bum, 9,000,000 phone calls and 30,000 text messages were taken for investigation. The news published that even though these calls and text messages were initially gathered to investigate on the case, the information were used as a source of entertainment by the police authority. After the news was published, Baburam Aryal filed a writ petition claiming that it was a violation of individual privacy.

In this case, the Supreme Court established that the right to privacy is a human right. The surveillance of private activities through the government or a third party is a violation of privacy in the digital era. The right to privacy is related to the right to be left alone and any breach of privacy by the government or the third party is condemned by this right.

The court held that during the time of emergency or in the name of national security, if it is necessitated that steps need to be taken by following certain procedures. As a result, the call report and SMS must not be disclosed for criminal investigation nor was it acceptable for them to store the information of those individuals.

The court said that telecommunication service provider companies, while providing the service, must protect the privacy of individuals and also the information related with them. Without proper legal order or in the absence of an authenticated formal application in writing, no such information should be disclosed because of pressure, influence or temptation.

In this case, the court orders to regulate and take legal permission for using details in the investigation to protect the right to privacy and to promote personal liberty of the citizens. The court established that the right to privacy is a human right in which surveillance of private activities through the government or the third party is a violation of privacy in the digital era.

In Robert Ian Penner v Department of Immigration[41] (NKP-2075, Vol.6, Decision No-10091), a Canadian citizen Robert Ian Penner, residing in Nepal on a work visa, is deported back to Canada by the immigration department. The department revoked his visa and asked him to leave the country within two days saying that his tweets disturbed the peace, security and social harmony of the country. The Supreme Court established that the fundamental rights on freedom of expression and opinion are exclusive only to its citizen and not to aliens.

According to the Immigration Rules, 2051, Rule No. 28 the following powers are available:
(1) The Department may cancel a visa of a *foreigner in the following circumstances*:
(e) If his or her presence seems to cause an adverse impact on peace and security of Nepal or mutual harmony between the people of Nepal;
(f) If his or her conduct is found suspicious or if he or she carries out, or causes to be carried out, any undesirable activity;
(g) If his or her presence seems to result in an adverse impact on the social and culture environment in Nepal;

40 Baburam Aryal v GoN, NKP. (2017).

41 Robert Ian Penner v Department of Immigration, NKP. (2018).

(i) If he or she carries out any other act which is not in consonance with the purpose for which the visa was issued or the purpose for which the visa was obtained ends prior to that time;
(j) Where it is recommended by the concerned body for the issuance of a visa of other category than that issued or an application is made for a visa of such other category, and it is then required to cancel the existing visa for the purpose of issuing a new visa to such a foreigner.

The case of Robert Penner showed how freedom of expression is violated in the name of national security and hatred against any race or community. His deportation caused significant debate and exposes the intolerance of state machineries.

V. Curtailment of freedom of expression online

a) Freedom of expression and sexual expression

Freedom of expression is recognised in several national and international documents yet people in power tries to stifle citizen's free speech. The struggle between state and citizens for free speech is never ending. Sexual expression, on the other hand, is controlled even more. There exists state-sponsored censorship and control over one's sexual expression through several legal and also through customary boundaries. Women and queer bodies face hate comments, trolls and threats online which are by-products of misogyny. Tirsana Budhathoki is one of the names who is mostly targeted for her sexual expression on Youtube and Tiktok. In an interview[42] with The Kathmandu Post she asserts:

"*In Nepal, I was often lambasted for my choices. My YouTube channel was also blocked because many people reported it, saying that I was polluting people with my 'indecent' videos.*"

There are many Nepali women and queer people facing the same consequences for expressing themselves online and usually they are targeted for their sexuality and sexual expression.

Coming to the legal grounds, the Constitution of Nepal recognises freedom of expression as a fundamental human right. It has also given the power to restrict freedom of expression in the name of reasonable restrictions on any act which undermines sovereignty, territorial integrity, nationality of Nepal or the harmonious relations between the federal units or the harmonious relations between various castes, tribes, religions or communities, or on any act of treason, defamation or contempt of court or incitement to an offence, or on any act which may be contrary to public decency or morality, on any act of hatred to labour and on any act of incitement to caste-based untouchability as well as gender discrimination.

