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# Assessment of the Legal Environment for Civil Society and Media in Nepal

## CIVIL SOCIETY: MUTUAL ACCOUNTABILITY PROJECT

*This report is made possible by the support of the American People through the United States Agency for International Development (USAID). The contents of this Assessment Report are the sole responsibility of ICNL and do not necessarily reflect the views of USAID or the United States Government.*

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## List of Acronyms

ARA	Associations Registration Act
CIAA	Commission for the Investigation of Abuse of Authority
CS:MAP	Civil Society: Mutual Accountability Project
CSO	Civil Society Organization
CSOSI	CSO Sustainability Index
DAO	District Administration Office
DCP	Development Cooperation Policy
DDC	District Development Committee
EENA	Enabling Environment National Assessment
FHI	FHI 360 – Family Health International
GON	Government of Nepal
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Center for Not-for-Profit Law
INGO	International Non-governmental Organization
MoFALD	Ministry of Federal Affairs and Local Development
MoFSC	Ministry of Forestry and Social Conservation
MoHA	Ministry of Home Affairs
MOIC	Ministry of Information and Communications
NDA	National Directive Act
NEPAN	Nepal Participation Action Network
NGO	Non-governmental Organization
NNDSWO	Nepal National Dalit Social Welfare Organization
SWA	Social Welfare Act
SWC	Social Welfare Council

SWR	Social Welfare Regulations, 1993 (with amendment in 2015)
UDHR	Universal Declaration of Human Rights
UNSR	United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association
USAID	United States Agency for International Development

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## EXECUTIVE SUMMARY

The International Center for Not-for-Profit Law (ICNL) conducted an assessment (Assessment) of the legal environment for civil society<sup>1</sup> and the media<sup>2</sup> in Nepal from May 2016 to March 2017. This Assessment was produced with the support of the USAID-funded Civil Society: Mutual Accountability project (CS:MAP), implemented by FHI 360 in partnership with ICNL and Equal Access. CS:MAP aims to strengthen an enabling environment for civil society and media in Nepal so that they are empowered to advance public interest.

The Assessment was conducted through a combination of desk research and information obtained from civil society organizations (CSOs) and media stakeholders through field interviews<sup>3</sup> and the convening of five workshops in Nepal (in Kathmandu, Banke, Dadeldhura, Kavre, and Palpa). This report provides an overview of the laws that regulate civil society and media in Nepal, and identifies those laws or practices that affect the freedoms of association and expression.

The Assessment examined only the legal framework for CSOs and the media, it did not review the role or workings of regulatory bodies. Similarly, the Assessment does not address the role or ownership of media houses.

It is important to note that the legal environment for both civil society and media in Nepal may evolve quickly during the current period of legislative reform. This Assessment only covers the existing laws available in English. CS:MAP recognizes that several pieces of draft legislation are currently pending, and will provide analyses of these draft laws, as necessary.

The civil society and media sectors in Nepal are vibrant, which is a credit to the country's commitment to democracy and recent history of a relatively permissive civic space. While media and CSOs have contributed a significant amount to progress in Nepal, there is a growing sense of fear that the legal environment for civil society and media is becoming restrictive. Laws and regulations for civil society and the media can be reformed in specific ways that would create a more enabling environment, meaning that both sectors can operate freely without onerous oversight, as well as better protect the freedom of association and the freedom of expression. The new Constitution in Nepal, promulgated in 2015, provides a unique opportunity to pursue the legal reforms that will allow the media and civil society sectors to continue their contributions to the country and protect their independence.

This summary highlights the key findings of the legal environment for civil society and media sectors. Also provided are some recommendations for reforms that can improve the legal enabling environment for civil society and media in Nepal.

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<sup>1</sup> "Civil society" covers a vast range of activities and includes any voluntary collective activity in which people combine to work on a particular issue. Civil society can include charities, neighborhood self-help schemes, international bodies like the Red Cross, religious-based groups, human rights organizations, and non-governmental organizations improving health, education and other development-focused goals; see e.g., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 51H52 (21 May 2012).

<sup>2</sup> For this Assessment, "media" is defined as the sector that disseminates news, which includes broadcast, print, and Internet communications.

<sup>3</sup> To the greatest extent possible, names of interviewees are noted. Some interviewees asked that their names not be used, and in those instances the location and date of the interview are noted.

## LEGAL ENVIRONMENT FOR CIVIL SOCIETY

Below are the findings regarding the legal environment for civil society:

- *There are critical gaps in understanding the role of civil society.* The Government of Nepal (GON)<sup>4</sup> seems to misunderstand the role of civil society in Nepal’s development. The GON’s vision and definition of civil society is limited: the GON is too focused on “hardware” meaning that an NGO focused on research may have trouble operating. In addition, communication gaps exist between CSOs and the GON. This situation is exacerbated by a lack of interagency cooperation within different parts of the GON bureaucracy with a role in regulating civil society. Similarly, not all CSOs fully understand their role, people’s understanding of CSOs is also very limited.
- *Underlying laws and GON decisions do not respect the independence of civil society.* The existing legal framework does not adequately recognize the independence of civil society. Part of the problem stems from a failure by the Constitution to envision an independent civil society; for example, the one-door policy described in the new Constitution appears to envision a role for CSOs in areas of national needs and priorities only. The registration process for CSOs reveals that the GON treats the sector as a tool for development purposes, and expects CSO work to be in line with national development policies. In addition, the Association Registration Act (ARA) empowers the GON to give directions to associations and to terminate associations if they refuse to follow directions.
- *Registration requirements for CSOs pose undue burdens.* The registration process for CSOs is restrictive and cumbersome. Information requirements include the disclosure of financial sources, an “address of the office”, a citizenship certificate, and police reports on the founders. The GON has virtually unlimited discretion to deny registration and requirements seem to vary among various registration authorities in Nepal. Specifically, CSOs face different requirements, forms, and fees among district offices, creating a very uncertain environment for approval. In addition, approval by the District Development Committees (DDC) is required and highly political.
- *Re-registration requirements are overly burdensome.* Depending on the project, the re-registration process may require CSOs to submit reports to multiple government offices at central and local levels, which creates too many points where renewal may be delayed or denied. The level of paperwork is onerous, with multiple supporting documents required.
- *Multiple requirements for CSOs are not explicitly prescribed by law.* Many of the demands required of CSOs, whether it be registration, reporting, or otherwise, do not meet the “prescribed by law” standard established under international law. For example, a Ministry of Home Affairs Directive requires CSOs applying for registration to submit a recommendation of the local agency where the CSO is intended to be established. This is an ad-hoc requirement that does not appear in the ARA. Many other requirements do not appear in any law, such as, for example, registration in both Kathmandu and with District Administration Offices (DAOs), as well as the need to

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<sup>4</sup> For this Assessment, the “Government of Nepal” or “GON” refers to both the Executive and Legislative branches, including Ministries, Departments and Government Agencies of the Federal Democratic Republic of Nepal.

obtain approvals from local government offices, the DDCs, and other line agency district offices.

- *Reporting requirements are too burdensome.* CSOs face district-specific reporting requirements to DDCs and DAOs. If a CSO is operating in multiple districts, then it faces a reporting obligation to the DDC in each district. All CSOs are also required to undergo an annual audit. These blanket requirements for all CSOs to submit reports are excessive and can be very burdensome and costly.
- *Inspection, suspension and dissolution powers are too broad.* The ARA provides vague standards on when the GON can investigate CSOs. In addition, the ARA provides very broad grounds for the GON to dissolve a CSO, instead of providing a limited list of objective grounds. The Social Welfare Council (SWC) also has similar powers to suspend or dissolve the executive committee of a CSO; while ICNL is unaware of cases where the SWC has used its power to suspend or dissolve the executive committee of a CSO, the broad authority opens the door to the exercise of excessive discretion.
- *The situation of CSOs in remote regions is inadequately addressed.* The current legal environment for civil society does not take into account the federal structure established in the new Constitution. In some cases, the GON systems that interface with civil society have been centered near Kathmandu, with little or no accommodation for CSOs in more remote areas. For example, it has been difficult for CSOs based in outlying districts to access the SWC, which is based in Kathmandu, and seek affiliation.
- *Restrictions on the access to resources violate international standards.* CSOs desiring to receive foreign or government resources must seek separate and additional approval from the Social Welfare Council (SWC) beyond initial registration. This second tier of approval has resulted in project delays, particularly for those funded by international donors, and runs counter to international standards relating to freedom of association.
- *The legal framework imposes unnecessary budget restrictions.* The SWC currently places a 20 percent limit on administrative costs in budgets through its project agreement requirements. This limit restricts the ability of CSOs to work on advocacy issues, as the SWC mandates that the other 80 percent of project budgets must focus on hardware, or tangible development outputs.

Below are some recommendations to improve the legal enabling environment for civil society:

- *Simplify registration requirements and provide an appeals process.* To protect against arbitrary decision-making and comport with international good practice, the registration process should include: (1) clear, legitimate grounds for denying registration; (2) a mandated timeframe in which the government must respond to an application; (3) a remedy if the registration body fails to respond to a registration application within the mandated time period; (4) a requirement to provide written justification for a denial of registration; and (5) a right to judicial appeal of a denial of registration.

- *Eliminate the re-registration requirement.* Registered organizations should not be required to re-register. If re-registration is required, the process must be made as simple, clear, and inexpensive as possible.
- *Simplify reporting requirements.* The reporting requirements should be streamlined so that CSOs do not face multiple reporting obligations to different district offices. In addition, only organizations that have significant amounts of income (and income above a specified threshold) should be subject to audit requirements.
- *Confine the government’s inspection, suspension, and dissolution powers to a level proportionate with the risk presented.* The inspection, suspension, and dissolution powers should be proportionate to the pursuit of legitimate aims. Objective grounds should be given for suspension and dissolution and the GON should not take such action for simple administrative irregularities.

## LEGAL ENVIRONMENT FOR THE MEDIA

Below are the findings regarding the legal environment for the media sector:

- *The constitutional framework does not adequately protect the freedom of expression.* The Constitution attempts to guarantee the freedom of expression. Although a “free press” is noted in the Preamble, only the right to communication is enshrined in the body of the Constitution. The right to communication only covers the operations of publications and broadcasts that disseminate news. As such, the right to free expression and right to communication have limited protection in Nepal’s legal framework. Moreover, the Constitution contains several categories of speech that are prohibited, many of which do not comply with international standards.
- *Implementation remains a challenge for the Right to Information Law.* The Right to Information Law (RTI Law) enables journalists and Nepali citizens to request and receive information held by the GON and “public bodies,” but more training on implementation is needed to ensure that journalists are able to access information in a timely manner. In addition, under the requirements of the RTI Law, all information seekers must provide reasons to justify their information requests; this requirement is unnecessary and impinges on the effectiveness of the RTI Law. Furthermore, the RTI Law lacks a public interest override, which would protect whistleblowers when releasing information in the overall public interest, such as information on corruption or other government wrong-doing.
- *Other laws restrict the ability of journalists to do their job.* The Defamation Act and Electronic Transactions Act contain provisions that restrict the freedom of expression and thus significantly impact the ability of journalists to report the news. For example, Section 47 of the Electronic Transactions Act has been used by the GON to control online speech. The GON brought five cases against journalists under Section 47 from March to August 2016.
- *Mandatory registration for online journalism was recently introduced.* The 2017 Online Media Operation Directives require that one obtain approval from the Department of Information before engaging in “online journalism.” This violates international norms that permit publication without advance licensing approval.



- *Licensing requirements may impinge on the freedom of expression.* The licensing of news outlets is also an issue in the National Broadcasting Act and the Press and Publication Act. Care should be taken to ensure that media outlets are able to operate independently and without obtaining prior government approval before engaging in journalism.
- *Journalists face physical threats.* There have been several attacks on and threats levied against journalists and media houses throughout 2016 and 2017, which has resulted in widespread self-censorship amongst journalists.

Below are some recommendations to improve the legal enabling environment for media:

- *Reform specific laws and policies that restrict the freedom of expression.* Rather than draft an umbrella policy for media, reform efforts should target laws and policies that impede the freedom of expression and the right to information. For example, changes should be made to the Defamation Act, Electronic Transactions Act and Online Media Operation Directives so that individuals cannot be prosecuted for espousing views critical of the GON or its policies.
- *Improve implementation on the Right to Information Law.* Implementation on the RTI Law can be improved by training GON officials so that they are able to handle requests for information in a proper, efficient manner. Implementation reforms should also do away with the requirement that information seekers must provide reasons to justify their requests.
- *Amend the Right to Information Law.* The RTI should be amended to (a): include a public interest override, which would protect whistleblowers that bring information about corruption or other wrong-doing; and (b) exempt private bodies that do not receive public funds and do not perform public functions from disclosure requirements and other obligations.
- *Protect the operation of media houses.* With respect to the right to communication, the law should ensure the ability of media houses to operate without government interference through specific legal reforms and implementation of such legal reforms. In addition, media houses should help to develop, implement, and adhere to self-regulation mechanisms, including professional guidelines. A well designed self-regulation mechanism that has broad support from the media sector can protect the freedom of expression by improving the media environment through respect for privacy and promoting accuracy, fairness, and impartiality.
- *Ensure that any new or revised laws do not infringe on the freedom of expression.* The Civil and Criminal Codes are currently in the process of being drafted, and the National Mass Communication Policy 2016 calls for several new laws to be enacted, including a Cybercrime Law. All revisions and amendments to existing laws, as well as new laws, should be reviewed and written in a manner to protect the freedom of expression.

