

Freedom of
Expression on the
Internet in Nepal

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Couple of years ago the issue of Freedom of Expression on Internet was not taken seriously. Aftermath of Arab revolution changed the perception. However, we had already witnessed the role of Internet in Freedom of Expression during peaceful movement that restored democracy in 2006. The team has done really wonderful job here on mapping the situation and analyzing it wisely. Internet Society Nepal believes it will serve as milestone in the area of Internet and Freedom of Expression in Nepal.

This research is out come of other significant contribution too. We are really thankful to all the participants who participated and expressed their valuable feedback in the consultation meeting on draft report of this research. This discussion really helped our research team.

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A handwritten signature in black ink, appearing to read 'Babu Ram Aryal', written in a cursive style with a long horizontal stroke extending to the right.

Advocate Babu Ram Aryal

President

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Chapter 1

Introduction

1. Introduction:

1.1. A Study on "Freedom of Expression on the Internet in Nepal"

The world has entered the digital era and the Internet has become an important source of information, communication and entertainment. The Internet is a gigantic library providing a vast amount of knowledge. It is a world-wide message board, a telephone network, and a publishing medium. The general populations' access to current events is unparalleled as blogs, social media and online content makes information about almost any subject available immediately and in great detail. This allows people to form their own opinions and express their views on a level unparalleled in history. Business transactions, communication, and research are some areas in which the use of Internet is increasing day by day. The increased use is attributed to the global presence of the Internet, easy accessibility and wide-scale communication.

Since more than two billion people around the world have access to the Internet, it has become part of popular culture and is widely considered an essential service. In today's world, the Internet has become a key means by which individuals can exercise their right to freedom of opinion and

expression i.e. the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, as guaranteed under articles 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The development of the Internet has indeed been revolutionary in facilitating participatory information sharing and collaboration in the creation of content that makes individuals no longer simply passive recipients, but also active publishers of information. More generally, by enabling individuals to exchange information and ideas instantaneously, safely and usually for free across national borders, the Internet allows access to information and knowledge that was previously unattainable.¹

On the other hand, misuse of the Internet is reported daily and cybercrime such as child pornography, website hacking, online fraud have become serious problems. In some countries, fearing the power of these new technologies, governments have devised subtle and not-so-subtle ways to filter, monitor and otherwise obstruct or manipulate the openness of the Internet, arguing that the measures are necessary to combat potential legal, economic, and security challenges raised by the Internet.² Such restrictions undermine freedom of expression on the Internet. With unprecedented

¹ UNHRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, May 2012, p. 7. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf.

²<http://www.freedomhouse.org/issues/Internet-freedom> <accessed on 9 Nov 2012>

expansion of the Internet and Internet-related services, business interests can also conflict with human rights, including freedom of expression. Misuse of copyright claim by enterprises to restrict expression online is an example of this challenge.

In this context, this report analyzes the opportunities and challenges for freedom of expression on the Internet in Nepal.

1.2. Freedom of Expression on the Internet and the Special Rapporteur's Report

In 2011 the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted a report to the UN General Assembly called the "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Internet". The report focuses on "... the advantages and challenges of new information and communications technologies, including the Internet and mobile technologies, for the exercise of the right to freedom of opinion and expression, including the right to seek, receive and impart information and the relevance of a wide diversity of sources, as well as access to the information society for all"³. The Special Rapporteur's report addresses the issue through two equally

³Paragraph 4 (f), Human Rights Council resolution 7/36, available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf

important dimensions of Internet access: access to content online and access to Internet connection.⁴

The Special Rapporteur's report underlines the fact that the Internet is vital to exercise the right to freedom of opinion and expression, as guaranteed by article 19 of the UDHR and the ICCPR. Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. However, the right to freedom of expression and opinion is not an absolute right and can be subject to certain restriction. According to international principles this right can be limited to for the respect of the rights or reputations of others and for the protection of national security or of public order (ordre public), or of public health or morals.⁵

In general, it is recognized that any limitation to the right to freedom of expression must pass the following three-part, cumulative test:

- (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and

⁴ *Supra* note 1, p.4

⁵ Article 19 (3), International Covenant on Civil and Political Rights 1966, available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

(b) It must pursue one of the purposes set out in article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and

(c) Any restriction must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).⁶

Moreover, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.⁷

Some types of information may be legitimately restricted. These include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement

⁶*Supra* Note, pp. 6-9

⁷ *Id*

to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

However, in many instances, States restrict, control, manipulate and censor content disseminated via the Internet without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions; and/or in a manner that is clearly unnecessary and/or disproportionate to achieving the intended aim. Such actions are clearly incompatible with States' obligations under international human rights law, and often create a broader "chilling effect" on the right to freedom of opinion and expression.

Due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with the Internet. For example, in cases of defamation of an individual's reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate. Likewise, protection of children from inappropriate content may constitute a legitimate aim, the availability of software filters that parents and school authorities can use to control access to certain content means the government's actions become harder to justify.

In addition to techniques which have long been used in the offline world to stifle expression (such as arbitrary arrests and detention, enforced disappearance, harassment and intimidation) the report explores a number of different techniques used by states and private actors specifically to limit expression online. One is technical measures to prevent access to certain content, such as blocking and filtering. Another is using criminal law to stifle online expression. This happens both through the application of existing criminal laws to online expression and by adopting new laws specifically designed to criminalize expression on the Internet. Such laws are often justified on the basis of protecting an individual's reputation, national security or countering terrorism, but in practice are used to censor content that the Government and other powerful entities do not like or agree with.

Internet use is not possible without the involvement of intermediaries. The way in which information is transmitted largely depends on intermediaries, or private corporations which provide services and platforms that facilitate online communication or transactions between third parties, including giving access to, hosting, transmitting and indexing content. The Special Rapporteur's report also finds that intermediary liability for user generated content can, therefore, violate freedom of expression, by encouraging intermediaries to police their users.