Though this kind of restrictions is portrayed by the law makers as necessary for maintaining peace and order, there is a great threat of violation of legitimate expression in the disguise of this provision.

42 Khadgi, A. (2020, 2 August). Nepali society cannot tolerate a woman who embrace her sexuality. https://tkpo.st/3dLrcgt

On the other hand, the government through its several laws such as ETA, Penal Code and Privacy Act, limits and controls citizen's right to express themselves. Moreover, the ETA is excessively used to suppress the dissenting voices online, which has become more evident over the last couple of years. Nepal Police arrested Toranraj Poudel[43] on 14 May 2020 for posting morphed photographs of politicians including the Prime Minister on his Facebook page. He was accused of disturbing public morality and spreading hoax about them in social media and charged under ETA. It is notable that the images were not even produced by him and he only shared them on his Facebook page. Earlier, on 28 April 2020, Rita Rijal, a student leader was arrested[44] under the charge of cybercrime. All she wrote was a status post against a former police officer referring to his alleged act of kidnapping a parliament member on national media.

The United Nation's Human Rights Committee in its general comment on the right to freedom of expression stated that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.[45] Unfortunately, citizens are arrested just for writing against politicians and government officials which is not even sufficient to justify monetary penalties against them. The government is detaining citizens on the grounds of trivial matters and easily getting away without any accountability for tarnishing the fundamental rights established by the Constitution.

Similarly, singer Astha Raut was sent to a four-day custody for her indecent behaviour in public and through her Facebook Live after misbehaving with police personnel during security check at Tribhuwan International Airport in Nepal[46]. The incident happened when she was travelling to Sikkim for her musical tour. This event was scarier because the Nepal police published an audio-less footage of the airport in which the alleged singer and police personnel were seen involved in a dispute.

As a reaction, the civil society in Nepal criticised the incident as an attempt of the police force to instil fear in the mind of public and to discourage the expression against the government and authorities. Even human right activists and the civil society overlooked the fact that publishing somebody's footage is a serious violation of privacy by the authorities. In Nepal, the Privacy Act is the only law that addresses the regulation around closed circuit television (CCTV) installation. Article 20 states that CCTV could be installed if it is necessary at a place other than the bathroom or changing room and the public should be clearly informed about the presence of the equipment.

There is no clear provision of how the CCTV footage is collected, processed, stored, used and when it is deleted. There are high chances of the footages being misused by

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43 *Freedom Forum*. (2020, 14 May). Police arrests citizen for sharing picture on Facebook. *Freedom Forum.* http://nepalpressfreedom.org/main/issue-single/1174

44 Freedom Forum. (2020, 29 April). Rita Rijal, A student Leader arrested for writing in Social media under Cyber Crime. *Freedom Forum*. http://nepalpressfreedom.org/main/issue-single/

45 Freedom Forum (2019, April-June). Free Expression Newsletter. *Freedom Forum*. http://freedomforum.org.np/download/free-expression-46/?wpdmdl=3802&refresh=5f9a8c1237a4b1603963922 5

46 The Himalayan Times. (2020, 25 January). Raut remanded to custody for four days. *The Himalayan Times*. https://thehimalayantimes.com/nepal/raut-remanded-to-custody-for-four-days/

the authority and individual's right to privacy halted. In Astha Raut's case, the police have clearly misused their power and resources to prove their point in which they presented the case as if a citizen is misbehaving against the institution and therefore, the accused should be held accountable. This argument is made while totally surpassing the citizen's privacy concern including their right to protest or criticise. This case also shows the bigger picture of state-imposed surveillance upon the citizens. The frequent and sudden arrests of the citizens for writing on their social media also proves that the state is watching citizens very closely and carefully.