# THE LEGAL ENVIRONMENT FOR CIVIL SOCIETY IN NEPAL

## Part I: Introduction

Nepal's civil society has rapidly grown since the 1990 People's Movement, which ended an absolute monarchy and began Nepal's path towards democracy. Since then, Nepal has made significant strides in the recognition of human rights. However, civil society freedoms remain restricted in different areas and aspects of the legal framework appear problematic under international law. This paper provides an overview of the laws that regulate civil society in Nepal, including the laws that impact the freedoms of association and expression, and identify concerning provisions under international law.

## Part II: International Legal Framework on the Freedom of Association

Nepal acceded to the International Covenant on Civil and Political Rights (ICCPR) on May 14, 1991.<sup>5</sup> Article 22 of the ICCPR provides the overarching international standard for laws impacting CSOs:

Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

In order to comply with its international obligations, therefore, Nepal has the burden of demonstrating that restrictions on the freedom of association meet three requirements.<sup>6</sup>

First, restrictions must be "prescribed by law," meaning that: (a) the restriction is "introduced by law (through an act of Parliament or an equivalent unwritten norm of common law)" rather than "Government decrees or other similar administrative orders;"<sup>7</sup> and (b) the law is "accessible and its provisions be formulated with sufficient precision."<sup>8</sup>

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<sup>5</sup> UN Human Rights Office of the High Commissioner, Human Rights Bodies, Ratification Status for Nepal, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN) (accessed July 30, 2016).

<sup>6</sup> "Defending Civil Society Report," International Center for Not-for-Profit Law and World Movement for Democracy (2<sup>nd</sup> Ed., June 2012), p. 40.

<sup>7</sup> Margaret Sekaggya, UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, p. 44 (July 2011).

<sup>8</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 16, U.N. Doc. A/HRC/20/27 (21 May 2012).

Second, restrictions must be in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. This is a closed list, and these limited circumstances must be “narrowly interpreted.”<sup>9</sup>

Third, restrictions must be “necessary in a democratic society.” Necessity amounts to a proportionality test: “Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”<sup>10</sup> Furthermore, “there must be a ‘pressing social need’ for the interference.”<sup>11</sup> The “democratic society” component “places the burden on States imposing restrictions to demonstrate that the limitations do not harm the principles of ‘pluralism, tolerance and broadmindedness.’”<sup>12</sup>

## Part III: The Constitutional Framework of Nepal for the Right to Freedom of Association

### The 2007 and 2015 Constitutions

A new Constitution of Nepal was adopted on September 20, 2015. As hundreds of laws must be changed to align with the new Constitution, the deadline to implement the Constitution is January 24, 2018.<sup>13</sup> Though controversial within Nepal in some respects, such as the new demarcation of administrative areas, the new Constitution is widely considered to be an improvement over the 2007 Interim Constitution, with many progressive rights-based provisions, such as the recognition of the rights of LGBT.

However, the new Constitution does not appear to heighten protection or promotion of the freedom of association and may even restrict this freedom more than the 2007 Interim Constitution.

The 2007 Interim Constitution provides, “Every citizen shall have the...freedom to form unions and associations.” Article 12(3)(d). This freedom cannot be suspended in a State of Emergency. Article 143(7). However, the freedom to form an association may be restricted by law in order “to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes, religions or communities, or which may incite violent activities, or which may be contrary to public morality.” Proviso 3 of Article 12.

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<sup>9</sup> Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”), Guidelines on Freedom of Association, para. 34 (17 December 2014) (available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e)).

<sup>10</sup> ICCPR Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 6 (26 May 2004).

<sup>11</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 17, U.N. Doc. A/HRC/20/27 (21 May 2012) *citing* OSCE/Office for Democratic Institutions and Human Rights (ODIHR), Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, para. 5.

<sup>12</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 17, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>13</sup> “Cabinet endorses constitution implementation plan,” *The Kathmandu Post* (16 June 2016) (available at: <http://kathmandupost.ekantipur.com/news/2016-06-16/cabinet-endorses-constitution-implementation-action-plan.html>).

The 2015 Constitution similarly provides, “Every citizen shall have the...freedom to form unions and associations.” Article 17(2)(d). This freedom also cannot be suspended in a State of Emergency. Article 273(10). However, the 2015 Constitution includes the 2007 grounds for restrictions on this freedom, as well as new foreign interference based grounds, including “any act which may constitute” espionage, sedition, divulgence of national secrets, or assistance to a foreign state, organization or representative in order to undermine security or conduct sedition:

Nothing in sub-clause (d) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the sovereignty, territorial integrity, nationality and independence of Nepal, or on any act which may constitute espionage against the nation or on any act of divulgence of national secrecy or on any act assisting any foreign state, organization or representative in a manner to undermine the security of Nepal or on an act of sedition or on any act which may undermine the harmonious relations between the Federal Units or on any act of incitement to caste-based or communal hatred or on any act which may undermine the harmonious relations between various castes, tribes, religions and communities or on incitement to violent acts or on any act which may be contrary to public morality. Article 17(4).

The restrictions featured in both constitutions raise concerns with regard to Article 22 of the ICCPR for two main reasons. First, there is no “necessary in a democratic society” standard to safeguard against undue restrictions. Rather, under both constitutions, restrictions are allowed “on any act which may” undermine various national interests (emphasis added). This language suggests that the state need not demonstrate a “pressing social need” for the restriction, but could even impose a restriction based on speculation of a risk, thereby opening the door to excessive government discretion. Similarly, “reasonable restrictions,” language found in both constitutions, is vague and does not safeguard civil society against restrictions that are not “necessary.”

Second, both constitutions appear to go beyond the closed list of legitimate aims for restrictions on the freedom of association under the ICCPR. In particular, protection of sovereignty is not a listed aim under the ICCPR.<sup>14</sup> Moreover, protection of sovereignty “does not meet the requirement of a “democratic society,” which “places the burden on States imposing restrictions to demonstrate that the limitations do not harm the principles of ‘pluralism, tolerance and broadmindedness.’”<sup>15</sup> Undermining of “harmonious relations” between federal

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<sup>14</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 30, U.N. Doc. A/HRC/23/39 (24 April 2013), “The protection of State sovereignty is not listed as a legitimate interest in the Covenant. The Special Rapporteur emphasizes that States cannot refer to additional grounds, even those provided by domestic legislation, and cannot loosely interpret international obligations to restrict the right to freedom of association.”

<sup>15</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 32, U.N. Doc. A/HRC/23/39 (24 April 2013), quoting European Court of Human Rights (ECtHR), *Handyside v. the United Kingdom*, application No.5493/72, judgement of 7 December 1976, para. 49) “Associations...should therefore be free to promote their views – even minority and dissenting views, challenge governments about their human rights record or campaign for democratic reforms, without being accused of treason and other defamatory terms. Dissenting views should be seen by the authorities as an opportunity for dialogue and mutual understanding.”

units or between various castes and other social groups is also by itself a problematic aim, as it could undermine the freedom of expression. Regarding relations among different groups and incitement, “Only propaganda for war or advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20 of the ICCPR) or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law (Article 5 of the ICCPR) should be deemed unlawful.”<sup>16</sup>

### The New “One-Door Policy”

Another problematic aspect of the 2015 Constitution is a new state policy on the regulation of non-governmental organizations (NGOs) and international NGOs (INGOs). Article 51(j) provides “Policies regarding social justice and inclusion.” The fourteenth point of that set of Policies states (unofficial translation): “Involving NGOs and INGOs *only* in the areas of national needs and priority, by adopting a one-door policy for the establishment, endorsement, engagement, regulation and management of such organizations, and by making the investment and role of such organizations accountable and transparent” (emphasis added). This specific point may have been an attempt to address the fact that many CSOs in Nepal expressed, and continue to express, a need for a “one-door policy.”

However, the “one-door policy” championed by CSOs was to address the fact that several laws and ministries currently involved in CSO regulation make it very difficult for CSOs to operate and carry-out activities. The “one-door policy” in Article 51j was roundly criticized by CSOs because it is viewed as an attempt to limit the areas in which CSOs can work, by suggesting that the GON would allow CSOs only to carry-out projects in GON-deemed areas of need and priority. Alignment with national needs and priorities is not a legitimate aim for restricting the freedom of association. Rather, the freedom of association allows CSOs to pursue a wide range of activity, regardless of national need.<sup>17</sup> Furthermore, a government might not be willing or able to recognize all the needs in a society, and CSOs often form to fill unmet needs. It is unclear how the government seeks to implement this one-door policy, although the draft Social Welfare and Development Act released in October 2016 appears to suggest that the SWC would serve as the main regulatory body of all CSOs.<sup>18</sup>

CSOs believe a “one-door policy” should not include limiting activities to areas set by the GON. Rather, it should streamline the process for CSO registration and for carrying-out activities. This type of “one-door policy” has been advocated for by a number of CSOs. For example, the NGO Federation believes there needs to be a one-door policy for all CSOs. The Nepal National Dalit Social Welfare Organization (NNDSWO) has also expressed that a one-door policy would help to resolve conflicts between the different government entities in charge of regulating CSOs. Some CSO participants attending the CS:MAP regional stakeholder conference held in Banke, Nepalgunj in December 2016 also made this preference clear.

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<sup>16</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 18, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>17</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 41, U.N. Doc. A/HRC/23/39 (24 April 2013) “...[R]equir[ing] associations to align themselves with Governments’ priorities contradict[s] one of the most important aspects of freedom of association, namely that individuals can freely associate for any legal purpose.”

<sup>18</sup> Draft Social Welfare and Development Act, dated September 2016. This was also the understanding of the NGO Federation of Nepal before the draft Act became public. ICNL meeting with NGO Federation of Nepal (26 May 2016).

## Part IV: CSO-Government Relations

The Government of Nepal (GON) is transitioning to a federal democratic republic and expanding its recognition of human rights, such as that of sexual minorities. At the same time, the status of civil society freedoms in Nepal is uncertain in some respects and civil society organizations (CSOs) perceive that the government has a mixed attitude toward civil society. According to the 2014 Civil Society Organization Sustainability Index (CSOSI) for Asia, published by the US Agency for International Development (USAID):

The relationship between civil society and government is characterized by both confrontation and cooperation, and on the part of government, by ambivalence towards civil society that ranges from distrust to recognition of its utility in the context of service delivery. While the government and CSOs sometimes have a tense relationship, the government's attitude towards the role of CSOs is gradually improving. Many government officials view CSOs as a means of communicating with and receiving political favor with local communities, as well as key partners in development. The government has also recognized the role of CSOs in achieving the goals of the prolonged transition period to democracy.<sup>19</sup>

The trajectory of the relationship between the GON and CSOs is also unclear. For example, in 2015, the Social Welfare Council of the GON (SWC) issued a number of directives, which purportedly impose additional obstacles on CSO operations. At the same time, the government has recognized the role of CSOs in relief efforts following the devastating earthquakes of 2015. The lack of clarity is compounded by the frequent change in government in Nepal which result in different parties, coalitions or individuals in charge of the GON for relatively short periods of time.<sup>20</sup>

According to interviews with various Nepali CSOs in May 2016, the GON is not necessarily against CSOs, but wants them to deliver “hardware” not “software.” Hardware means tangible things, like bridges, schools, clean water, and textbooks, while software essentially means any work related to human rights, research, and community awareness or engagement. The GON is reportedly distrustful of rights-based advocacy. In addition, as prominent CSOs are closely affiliated with political parties, many—both inside and outside of the government—view CSOs as being non-independent and carrying out the work of the political parties with which they are affiliated.

At the two-day Stakeholder Conference in September 2016, entitled, “The Legal Framework for Civil Society and the Media: Challenges and Opportunities,” numerous participants stated that a significant challenge is the lack of understanding or communication gaps between CSOs and the government of their respective roles, which is made more difficult by the lack of

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<sup>19</sup> USAID, 2014 Civil Society Organization Sustainability Index for Asia (hereinafter “2014 CSOSI for Asia”), Nepal Country Report, p. 34 (available at: [https://www.usaid.gov/sites/default/files/documents/1866/2014\\_Asi\\_CSOSI\\_USAID.pdf](https://www.usaid.gov/sites/default/files/documents/1866/2014_Asi_CSOSI_USAID.pdf)).

<sup>20</sup> Usha Jha, Samjhauta Nepal, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (28 September 2016).

interagency cooperation within the GON in regulating civil society.<sup>21</sup> At the same time, government officials have supported the idea that CSOs should challenge the leaders of political parties, reflecting the concept of an independent civil society.<sup>22</sup> Government officials have also expressed that civil society has a key role to play in drafting legislation, especially during the current stage of legal reform.<sup>23</sup>

## Part V: The State of CSO Regulation in Nepal

Similar to other South Asian countries with common law traditions, Nepal has numerous laws that affect the freedom of association and CSOs. However, in Nepal, multiple registration steps and numerous entities regulating CSOs have made registration and aspects of CSO operations quite burdensome. (Indeed, the multi-layered legal framework might have been the impetus for the “one-door policy” in the 2015 Constitution).

Domestic CSOs generally seek primary registration under one of three laws: the Associations Registration Act (ARA) of 1977 the National Directive Act (NDA) of 1961, and the Companies Act of 2006. Secondary registration is then sought under the Social Welfare Act (SWA) of 1992 for domestic CSOs seeking foreign or government assistance of any kind. Foreign CSOs seek primary registration under the SWA. Furthermore, other levels of registration or approval are sought at local offices and with other ministries relevant to an organization’s work, such as District Development Committees (DDCs), the Ministry of Federal Affairs and Local Development (MoFALD), and the Ministry of Forestry and Social Conservation (MoFSC).

The following aims to identify key issues with the registration and operation of CSOs under the four main laws governing CSOs in Nepal: the ARA, the NDA, the Companies Act, and the SWA.