Cyber-attacks are another technique that is addressed in the report. Cyber attacks are attempt to undermine or compromise the function of a

computer-based system and include hacking into accounts or computer networks and distributed denial of service (DDoS) attacks. Recently it is observed that websites of human rights organizations and dissidents are frequently and increasingly becoming targets of DDoS attacks. According to the Special Rapporteur, the state has mainly two responsibilities: if the State is involved in the cyber attacks, the state is involved in direct violation and must cease this activity; and states also have an obligation to protect individuals against interference by third parties that undermines the enjoyment of the right to freedom of opinion and expression.

Another technique is giving users inadequate protection of the right to privacy and data protection. The Internet allows individuals to access information and to engage in public debate without having to reveal their real identities and this supports greater free expression. Some states use popular social networking sites, such as Facebook, to identify and to track the activities of human rights defenders and opposition members, and in some cases have collected usernames and passwords to access private communications of Facebook users. Likewise, many States put pressures on the private actors to hand over information of their users.

On access to the Internet and the necessary infrastructure the Special Rapporteur' finds that a States commitment to develop effective policies to attain universal access to the Internet is crucial – along with removing obstacles such as lack of technological availability, slower Internet

connection and higher costs.⁸Persons with disabilities and persons belonging to minority groups often face barriers to accessing the Internet and without Internet access, marginalized groups and developing States remain trapped in a disadvantaged situation. States should consider recognizing access to the Internet as a right as has happened in Estonia, France, Costa Rica and Finland.

According to the Special Rapporteur, States have positive obligation to promote or to facilitate the right to freedom of expression and the means necessary to exercise this right and the State should adopt effective and concrete policies and strategies to make the Internet widely available, accessible and affordable to all.

1.3. Objectives and Methodology of the Study

The primary objective of the study was to study the level of Internet freedom and access to online content and infrastructure in Nepal. The Study was carried out using the doctrinal method, particularly law reviews. Some qualitative dimensions were explored through key actor interviews, stakeholder's consultation and a focus group discussion. In this way the study is based on both primary and secondary data relating to the subject matter, collected from various organizations (working in the field

⁸*Id*, p.16

of freedom of expression and Internet in Nepal) and available publications.

1.4. Rationale and Significance of the Study

The Report analyzes the Internet landscape in Nepal in light of the Special Rapporteur's report. This paper seeks to identify changes that are needed in Nepal in order to ensure that freedom of expression on the Internet is respected, protected and fulfilled. In this way it is intended that this report will be a useful resource for civil society (and other interested actors) who are advocating for change.

1.5. Limitations of the Study

The analysis in this report is generally concerned with the legal and policy framework rather than with implementation measures.

Chapter 2

Freedom of Expression on the Internet in Nepal

2. Freedom of Expression on the Internet in Nepal

2.1. Access to the Internet

Recommendations from UN “Freedom of Expression and the Internet Report”

85. Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population.

86. At the international level, the Special Rapporteur reiterates his call on States, in particular developed States, to honour their commitment, expressed inter alia in the Millennium Development Goals, to facilitate technology transfer to developing States, and to integrate effective programmes to facilitate universal Internet access in their development and assistance policies.

87. Where the infrastructure for Internet access is present, the Special Rapporteur encourages States to support initiatives to ensure that online information can be accessed in a meaningful way by all sectors of the population, including persons with disabilities and persons belonging to linguistic minorities.

88. States should include Internet literacy skills in school curricula, and support similar learning modules outside of schools. In addition to basic skills training, modules should clarify the benefits of accessing information online, and of responsibly contributing information. Training can also help individuals learn how to protect themselves against harmful content, and explain the potential consequences of revealing private information on the Internet.

Internet use began in Nepal before any specific legal framework for its use had been developed. The Telecommunication Act 1997 was the first instrument to regulate the Internet. It established a regulatory body called the Nepal Telecommunication Authority (NTA). Another major development took place in 2008 with the enactment of the Electronic Transaction Act 2008 that is considered to be important in managing Internet usage in Nepal.

On the policy front the National Communication Policy 1992 encouraged the private sector to provide telecommunication services to the public. This process was further facilitated through the promulgation of Privatization Act 1994. The IT Policy 2000 was another milestone in the development of Internet. In this policy the state recognized itself as a promoter, facilitator and regulator of IT development in Nepal.⁹ Many ambitious strategies and activities are stated in the policy. The policy focused IT expansion in the rural areas of the country including access to

⁹Policy No. 4.1., Information Technology Policy 2000, available at:

<http://www.nta.gov.np/en/legislation/policies>

Internet in all Village Development Committees of Nepal.¹⁰ Other strategies included legalizing and promoting e-commerce, computerizing all governmental works, developing websites for all governmental offices¹¹, introducing computer education at school level¹², and establishing a National Information Technology Center¹³. Regarding infrastructure development, the Policy called for the establishment of an IT Park in Nepal.¹⁴In order to attract both national and international investment and promote development of necessary infrastructure the policy made provision for just 1% tax (in effect a subsidy) on the import of infrastructures related to IT.¹⁵The policy also envisaged the establishment of Internet nodes in all development regions of Nepal by the end of fiscal year 2003/2004.¹⁶

The Telecommunication Policy introduced in 2004 has incorporated several provisions regarding the use of Internet. The policy enabled people involved in development activities to use the Internet by developing

¹⁰*Id*, Policy No. 5.5

¹¹*Id*, Policy No. 5.7

¹² *Id*, Policy No. 4.11

¹³*Id*, Policy No. 5.11

¹⁴*Id*, Policy No. 6.2.2

¹⁵.*Id*, Policy 6.1.1

¹⁶*Id*, Policy No. 6.2.4

capacity down to the district and village level.¹⁷The policy also envisaged the facilitation of granting licenses for the provision of Internet and data service through cable television and wireless technology.¹⁸ The Policy also stated that by the end of the Fiscal Year 2061/62, all central bodies of the Government of Nepal would be connected with Internet¹⁹ and provided for training to government employees on using email and the Internet.