Additionally, the Penal Code has been imperative to curb citizen's rights to speech including sexual expression in the name of obscenity, morality, defamation, public peace, privacy breach and jeopardising harmonious relationship among different clans. The Penal Code's restrictions on production and distribution of any obscene materials are core to the limitation on sexual expression online. Based on this law, the Nepal governments decided to ban all porn websites in the country which came as a prompt action from the government to curb the sexual violence.[47]

Terms like morality, indecency and obscenity are very subjective and its understanding differs from person to person and one culture to another. Restricting an individual's expression through the law is a very harsh act intended to control an individual's opinion and sexuality. In this regard, Shubha Kayastha writes:[48]

The basis for banning porn in both the Indian and the Nepali case appear to be a concern with the "obscene." It is therefore worth examining what "obscenity" is. The word has been used repeatedly in the 2018 Civil Code, despite never having been defined. Along with "obscenity," words such as "morality" and "decency" are in many articles in laws and policies. This is not to say that it is desirable for the state or the judiciary to define abstract concepts like obscenity and morality, because those in positions of power can do so arbitrarily.

There are a few other laws that also impose restriction on individual sexual and freedom of expression. This includes the Individual Privacy Act, the Electronic Transaction Act, National Broadcasting Act, Press and Publication Act and the Motion Picture (Production, Exhibition and Distribution Act of 1969.

b) Press freedom violation in Nepal

Nepal is ranked 112th out of 180 countries in World Press Freedom Index 2020[49] and has a low score of 3.9 out of 10 on freedom of opinion and expression according to a survey by New Zealand-based Human Rights Measurement Initiative in 2020.[50] The arbitrary arrests, physical attacks and threats posed at journalists and editors including the censorship and intimidation towards the online portals from state parties are proof of the worsening scenarios.

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47 ABC News. (2018, 4 October). Porn ban introduced in Nepal in attempt to combat violence against women. *ABC News*. https://www.abc.net.au/news/2018-10-03/nepal-bans-online-pornography-to-counter-violence/10330772

48 Kayastha, S. (2020, 1 October). The problem with Nepal's Porn ban. *The Record*. https://www.recordnepal.com/perspective/policing-sexuality-porn-ban-in-nepal/

49 Reporters Without Border. (2020). Country Report- Nepal. https://rsf.org/en/ranking

50 HRMI Rights Tracker. (2020). Right to opinion and expression. *HRMI Rights Tracker*. https://rightstracker.org/en/metric/expression

According to Freedom Forum Nepal an organisation working for press freedom, a total 104 cases of press freedom violations[51] took place as of April 2019.

As Reporters Without Borders (RSF) cites, at least 10 journalists have been threatened[52] in connection with their COVID-19 reporting in Nepal since late March 2020 in an attempt to control the narrative about the virus spread and government's response towards it. Similarly, the Nepal Telecom Authority blocked 22 online portals during March 2020 for spreading fake news in relation to the COVID-19 situation[53]. Freedom Forum Nepal on the blocking of the online portal states:

(Nepal Press) Council must not act arbitrarily; it has not specified any methodology or type of content as misinformation. Yes, it is rightful body to monitor the content while in the name of monitoring content, blocking media is deplorable. Also, in the name of misinformation, journalists must not be panicked and media controlled.

Press Council is eligible to ask for clarification to concerned media and help those improve their contents but such action of banning online news portals is unconstitutional as Nepal's Constitution itself guarantees rights to free press and freedom of expression argues FF's Executive Chief Taranath Dahal.

In March 2020 a news article about the illegal removal of the story from Kathmandu Press by the website developer hit the media by storm.[54] A company named Shiran Technologies which developed and monitored the site name Kathmandu Press removed the news from the site about the alleged involvement of relatives of senior government officials in purchase of medical kits from China during the pandemic response. This happened because one of the company's owners happens to be the Prime Minister's IT adviser.

In this case, RSF again cites that the prime minister's press advisor even called Ramesh Bista, the general secretary of Federation of Nepalese Journalists after he issued a statement condemning the story's removal.[55]

While the Constitution of Nepal guarantees press freedom, it also restricts press freedom in the name of sovereignty, territorial integrity, nationality or the harmonious relations between the federal units and so on. There are other acts such as Electronic Transaction Act, National Broadcasting Act, Press and the Publication Act including the Penal Code that are also used to curtail press freedom in the name of curbing cybercrimes.