### The Associations Registration Act (1977)

Most registered CSOs in Nepal—an estimated 80,000<sup>24</sup>—are registered with District Administration Offices (DAOs) of the Ministry of Home Affairs (MoHA), under the ARA. Several aspects of the Act raise concerns under international law, norms, and good practice.

#### Registration

The freedom of association includes the right to operate as an unregistered organization, and to easily form a legal entity if a group so desires. CSOs should be able to register for a broad range of purposes and be protected against arbitrary decision-making in the registration process.

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<sup>21</sup> Babita Basnet, Chairperson, Media Advocacy Group, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (29 September 2016).

<sup>22</sup> Nilmani Baral, Vice President, Social Welfare Council, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (28 September 2016).

<sup>23</sup> Bishnu Prasad Lamsal, Secretary, Ministry of Women, Children, and Welfare, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (28 September 2016).

<sup>24</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

## **Mandatory Registration**

Mandatory registration constitutes an impermissible restriction on the freedom of association under Article 22 of the ICCPR—the right to freedom of association equally protects registered and unregistered CSOs.<sup>25</sup> Such a requirement is especially problematic when registration is difficult to achieve due to burdensome requirements and administrative discretion, as denial of registration can be used to suppress dissenting viewpoints in society.<sup>26</sup>

The ARA appears to make registration mandatory for virtually all CSOs, unless another law, such as the NDA, applies.<sup>27</sup> The ARA provides, “No person shall establish or cause to be established any Association without having it registered pursuant to this Act.” ARA, Article 3. “Association” is defined broadly, to mean “an association, institution, club, circle, council, study centre etc. established for the purpose of developing and extending social, religious, literary, cultural, scientific, educational, intellectual, philosophical, physical, economical, vocational and philanthropic activities, and also includes the friendship association.” ARA, Article 2(a). This definition appears to cover virtually every type of CSO, “[u]nless the subject or the context otherwise requires,” which might refer to other laws such as the NDA that regulate certain types of CSOs.<sup>28</sup>

If an association is established without having registered under the ARA, a fine of up to 2,000 Rupees (about \$20, or about one-third of an average month’s salary in Nepal)<sup>29</sup> may be imposed on each member of the management committee of the association. ARA, Article 12. This amount may be costly enough to deter people from participating in founding an association. However, in part because DAOs are understaffed, associations are generally not penalized for operating at the local and district levels without registration.<sup>30</sup>

## **Eligibility Requirements**

Under Article 22 of the ICCPR, “[e]veryone” has the right to freedom of association, and Article 2 provides that the rights of the ICCPR must be respected for all individuals in the state’s territory “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

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<sup>25</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 56, U.N. Doc. A/HRC/20/27 (21 May 2012) “[T]he right to freedom of association equally protects associations that are not registered... Individuals involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies...”

<sup>26</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 18, U.N. Doc. A/HRC/20/27 (21 May 2012) “[The right to the freedom of association of unregistered organizations] is particularly important when the procedure to establish an association is burdensome and subject to administrative discretion, as such criminalization could then be used as a means to quell dissenting views or beliefs.”

<sup>27</sup> See ARA, Section 16: “If any other Nepal Act contains separate provisions on registration and establishment of any Association, notwithstanding anything contained in this Act, such an Association shall have to be registered or established in accordance with such Act.”

<sup>28</sup> ARA, Article 2; 2014 CSOSI for Asia, p. 27. Despite this broad definition, CSO experts find that the ARA is “out-of-date as it envisions CSOs only as service providers... and does not readily apply to the diverse range of CSOs in the country.”

<sup>29</sup> In 2015, the average GDP per capita in Nepal was \$732.30, or \$61 per month. *GDP per capita (current US\$)*, The World Bank: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>

<sup>30</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).



**Citizenship:** A citizenship requirement does not appear in the ARA; however, it is understood in Nepal that foreign persons do not have the right to participate as founders of an association or as members with voting rights. All founding members must submit their citizenship certificates upon application for registration.<sup>31</sup> The citizenship requirement is a clear violation of the ICCPR’s ban on discrimination with regard to rights under the ICCPR based upon national origin.

The requirement of citizenship certificates, in practice, excludes not only foreigners from enjoying the right to association, but also the many people who are born and live in Nepal but do not possess citizenship certificates, including Dalits, refugees, people living in remote regions, and other marginalized groups. Foreigners can, however, be honorary members (without voting rights) of associations.<sup>32</sup>

**Minimum number of founders:** It is the State’s burden to justify a restriction on the freedom of association, based on the three-part test previously described. The ARA requires “any seven or more persons” to a registration application to the local authority. ARA, Section 4. The required minimum threshold of seven founding members seems arbitrary, in that the government rationale for not allowing three to six people from forming an association is not clear.<sup>33</sup>

### **Registration Submissions**

Best practices dictate that procedures for registration be “non-onerous.”<sup>34</sup> Section 4(1) of the ARA sets out the required registration submissions: a copy of the statute of association; a prescribed fee; the name and objectives of the association; the name, address, and occupation of members of the Management Committee; financial sources; and the “address of the office.” In addition, citizenship certificates are generally required, while police reports are often required, though neither of these requirements appear in the ARA. The following four requirements potentially pose an undue burden on CSOs seeking to register:

- **Disclosure of financial sources:** Registration processes generally do not require CSOs to reveal sources of funding, in part due to funding uncertainties. Rather, it is best practice for CSOs to submit annual reports based on their actual funding and activities, which ensures a proper level of transparency.
- **“Address of the office”:** While it is common in many countries to require that organizations provide a mailing address, requirements to secure actual office space or a residence are potentially burdensome, especially if the CSO does not have legal personality and therefore cannot sign a lease. A central office may be appropriate for well-funded CSOs, but smaller organizations may lack sufficient resources to support an office. As a case in point, ICNL is aware of one instance where a new NGO without

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<sup>31</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017). According to an unpublished assessment of Nepal by the Civic Space Initiative, the citizenship requirement comes from a directive issued by the MoHA.

<sup>32</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>33</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>34</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012).

possession of an existing office space had to use the home address of a member's family residence to receive an endorsement letter.<sup>35</sup>

- **Citizenship certificate:** All founding members must submit their Nepali citizenship certificates upon application for registration.<sup>36</sup> As previously mentioned, this requirement violates the ICCPR's prohibition on discrimination regarding rights under the ICCPR based on national origin.
- **Police reports:** Although not required by the ARA—and therefore perhaps not meeting the “prescribed by law” standard on restrictions to the freedom of association—many DAOs require applicants to submit individual police reports and DAOs may reject registration based on those police reports.<sup>37</sup> In the experience of one group that applied for registration, the local police office must declare that none of the prospective executive members have been charged with or convicted with a felony before the registration process may proceed.<sup>38</sup> Feedback from outlying districts also demonstrates that the requirement to obtain police reports for each founding member makes registration very difficult.<sup>39</sup> According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (UNSR), because “everyone” has the right to the freedom of association, “legislation that does not set any specific limitation on individuals ...complies with international standard...”<sup>40</sup> There is no clear justification for a ban on founders merely with criminal records, and there is no articulated standard for evaluating registration applications in light of criminal records. Registration might be denied no matter how minor or how long ago the crimes were committed. Furthermore, evaluation of criminal records could prevent former political prisoners like Nelson Mandela from founding associations, or even a former convict from establishing a group to rehabilitate other former convicts.

### **Safeguards against Arbitrary Decision-Making**

Denying registration to a CSO is a clear infringement on the freedom of association. As for any restriction to the freedom of association, the grounds for denying registration must comport with Article 22 of the ICCPR: the restriction must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

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<sup>35</sup> This was the experience of a group of law students attempting to register an NGO for international law in late 2015.

<sup>36</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017). According to the 2015 EENA Report, the citizenship requirement comes from a directive issued by the MoHA.

<sup>37</sup> US Agency for International Development (USAID), 2015 Civil Society Organization Sustainability Index for Asia (hereinafter “2015 CSOSI for Asia”), Nepal Country Report, p. 29. According to the Enabling Environment National Assessment (EENA) Nepal (hereinafter “2015 EENA Nepal”), November 2015, prepared by the NGO Federation of Nepal and supported by the Civic Space Initiative, p. 18, the MoHA directive that provides the citizenship requirement also requires “proof of clean criminal records” of a founding member and a recommendation of the local agency where the CSO is intended to be established.

<sup>38</sup> *Supra* note 37. This group had to obtain police reports from seven different police offices as its members lived in seven different locations. Due to frustration with the process, the group delayed its registration plans.

<sup>39</sup> CSO participant discussions, CS:MAP Stakeholder Forum, Banke, Nepalgunj (14 December 2016).

<sup>40</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 54, U.N. Doc. A/HRC/20/27 (21 May 2012).

Best practices dictate that procedures for registration be “simple,” “straightforward,” “non-onerous,” and “expeditious.”<sup>41</sup>

To protect against arbitrary decision-making and comport with international good practice, the registration process should include: (1) clear, legitimate grounds for denying registration;<sup>42</sup> (2) a mandated timeframe in which to respond to an application;<sup>43</sup> (3) a remedy if the registration body fails to respond to a registration application within the mandated time period;<sup>44</sup> (4) a requirement to provide written justification for a denial of registration;<sup>45</sup> and (5) a right to a judicial appeal of a denial of registration.<sup>46</sup>

First, the ARA provides no specific ground to reject a registration application. It merely states, “the Local Authority shall make necessary inquiry, and register the Association, if he/she deems it *appropriate* to register the Association...” ARA, Section 4(2) (emphasis added). “Appropriate” is a vague and arbitrary term, allowing the Local Authority virtually unlimited discretion to deny registration to CSOs and prohibit the existence of groups it disfavors. In practice, some groups have experienced arbitrary decisions with respect to their preferred name and providing proof that taxes have been paid on rental spaces. Some district offices also have new and different requirements for registration that applicants discover only upon filing an application.<sup>47</sup>

Second, the ARA neither provides a mandated timeframe in which to respond to an application, nor a remedy if the applicant receives no response. The application process could therefore be delayed indefinitely. According to the 2015 CSOSI for Asia, in practice registration can sometimes take three months, especially for applicants from marginalized communities or remote parts of the country, due to understaffing at DAOs. Good practice is that registration takes no more than 60 days upon filing of the application;<sup>48</sup> best practice is between five and 30 days.<sup>49</sup>

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<sup>41</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>42</sup> Some legitimate grounds for issuing a denial of registration include incomplete or incorrect documentation (after opportunity is given to correct the error); the name of the applicant organization is the same as another registered legal entity, which would breed confusion; or the CSO is formed for criminal or for-profit purposes.

<sup>43</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 60, U.N. Doc. A/HRC/20/27 (21 May 2012) “...registration bodies must be bound to act immediately and laws should set short time limits to respond to submissions and applications respectively.” See also, Monitoring Matrix on Enabling Environment for Civil Society Development Tool-Kit (2013), at p. 12, developed by the Baltic Civil Society Development Network, the European Center for Not-for-Profit Law and ICNL, based on good practices and observations in the Western Balkans and Turkey; Good practice is that registration decisions are made quickly, such as between 5 and 30 days.

<sup>44</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 60, U.N. Doc. A/HRC/20/27 (21 May 2012). “During this [application] period associations should be presumed to be operating legally until it is proven otherwise... Failure to provide a response within a clear and short time limit should result in a presumption that associations are operating legally...”

<sup>45</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 61, U.N. Doc. A/HRC/20/27 (21 May 2012) “Any decision rejecting the submission or application must be clearly motivated and duly communicated in writing to the applicant.”

<sup>46</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 61, U.N. Doc. A/HRC/20/27 (21 May 2012) “Associations whose submissions or applications have been rejected should have the opportunity to challenge the decision before an independent and impartial court.”

<sup>47</sup> *Supra* note 37.

<sup>48</sup> Open Society Institute, Guidelines for Laws Affecting Civic Organizations, p. 27 (2<sup>nd</sup> Ed., 2004), Sixty days is considered a “reasonable” time period to complete registration.

<sup>49</sup> Monitoring Matrix on Enabling Environment for Civil Society Development Tool-Kit, p. 12 (2013).

Third, upon denial of registration, the ARA only requires the Local Authority to provide the applicant with “notice” of such a decision, not necessarily the reasons behind the decision. ARA, Section 4(3). In filing an appeal or reapplying to register, CSOs do not necessarily know the grounds upon which they were denied registration.

Fourth, an applicant can appeal a denial of registration only to “the Authority specified by the Government of Nepal,” suggesting an administrative rather than an independent judicial body. ARA, Section 4(3). Moreover, this authority decides whether to order the registration based on whether it is “reasonable,” another vague and arbitrary standard. ARA, Section 4(4).

### **Re-Registration**

Under international standards, registered organizations should not be required to re-register, as re-registration provides periodic opportunities for arbitrary rejection of registration.<sup>50</sup>

Under the ARA, associations are required to renew their registration annually. The renewal process requires the association to submit a progress report to the DAO, including audit, minutes of the annual general meeting. The renewal fee is 500 Rupees (about \$7.50), and organizations that do not renew are subject to a penalty which increases incrementally each year that the registration is not renewed. After five years of not renewing, an organization is subjected to a 5,000 Rupee (about \$75) fee on top of the unpaid annual renewal fees. If the registration is not renewed within five years, the registration will automatically be cancelled. As a result, associations that voluntarily suspend activities for five years are forced to pay the 5,000 Rupee fee plus the unpaid annual renewal fees to begin operating again or, alternatively, must establish themselves anew, which is a burdensome and costly process.<sup>51</sup> The experience of the Nepal Participation Action Network (NEPAN) confirms that the renewal process is quite complicated. For its renewal, in addition to submitting a report to the DAO, the NEPAN also must report to the relevant local government office (i.e., DDC and/or municipality office) and district level office (i.e., district health office or district education office), which makes for three reports in total. At the district level, participants at the Banke stakeholder forum in December 2016 also reported that the annual registration renewal is a challenge, particularly when a renewal recommendation is required from several offices.<sup>52</sup> At the Dhulikhel stakeholder forum in January 2017, CSOs also highlighted the complexity and expensiveness of registration and renewal due to the need to engage multiple government offices, including the tax authorities.<sup>53</sup>

### **Multiple Layers of Registration and CSO Experiences**

Associations often need to register (and re-register) with various state bodies, particularly if an organization seeks to operate in more than one district or seeks government or foreign assistance.