At the implementation level the NTA began the District Optical Fibre Network Project in 2009 with the aim of expanding the system across the country by 2014 to improve access to broadband Internet service. The project is estimated to cost Rs. 6 billion.²⁰ The government is also working to establish an optical fibre link between Nepal and India, Bangladesh and Bhutan under an information highway project supported by the Asian Development Bank (ABD). The project focuses on increasing cross-border connectivity with a backbone bandwidth capacity of 10 Gbps and expanding ICT accessibility in rural communities. In 2009, the ADB provided US\$ 9 million for the South Asian Sub-Regional Economic Cooperation (SASEC) Information Highway Project. However, progress

¹⁷ Policy No. 4.9, Telecommunications Policy 2004, available at: <http://www.nta.gov.np/en/legislation/policies>.

¹⁸ *Id*, Policy No. 5.3.3

¹⁹ *Id*, Policy No. 5.9.1

²⁰ <http://www.ktm2day.com/2010/10/11/nepals-75-districts-to-be-connected-by-optical-fibre-in-3-years/><accessed on November 6, 2012>

has been slow. Recently, the Ministry of Information and Communications called a global tender for the SASEC project which has three main components i.e. Fiber Optic Connection with three countries, establishment of 30 community e-centers and operation of a resource and training centre.²¹ Efforts have also been made to establish an optical fibre connection with China.²²

The Nepalese government - with the aim of providing Internet services to the communities not served by large business companies - has made provision for rural Internet service providers. Under this provision, the NTA provides license to companies, local communities or community social organizations license to operate Internet services with nominal license fee. Currently such license is issued with nominal fee of NRs 100.00 (US\$ 1.1 at current rate). Following this provision, 6 licenses have been issued to Rural ISPs.²³ Nepal Wireless is one of such rural ISP and has connected 22 villages wirelessly.²⁴

²¹<http://www.ekantipur.com/the-kathmandu-post/2012/02/20/money/optical-fibre-project-to-link-nepal-with-india-bangladesh-bhutan/231782.html><accessed on November 6, 2012>

²²<http://66.7.193.115:8080/kathmandumetro/news/laying-down-115-km-optical-fiber-cable-in-nepal><accessed on November 6, 2012>

²³<http://nta.gov.np/en/licensee-list-en> <accessed on November 3, 2012>

²⁴<http://ispan.net.np/rural-Internet-service> <accessed on November 3, 2012>

Major Internet service providers are gradually introducing new technologies and services to cater to the demands of Nepali consumers. Recently, Nepal Telecom (NT) started a WiMax Internet service in Nepal. The service will be distributed to the users in phase wise. In first phase it will cover central development region, in second phase it will cover western development region and the rest of the part will be covered within one year of the commencement of the service. It has planned to provide approximately 2 hundred thousands service lines to the users.²⁵ This service has the goal of connecting all 75 districts of Nepal with broadband Internet within very short span to time.

2.1.1. Internet Use in Nepal

Nepal is considered to be among the world's least-developed countries. It has endured extreme political instability in recent history because of its transition from absolute monarchy to constitutional monarchy, to constitutional democracy, and finally to a republican state. In this period it also witnessed a decade-long armed conflict. During this period - except in 2005/06 when King Gyanendra overtook the executive power - the use of Internet was not really regulated. Limited Internet access, lack of online content, lack of technical knowledge and resources were some of the reasons the then government did not consider the Internet an important medium of communication.

²⁵http://www.ntc.net.np/publication/pressrelease/pressrelease_20690723.pdf

<Accessed on November 6, 2012>

Up until 2000 very few people used the Internet in Nepal. An ITU study estimated that just 35,000 people were using Internet in Nepal at the end of 1999.²⁶ The number of Nepali users was even less as most users were from development agencies and international organizations. According to MIS report, by September 2012 19.32% of the population had access to the Internet. That represents an enormous increase in Internet usage given that there were just 625,800 Internet users in Nepal in June 2010 (approximately 2.2% of the population).²⁷ Internet users are growing rapidly nowadays as a result of a competitive Internet Service provider (ISP) market and low Internet access prices.

Positive growth in the number of Internet users in Nepal is quite encouraging. However, there is still evidence suggesting that access to the Internet is still in large part a prerogative of the privileged few. For instance, after the election of the Constituent Assembly, many constituent assembly members did not have a basic knowledge how to use computer. Research conducted by a national level NGO, Citizens' Campaign for Right to Information, found that in a majority of government offices, the computers were used as typewriters and not properly utilized.²⁸ It should

²⁶ ITU, *The Internet from the Top of the World: Nepal Case Study*, November 2000, p. 14, available at <http://www.itu.int/ITU-D/ict/cs/nepal/material/nepal.pdf> <accessed on October 14, 2012>

²⁷ <http://www.Internetworldstats.com/asia/np.htm> < accessed on October 14, 2012>

²⁸ CCRI Nepal (Kathmandu), *RTI Request Tracking Survey Report*, 2012 (Unpublished)

also be noted that Internet access in Nepal is mainly access by mobile devices. 92.94% of Internet users use GPRS Internet facility provided via mobile phones by companies like Nepal Telecom, Ncell, UTL etc.²⁹

Today Internet services are available in most parts of Nepal including mountainous regions where electricity and telecom services are available. Recently, Internet service has become much cheaper than in the past. Nepal Telecom's Asymmetric Digital Subscriber Line (ADSL) Internet service and NCell datacards as well as wi-fi services have improved the general populations' accessibility to the Internet. Nepal Wireless Project has wirelessly connected 22 remote mountain villages to the Internet in five years, allowing villagers to exchange information about commodity prices, local goods, and markets, and implement telemedicine facilities.³⁰

Another important initiative by the state to promote IT in rural areas is the establishment of telecenters. A telecenter is a public location where people can use ICTs. Telecenters provide services like Internet and email service, offline services like document formatting and basic computer skill training

²⁹Nepal Telecommunications Authority, *Management Information System*, September, 2012, Vol 92, P. 2.