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51 Freedom Forum. (2019, 3 May) Regressive laws, Mounting Violations. *Freedom Forum*. https://www.kantipurhotline.com/wp-content/uploads/2019/05/May-3-Report-2019.pdf

52 Reporters Without Border. (2020, 8 June). Nepali Journalist threatened, attacked and censored over COVID 19 coverage. *Reporters Without Border*.https://rsf.org/en/news/Nepali-journalists-threatened-attacked-and-censored-over-covid-19-coverage

53 Freedom Forum, (2020, 20 April). FF condemns Press Council's decision to shut down online news portals. *Freedom Forum*. http://freedomforum.org.np/ff-condemns-press-councils-decision-to-shutdown-online-news-portals/

54 The Kathmandu Post. (2020, 14 April). Kathmandu Press accuses its site developer of removing news article without consent. *The Kathmandu Post*. https://kathmandupost.com/national/2020/04/02/kathmandu-press-accuses-its-site-developer-of-removing-a-news-article-without-consent#:~:text=National-,Kathmandu%20Press%20accuses%20its%20site%20developer%20of%20removing%20a%20news,procuring%20medical%20equipment%20from%20China

55 Federation of Journalist, (2020, 2 April). Press Release. http://fnjnepal.org/uploads/presses/press_1585815328.pdf

Though these kind of restrictions on the said subject is deemed necessary for maintaining peace and order, there is a great threat of violation of legitimate expression in the disguise of this provision.

c) Artistic expression

There are significant incidents of freedom of expression being undermined in various fronts in films, music, comedy and the creative arts along with media. Artists, singers and filmmakers are facing unprecedented attacks over the years. As mentioned earlier, Rapper Samir Ghising known as Vten and Singer Durgesh Thapa were arrested for disrupting social harmony.

Folk singer Pashupati Sharma was forced to remove[56] his song from his YouTube channel after receiving threats from the ruling Nepal Communist Party's (NCP) youth wing. The youth wing issued a statement in its Facebook Page[57] accusing the singer of defaming the party. In reality, the song was about the suffering of Nepali citizens due to massive corruption within the state.[58]

In a recent case, singer Sophiya Thapa, who sang a song related to Teej (a Hindu religious festival) was subjected to cyber-attack to pressure her to remove the song from her YouTube channel. The pressure came from from various religious groups and individuals after she released the song titled "Aba ko teej no Brata please".[59]

Manoj Pandit, filmmaker and director, is another popular name whose movies were banned, censored and prevented from screening by the government and the Nepal Army.[60] Pandit's production Greater Nepa- a movie about the state of the country before the Sugauli Treaty and Dasdhunga- a movie about the scandalous accident and death of popular communist leader Mr. Madan Bhandari and Badhshala- a movie about the ten-year long people's war were banned from screening by the Nepal Army after the instruction of current Prime Minister. [61]

In general, movies are screened after removing adult scenes and dialogues even if they are A rated already. This usually happens with foreign films. For Nepali productions, some are directly banned such as the ATM, a Nepali movie banned in 2012. The Ministry of Communication banned the movie[62] for having adult scenes and for violating the law.

According to the Motion Picture (Production, Exhibition and Distribution) Act[63], the film Censor Board cannot permit the screening of motion pictures that "may jeopardise the security, peace and

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56 Al Jazeera. (2019, 18 February). Nepali singer pulls corruption song from YouTube after threats. *Al Jazeera*. https://www.aljazeera.com/news/2019/02/nepali-singer-pulls-corruption-song-youtube-threats-190218083248187.html

57 National Youth Federation of Nepal. (2019, 16 February). Facebook Status. https://www.facebook.com/yfnepal.org/posts/2289822537715862

58 *My Republic*. (2019, 17 February). Pashupati Sharma talks about' Lootna sake Loot. *My Republic*. https://myrepublica.nagariknetwork.com/mycity/news/pashupati-sharma-talks-about-lootna-sake-loot