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<sup>50</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 62, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>51</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017); *see also* 2014 CSOSI for Asia, p. 28. According to the 2015 EENA Nepal report, this requirement is provided in Rule 5 of the Associations Registration Regulation of 1977, and the process requires approximately sixty days to complete.

<sup>52</sup> CSO participant discussions, CS:MAP Stakeholder Forum, Banke, Nepalgunj (14 December 2016).

<sup>53</sup> CSO participant discussions, CS:MAP Stakeholder Forum, Dhulikhel (16 January 2017).

- According to the 2015 EENA Nepal, a MoHA directive requires CSOs applying for registration to submit a recommendation of the local agency where the CSO is intended to be established. This is yet another ad-hoc requirement that does not appear in the ARA and therefore would seem to fail the “prescribed by law” standard. Furthermore, this requirement could be a difficult and arbitrary one to fulfill. One Nepali CSO interviewed, NNDSWO, went through this multi-layered process and registered with the Ministry of Local Development, which was presumably the local agency, in addition to the DAO. In addition to these agencies, NNDSWO registered with the SWC. CSOs at the district-level have mentioned that they are sometimes faced with contradictory decision-making among different local GON bodies during the renewal process.
- According to the GoGo Foundation, CSOs operating at the national level must register in Kathmandu, in addition to the relevant DAOs. Furthermore, the level of paperwork is onerous, with multiple supporting documents requiring substantiation. Complicating matters, each district office and officer has different requirements, forms, and fees, which creates a very uncertain environment for CSOs seeking official approvals.
- According to CSOs in May 2016, to work in a new district, an organization must obtain approval (and annual renewal) from the local government office, DDC, and the district high-level office. According to a Nepali CSO, approval by DDCs is highly political; an organization that criticizes a DDC would not be allowed to work in that district. Therefore, even if a CSO receives registration or approval from the DAO and other agencies, it may still be blocked from carrying out its project.<sup>54</sup>
- In order to receive government or foreign assistance, associations and other registered organizations (such as under the NDA) must also register, or “seek affiliation with” the SWC under the SWA, in addition to seeking approval to receive foreign funding on a case-by-case basis. From the experience of one Nepali CSO, the SWC has great discretion in deciding to either facilitate civil society work or to more closely control civil society work.<sup>55</sup> (*The SWA is described further below.*)

With the exception of SWC affiliation, none of these approval requirements appear in the main laws governing CSOs in Nepal, which places in doubt whether these requirements meet the “prescribed by law” standard. Moreover, these multiple levels of requirements do not allow for a “simple,” “straightforward,” “non-onerous,” and “expeditious” registration procedure, as called for by the UNSR.<sup>56</sup> In some instances, CSOs have also reported that renewal procedures also require securing tax clearance or a tax certificate, which facilitates access to government funding, as part of this multi-layered process.<sup>57</sup>

## Government Oversight

Many countries have laws that provide some degree of government oversight over CSOs and other legal entities, but such oversight should be reasonably restrained, based on a principle of

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<sup>54</sup> Interview with NEPAN (26 May 2016).

<sup>55</sup> Interview with Informal Sector Service Center (25 May 2016).

<sup>56</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>57</sup> Interview with NNDSWO (27 May 2016); Interview with NEPAN (26 May 2016).

minimum state interference, with a clear legal basis and proportionality to the legitimate aim being pursued. CSOs and their members are protected by the right to privacy under Article 17 of the ICCPR.<sup>58</sup> In addition, based on the principle of sectoral equity,<sup>59</sup> oversight over CSOs should not be more intrusive than oversight over commercial and other legal entities.<sup>60</sup>

### **Decision-Making**

CSOs have the right to operate free from undue government interference, including in their internal governance and affairs.<sup>61</sup> “An association is not independent if decisions concerning its activities and operations are taken by anyone other than the members of the association or a body designed by its members to do so.”<sup>62</sup>

However, the ARA has a vague provision giving the government the power to “give necessary directions to the Association, and it shall be the duty of the Association to follow such directions.” ARA, Section 11. Furthermore, Section 12(4) of the ARA provides that the Local Authority may suspend or terminate registration if an association “fails to follow the directions given by Government of Nepal...” There are no clear grounds for when the government is empowered to give an order to an association that must be followed. It is unclear how the government has used this provision, if at all.

### **Reporting**

“Reporting requirements, where these exist, should not be burdensome [and] should be appropriate to the size of the association and the scope of its operations...”<sup>63</sup> It is not uncommon for governments to require an annual report on activities and finances for CSOs with certain levels of activity and funding. CSOs that meet a significant level of funding may also be required to submit to audits, but this is generally unnecessary and cost-prohibitive for smaller organizations.

In Nepal, reporting to responsible state agencies, such as the DDC and DAO, is required and is part of the registration renewal application.<sup>64</sup> In addition, all associations are required to undergo an annual audit conducted by a certified accountant or a registered auditor appointed by the annual general assembly. ARA, Section 9. If an organization fails to submit the proper financial documentation to the DAO, the DAO may impose a fine of up to 500 Rupees on each member of the management committee. ARA, Section 12(2). (As will be later discussed,

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<sup>58</sup> Article 17 of the ICCPR reads as follows: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.” *See also*, Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 57, U.N. Doc. A/HRC/20/27 (21 May 2012) “Authorities must ...respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights.”

<sup>59</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 24, U.N. Doc. A/HRC/23/39 (24 April 2013) “...States [should] avoid measures that disproportionately target or burden civil society organizations, such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector writ large.”

<sup>60</sup> OSCE/ODIHR, Guidelines on Freedom of Association, para. 228 (17 December 2014).

<sup>61</sup> “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2<sup>nd</sup> Ed., June 2012), p. 6.

<sup>62</sup> OSCE/ODIHR, Guidelines on Freedom of Association, para. 41 (17 December 2014).

<sup>63</sup> OSCE/ODIHR, Guidelines on Freedom of Association, para. 227 (17 December 2014).

<sup>64</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

organizations that are also registered with the SWC must submit an audited annual activity and financial report to the SWC, as well as an activity plan for the following year.) The reporting requirement to the DDC is a district-specific requirement, meaning that if a CSO is operating in multiple districts, then it must report to the DDC in each district. The Forum for Protection of People's Rights stated that it has faced increasing challenges to renew registration in the last four years and that the district-level approvals from the DDC, which are tied to the reporting requirements, posed a challenge. CSOs at a district-level forum stated that the requirement to submit reporting to GON entities at multiple levels presents a heavy administrative burden.

Blanket requirements for all associations to submit reports to multiple state agencies, as well as submit to annual audits, are excessive and can be very burdensome and costly. State agencies may have different reporting requirements and likely seek information that is only relevant to their geographic or topical scope. An organization that works in more than one district would need to report to agencies in each district and include information relevant to each. Annual audits can be very costly, especially for smaller organizations. Only organizations that have "significant amounts of income" should be subject to audit requirements.<sup>65</sup>

### **Inspections**

As CSOs and their members are protected by the right to privacy under Article 17 of the ICCPR, governments should not have unlimited power to inspect organizations: "...oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue."<sup>66</sup>

Under the ARA, "The Local Authority may, *if it deems necessary*, cause the accounts of the Association to be examined by an officer appointed by him/her." ARA, Section 10(1) (emphasis added). The Local Authority can impose a fee on the association for the inspection "not exceeding three percent of the balance of the Association..." ARA, Section 10(2). "It shall be the duty of the official, member and employee of the Association to submit the statement and documents or to answer the questions asked by the officer examining the accounts." ARA, Section 10(3). Any such person who does not provide the statements, answers or documents requested by the officer may be fined up to 500 Rupees. ARA, Section 12(3). At the Dhulikhel stakeholder forum, CSO participants specifically cited the expensive inspection (or audit) fees as a significant challenge to their work.

The ARA provides a vague standard (i.e. no clear legal basis) by which the Local Authority can trigger an investigation of the association. Furthermore, the ARA does not provide any limitations to the scope of the officer's power to request information or even a notice requirement before entering the premises of an organization.<sup>67</sup> There is no assurance of proportionality to any legitimate aim of an inspection. These provisions open the door for arbitrary inspection and even harassment of CSOs.

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<sup>65</sup> Open Society Institute, Guidelines for Laws Affecting Civic Organizations, p. 71 (2<sup>nd</sup> Ed., 2004).

<sup>66</sup> OSCE/ODIHR, Guidelines on Freedom of Association, para. 228 (17 December 2014).

<sup>67</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 65, U.N. Doc. A/HRC/20/27 (21 May 2012) "... authorities should not be entitled to: ... enter an association's premises without advance notice."

## Suspension and Involuntary Dissolution

The freedom of association applies for the entire life of an association. Suspension and involuntary dissolution are the most severe restrictions on the freedom of association and therefore should only be applied “when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.”<sup>68</sup> The grounds for suspension and dissolution should be a clear and limited list, and proper under the ICCPR.

### **Grounds**

Section 12(4) of the ARA provides that the Local Authority may suspend or terminate registration if an association: changes its objectives or merges with another association without prior permission; “performs any acts contrary to the objectives of the Association”; or “fails to follow the directions given by Government of Nepal...” Furthermore, Section 14 suggests that an association can be dissolved “due to its failure to carry out the functions pursuant to its Statute *or for any other reasons whatsoever*” (emphasis added).

The ARA therefore lacks a limited list of objective grounds for suspension or dissolution and essentially provides the government unlimited discretion to take these measures. The grounds that are listed are also vague or improper. For example, closing an organization that performs acts “contrary to [its] objectives” is both vague and pursues no clear aim under the ICCPR. Furthermore, grounds such as changing objectives without prior approval or not following the directions of the government do not necessarily rise to “clear and imminent danger”— “Actions by the Government against NGOs must be proportionate...Administrative irregularities ... should never be considered as sufficient grounds for closing down an organization.”<sup>69</sup> Rather, softer measures, such as warnings, should be pursued in order to rectify the irregularities.

### **Judicial Oversight**

Drastic measures like dissolution of an association should be ordered only by independent and impartial courts, in order to ensure full protection of an association’s rights.<sup>70</sup> The government should never have the power to dissolve an organization directly. Contrary to international norms, the ARA allows the Local Authority to dissolve an association directly. Section 12.

“Actions by the Government against NGOs must be...subject to appeal and judicial review.”<sup>71</sup> Accordingly, under the ARA, a CSO can appeal a suspension or dissolution decision by a Local Authority to a Court of Appeal. ARA, Section 13. However, aside from seizure of

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<sup>68</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 75, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>69</sup> Hina Jilani, Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, in accordance with General Assembly resolution 58/178, para. 82, U.N. Doc. A/59/401 (1 October 2004); *see also*, Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 38, U.N. Doc. A/HRC/23/39 (24 April 2013) Failure to provide mandatory reports is “such minor violation of the law” that it should not lead to closing an association.

<sup>70</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 76, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>71</sup> Hina Jilani, Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, in accordance with General Assembly resolution 58/178, para. 82, U.N. Doc. A/59/401 (1 October 2004).



property (Section 6), the ARA provides no explicit right to judicial review of other government actions, such as inspections.

### **Transfer of Assets**

Section 14 provides that upon dissolution, the assets of an association are transferred to the State. This rule also applies to associations that terminate their operations voluntarily. Such a rule creates perverse incentives in the government's regulatory role. The preferred practice is for any remaining funds to be transferred to another CSO performing the same or similar activities as the dissolving organization, especially in cases where the CSO is designated as a public benefit or tax-exempt organization.<sup>72</sup>

### **Other Laws for Primary Registration**

A limited number of CSOs forego the ARA and receive primary registration through other laws, in particular the National Directive Act of 1961 (mainly for professional associations and trusts), and the Companies Act of 2006 (to register as a not-for-profit company).

### **National Directive Act of 1961**

ICNL has little information of the National Directive Act of 1961 (NDA) as no English translation was available.

However, according to the USAID 2015 CSOSI for Asia:

The National Directive Act (NDA) of 1961 is mainly used to regulate trusts, professional associations, federations, and networks of professional associations. Associations registered under the NDA with the Company Registrar's Office are directly accountable to the government and are not required to report or renew registration with a DAO. Unless formed by the government itself, groups registering under this Act must apply and receive approval from the Cabinet.<sup>73</sup>

These professional groups include the Nepal Bar Association, the Teacher's Association, medical/nursing associations, faith-based organizations, Federation of Nepalese Chambers of Commerce and Industries, and the Nepal Chamber of Commerce.<sup>74</sup> The NGO Federation is registered under the NDA while most of its 6,034 members are registered under the ARA. According to the GoGo Foundation, in December 2015, MoHA issued a circular to its regional directorates, encouraging them to register CSOs under the ARA instead of the NDA. This order could be due to an effort to streamline the regulation of CSOs, or perhaps because the provisions of the ARA allow for more government oversight.