³⁰http://www.access-controlled.net/wp-content/PDFs/part2/024_Asia.pdf <accessed on 24th September, 2012>

programs. By the end of FY 2010/11, 114 rural telecenters had been established in different parts of Nepal.³¹

With the increase in computer literacy, easy access to and availability of Internet even through mobiles, the use of Internet in Nepal has been rapidly increasing. These statistics prove that the Internet is becoming more important as a medium of communication and tool of development to Nepali people. In this context, many development agencies and international communities are interested in investing in ICT technology. Internet services should not be limited to a handful of well educated, affluent people and reach the poor and deprived communities so they can have better knowledge of the world around them. For a country like Nepal, the Internet, due to geographical realities, will sooner or later be central to people's freedom to communicate, share, advocate and innovate.

2.1.2. Online language and scripts

Until 2002, computer and Internet users in Nepal could only rely on a few options regarding the use of Nepali fonts like Preeti Font and Kanchan Font.³² These available fonts were not adequate to address the growing

³¹http://www.npc.gov.np/new/uploadedFiles/allFiles/TYP_2012.pdf <accessed on November 12 2012>

³² These Nepali fonts lacked data processing facilities like "Sorting" and "Find and Replace", they also lacked uniformity in terms of keyboard mapping of the Nepali characters, thus making Nepali typing difficult to the general public.

need of electronic use of Nepali language. In March 2002, Madan Puraskar Pustakalaya undertook the Font Standardization Project which was assisted by the Ministry of Science and Technology and United Nations Development Project. This Project led to the inception of Unicode in Nepal, which is an encoding scheme that assigns unique code to every character of standard writing scripts of the world. Under the Project, Unicode compatible fonts like Kalimati, Kanjirowa, Thakwa Robinson along with two keyboard drivers, namely the Nepali Unicode Keyboard Romanized and Nepali Unicode Keyboard Traditional were developed.³³ Despite the development of Unicode Keyboard romanized and Nepali Unicode Keyboard Traditional, many consider that the Internet is not yet Nepali language friendly. Many Internet users find such keyboards hard, and slow, to use.

It should also be noted that the majority of content available on the Internet is in English and there is very little information relating to Nepal and Nepali people. The lack of online information about the local market, local business and local people is considered to be one of the obstacles to wider Internet use in Nepal.

³³http://mpp.org.np/index.php?option=com_content&task=view&id=72&Itemid=98<accessed on November 18, 2012>

2.1.3. Access for People with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which came into force in May 2008, requires signatories to ensure the full enjoyment of human rights and equality under the law by those with disabilities. Nepal ratified UNCRPD in December 27, 2009.³⁴

Article 9 of the Convention obliges state parties to take appropriate measures to ensure people with disabilities have access, on an equal basis with others, to the physical environment, to transportation, to information and communications - including information and communications technologies and systems - and to other facilities and services open or provided to the public, both in urban and in rural areas. Several national IT laws also urge special attention to persons with disability.³⁵

³⁴<http://www.ekantipur.com/2010/01/10/oped/ratification-aint-enough/306097/><accessed on November 12, 2012>

³⁵ Examples: Telecommunications Act 1997 states about the ubiquitous, reliable and easily available services to the persons with disability, Telecommunication Policy 2004, IT Policy 2010 states about the importance to access by the aged and disabled people. <Source: Formulating Policy and Project Implementation for Access to ICT for Persons with Disabilities in Nepal, ITU-NTA Workshop ,9 November 2012 , Kathmandu, Nepal , Archana G. Gulati, ITU Expert, available at http://www.itu.int/ITU-D/asp/CMS/Events/2012/Nepal-PwDs/Presentation_GULATI.pdf>

Recognizing the significance and potential of ICTs to empower people with disabilities and other underprivileged groups; the Ministry of Information and Communication and the NTA under the technical collaboration of the International Telecommunication Union (ITU) have undertaken a project to identify gaps and make recommendations for policy, regulatory and project intervention/initiatives in Nepal to implement ICT accessibility for persons with disabilities.³⁶ A workshop in November, 2012 identified some specific recommendations including introducing assistive technologies in telecenters.³⁷

2.2. Restrictions of contents in Internet

Recommendations from UN “Freedom of Expression and the Internet Report”

69. The Special Rapporteur is cognizant of the fact that, like all technological inventions, the Internet can be misused to cause harm to others. As with offline content, when a restriction is imposed as an exceptional measure on online content, it must pass a three-part, cumulative test: (1) it must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); (2) it must pursue one of the purposes set out in article 19, paragraph 3, of

³⁶ Nepal Telecommunications Authority, MEDIA BRIEFING ON Making ICT and mobile phones accessible for persons with disabilities, Kathmandu Nepal 08 November 2012. Full text can be accessed from <http://www.itu.int/ITU-D/asp/CMS/Events/2012/Nepal-PwDs/Media_Briefing.pdf>

³⁷ *Supra* note 35

the International Covenant on Civil and Political Rights , 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) it must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality). In addition, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.

In Nepal, the Constitution protects the fundamental rights of freedom of opinion and expression³⁸ and other rights related to publication, broadcasting and press³⁹ which entitle every Nepalese citizen to broadcast any news or information through electronic publication. The Constitution also safeguards digital and electronic equipment against closure, interruption and cancellation of registration due to reasons associated with publication and broadcasting.⁴⁰ This implies further rights for Nepalese citizens.