59 Freedom Forum. (2020, 22 July). Threat of attack on singer Thapa. *Freedom Forum*. http://freedomforum.org.np/threat-of-attack-on-singer-thapa/

60 Freedom Forum. (2020, 21 July). Media, film, literature under control and fear in Nepal. *Freedom Forum*. http://freedomforum.org.np/media-film-literature-under-control-and-fear-in-nepal/

61 Nepal Monitor. (2013, 28 January). Nepal Army bans screeding of "Badhshala". Nepal Monitor. https://nepalmonitor.org/reports/view/1047

62 Singh, P. (2012, 23 November). ATM Nepali Movie Banned in Nepal. *Nepali Chalchitra*. https://nepalichalchitra.com/atm-nepali-movie-banned-in-nepa

63 Motion Picture (Production, Exhibition and Distribution) Act. (1969). http://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/motion-picture-production-exhibition-and-distribution-act-2026-1969.pdf

order of Nepal or harm the harmonious relation subsisting with the foreign states or the peoples of various castes or tribes or which may cause negative impact to the public interest or descent behaviour or morality or defame any person or contempt of court or incitement to any offence". With such a vague list, it is not surprising to find the that Censor Board take offense at the slightest provocation in a desperate bid to stay relevant.

There are other incidents of artistic freedom being infringed upon as well. A theatrical performance[64] directed by Loonibha Tuladhar had to shut down because it was about a Tibetan refugee in Nepal. The social media promotion of the show was restricted too. In such incidents, the artists are silenced for exercising their artistic freedom and they never get the chance to report about the human rights violation. On the other hand, the state is never held accountable and it gets more authoritative with each passing day.

v. Future violation through draft laws

Given that Nepal does not have a comprehensive legislation to regulate the internet and the acts that are present does not address the issues properly, the Nepal government is bringing up a couple of bills that exclusively addresses this including cyber violence, data breach, social media regulation and other related digital rights. However, these bills have the potential to impact the freedom of expression on the internet. Among these, the major bills are the Information Technology (IT) Bill, Media Council Bill and Special Service Bill.

a) Information Technology Bill

Section 83 of the IT bill prohibits cyberbullying which is defined as continually harassing, teasing, demeaning, discouraging, insulting or scolding someone.

The categories of speech mentioned in the article above are too broad and vague to meet Section 19's[65] three-part test[66] (that limits to freedom of expression should be necessary, legitimate and proportionate). Terms like continually, demeaning, teasing, scolding and discouraging are subjective and open to interpretation. This gives the government broad discretion to pursue criminal actions against individuals based on arbitrary and subjective grounds.[67] This article has the potential to curtail rights to freedom of expression especially when it comes to political opinion.

Section 86 prohibits the "production, collection, distribution, publication, exhibition, transmission or purchase/ sale" of pornographic materials using the electronic system to produce and collect pornographic materials.

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64 Ghimire, S. (2018, 20 June). Government pressure shut down play about Tibetan refugee before PM's visit to China. *The Record*. https://www.recordnepal.com/wire/government-pressure-shut-down-play-about-tibetan-refugees-before-pms-visit-to-china/

65 Article 19 of Universal Declaration of Human Rights (UDHR) talks about right to freedom of opinion and expression that includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media (online and offline) regardless of frontiers. (http://www.claiminghumanrights.org/udhr_article_19.html)

66 Article 19's three-part test says that any restriction in person's freedom of expression must meet three conditions which are a) it must be provided by law, b) it must respect the right of reputation of others and protection of national security, public order, public health or morals c) and must be necessary to achieve the legitimate purpose. (http://www.claiminghumanrights.org/opinion_expression_definition.html)

67 ICNL. (2019). Summary Legal Analysis of Nepal's Information Technology Act, 2075.

Here, the law criminalises even those who record, store or share any sexual materials (photos and videos) with consent, as anything sexual is seen as pornographic. Recording or/and sharing of intimate images and videos with consent is part of sexual expression thus, this law curtails freedom of sexual expression of an individual. It limits one's practice of exploring and expressing their sexuality.