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<sup>72</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>73</sup> 2015 CSOSI for Asia, p. 30.

<sup>74</sup> 2014 CSOSI for Asia, p. 28.

According to the EENA, registration under the NDA requires examination of the nexus of the organization with the class or profession it intends to support or develop, as well as with national development.<sup>75</sup>

### **Companies Act of 2006**

In order to circumvent the difficulties of establishing an association, many CSOs will establish a “company not distributing profits” under Chapter 19 of the Companies Act of 2006. Compared to the ARA, eligibility requirements are less stringent under the Companies Act. A “company not distributing profits” requires at least five “promoters,” and after incorporation, at least five members. (Companies Act, Section 166(3)). This is less than the minimum of seven required founders for associations under the ARA. Also unlike the ARA, both Nepali citizens and foreigners, as well as domestic and foreign legal persons, can establish a company. (Section 4(f-i)).

The Companies Act also has safeguards that the ARA lacks against arbitrary denial of registration, including a mandated timeframe in which to respond to an application, specific grounds for refusal of registration (though some grounds raise concerns, as will be described), a remedy if the applicant receives no response, a requirement to provide reasons for the rejection of an application, and judicial appeal of denial of registration. (Sections 5-6).

A “company not distributing profits” can be established for a wide range of purposes: “...to develop and promote any profession or occupation or to protect the collective rights and interests of the persons engaged in any specific profession or occupation or to carry on any enterprise for the attainment of any scientific, academic, social, benevolent or public utility or welfare objective on the condition of not distributing dividends.” (Section 166(1)). No capital is required to register a “company not distributing profits.” (Section 167(1)(a)).

While the Companies Act appears to have many advantages for CSOs, several provisions raise potential concerns and may warrant review by local stakeholders regarding: (1) standards and norms for the freedom of association and (2) the principle of sectoral equity<sup>76</sup> with regard to the legal treatment of CSOs versus businesses.

#### *(1) Standards and norms with regard to the freedom of association*

- All registering companies require proof of Nepali or foreign citizenship (for a natural person) or proof of Nepali or foreign incorporation (for a legal person). (Section 4(a-i)). The proof of citizenship requirement can pose a major obstacle to registration for many Nepali citizens, as previously mentioned.
- A company can be refused registration if “the name or objective of the proposed company...appears to be improper or undesirable in view of public interest, morality, decency, etiquette etc. ...” (Section 6(1)). Among other things, this ground includes several vague and subjective terms that could allow for wide government discretion.
- “Every company” must appoint a licensed auditor to examine the company’s accounts and provide an audited report. (Sections 110, 115(1)). Audits can be very costly, particularly for smaller organizations.

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<sup>75</sup> See Section 3(3) of the NDA.

<sup>76</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 24, U.N. Doc. A/HRC/23/39 (24 April 2013) “States [should] avoid measures that disproportionately target or burden civil society organizations, such as imposing onerous vetting rules, procedures or other CSO-specific requirements not applied to the corporate sector writ large.”

- The government may investigate a company’s transactions or business if it “is of the opinion” that it received... “information that the business of transaction of the company is being carried on... against public interest” (Section 121(2)), a vague standard which may allow for investigations into activity not necessarily criminal or fraudulent. The expenses of an investigation shall be paid by the inspected company (Section 125), which the company may not be able to afford. This shift of cost onto the company may also discourage the government from differentiating between frivolous and genuine claims against an organization.
- The government—rather than an independent and impartial court—has the power to order cancellation of registration.
- In the event of liquidation of a “company not distributing profits,” if the articles of association do not address where to transfer assets after all debts and liabilities are settled, the assets transfer to the government. (Section 167(1)(i)).
- A “company not distributing profits” can be cancelled involuntarily: (1) if the Office has a reasonable ground to believe that the company is not carrying on its business or the company is not in operation (Section 136(c)); or (2) “[i]n the event of violation of any provision contained in [Section 167(1)] ....” a section which applies *all* the other provisions of the Act to “companies not distributing profits,”<sup>77</sup> opening the door to additional grounds for dissolution.

## (2) Sectoral equity

- A “company not distributing profits” requires at least five “promoters” (Section 166(3)), much more than the number of founders required for a private for-profit company — just one person (Section 3(1)).
- Two operational requirements apply to “companies not distributing profits,” while no similar requirements appear to apply to for-profit companies: prior government approval is required for a “company not distributing profits” to “expand its branch” (Section 166(6)); and expenses such as salary, meeting allowances, and incorporation and operational expenses cannot exceed the amount specified by the government (Section 167(1)(h)).

## The Social Welfare Act of 1992: Regulation of Access to Resources and Foreign CSOs

Foreign CSOs, as well as domestic CSOs that seek international or government resources, must obtain “affiliation” with the SWC under the SWA. The complex system of approval to access international resources or operate as a foreign CSO raises concerns under international law. The following analysis addresses the current SWA, however, as mentioned previously, the GON released a draft Social Welfare and Development Act in October 2016, which has not yet been passed by the Parliament.<sup>78</sup>

### Access to Resources

The right to resources is a critical aspect of the freedom of association. The freedom of association includes the right of *any* association “to seek, receive and use resources – human,

<sup>77</sup> Except for some provisions that pertain specifically to companies with share capital. Section 167(2).

<sup>78</sup> The draft Social Welfare and Development Act includes many of the same requirements as the SWA. An analysis of the draft Social Welfare and Development Act is available upon request.

material and financial – from domestic, foreign, and international sources.”<sup>79</sup> Access to resources is necessary for the existence and work of organizations, many of which promote economic, social, and cultural rights. Therefore, “undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.”<sup>80</sup>

Requirements “to obtain authorization from the authorities to receive or use funds...constitute human rights violations.”<sup>81</sup> This includes registration as well as other approval procedures. Nonetheless, CSOs in Nepal that want to receive foreign or government resources (“material, technical, economic, or any other kind of assistance”) must register with the SWC and then receive case-by-case project approval in order to receive such resources. (Sections 13, 16.)

### **Eligibility**

“Social organizations and institutions” are eligible to apply for affiliation. These are organizations “established under the prevailing Laws in order to carry out various social welfare activities and social welfare oriented non-governmental organization[s] or institution[s].” Section 2(c). “Social welfare activity” is defined as “welfare activity oriented towards the economic and social upliftment and self-reliance to the weak, helpless and disable[d] individuals.” Section 2(a). These provisions indicate that organizations seeking SWC affiliation must already be registered under another law and be established to pursue a narrow range of operations deemed to be “social welfare activity.” The SWA therefore appears to exclude many other types of CSOs, such as human rights organizations, from receiving foreign or government assistance. However, it is unclear if the SWA is interpreted so narrowly in practice. In fact, organizations like the Forum for People’s Protection of People’s Rights, which works on legal reform issues and legal aid, have been able to register its foreign funded projects with the SWC. In addition, it has been confusing for social enterprises registered under the Companies Act to know whether their activities are also subject to regulation by the SWC. According to the Accountability Lab, which is registered under the Company Act, when their staff asked two different officials on the SWC about the registration responsibilities of non-profit companies, the officials gave conflicting answers.<sup>82</sup>

### **Registration**

Under the SWA and the Social Welfare Regulations, 1993 (with amendment in 2015) (SWR), affiliation with the SWC appears to be straightforward. Several directives (many of which were issued by the SWC in 2015) likely provide additional requirements.

The SWA simply provides that “social organizations and institutions” must submit an application, along with its Constitution, name of executive committee members, their occupations and addresses, the office where the organization or institution has been registered, and the date of the registration. The SWC then simply decides whether or not to provide a

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<sup>79</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 8, U.N. Doc. A/HRC/23/39 (24 April 2013).

<sup>80</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 9, U.N. Doc. A/HRC/23/39 (24 April 2013).

<sup>81</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 36, U.N. Doc. A/HRC/23/39 (24 April 2013).

<sup>82</sup> Narayan Adhikari, Accountability Lab, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities” (28 September 2016).

certificate of affiliation. (Section 13). There appears to be no safeguards against arbitrary denials of registration, such as a mandatory time period for the SWC to respond to an application; listed grounds for denial of registration; or avenues for appeal of a denial of registration. The SWR states that the SWC “may, upon examining the received application, grant approval of affiliation within 15 days”, however, this is not a mandatory time period to make a decision. (SWR, Section 13.)

As the SWC only has an office in Kathmandu, this has made it difficult for CSOs based in outlying districts to seek affiliation. In the December 2016 Banke stakeholder forum, the need to travel to Kathmandu to discuss registration issues with the SWC was cited as one obstacle to affiliation.

### **Case-By-Case Approval of Receipt of Government and Foreign Assistance**

Social organizations and institutions wishing to receive any kind of assistance from the GON, foreign countries, international social organizations and institutions, missions, or individuals shall submit a project proposal and application along with other details to the SWC as prescribed for approval. (Section 16(1)). After receiving an application, the SWC shall provide permission in coordination with the concerned ministry or agency within 45 days. The review process is lengthy because each funder for a particular project needs to be vetted. No permission for annual assistance may be given to projects that are “against the national interest,” though “against the national interest” is vague and not defined. (Section 16(2)).<sup>83</sup>

For projects of up to 200,000 Rupees (less than \$2,000) that will be finished quickly, organizations need only give prior notice to the SWC, and submit a report to the SWC within three months of the completion of said work. (Section 16(1)).<sup>84</sup>

The SWR also carries a project approval requirement concerning the percentage of a project budget that may be spent on “administrative costs”. Project budgets can allocate no more than 20 percent of project budgets on administrative costs. (SWR, Section 15A.) However, the SWR does not provide further information on what constitutes administrative costs. Nepali CSOs and lawyers have confirmed that the SWC adheres to this requirement in approving projects, but there appears to also have some discretion in approving the breakdown of a project’s ‘hardware’ and ‘software’ expenditures. The SWC approved a NNDSWO project that had a 60/40 split between hardware and software costs, while it adhered to the 20 percent requirement in approving an International Legal Foundation project.

### **Reporting**

The SWA provides a typical reporting requirement for those affiliated with the SWC: an audited report along with detailed descriptions of their work and activities during the concerned fiscal year. (Section 23(2).) The SWR states that CSOs with SWC affiliation must open a separate bank account for each approved project and provide quarterly reports on the banking transactions to the SWC. (SWR, Section 20(4).) These requirements are in addition to the reporting requirements provided under the laws for primary registration of a CSO: the ARA,

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<sup>83</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>84</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

the Companies Act, and the NDA. The SWC directives likely elaborate on reporting requirements.

### **Suspension and Dissolution of the Executive Committee**

Article 20 of the SWA provides that the government, upon the recommendations of the SWC, can suspend or dissolve the executive committee of an affiliated organization “if they do their business against prevailing laws or their own constitutions.” (Section 20(1).) A “reasonable opportunity” to provide “clarification” would be given to the executive committee before suspension or dissolution, but no further detail is provided about this opportunity to be heard. The government may form a committee from the general members of the organization to carry on its business until the suspension is lifted, or in the case of dissolution, the committee appoints a new executive committee in accordance with the organization’s constitution. (Section 20(1-3).) The SWC directives may provide clarification on the suspension and dissolution of the executive committee.

The suspension or dissolution of the executive committee is a serious infringement on the governance of an organization,<sup>85</sup> as well as organizations’ right to privacy.<sup>86</sup> In keeping with the requirements of the ICCPR, such measures should only be applied on legitimate grounds that are proportionate to such a severe sanction, rather than such a wide and unclear ground as provided by Article 20 of the SWA. Furthermore, removal of the governing body should be “court-supervised,” and “should not ordinarily occur without adequate notice and opportunity to correct, and should not be final until appeal rights have been exhausted.”<sup>87</sup> The SWA does not provide for court supervision over this process or any appeals process. It also does not indicate whether there is any opportunity to correct the misconduct of concern.

### **Foreign Organizations**

International norms generally require that foreign organizations be treated in the same manner as their domestic counterparts: “Foreign NGOs...should be subject to the same set of rules that apply to national NGOs; separate registration and operational requirements should be avoided.”<sup>88</sup>

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<sup>85</sup> CSOs have the right to operate free from undue government interference, including in their internal governance and affairs. *See*, “Defending Civil Society Report,” International Center for Not-for-Profit Law and World Movement for Democracy (2<sup>nd</sup> Ed., June 2012), p. 5; OSCE/ODIHR, Guidelines on Freedom of Association, para. 41 (17 December 2014) “An association is not independent if decisions concerning its activities and operations are taken by anyone other than the members of the association or a body designed by its members to do so.”

<sup>86</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 65, U.N. Doc. A/HRC/20/27 (21 May 2012).

<sup>87</sup> Open Society Institute, Guidelines for Laws Affecting Civic Organizations, p. 74-75 (2<sup>nd</sup> Ed., 2004).

<sup>88</sup> Margaret Sekaggya, Report of the UN Special Rapporteur on the situation of human rights defenders, to the UN General Assembly, para. 126, U.N. Doc. A/64/226 (4 August 2009); *see also*, Hina Jilani, Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, in accordance with General Assembly resolution 58/178, para. 82, U.N. Doc. A/59/401 (1 October 2004) “Foreign NGOs ... must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives.” *See also*, OSCE/ODIHR, Guidelines on Freedom of Association, para. 166 (17 December 2014) The same standards that apply to domestic associations “should equally be observed with respect to.... foreign associations.”

Under Nepal's legal framework, however, foreign CSOs must undergo a separate and more burdensome registration process. Foreign CSOs must become affiliated with the SWC in order to operate in Nepal. A foreign CSO must apply for permission and then reach an agreement with the SWC before beginning work in Nepal. (Section 12(1, 3).) The SWC would respond to an application for permission within three months. (Section 12(2).) No other safeguards are provided against arbitrary denials of an application for affiliation.