2.2.1. Arbitrary blocking or filtering of content

³⁸ Article 13 (3) (a), Interim Constitution of Nepal 2007

³⁹ *Id*, Article 15

⁴⁰ *Id*, Article 15(2), 15(3), 15(4)

Recommendations from UN “Freedom of Expression and the Internet Report”

70. The Special Rapporteur is deeply concerned by increasingly sophisticated blocking or filtering mechanisms used by States for censorship. The lack of transparency surrounding these measures also makes it difficult to ascertain whether blocking or filtering is really necessary for the purported aims put forward by States. As such, the Special Rapporteur calls upon States that currently block websites to provide lists of blocked websites and full details regarding the necessity and justification for blocking each individual website. An explanation should also be provided on the affected websites as to why they have been blocked. Any determination on what content should be blocked must be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences.

71. With regard to child pornography, the Special Rapporteur notes that it is one clear exception where blocking measures are justified, provided that the national law is sufficiently precise and there are sufficient safeguards against abuse or misuse to prevent any “mission creep”, including oversight and review by an independent and impartial tribunal or regulatory body. However, the Special Rapporteur calls upon States to focus their efforts on prosecuting those responsible for the production and dissemination of child pornography, rather than on blocking measures alone.

In Nepal, some incidents of Internet censorship have taken place. In 2005 February, then king Gyanendra blocked all Internet access in the country for a few days. When service was resumed the state remained very

vigilant. According to the report by the Reporters Without Borders (RSF), after 1 February 2005, most of Nepal's 16 Internet Service Providers sporadically blocked access to more than a dozen news websites, such as www.samudaya.org and www.insn.org.⁴¹ However, there is no transparent mechanism for blocking or filtering Internet. ISPs have since stated that they were compelled to follow the orders, generally oral, from authorities, including security forces, as state of emergency was declared. RSF has reported that some of the ISPs were even threatened with cancellation of their licenses if the orders for blocking were not followed.

A news website www.gorkhanews.com was blocked due to “its stand against the curbs on the Nepalese press since 1 February”, according to the editors of the website.⁴² Other sites like www.krishnasenonline.org, and www.ucpn.org were also blocked during the decade long civil war⁴³ with the state claiming that the websites were run by groups associated with terrorists. However, no formal process was followed in blocking these sites. Generally, oral orders from security forces were sufficient to block any site.

⁴¹<http://en.rsf.org/nepal-another-news-website-blocked-13-09-2005,14461.html>

<accessed on November 8, 2012>

⁴² *Id*

⁴³<http://en.rsf.org/nepal-another-news-website-blocked-13-09-2005,14461.html>,

<accessed on 15 October 2012

More recently, in 2010, the Government of Nepal decided to block more than 60 websites containing explicit content and nudity.⁴⁴ According to the authorities, those sites were blocked because they violated public decency and courtesy. The NTA ordered all ISPs to block websites containing adult content. However, again, no transparent process was followed and no specific reasons were given for the individual blocked websites (for example identifying the exact content which caused them to be blocked) and no appeals mechanism was instituted. The list of blocked sites reveals that the government wanted to block any websites containing the word 'sex'. This was very broad and led to the blocking of many sites that contained content other than that which was targeted. For example, the website of the punk band 'The Sexpistols' was blocked because the domain name included the word 'sex'.⁴⁵ The popular news website Huffington post (www.huffingtonpost.com) was also blocked.⁴⁶ Another website which provided free blogging services was also blocked, resulting in the blocking of all the blogs hosted by that site. However, thanks to an immediate and forceful critical response from civil society, including the human rights community, the government was forced to unblock some of these sites.

⁴⁴ It was not a statutory provision rather it was in the form of a government order.

⁴⁵ <http://xyzmusic.blogspot.com/2010/11/official-website-of-sex-pistols-banned.html>
<accessed on November 15, 2012 >

⁴⁶ <http://www.nepalitimes.com.np/issue/2011/07/22/ThisIsIt/18395/print> <accessed on November 14, 2012>

However, the website of the NTA does not provide any information on sites which continue to be blocked in Nepal.

The examples discussed above indicate that sporadic arbitrary blocking is practiced by the state in Nepal. Broad and ambiguous justifications for restricting on freedom of and opinion⁴⁷ - for example content which jeopardizes harmonious relations subsisting among the peoples of various castes, tribes, religion or communities, or anything contrary to decent public behaviour or morality - has created a situation whereby the authorities can block and filter legitimate expression and where citizens self-censor. Furthermore, the lack of proper mechanisms and processes mean that there is little opportunity to legally challenge these blocks. At the same time, some people think that the government should take proper action to regulate the contents to enforce legitimate restrictions to the contents containing child pornography, hate speech etc.

2.2.2. Criminalization of legitimate expression

Recommendations from UN “Freedom of Expression and the Internet Report”

72. The Special Rapporteur remains concerned that legitimate online expression is being criminalized in contravention of States’ international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of

⁴⁷ Article 12(3) (a), Interim Constitution of Nepal 2007

new laws specifically designed to criminalize expression on the Internet. Such laws are often justified as being necessary to protect individuals' reputation, national security or to counter terrorism. However, in practice, they are frequently used to censor content that the Government and other powerful entities do not like or agree with.

73. The Special Rapporteur reiterates the call to all States to decriminalize defamation. Additionally, he underscores that protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless it can be demonstrated that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

In Nepal, there are some laws that criminalize the dissemination of certain materials in electronic form or on the Internet. Section 47 of the Electronic Transactions Act 2008 deals with publication of illegal materials in electronic form and reads: "If any person publishes or displays any material in electronic media which is prohibited to publish or display by the prevailing law, or which may be contrary to the public morality or decent behavior, or any type 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 a fine not exceeding 100,000 Rupees or with imprisonment not exceeding five years or with

both”.⁴⁸ It also states that “if any person commits an offence referred to in Sub-section (1) repeatedly, he/she shall be liable to punishment for each offence with one and one half (1.5) times of the previous punishment”.⁴⁹ This provision is applicable against illegal materials and illegal expression. However, the terms are not well defined and there is a risk of this law being abused to criminalize legitimate expression on the Internet. Therefore, it should be noted that criminal law being used to restrict freedom of expression online may include application of laws relating to public decency against legitimate expression. In a public notice published on October 2010 the Nepali government stated its intention to use these provisions to maintain "public decency and courtesy".⁵⁰ In reality, however, no significant cases of legitimate expression over Internet have been found to be criminalized using this law. This may be attributed to the fact that Internet use in Nepal lags behind global average.

