

Nepalese Cyber Law and Children

The internet, otherwise known as the “World Wide Web” is a medium which facilitates the spread of information and communication between people at a global level. The internet is a ‘free’ medium, with no international laws and regulations upon it, therefore it is extremely difficult to both monitor and prohibit transactions that occur within it.

Cybercrime is regarded to be the computer manipulation of information to the detriment of the focus or victim of said information:

“Cybercrime is an act of creating, distributing, altering, stealing, misusing and destroying information through the computer manipulation of cyber space; without the use of physical force and against the will or interest of the victim.” *US Department of Justice*

Although it is a positive tool in many regards, for it can promote the infiltration of knowledge at an educational and liberating level, it allows for illicit transactions such as the availability of child pornography, gambling and inappropriate interaction between minors and adults.

The internet has become a breeding ground for child exploitation and pornography. There are few prohibitions within the internet to control exploitative pornography therefore the internet has given rise to an ever increasing pornographic trade – particularly in countries where regulations are at a minimum, such as Nepal.

The *Council of Europe Convention on Cybercrime* (2001) defines child pornography as depictions of individuals who are in fact or who appear to be under 18 years of age engaging in sexually explicit conduct. Child pornography, whether by free choice or against the will, is extremely damaging to minors both emotionally and psychologically.

Children, in particular girls, are vulnerable to sexual exploitation facilitated by the open market of the internet within which pornographers and pedophiles flourish. Images of children exposed or in the course of sexual activity, either by or against their own will, are easily accessible over the internet which adults and minors have free access to daily. Both those creating such images and those consuming such images are criminals, yet Nepal currently has no legal framework in order to persecute perpetrators encouraging criminals to continue the victimization of children.

In light of the *International Conference on Combating Child Pornography on the Internet* (Vienna, 1999) which called for a world-wide effort to criminalize the creation, distribution, manipulation and dissemination of child pornography it is even more important for Nepal to become a part of this global effort.

Nepal lacks the laws to criminalize perpetrators and the spread of pornographic material, nor is there a support system to aid victims of pornography with recovery as is required by The United Nations' *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography* (2000). This needs to be rectified. In order to fulfill its obligation to its children and to protect them from exploitation, abuse and damage Nepal needs to implement and enforce effective cyber laws which can deter crimes, persecute perpetrators and protect children.

Current Nepalese Laws Regarding Children

The *Nepal's Children's Act* 1992, **Article 16, states** that children should not be involved in immoral professions, which includes taking photographs of children, producing, distributing or exhibiting such for the purpose of engaging a child in immoral profession. This includes publishing, exhibiting or distributing photographs or personal events or descriptions of a child tarnishing the character of a child.

This current Act in place is insufficient in its definition of child pornography. The Act talks of photographs which “tarnish the character of a child”. There is no reference to photographs of a sexual nature thus the ambiguity surrounding what may “tarnish the character of a child” makes it more difficult to criminalize pornographers. Moreover the current penalty for person(s) who commit such offences in contravention of the law is a fine of up to ten thousand rupees or imprisonment for up to one year or both. This punishment is inadequate to act as a deterrent to pornographers and other perpetrators of the exploitation of children.

The draft *Nepal's Child Rights Act, 2064* identifies child pornography as an act of abuse against children which is an improvement from the current law. Moreover it defines child pornography in more definite terms as taking videos or pictures of children showing their sexual organs with or without their permission. It also includes images of children in sexual activity which are published in electronic or other media forms such as newspapers, posters and movies.

The draft Act references the dissemination of child pornography via an electronic medium, however it offers no way in which this dissemination can be controlled and prohibited.

Thus the *Nepal's Child Rights Act, 2064* criminalizes child pornography on the internet however pornographers remain freely able to market their trade via the internet. Without an effective cyber law aimed to control this trade children will continue to remain vulnerable to both exploitation and psychological damage via the internet.

Cyber Laws

The *Electronic Transaction Act, 2063* is Nepal's first cyber law. It was created in response to the growing usage of the internet in Nepal. It makes provision for the commercial use of computers and networks; authorizes e-transactions and communication in public and private sectors; criminalizes different computer related unwanted activities:

“Whoever publishes or causes to publish, display any material in the electronic form including computer, internet which are prohibited to publish or display by the law in force or which may be contrary to the public morality or decent behaviour or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities shall be liable to be punished with a fine of up to one hundred thousand rupees or with imprisonment of up to five years or both.”

This Act remains ambiguous in regards to child pornography to which it makes no direct reference. Section 47 prohibits material which is “contrary to the public morality or decent behaviour”. This could be roughly taken to refer to child pornography but with no explicit mention as such it has no effective way to criminalize pornographers, nor to provide protection and support for victims. This sole internet law provides a loophole for pornographers and is too vague in its description of prohibited material to ensure the punishment of perpetrators against children.

In contrast to *The Electronic Transmission Act, 2063* the *Council of Europe Convention of Cybercrime* in **Article 9** makes specific note of offences related to child pornography. It requires each party to make criminal the production, distribution, procuring and possessing of child pornography via the internet. It defines child pornography as any minor either under 16 or 18 years of age engaging or appearing to engage in sexual activity.

Furthermore the *Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography* in **Article 8** requires states who sign the convention to include in cyber laws the need to adapt legal procedures to the vulnerability of child victims. Thus the *Optional Protocol* states parties ought to provide trained services which can support child victims throughout the legal process.

These requirements set out in both *Council of Europe Convention of Cybercrime* and the *Optional Protocol* are ones lacking in any current Nepalese laws. Thus the Government is obligated to protect minors from sexual exploitation and abuse by taking action to implement a comprehensive legal framework to ensure the prohibition and criminalization of child pornography.

Recommendations for legislation and policies

Legislation and policies should include:

- Clear definition of child pornography.
- Definition of a child and/or a young person.
- Criminalisation of all aspects of (the use of) child pornography.
- Severe penalties for all offences related to child pornography.
- Regulations should be stipulated for cybercafés to ban cabins or cubicles and prevent children below the age of 18 from accessing child pornography.
- Regulations for blocking access to child abuse images and take down procedures for ISP's.
- Enforcement of data retention for ISP's and mobile phone operators.
- Extraterritorial law to be enforced in order to address the possibility of foreign paedophiles exploiting children online.
- Responsibilities of concerned stakeholders, including the line ministries should be clearly mentioned in the regulations to be formulated in order to implement legislation on protecting children online.
- Training of criminal justice professionals, including law enforcement, prosecutors and the judiciary is required in order to effectively execute the cyber legislation.
- Installment of a cyber crime police unit (like the Cyber Cell in India) is a necessary precondition in order to execute the cyber law.

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