The SWR sets forth further requirements of foreign CSOs. Foreign CSOs must organize advisory committee meetings at the central and district levels for their projects. (SWR, Section 15A(7).) Foreign CSOs must obtain prior approval letters from the relevant DDC of the districts in which their projects are located before submitting project proposals to the SWC. (SWR, Section 15A(10).) Foreign CSOs are also required to coordinate with relevant DDCs during project implementation. (SWR, Section 15A(13).) The experience of Nepali CSOs working with foreign funds confirms this practice. NNDSWO had to secure 'pre-consensus' from the DDC, as well as respond to questions about its projects regarding the amount, purpose, and compliance with national plans. The SWC must approve any foreign staff of CSOs working on projects, and make a recommendation for their visas. (SWR, Section 19.) In addition, the SWR also appears to require foreign CSOs working in Nepal to obtain SWC approval for mergers with any other CSOs. (SWR, Section 15A(16).)

Information provided by a Nepali lawyer on the General Agreement and Facilitation Guidelines, which is available only in Nepalese, shows that the SWC requires a financial commitment by foreign CSOs to spend a minimum of US \$200,000 annually in Nepal. The General Agreement itself, as seen in a template translated in English, includes a number of the requirements discussed above, including the 20 percent cap on administrative expenses, financial reporting and audits, and a commitment to spend project funds only in Nepal. Once executed, the General Agreement is generally in force for three or five years, depending on the particular project timeline, with the possibility of renewals. The SWR also requires affiliated foreign CSOs to provide descriptions of their bank transactions in Nepal on a quarterly basis. (SWR, Section 20(1).) Notably, the General Agreement template includes a requirement to pay for the costs incurred by the SWC in monitoring projects out of the project budget. One Nepali CSO stated that if they asked the SWC to approve a foreign funded project, the CSO would have to pay for the monitoring costs of the SWC monitoring team, including hotels, transportation, and meals.<sup>89</sup>

After signing a General Agreement, foreign CSOs must also implement their programs through local CSOs by entering into project-specific agreements (Project Agreements). This can be a burdensome process because the project-specific agreement requires approval from as many as seven different ministries.<sup>90</sup> The SWC issued amended guidelines for the Project Agreements in 2016, which are available only in Nepalese. According to Nepali lawyers, the Project Agreements have a number of requirements, including the previously mentioned requirement to obtain a pre-consensus paper signed with the DDC to implement projects in proposed districts.

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<sup>89</sup> Interview with Forum for Protection of People's Rights (2 June 2016).

<sup>90</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

## Other relevant laws

- **Local Self-Governance Act:** The Local Self-Governance Act of 1999 encourages local government entities such as Village Development Committees, DDCs, and municipalities to engage CSOs in the identification, formulation, implementation, and evaluation of development projects.<sup>91</sup> “The Act also encourages the private sector to participate in local self-governance to provide basic services for sustainable development.”<sup>92</sup>
- **Poverty Alleviation Act:** The Poverty Alleviation Act of 2006 established a Poverty Alleviation Fund that can provide grants and monetary assistance to CSOs for poverty alleviation programs.<sup>93</sup>
- **Cooperatives Act:** The Cooperatives Act of 1992 governs the formation, registration, dissolution and governance of cooperative associations.
- **Forest Act:** The Forest Act of 1993 outlines registration procedures and permissible activities of “Users’ Groups” for developing and conserving forests.
- **Trade Union Act:** The Trade Union Act of 1992 regulates the registration and operations of trade unions,
- **Public fundraising:** CSOs must receive prior permission from the MoHA to engage in public fundraising.<sup>94</sup>
- **Economic activity allowed:** CSOs are permitted to sell goods and services and to earn income from these activities. However, a CSO must ensure that “the profit from such activities is used to pursue its mission; the activities conform to the CSO’s objectives; and the profit is not distributed among CSO members or staff.” CSOs intending to pursue government tenders, such as tenders for UN projects implemented through government ministries, must register with the Value-Added Tax system.<sup>95</sup>
- **Taxation:**
  - Income that CSOs accrue from donations and membership fees are not taxed. CSOs are exempt from customs duties for specific imports, such as equipment to serve persons with disabilities and orphanages. However, to receive these exemptions, CSOs must secure prior recommendation from the relevant line ministries and final approval from the cabinet, which is a lengthy process. Tax benefits and customs exemptions are often subject to public officials’ interpretation of the law or the influence of CSOs’ personal connections. Individuals and legal entities that donate funds to CSOs do not receive any tax benefits or exemptions.<sup>96</sup>
  - The Income Tax Act 2058 (2002), Article 2, recognizes a category of tax-exempt organizations which includes organizations of a “social, religious, educational or benevolent organization of public nature established with non-profit motive.” Legal identity alone is not sufficient for CSOs to access tax exemptions, and most CSOs have found application of Article 2’s criteria unclear. For organizations that have received a tax-exemption certificate from the Department of Internal Revenue, income from grants, donations, and

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<sup>91</sup> 2015 CSOSI for Asia, p. 30.

<sup>92</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>93</sup> Poverty Alleviation Act, Articles 4, 5, 9 and 10.

<sup>94</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>95</sup> 2015 CSOSI for Asia, p. 31; 2014 CSOSI for Asia, p. 29.

<sup>96</sup> 2014 CSOSI for Asia, p. 28.



investments is not taxed. The certificate remains valid so long as the organization carries out the public benefit purposes mentioned in the organization's by-laws and does not carry out income generating activities.<sup>97</sup>

- **Development Cooperation Policy:** According to the unofficial translation of the DCP released by the Ministry of Finance in June 2014, the government will not accept grants below \$5 million, concessional loans less than \$10 million, and commercial loans below \$20 million per program or project (2.3, 2.4.3, and 2.5.2). In addition, another provision requires all development cooperation to be channeled through the Ministry of Finance, rather than directly to civil society (3.9.10). However, it is reported that the DCP is not strictly implemented in all cases.<sup>98</sup> Various aspects of the DCP conflict with the requirements of the SWC, most prominent of which include the allowable level of foreign grants.<sup>99</sup>

## Next steps

Presently the GON is working to adopt a Social Welfare and Development Act, which is intended to replace the Social Welfare Act of 1992. The Associations Registration Act may also undergo some changes in the near future. Amending these laws presents an opportunity to enact legislation that not only ensures and enables a vibrant, independent civil society, but also contributes to a legal framework that complies with international law. Civil society and the GON should work together, in a fully participatory and inclusive consultation process to improve the legal framework for civil society.

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<sup>97</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>98</sup> Civic Freedom Monitor, Nepal: <http://www.icnl.org/research/monitor/nepal.html> (last updated 25 April 2017).

<sup>99</sup> Usha Jha, Samjhauta Nepal, Conference: "The Legal Framework for Civil Society and the Media, Challenges and Opportunities," (28 September 2016).

# THE LEGAL ENVIRONMENT FOR THE MEDIA IN NEPAL

## Part I: Freedom of Expression: International Standards

Nepal is a party to the ICCPR and is a signatory to the Universal Declaration of Human Rights (UDHR). Both documents articulate the binding obligation States have to promote and protect the freedom of expression.

Article 19 of the ICCPR requires State parties to guarantee the right to freedom of expression, including the right to receive and impart information and ideas of all kinds regardless of frontiers. The full text of Article 19 reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The UN Human Rights Committee has stated that, “any restrictions on the operation of websites, blogs, or any other internet-based electronic or other such information dissemination systems” must comply with Article 19.<sup>100</sup> Restrictions to the speech and expressions guaranteed in Article 19 are lawful only when such restrictions pass a three-part, cumulative test:

- (1) the restriction must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency);
- (2) the restriction must pursue one of the purposes set out in article 19(3) of the ICCPR, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and
- (3) the restriction must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).<sup>101</sup>

Any restriction, whether in the form of legislation or regulations, that fails to meet the

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<sup>100</sup> UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, para. 43, UN Doc. CCPR/C/GC/34 (2011).

<sup>101</sup> See, e.g., Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 69, U.N. Doc. A/HRC/17/27 (16 May 2011).

parameters of this three-part test constitutes an unlawful restriction to the freedom of expression. Nepal's legal framework generally protects the freedom of expression, but contains legislation that curtails this fundamental human right.

## Part II: The State of Freedom of Expression and Press in Nepal

Freedom of expression and a vibrant, independent media are closely connected. The media plays a vital role in disseminating information to Nepali citizens. The media informs the citizenry of the government's actions, thus allowing individuals to form opinions, which are then exchanged with others.

The Constitution of Nepal is "the fundamental law" of Nepal. It explicitly states that any laws that contain provisions "inconsistent" with the constitution are void "to the extent of such inconsistency." The constitution recognizes and broadly affirms the freedom of expression, the freedom of the press, and the right to information.

### Freedom of Expression in the Constitution

Article 17(2)(a) of the Nepali Constitution states, "Every citizen shall have the following freedoms... freedom of opinion and expression." However, these rights are not absolute. First, this fundamental human right only applies to "citizens" of Nepal,<sup>102</sup> and second, the Constitution expressly limits these rights later in Article 17.

Limiting the freedom of expression to citizens violates the ICCPR. Article 2(1) of the ICCPR explicitly affirms that the rights of the ICCPR extend "to all individuals within its [the State's] territory and subject to its jurisdiction." The ICCPR Human Rights Committee, in its General Comment No. 15, explained that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness," and "[aliens] have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association."<sup>103</sup> The right to freedom of expression is guaranteed to everyone.<sup>104</sup>

Every individual – whether stateless persons, refugees, foreign nationals, asylum seekers, migrants or tourists – has the right to express herself or himself freely. The freedom of expression attaches to all individuals regardless of their physical location. States are obligated to respect, protect and in some cases, promote this to all people within their jurisdiction, irrespective of an individual's citizenship status. Governments must ensure that everyone under its jurisdiction - nationals and non-nationals, alike – enjoys the freedom of expression. States, therefore, cannot prohibit foreigners or non-nationals from exercising the right to freedom of expression. Such a prohibition runs afoul of Articles 2 and 19 of the ICCPR.<sup>105</sup>

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<sup>102</sup> Bimal Pratap Shah, "Free the Speech, *Republica*, (17 May 2016) (available at: <http://admin.myrepublica.com/opinion/story/42524/free-the-speech.html>).

<sup>103</sup> ICCPR Human Rights Committee, General Comment No. 15, The position of aliens under the Covenant (1986).

<sup>104</sup> Human Rights Council Resolution 15/12, U.N. Doc. A/HRC/RES/15/12 (6 October 2010).

<sup>105</sup> Additionally, this provision may violate Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Constitution also expressly restricts the freedom of expression in certain instances. Article 17 further states:

Nothing in sub-clause (a) shall be deemed to prevent the making of an Act to impose reasonable restrictions on any act which may undermine the sovereignty, territorial integrity, nationality and independence of Nepal or the harmonious relations between the Federal Units or the people of various castes, tribes, religions or communities or incite caste-based discrimination or untouchability or on any act of disrespect of labour, defamation, contempt of court, incitement to an offence or on any act which may be contrary to public decency or morality.<sup>106</sup>

Some of the restrictions listed here appear to comply with the ICCPR's permissible restrictions. However, the language used also permits the GON to enact further legislation that is likely to amount to impermissible restrictions. For example, "contempt of court" is not an acceptable category in which to restrict expression. Similarly, "incitement to an offence" is a broad, vague term, and thus likely violates the principle of predictability. The banning of "any act which may be contrary to public decency or morality" is also troubling because it begs the question of who defines what is considered "public decency or morality." Since these terms are not easily defined, it opens the door for the criminalization of ordinary expression or speech.

In short, the Constitution gives the GON latitude to enact laws that restrict the freedom of expression. Efforts should be made to ensure that the freedom of expression is available to all individuals in Nepal and should only be restricted in limited, delineated, clear and necessary circumstances.

### Freedom of the Press and the Right to Communication

The extent to which freedom of the press is guaranteed in the Constitution is unclear. The preamble notes that "full freedom of the press" is a necessary facet of a democratic society.<sup>107</sup> However, the body of the Constitution only guarantees the "right to communication." The term "free press" or "freedom of the press" is not mentioned in any article of the Constitution.

Article 19 of the Constitution enshrines the "right to communication," stating, "No publication and broadcasting or dissemination or printing of any news item, editorial, feature article or other reading, audio and audio-visual material through any means whatsoever including electronic publication, broadcasting and printing shall be censored." Article 19 therefore

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<sup>106</sup> Constitution of Nepal, Article 17. Compared to the present constitution, the previous constitution, the Interim Constitution of Nepal 2007 (2007 Constitution), had fewer restrictions to the freedom of expression. Article 12 of the 2007 Constitution stated with respect to the freedom of expression: "Nothing in sub-clause (a) shall be deemed to prevent the making of laws to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behaviour or morality."

<sup>107</sup> Constitution of Nepal, Preamble, "Being committed to socialism based on democratic norms and values including the ... full freedom of the press..."

prevents the GON from engaging in censorship. However, Article 19 goes on to give the GON the ability to enact legislation that restricts this right to communication in order to prevent:

any act which may undermine the 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 sedition, 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.

The categories for which the GON may restrict the right to communication largely mirror the permissible restrictions to the freedom of expression. As noted above, many of these categories are more vague and broader than enumerated in the ICCPR.