Section 87 of the bill prohibits anyone from using an "electronic medium to make a proposal with the intention of sexually exploiting or defraud or carrying out any illegal activity, incite, encourage to meet or involve in illegal activities or propose to establish online relations for the same."

The section includes not just sexual violation but also online relationship with the purpose of sexual violations and defraud. The law can be used to criminalise consensual sexual conversation in platforms such as dating apps or social media. The focus is on the content of the conversation instead of whether or not the involved parties are doing it willingly with consent or not.

Section 91 of the bill states that it is mandatory for social network sites to register at the Department of Information and Technology to operate in Nepal and will be banned for not doing so. Mandatory registration in Nepal would mean that many of the networks will not be able to operate in Nepal as a result of the difficulties involved.

Internet has become an integral part of people's lives in Nepal. For many, internet means solely social media and they use it for information, organising and entertainment. With the social media companies not being able to operate in the country, many will not be able to access information of their choice and their means of communication will be disrupted. It also curtails the rights to assembly, which is against basic human rights as ensured by the Constitution of Nepal.

The government will be able to censor the online content and surveillance against any individual or groups could increase. A policy brief from ICNL suggests that the mandatory registration provision of social networks means prior censorship and interference on the right to freedom of expression given the chances of procedure being tedious, costly and arbitrary.[68] By having social networks registered in Nepal, the government is seeking more and direct influence over the companies, which will allow it to access information and personal detail of individuals or groups.

Section 92 of the bill gives the Department of Information and Technology direct power to remove any content through social network, which is commonly referred to as a notice-and-takedown system.[69] This article creates censorship concerns due to: (a) required registration of social networks; (b) prohibitions from using unregistered social networks; and (c) undefined regulations of social networks. It might enforce restriction on content on social media platforms on basis of vague limitations and expansive terms such as offensive content with no safeguards for arbitrary prosecution or shutdowns that violates freedom of expression of individuals.

68 Ibid.
69 Ibid.

b) Media Council Bill

The parliament has proposed Medial Council Bill to amend and integrate laws relating to the regulation of media in Nepal including the Press Council Act of 1992. Section 6(4) reads, "The Council shall monitor whether every media outlet, electronic broadcasting media and online news sites, newspapers and literary papers, and its publisher, editor, journalists and reporter abide by the Code of Conduct or not and the Council may issue necessary directives to comply with the Code of Conduct during such monitoring." The code of conduct rather than an ethical guidance is treated as a strict law that journalists fear. This very provision is against the main principle of press freedom enshrined in the Constitution.

Section 7(1) is related to the formation of the media council which consists of one person appointed by the government, first class gazettes appointed by the ministry as a member, six people including at least two women nominated by the ministry and the chairperson of federation of Nepalese journalists. The Media Council should be independent and free of government intervention as it is an autonomous body. According to the aforementioned clause, the government has a predominate role to determine the member of the council and how the council functions, which gives the chances of prejudice to come into play. The self-regulatory function of the council may come into question given that government interference cannot be avoided with such formation, restricting freedom of expression.

Similarly, Section 7(3) is related to the formation of a recommendation committee consisting of the Secretary of the Ministry as a Coordinator, one person appointed by the ministry from amongst persons who are renowned in law, information technology or social sector as a Member and one person appointed by the ministry amongst senior journalists as a Member. The recommendation committee also consists of government members only. The positions for recommendation committee should have consisted of members that are independent and unbiased towards press freedom and freedom of opinion and expression.

c) Special Service Bill

This bill purposes the formation of special Intelligence Service in Nepal. Section 10 of the bill provides the department an authority to have surveillance, monitoring and interception of conversations, audio-visual and electronic codes and the details communicated by public media or other mediums of suspected and people under surveillance, organisations and institutions during the course of information collection and counter-intelligence activities.
Giving the power to Intelligence Service to monitor, intercept and conduct surveillance in the bill may threat individual data privacy and breach citizen's right to privacy by the state party. Likewise, this very provision is in contradiction with the previously established precedent by the Supreme Case in Baburam Aryal v Government of Nepal. Additionally, when a person or an institution, such as a media organisation is under surveillance by the authority, they cannot function freely and poses a tendency of self-censorship which ultimately affects their right to freedom of expression.