That said, during the reign of former King Gyanendra in 2001, after banning the publication of any criticism for six months, the royal palace issued a new series of directives banning negative reports about the security forces under pain of imprisonment or house arrest. The military

⁴⁸ Section 47(1), Electronic Transaction Act 2008

⁴⁹ *Id*, Section 47(2)

⁵⁰ Public notice issued by the Ministry of Home Affairs, Available at

<http://nta.gov.np/en/public-notice-en/65-importance-notice-of-the-ministry-of-home-affairs-government-of-nepal>

were also granted the authority to monitor and ban any communication as part of the state of emergency.⁵¹ There are reports that websites were threatened with prosecution for publication of certain news at that time but no records have been found to show the government has used such provisions to criminalize legitimate expression. Rather than conducting criminal prosecutions, the state opted to block content as discussed in the previous section.⁵²

On the other hand, there is some public feeling that some content available on various websites is offensive and inappropriate for Nepali society, especially children. Number of websites having pornographic, defamatory content such as private videos, pictures has increased but the government has been very slow in responding to such issues. This could be seen as ineffectiveness Section 47 of ETA. However, according to international law the Nepalese government is correct not to pursue criminal sanctions for expression other than in the most extreme cases covered by Article 20 of the ICCPR which reads: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” and even though criminal sanctions should only be used if strictly necessary. For all other circumstances, content

⁵¹<http://en.rsf.org/nepal-king-takes-further-measures-08-02-2005,12502.html>

<accessed on November 8, 2012>

⁵²<http://en.rsf.org/nepal-another-news-website-blocked-13-09-2005,14461.html>

<accessed on November 8, 2012>

which can be legitimately restricted should be tackled using less serious measures which have less chance of being abused or chilling free expression.

2.2.3. Imposition of intermediary liability

Recommendations from UN “Freedom of Expression and the Internet Report”

76. In addition, while States are the primary duty-bearers of human rights, the Special Rapporteur underscores that corporations also have a responsibility to respect human rights, which means that they should act with due diligence to avoid infringing the rights of individuals. The Special Rapporteur thus recommends intermediaries to: only implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and, where applicable, to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved.

Finally, there must be effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.

77. The Special Rapporteur commends the work undertaken by organizations and individuals to reveal the worldwide status of online impediments to the right to freedom of expression. He encourages intermediaries in particular to disclose details regarding content removal requests and accessibility of websites. Additionally, he recommends corporations to establish clear and unambiguous terms of service in line with international human rights norms and principles and to continuously review the impact of their services and technologies on the right to freedom of expression of their users, as well as on the potential

pitfalls involved when they are misused. The Special Rapporteur believes that such transparency will help promote greater accountability and respect for human rights.

In Nepal, the definition of intermediaries is unclear. The laws governing Internet in Nepal - primarily the ETA 2007 - do not define intermediaries. However, groups/parties are specifically defined as not constituting an intermediary. For example Section 2(c) of the Act defines "Originator" as "a person who generates, stores or transmits electronic records, and a person who causes any other person to carry out such functions".⁵³ Section 2(u) defines "Addressee" as a person receiving the processed electronic record as intended by the originator". Both sections go on to state that these categories do not constitute intermediaries.⁵⁴

However, Section 42 of the ETA describes the liabilities of Network Service Provider (NSPs) who are intermediaries. The section reads: "Intermediaries providing their services as network service providers shall be subject to the following liabilities in regard to such service provided by them:(a) Liabilities referred to in the agreement made with the subscriber in regard to service provision, (b) Liabilities referred to in the license of network service providers, and, (c) Any such other liability as prescribed". Thus, Network Service Providers (NSPs) are considered to be

⁵³Section 2 (c), Electronic Transaction Act 2007

⁵⁴*Id*, Section 2 (u)

intermediaries in Nepal and their liability is unclear given that Section 42(c) contains a catch-all provision.

Section 43, nonetheless provides that: "Notwithstanding anything contained in Section 42, no network service provider shall be liable to bear any criminal or civil liability arising from any fact or statement mentioned or included in the information or data of the third party made available in electronic form by him/her merely on the ground that he/she has made available the access to such information or data. Provided that, such a person or institution providing network service shall not be relieved from such liability, if he/she has made available access to such information or data with the knowledge that any fact or statement mentioned or included in such information or data contravene this Act or Rules framed hereunder".

In this way NSPs are clearly relieved from any criminal or civil liability for user-generated content except where the concerned NSP has explicit knowledge that such information or data contravenes the Act or Rule. However in practice this immunity is not always provided to NSPs. In September 2010 the NTA issued a proposal to amend the rules and regulations applied to Internet Service Providers (ISP) in Nepal. The proposals include the following:

- “The Service Provider shall install filtering software and make other arrangements to prevent access by its subscribers to content

that is punishable under section 47 of Electronic Transaction Act, 2007”.

- “The Service Provider shall make arrangements to deny publication, distribution, transmission, commercial exchange (sales) and consumption (use) of the following content through the Internet:
 - a. Any content whether it be visual, graphics, articles or other which is obscene, seductive, horror, highly violent or that corrupts social morals;
 - b. Any content that encourages religious discord or disturbs the public peace and order creating misunderstanding based on religion, class, sex, cast and community;
 - c. Any content which is against the national interest; fundamental political principles, values and beliefs determined by the state; the preservation and/or consolidation of national integrity, national security; or which obstructs public security”.

- “The service provider shall enter into a contract with its subscribers that compel the subscriber to abide by aforementioned terms of this license agreement”.