Article 19(2) protects television, radio and digital media from being closed and its equipment seized by government authorities. This provision states:

No radio, television, on-line or other form of digital or electronic equipment, press or other means of communication publishing, broadcasting or printing any news item, feature, editorial, article, information or other material shall be closed or seized nor shall registration thereof be cancelled nor shall such material be seized by the reason of publication, broadcasting or printing of such material through any audio, audio-visual or electronic equipment.

Article 19(2), however, specifically notes that its language does not prevent the “making of an Act to regulate radio, television, online or any other form of digital or electronic equipment, press or other means of communication.” The Constitution therefore provides the right to the GON to enact a law or laws that regulate television, radio and online or digital news.

The right to communication is further protected via Article 19(3). That provision states, “No means of communication including the press, electronic broadcasting and telephone shall be interrupted except in accordance with law.” While there is no issue with this provision per se, care must be taken to ensure that any such law only permits interruption to communications in strict accordance with Article 19 of the ICCPR.

There is concern that the right to “communication” is not the same as the right to press freedom, or press, publication and broadcasting rights.<sup>108</sup> This concern is further supported by the fact the Constitution does not include the right to a free press in its text (as opposed to the Preamble). Therefore, strong laws that support media houses’ ability to operate without government interference should be pursued.

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<sup>108</sup> Bhanu Bhakta Acharya, “Curbs on press freedom,” *The Kathmandu Post* (25 April 2016) (available at: <http://kathmandupost.ekantipur.com/news/2016-04-25/curbs-on-press-freedom.html>).

## Right to Information in the Constitution

The right to information is guaranteed in the Constitution in Article 27. This article 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.” Enshrining the right to information is a positive step. However, there are three issues with this right. First, this right only applies to Nepali citizens. Therefore, the same concerns regarding the freedom of expression, outlined above, are applicable to the right to information. Second, and as discussed in detail below, the Right to Information Law makes receiving information a long and sometimes difficult process. Third, this article leaves out the right to “impart” information, which is a fundamental aspect of the freedom of expression and right to information, and which is enshrined in Article 19 of the ICCPR.

## Part III: State of the Media in Nepal

By pure numbers, Nepal’s media is numerous, with approximately 900 newspapers, 650 radio stations, 85 television channels, and over 450 online news portals.<sup>109</sup> Indeed, Nepali media was rated as “partly free” by Freedom House in its 2016 Freedom of the Press Report.<sup>110</sup> Although there does not appear to be frequent direct government interference with media houses or journalists, the heavily politicized environment in Nepal also affects the media. There is a sense that some media outlets are “government” media while others are “non-government” media.<sup>111</sup>

## National Mass Communication Policy 2016

The GON released the National Mass Communication Policy 2016 in December 2016. The National Mass Communication Policy was not translated in time for a full analysis to be included in the Assessment. However, a brief review of the National Mass Communication Policy reveals that it calls for the creation of several new laws and amendments to many existing laws regarding the formation, registration and operations of the media. A full analysis of the National Mass Communication Policy will be conducted to assess its effect on the freedom of expression, and will be added as an addendum to this Assessment.

## Legal Framework

The legal framework governing the media is enabling in some ways, but restrictive in others. There is not one “umbrella” law for the media, and, presently, there is not a unified media policy. There is little direct government oversight, which allows for media houses and

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<sup>109</sup> Dr. Mahendra Bista, President, Federation of Nepali Journalists, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (28 September 2016).

<sup>110</sup> The Battle for the Dominant Message: Freedom of the Press 2016, *Freedom House* (April 2016) (available at: [https://freedomhouse.org/sites/default/files/FH\\_FT0P\\_2016Report\\_Final\\_04232016.pdf](https://freedomhouse.org/sites/default/files/FH_FT0P_2016Report_Final_04232016.pdf)).

<sup>111</sup> The terms “government” and “non-government” in this section refer to alleged or perceived bias regarding editorial and news content by media houses and news outlets; these terms do not refer to ownership of media houses or news publications. People reportedly view media outlets as either being pro-government, due to producing content favorable to the government and unfavorable to opposition groups; or as being anti-government, due to producing content that is unfavorable to the government and favorable to opposition groups.

journalists to create and deliver news according to their own editorial standards and guidelines. For example, there is a code of conduct for journalists – overseen by the Press Council of Nepal – but it does not provide for sanctions when its provisions are violated. A lack of direct government oversight ensures that journalists are not deprived of their right to work or freedom of speech based on the content of their reporting. However, there are number of laws that restrict the media. Each of these laws will be discussed in turn.

### **Right to Information Law**

The Right to Information Act (RTI Act) was adopted in 2007, and, together with the Right to Information Regulation (2009) constitute the legal framework for accessing information of the GON, as well as other “public bodies.” (collectively, RTI Law). The RTI Law is considered one of the best in the world.<sup>112</sup> However, some provisions of the RTI Law do not align with international standards, and there have been several issues with its implementation.

As noted above, the RTI Act only gives “every citizen” the right to information,<sup>113</sup> which is overly restrictive and not in accordance with international standards. Similarly, Article 3 outlines five sets of exceptions to the general rule that a “public body” must disseminate information. These five categories are made up of any information:

- (a) which seriously jeopardizes the sovereignty, integrity, national security, public peace, stability and international relations of Nepal;
- (b) which directly affects the investigation, inquiry and prosecution of a crime;
- (c) which seriously affects the protection of economic, trade or monetary interest or intellectual property or banking or trade privacy;
- (d) which directly jeopardizes the harmonious relationship subsisted among various cast [*sic*] or communities; and
- (e) which interferes on individual privacy and security of body, life, property or health of a person.

While these restrictions generally comport to international standards, the exception that seeks to safeguard the “harmonious relationship subsisted among various cast or communities” is likely overly broad. Additionally, this exception is redundant since the “public peace” exception covers this area.

Furthermore, the RTI Law does not include a public interest override. Under such a mechanism, information would still be subject to release where this information is in the overall public interest, even if it might harm a legitimate interest. This is necessary, for example, to protect whistleblowers that bring information about corruption or other government wrongdoing to light.

The RTI Law covers “public agencies,” which include all government agencies, all public-private partnerships, including all agencies owned or controlled by the government, political

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<sup>112</sup> See the *Global Right to Information Rating* (2017) (available at: <http://www.rti-rating.org/country-data/>), ranking Nepal 27<sup>th</sup> out of 111 countries; see also, Interview with Santosh Sigdel, ICTJ (26 May 2016).

<sup>113</sup> RTI Act, Article 3(1).

parties, and organizations and NGOs that operate via receiving “money directly or indirectly from the Government of Nepal or Foreign Government(s) or International Organizations/Institutions.”<sup>114</sup> Organizations and NGOs are private entities. While requiring those public entities that receive direct funding from the government to be subject to the RTI Law’s provisions generally reflects good regulatory practice, requiring private bodies that receive no public funds and that do not necessarily perform public functions to abide by all disclosure and other provisions of the RTI Law goes beyond the scope of most other Access to Information Laws.

Turning to the RTI Law’s implementation, a number of issues have been raised, all of which directly affect journalists’ (as well as the average person’s) ability to receive and use information. First, in order to obtain information from a public body, a Nepali citizen must “state a reason to receive” the requested information.<sup>115</sup> Pursuant to Article 31, a person who obtains information from a public body is prohibited from using it for a reason different from the reason given when requesting the information. If a journalist sought information for a newspaper article, but then used such information in a radio broadcast, she would likely be in violation of Article 31, which under Article 32(4) allows the imposition of a fine of up to NRS 25,000. Similarly, an Information Officer may think twice or err on the side of using an exception when receiving information requests from journalists, especially if such information relates to government wrongdoing. There is no reason to require an information seeker to provide a reason justifying the request. Indeed, that runs contrary to the purpose of the RTI Law - making the functions of the State open and transparent in accordance with the democratic system – and makes it more difficult for journalists to receive information.

Second, there has so far been very little dedicated training of public officials, including Information Officers. Thus, requests for information are often not properly handled. Public agencies rarely respond to requests for information in the time period stipulated by the RTI Law, which is maximum 15 days for Information Officer, seven days for Chief of the Office and either 45 days for a complaint or 60 days for an appeal for the National Information Commission. There are many cases where information was not provided for many months, with fulfilled requests frequently taking approximately 100 days.<sup>116</sup> This extended length of time essentially prohibits journalists from carrying out long-term investigations, as well as short-term investigative reporting. Local CSOs have commented that GON officials need training on how to meet the requirements of the RTI Law.<sup>117</sup>

The government has made two attempts to classify information under the section 27 of the RTI Act, both of which failed<sup>118</sup> Despite such failure, the lack of clear regulations regarding classification of information provides gray space to public officials not to disclose information. Compounding matters is that the GON has generally interpreted the RTI Act as only being a tool for journalists to use, but the terms of the Act allow all Nepalese citizens to seek information from the government.<sup>119</sup>

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<sup>114</sup> RTI Act, Article 2(a).

<sup>115</sup> RTI Act, Article 7(1).

<sup>116</sup> Interview with Tanka Aryal, Citizens Campaign for Right to Information (CCRI) (31 May 2016).

<sup>117</sup> Interview with Krishna Sapkota, Executive Director, Freedom Forum (31 August 2016).

<sup>118</sup> The first classification was carried out on 22 December 2008 and second classification was made on 12 December 2011. The first classification was replaced by second classification and the second classification was declared void by the Supreme Court decision.

<sup>119</sup> Interview with Madhu Acharya, formerly of Internews (31 May 2016).



## **Defamation Law**

The Nepali Defamation Act 1959 provides for criminal sanctions, including imprisonment for defamation. Article 5 provides for a fine of up to NRS 50,000 and/or imprisonment for up to 2 years for dishonoring someone, or for printing or writing something deliberately, or with adequate reasons to believe it is not true, to dishonor someone. Although imprisonment for defamation has, in practice, rarely been a punishment in recent times, this law is an impediment to journalists. Criminal defamation violates the freedom of expression enshrined in Article 19 of the ICCPR, and numerous international bodies and experts have consistently called for defamation to be decriminalized.<sup>120</sup>

Criminal penalties for defamation amount to disproportionate punishment. A prison term or suspension from the right to practice journalism – common punishments under criminal defamation regimes – are unduly harsh compared to the wrong committed and are unnecessary to protect individual reputations. Therefore, criminal sanctions for defamation constitute a violation of the freedom of expression. Civil penalties for defamation, such as apologies, corrections, the right of reply, and even fines, in a reasonable amount and proportionate to the injury or reputation suffered, allow for individuals' reputations to be protected, while complying with the freedom of expression. The Nepali Defamation Act 1959 should be reconsidered in order to ensure compliance with Article 19 of the ICCPR.

## **Electronic Transaction Act**

Section 47 of the Electronic Transaction Act reads:

Publication of illegal materials in electronic form: (1) If any person publishes or displays any material in the electronic media including computer, internet which are prohibited to publish or display by the prevailing law or which may be contrary to the public morality or decent behavior or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities shall be liable to the punishment with the fine not exceeding One Hundred Thousand Rupees or with the imprisonment not exceeding five years or with both.

Essentially, this provision prohibits the publication or exhibition of materials contrary to public morality and decency. These terms are overly broad and not defined. Therefore, it directly violates Article 19 of the ICCPR.

According to one local CSO, Section 47 is consistently used by GON Authorities to control freedom of expression made online.<sup>121</sup> Five cases were brought by the government under

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<sup>120</sup> Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 87, U.N. Doc. A/HRC/17/27 (16 May 2011); Ambeyi Ligabo, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, paras. 39-43, UN Doc. A/HRC/7/14 (28 February 2008); Promotion and protection of the right to freedom of opinion and expression, para. 28, UN Doc. E/CN.4/1999/64 (29 January 1999).

<sup>121</sup> Interview with Forum for Protection of People's Rights (2 June 2016).

Section 47 against journalists in the short period between March to August 2016.<sup>122</sup> In many of these cases, GON Authorities invoke the vague provisions of Section 47 against journalists that report on politically sensitive topics or are critical of government policy. Such speech does not amount to a “cybercrime,” but Section 47 allows GON authorities to criminalize such speech. Another issue is that it is unclear whether the Electronic Transaction Act is to be applied by GON as a criminal or non-criminal manner.<sup>123</sup> Some freedom of expression advocates in Nepal are concerned that a cybercrime law might be introduced soon.<sup>124</sup> Media stakeholders at a district-level forum expressed concern about the lack of clarity in Section 47 because of the threat it posed to their ability to report stories online.<sup>125</sup>

### **National Broadcasting Act**

Under the National Broadcasting Act 1993 and National Broadcasting Rules 1995, the Ministry of Information and Communication (MOIC) controls allocation of all licenses for broadcasting, including radio, television and satellite. Radio is the major source of information for most Nepalese. Section 4 of the National Broadcasting Act makes it illegal for anyone to broadcast any program without a license. International best practices encourage States to establish independent bodies to regulate broadcasting.<sup>126</sup> Without such an independent body, the possibility that decisions on broadcast licenses will be determined arbitrarily or based on the content of the broadcaster is significant. The MOIC is not sufficiently independent to guarantee that broadcast licenses are handed out in a fair and transparent manner, and not based on the content of the broadcaster. One Nepali CSO recommended that the process for obtaining broadcast licenses be reviewed.

Two major broadcasters, Nepal Television and Radio Nepal, are run by the GON. Media run by the government can potentially be biased against the viewpoint of government critics. Thus, establishing a Public Service Broadcasting (PSB) entity is a priority agenda item for freedom of expression in Nepal. A PSB model will provide an opportunity for different voices and communities to be heard from around the nation. Adoption of a PSB model is essential to improving freedom of expression and the people’s right to information. Once the GON drafts the law and/or regulations surrounding a PSB, CS:MAP will undertake an analysis of it, comparing it with international standards and best practices.