VI. Findings and conclusion

Based on the research we undertook the following findings are put forward:

Internet usage is on rise for various purposes from communication, information and for entertainment. However, in a legal sense, the internet is treated more as a service in which government intends to regulate rather than a right or a space for general public to explore and express. The legal mechanisms for the regulation of digital space are guided by patriarchal and religious norms. As a result, the legal provisions are ambiguous. For example, terms such as obscenity and immorality that are mentioned in various laws are subjective and their meanings may differ from person to person and from community to community. Thus, moral policing and restriction upon sexual expression of women and queer individual could be imposed through such ambiguity.

Several terms used in the laws are over broad, vague and subjective. This falls below international standards and guarantees for freedom of expression in Article 19 of the International Covenant on Civil and Political Rights as well as the Universal Declaration of Human Rights. This gives the authority the power to interpret laws in their favour which is not good for any democratic state. The consent factor is missing in our legal framework as it implies all sexual content as obscene, immoral or indecent. Here, the laws do not seem to respect an individual's agency, autonomy and freedom over their own bodies and expression which leads into further criminalising sexual expression. On the other hand, direct or indirect censorship, arbitrary accusation and custodial action has been taken by the state based on these ambiguous laws and through its mechanism. This has been instrumental to curb free speech of press, artists and general citizens.

The implementation of laws related to freedom of expression is not consistent between online and offline context. There should not be separate laws for the same actions done at different platforms. In fact, the laws to regulate offline spaces should be followed to regulate online spaces rather than making separate laws.

Press freedom, artistic freedom and sexual expression are limited in the name of morality, public decency, national security, national integrity and sovereignty. This curbs the voices of marginalised and dissenters.

Even though there is an act regulating individual privacy, it does not cover the aspect of online privacy as much as it should.

Cases related to freedom of expression are mostly solved through mediation by the police rather than in courts. Even though there are cases reported through media reports about the arrest of civilians, artists and journalists for the violation of laws related to freedom of expression, they are settled by police instead of furthering it to a court case. Nepal also lacks data protection laws. There is a lack of proper procedure regarding the collection, use and storage of the data defined by the law. Many businesses hold confidential personal information of the general public. Often times this information including phone numbers and other contact details are used for marketing purposes. Now that the

economy is digitised, these information are crucial, hence there is a huge chance of these information being misused by selling it to third parties for marketing purposes or for general surveillance.

If there occurs blocking of internet or websites by the government, there is no legal mechanism to challenge it. The recent porn ban by the government was a unilateral decision by the state and aside from digital activists speaking against it, no legal action opposing it was taken because of lack of legal grounds.

Conclusion

The number of apparent cybercrime cases that is directly related with the infringement of freedom of expression online is in the rise. In Nepal, freedom of expression and opinion including sexual expression of citizens, artists and the press is frequently being criminalised and suppressed through state-sponsored surveillance and censorship along with the ambiguous laws. Additionally, it is an alarming situation that the state-posed surveillance, violation of privacy and censorship is impending through different bills and announcements of the government which could stifle the freedom of expression of the dissenting voices for a long time to come. It is critical that the state adopts an objective and human rights-based approach in developing and amending these provisions. Extensive consultation with the technical community, civil society and marginalised communities is imperative for democratic governance of a common internet. In this regard, it would be advisable to take note of the developments in the region and at the international stage by relying on progressive legislation and jurisprudence.

Beyond legal framework too, there are several factors that hinders individual's freedom of expression online especially of women and marginalised community. ack of access to technology, online gender-based violence, patriarchal values and protectionist approach of family and society are few factors that plays roles in curbing their right to express online. Therefore, if freedom of expression including sexual expression as a fundamental right have to be ensured we have to look at and address these socio-cultural, political and economic factors as well beside the legal ones.