- “ISPs shall inform the NTA of website blocks which are ordered by the Nepali Government and the NTA in writing from time to time”.

The proposal was opposed by civil society and by ISPs and the ISP association (ISPAN). Civil society leaders argued that the provision would infringe on the right to freedom of expression and the right to privacy, and ISPAN strongly argued that ISPs were not the appropriate actors to assess the legality of the content. In response to these criticisms the government withdrew the proposal but continues to pursue ISPs to block websites that are deemed to contain adult content.

In practice the NTA will immediately approach an ISP if anything deemed illegal is carried out on the services provided by that particular ISP. For example, some ISPs have been threatened with legal action by the regulator for any Voice over Internet Protocol (VoIP) traffic over their networks and some staff members and owners of the relevant ISPs were detained in 2011 for this reason.⁵⁵ According to the president of the ISPAN, "ISPs simply want a safe working environment where we don't have to worry about going to jail because one of tens of thousands of Internet customers misuses the service".⁵⁶ On April 10th, 2011 the ISP

⁵⁵ <http://www.ispan.net.np/ispan-launches> <accessed on November 7, 2012>

⁵⁶ http://www.nepalitimes.com/issue/2011/04/19/Interview/18109#.UNMAx2_0D0c
<accessed on November 7, 2012>

Association of Nepal blocked all Internet services for one hour to protest against new proposed rules which would make them liable for VoIP traffic over their networks. After opposition to this proposed rule from several sections of the society, the government has decided not to implement the rule.

On the other hand, the Government of Nepal has effective control over the ISPs in Nepal in relation to granting licenses. To obtain a license to start an Internet business in Nepal, prior approval of the NTA must be granted.⁵⁷ In some situations the NTA can direct an ISP to allow or restrict content over the Internet.⁵⁸ According to RSF, in 2005 – after the royal takeover - the owners of a blogging platform called “United We Blog” were summoned by a military officer and reminded of their responsibility for the contents of the blogs in 2005 after royal takeover.⁵⁹ Such control, without any judicial sanction or scrutiny, has indirectly compelled ISPs to

⁵⁷Schedule 6 and 6(a), the Telecommunication Rules 1997

⁵⁸ On Thursday, October 28th, 2010, Nepal Telecommunications Authority has written to all Internet Service Providers to immediately block dozens of sites it deems objectionable. The list includes URLs that have explicit sex or violent content but also includes sites like *huffingtonpost.com* and the website of the rock band Sex Pistols. <Source: <http://www.nepalitimes.com/blogs/thebrief/2010/10/28/nepal-bans-huffingtonpost-com/> <accessed on November 8, 2012>

⁵⁹ <http://en.rsf.org/nepal-another-news-website-blocked-13-09-2005,14461.html> <accessed on November 8, 2012>

follow orders from the regulator or self-censor content resulting in the arbitrary restriction of legitimate expression.

2.2.4. Disconnecting users from Internet access, including on the basis of violations of intellectual property rights law

Recommendations from UN “Freedom of Expression and the Internet Report”

78. While blocking and filtering measures deny users access to specific content on the Internet, States have also taken measures to cut off access to the Internet entirely. The Special Rapporteur considers cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

79. The Special Rapporteur calls upon all States to ensure that Internet access is maintained at all times, including during times of political unrest. In particular, the Special Rapporteur urges States to repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access, and to refrain from adopting such laws.

Nepal has witnessed a complete Internet shutdown. In 2005 the former King Gyanendra Shah, a constitutional monarch by constitutional provision, scrapped the parliament and seized executive power from the Prime Minister, he chose to block all Internet access along with

international telephone lines and cellular communication networks.⁶⁰ For weeks there was no Internet available in Nepal. For this reason, in 2005, RSF listed Nepal as one of the 15 enemies of the Internet. Since then, Nepal has been delisted because of a significant improvement in the situation.

It is not only the state but private ISPs as well that have disconnected Internet access in Nepal; they did so to apply pressure on the government. In May 2010, the Association of ISPs in Nepal disconnected Internet to protest proposals from the Nepali Government that would have made them liable for content over their networks. While proposal to make intermediaries liable for user-generated content are not acceptable, it is equally not acceptable for intermediaries to prevent citizens from exercising their right to freedom of expression and opinion by obstructing Internet services.

In Nepal, laws are not clear about this issue. There is no law that provides for or prohibits disconnecting Internet access on the basis of violation of intellectual property rights or any other reason. Given the examples discussed, it seems necessary to provide in law that complete disconnection of Internet access either by the state or private parties on any ground goes beyond legitimate restriction of freedom of expression.

⁶⁰Robert Faris and Nart Villeneuve, *Measuring Global Internet Filtering*, p. 9

2.3 Other Issues

2.3.1. Cyber Attacks

Recommendations from UN “Freedom of Expression and the Internet Report”

80. The Special Rapporteur is deeply concerned that websites of human rights organizations, critical bloggers, and other individuals or organizations that disseminate information that is embarrassing to the State or the powerful have increasingly become targets of cyber-attacks.

81. When a cyber-attack can be attributed to the State, it clearly constitutes, inter alia, a violation of its obligation to respect the right to freedom of opinion and expression. Although determining the origin of cyber-attacks and the identity of the perpetrator is often technically difficult, it should be noted that States have an obligation to protect individuals against interference by third parties that undermines the enjoyment of the right to freedom of opinion and expression. This positive obligation to protect entails that States must take appropriate and effective measures to investigate actions taken by third parties, hold the persons responsible to account, and adopt measures to prevent such recurrence in the future.

There have been no reports or records to suggest the Nepali Government has engaged in cyber attacks to censor information online. Rather than adopting this method, the State has directly blocked websites promoting opposition views or political ideology.