### **The Press and Publication Act**

Under the Press and Publications Act 1991, anyone who wishes to operate a “press” – which includes newspapers and bulletins – must obtain government registration before carrying out operations. This Act also requires journalists to obtain a “Press Representative Certificate.” Both Nepali and foreign media organizations working in Nepal are required to send

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<sup>122</sup> Interview with Dependra Jha, Terai Justice Centre (30 August 2016).

<sup>123</sup> Taranath Dahal, President, Freedom Forum, Conference: “The Legal Framework for Civil Society and the Media, Challenges and Opportunities,” (28 September 2016).

<sup>124</sup> Interview with Tanka Aryal, Citizens Campaign for Right to Information (CCRI) (31 May 2016); *see also*, National Mass Communication Policy 2016, Chapter 3, Section 3.7.6.

<sup>125</sup> CSO participant discussions, CS:MAP Stakeholder Forum, Dhulikhel (16 January 2017).

<sup>126</sup> Eve Salomon, *Guidelines for Broadcasting Regulation*, UNESCO, p. 12 (available at: [http://portal.unesco.org/ci/en/files/21345/11399384219Guidelines\\_for\\_Broadcasting\\_Regulation.pdf/Guidelines%2Bfor%2BBroadcasting%2BRegulation.pdf](http://portal.unesco.org/ci/en/files/21345/11399384219Guidelines_for_Broadcasting_Regulation.pdf/Guidelines%2Bfor%2BBroadcasting%2BRegulation.pdf)); *see also*, Policy Brief: International standards: Regulation of broadcasting media, Article 19 (5 April 2012) (available at: <https://www.article19.org/resources.php/resource/3022/en/international-standards:-regulation-of-broadcasting-media>).

information about the names, qualifications and working area of their staff and representatives to the Press Council of Nepal.<sup>127</sup> In an interview, the Federation of Nepali Journalists recommended revisions to the Press and Publications Act.

Prior approval to operate a journalistic endeavor does not conform to international best practices. “Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures, must be eliminated.”<sup>128</sup> Accreditation schemes, like the one in Nepal, should only be used to facilitate the work of the press; it should not be used as a work permit for journalism.<sup>129</sup> Because the State has such an important role protecting and promoting the freedom of expression, regulation of the media should be minimal.<sup>130</sup>

### **Working Journalists Act**

The Working Journalists Act 1993 provides for a minimum wage for journalists, and sets other workplace standards. For example, the Act denotes the situations where journalists are to be promoted and provides for certain job protections. Currently, this Act is being reviewed for substantial revisions.

The Working Journalists Act seeks to standardize certain aspects of professional journalism. This in turn, can enable media pluralism, which should be an overall objective for the media in every country.<sup>131</sup> If implemented properly, legislation such as this will also develop the capacity of journalists. However, care should be taken to ensure that the State’s intervention is minimal. Owners and operators of media houses should be included in discussions about revisions to the Working Journalists Act. Akhilesh Upadhyay, the Editor-in-Chief of the Kathmandu Post, also recommended that journalists should be part of the revision process.

A report published by the Minimum Wages Fixing Committee in 2015 stated that the recommendation on a minimum wage for journalists has not been implemented properly. More than 26 percent of journalists are working without an appointment letter, which is one of the most important requirements of the Working Journalist Act 1993. Furthermore, the report says that about 15 percent of journalists are receiving salaries lower than the committee’s recommendation.<sup>132</sup> The Federation of Nepali Journalists also stated that minimum wage issues and job security are two major concerns of journalists that should be addressed in any revisions to the Act.<sup>133</sup>

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<sup>127</sup> The Press and Publication Act, Section 20.

<sup>128</sup> World Press Freedom Committee, Charter for a Free Press, Article 9.

<sup>129</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 7 (2006).

<sup>130</sup> Andrew Puddephatt, *The Importance of Self Regulation of the Media in Upholding Freedom of Expression*, UNESCO, p. 11 (2011).

<sup>131</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 7 (2006).

<sup>132</sup> Media Study Report (2015) (in Nepali) (available at: [http://www.mediawage.gov.np/files/sramjibi\\_patrakar\\_2072.pdf](http://www.mediawage.gov.np/files/sramjibi_patrakar_2072.pdf)).

<sup>133</sup> Interview with Santosh Sigdel, ICTJ (26 May 2016).

## Online Regulations

There is one regulation and one potential draft law that, if passed, are likely to affect the media and journalists. First, the Online Media Operation Directives, 2073 (Directive) was adopted on March 20, 2017.<sup>134</sup> The Directive mandates the following: approval from the Department of Information before operating “online journalism;” prohibitions on materials that can be published online; and strict monitoring of online media to be undertaken by the Press Council of Nepal.

The Directive also contains a licensing or registration scheme, “...any individual or organization desiring to adopt online journalism through the online media should file an application at the Department [of Information] ...” This registration requirement applies to all media organizations – including print, television and radio – that seek to have, or already have, an online presence. This type of registration poses an issue because it may be impossible to define who “operates online journalism.” Would an individual teacher who also maintains a blog about education in Nepal have to register? Or what about a law firm that posts articles about court decisions so that their clients better understand Nepali law?

In addition to adhering to these registration requirements, the Directive also restricts news content. Article 10 prohibits the publishing and broadcasting of “The materials which are prohibited to be published or broadcast in accordance with the Constitution of Nepal and prevailing laws,” and “Materials that are against journalist codes of conduct.”<sup>135</sup> These prohibitions are overly broad and vague, and likely constitute an unlawful restriction to the freedom of expression as protected in Article 19 of the ICCPR.

As the Directive was issued shortly before publication of this Assessment, ICNL and CS:MAP will provide a complete analysis of the Directive in the near future, which will be available upon request.

Nepal may also be in the process of drafting a Cybercrime Law. While Cybercrime Laws can be a useful tool in preventing actual cybercrimes, many Cybercrime Laws are not narrowly-tailored, and thus restrict the freedom of expression. The GON should be encouraged to ensure that if a Cybercrime Law is deemed to be necessary, that it be drafted in a specific manner so as to protect the freedom of expression while giving authorities the ability to prevent, investigate and prosecute legitimate cybercrimes.

## Practical Challenges

In addition to the laws outlined above, arrest, self-censorship and safety are major challenges facing Nepali journalists today. There have been at least four arrests for journalists or reporters

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<sup>134</sup> “Govt Issues Online Media Directive,” Republica (23 March 2017) (available at: <http://www.myrepublica.com/news/16980/?categoryId=81>; and “Nepal reintroduces restrictive online media directives,” International Federation of Journalists (28 March 2017) (available at: <http://www.ifj.org/nc/news-single-view/backpid/30/article/nepal-reintroduces-restrictive-online-media-directives/>).

<sup>135</sup> Online Media Directive, Article 10: “Publication and broadcasting to be prohibited: The following materials shall not be allowed to be published and broadcast from the online media:

- a. The materials which are prohibited to be published or broadcast in accordance with the Constitution of Nepal and prevailing laws.
- b. Materials that are against journalist codes of conduct.”

in 2016, already.<sup>136</sup> Each of these journalists was arrested while engaged in journalism. For example, a photo-journalist was arrested for taking photographs of red graffiti in May 2016. In addition to formal arrests, according to the Federation of Nepali Journalists, which maintains a database of attacks on journalists, there have been 139 such attacks in the past year, resulting in no prosecutions.<sup>137</sup>

The challenges of self-censorship and safety are interrelated. Some journalists are afraid of being attacked and/or arrested, which in turn causes them to self-censor or modify their reporting so as not to anger segments of the population. According to a former President of the Federation of Nepali Journalists, Dharmendra Jha, self-censorship is exacerbated because many journalists believe the government will not do enough to protect them from attacks or to prosecute individuals who attack journalists.

A high-profile incident involving Kunda Dixit, the Editor and Publisher of the Nepal Times, shows that pressure on journalists also takes the form of intimidation tactics and government investigation. The Commission for the Investigation of Abuse of Authority (CIAA) investigated Mr. Dixit for the mismanagement of funds and a CIAA commissioner appeared to be using the investigation to pursue a political vendetta.<sup>138</sup> Investigations such as this and the threat of possible investigations by quasi-governmental bodies whose powers are unclear can also create an environment of self-censorship.

Licensing of journalists is also a potential challenge to an independent media and free expression. In addition to the licensing scheme outlined in the Online Media Operation Directives, the Nepal Press Council is considering an examination and licensing scheme for one to become a journalist, which does not comply with international standards. The Nepal Press Council has not yet implemented such a scheme, but CS:MAP will continue monitor developments surrounding licensing for journalists, and will analyze any law or regulation on this issue via an addendum.

## Self-Regulation

Nepal's media does not currently utilize a self-regulatory scheme. Rather, the Press Council of Nepal oversees print media and enforces the Code of Journalistic Ethics (2013). As the Press Council is not a self-regulatory body because its members are appointed by the GON and does not operate independently of the government, this is a form of governmental regulation. The government role on the Press Council was mentioned during "The Legal Framework for Civil Society and the Media: Challenges and Opportunities," conference as an important reason why a revised Code should allow for more of a non-governmental role in governing Nepali media.<sup>139</sup>

Self-regulation is simply a standard of behavior for the media that is agreed upon and enforced by the media. Self-regulation can preserve the independence of the media while supporting the

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<sup>136</sup> "Nepal press group condemns journalist's arrest," *The Statesman* (26 May 2016) (available at: <http://www.thestatesman.com/news/world/nepal-press-group-condemns-journalist-s-arrest/144602.html>).

<sup>137</sup> Interview with Dr. Mahendra Bista, President, The Federation of Nepali Journalists (FNJ) (3 June 2016) noting that the FNJ is focused on this issue.

<sup>138</sup> Interview with Akhilesh Upadhyay, Editor-in-Chief of the Kathmandu Post (1 June 2016). The CIAA commissioner has been expelled from his position by the Nepali Parliament for abuse of parliament related to the Dixit case and other cases.

<sup>139</sup> Statement of Kundan Aryal, Associate Professor, Tribuwan University, Conference: "The Legal Framework for Civil Society and the Media: Challenges and Opportunities," (29 September 2016).

freedom of expression. A self-regulatory scheme can also encourage greater compliance with the regulations than with government regulation since media houses would be subject to peer pressure (and potentially sanctions).

Generally, self-regulatory schemes include three components; a journalists' code of conduct, a code of editorial independence, and professional guidelines.<sup>140</sup> Codes of conduct tend to focus on accepted principles of reporting: "a respect for truth and the right of the public to truth; the right to fair comment and criticism; factual and objective reporting; the use of fair methods to obtain information; the willingness to correct mistakes; respecting the confidentiality of sources."<sup>141</sup> Codifying editorial independence ensures that journalists are able to operate, report, write and publish on issues free from the control of commercial interests of the owners of media houses. Editorial independence ensures the right of journalists "to decide what to cover, how to cover it and where to place the story in a newspaper, magazine or broadcast, regardless of the views of the owners."<sup>142</sup> Professional guidelines are editorial policies that are designed to govern the output of media houses by balancing the freedom of expression with the responsibility to respect privacy, avoid unnecessary harm and promote accuracy, fairness and impartiality.<sup>143</sup>

Self-regulation can be a viable tool to improve the media environment in Nepal, especially if there is a consensus amongst journalists, editors, publishers and owners of media houses. Any such scheme should be developed and adopted voluntarily, with clear oversight and compliance procedures.

Although the Code of Journalistic Ethics was recently revised,<sup>144</sup> there are ongoing discussions between the Federation of Nepali Journalists and the Press Council of Nepal on how best to implement to it. One challenge in this process is determining which body will take ownership over the Code, a decision that will impact whether journalists regard the Code's standards as coming from their own sector or imposed by an outside body. Dharmendra Jha asserted that journalists worry that a Code written and enforced by the Press Council of Nepal would be used to control their work. An initial plan later withdrawn by the Press Council of Nepal to test and license journalists was immediately opposed by journalists as leading to government control over the sector.<sup>145</sup> One alternative suggestion involves the creation of codes of conduct in different media entities, instead of a code applicable to the entire sector.<sup>146</sup>

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<sup>140</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 12-15 (2006).

<sup>141</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 13 (2006).

<sup>142</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 13 (2006).

<sup>143</sup> Miklos Haraszti, The Representative on Freedom of the Media, Organization for Security and Cooperation in Europe, *Special Report: Accreditation of Journalists in the OSCE area Observations and Recommendations*, p. 14 (2006).

<sup>144</sup> The Code of Journalistic Ethics was amended in September 2016.

<sup>145</sup> Interview with Krishna Sapkota, Executive Director, Freedom Forum (31 August 2016).

<sup>146</sup> Gunaraj Luitel, Editor-in-Chief, Nagarik Daily and Kundan Aryal, Associate Professor, Tribuwan University, Conference: "The Legal Framework for Civil Society and the Media: Challenges and Opportunities," (29 September 2016).

## Next steps

As the GON works to redraft its Media Policy, it will propose new laws and introduce amendments to current laws. The Press Council of Nepal, hopefully with significant input and buy-in from journalists, will also likely revise and implement a new Code of Journalistic Ethics to include real sanctions for violations.

While the overall media policy in Nepal could benefit from significant amendments, reform efforts should target laws that impede the freedom of expression and the right to information rather than on the drafting of an umbrella policy. Similarly, all stakeholders, including the government, the Press Council of Nepal, the Federation of Nepali Journalists, media houses and journalists should work to improve the implementation of laws so that the press remains safe and free, and that the freedom of expression is protected. Finally, as many participants in the Assessment expressed, media and civil society in Nepal need to work together to better understand the role each sector has to play.