A State has dual responsibilities regarding cyber attacks according to the UN Special Rapporteur’s report. While it has to refrain from cyber attacks itself, it has a positive obligation to protect individuals against interference

by third parties that undermines the enjoyment of right to freedom of opinion and expression. Thus it is a duty of the state to provide protection against possible cyber attacks and make provision in the law against cyber attacks. The Electronic Transaction Act has defined and set penalties for computer and cybercrimes, such as hacking, piracy, and computer fraud. The Act prohibits unauthorized access to a computer and provides that "If any person, with an intention to have access to any programme, information or data of any computer, uses such a computer without the authorization of the owner or the person responsible for such a computer, or even in the case of authorization, performs any act with an intention to have access to any programme, information or data contrary not included in such authorization, such a person shall be liable to punishment with a fine not exceeding 200,000 Rupees or with imprisonment not exceeding three years or with both depending on the severity of the offence".⁶¹

Similarly, the Act prohibits damage to any computer and information system. Section 46 of the Act provides that "If any person knowingly and with a *mala fide* intention to cause wrongful loss or damage to any institution destroys, damages, deletes, alters, disrupts any information of any computer source by any means or diminishes value and utility of such information or affects it injuriously or causes any person to carryout such an act, such a person shall be liable to the punishment with the fine not

⁶¹ Section 45, Electronic Transaction Act 2008

exceeding 2000 Rupees and with imprisonment not exceeding three years or with both."

Furthermore, the Nepali Government has prepared a plan to form an Information Technology Emergency Response Team (ITERT) under the Ministry of Science and Technology to audit the security of Nepali websites before uploading them on the Internet.⁶² However, this plan has not yet been implemented. The ITU and a team of experts from IMPACT have carried out a “readiness assessment” of the cyber-security situation in Nepal to review the institutional and regulatory framework, existing critical information infrastructure, and identify areas of improvement. The assessment recommends establishing a National Computer Incidence Response Team.⁶³

2.3.2. Inadequate Protection of Right to privacy and data protection

Recommendations from UN “Freedom of Expression and the Internet Report”

⁶²SATRC (South Asian Telecommunications Regulators’ Council), *SATRC Report on Critical Information Infrastructure Protection And Cyber Security*, Adopted by 13th Meeting of the South Asian Telecommunications Regulator’s Council, 18 – 20 April 2012, Kathmandu, Nepal, p. 29, available at <http://goo.gl/VKJ2r>

⁶³*Id*

82. The Special Rapporteur is concerned that, while users can enjoy relative anonymity on the Internet, States and private actors have access to technology to monitor and collect information about individuals' communications and activities on the Internet. Such practices can constitute a violation of Internet users' right to privacy, and undermine people's confidence and security on the Internet, thus impeding the free flow of information and ideas online.

83. The Special Rapporteur underscores the obligation of States to adopt effective privacy and data protection laws in accordance with article 17 of the International Covenant on Civil and Political Rights and the Human Rights Committee's general comment No. 16. This includes laws that clearly guarantee the right of all individuals to ascertain in an intelligible form whether, and if so what, personal data is stored in automatic data files, and for what purposes, and which public authorities or private individuals or bodies control or may control their files.

84. He also calls upon States to ensure that individuals can express themselves anonymously online and to refrain from adopting real-name registration systems. Under certain exceptional situations where States may limit the right to privacy for the purposes of administration of criminal justice or prevention of crime, the Special Rapporteur underscores that such measures must be in compliance with the international human rights framework, with adequate safeguards against abuse. This includes ensuring that any measure to limit the right to privacy is taken on the basis of a specific decision by a State authority expressly empowered by law to do so, and must respect the principles of necessity and proportionality.

The 1990 Constitution of Kingdom of Nepal was the first Constitution to guarantee the right to privacy as a fundamental right in the history of Nepal. Earlier constitutions - including the Government of Nepal Act 1948, Interim Government of Nepal Act 1951, the Constitution of Kingdom of Nepal 1959 and the Constitution of Kingdom of Nepal 1962 - contained no provisions regarding the right to privacy. The right to privacy is also in the Interim Constitution of Nepal 2007, which remains in force today. Article 28 of the Interim Constitution provides that "Except in circumstances as provided by law, the privacy of the person, residence, property, document, statistics, correspondence, and character of anyone is inviolable". The right is framed in negative language and lacks the clarity and precision necessary for citizens to know when their right to privacy is violated. Despite the constitutional guarantee, no statutory law or Act has been passed to protect this right. Recently the Supreme Court of Nepal has issued a directive to the Government of Nepal to order it to formulate laws relating to the right to privacy.⁶⁴

Nepal has signed and ratified the ICCPR, Article 12 of which states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and everyone has the right to the protection of the law against such interference or attacks". Nepal, therefore, has an international obligation to protect its citizens' right to privacy.

⁶⁴Sapana Pradhan Malla v Government of Nepal et al, Writ Petition No. 3561-2063

The constitutional right to privacy applies in the domain of the Internet and for Internet users. As pointed out by the Special Rapporteur, the Internet is important as it allows individuals to engage in public debate without having to reveal their real identities. However, the State and its regulatory agencies have introduced several requirements which infringe this right. As mentioned earlier, cybercafés are the most efficient way to surf the Internet in Nepal for the general public. According to a report Kathmandu alone has more than 1200 Internet parlours.⁶⁵ However, in September 2010, the NTA made provision of an Identity Card mandatory for citizens to access the Internet from a cybercafe.⁶⁶ The NTA directed all Internet Service Providers (ISPs), to ask their clients to maintain a log of Internet users accessing the Internet in their cybercafes. Under this regulation, cyber cafes are required to keep details including the name and permanent and temporary address of the customers before letting them use the Internet. Similarly, they are asked to verify the details by checking other government issued identity cards such as driving license, citizenship certificate or passports. Foreigners have to show their passport before using the Internet. According to officials at the NTA, the regulation was introduced through an amendment of the license issued to the ISPs.

⁶⁵ <http://site.thehimalayantimes.com/fullNews.php?headline=170+cyber+cafes++under+new+law++&NewsID=270607>< accessed on 18 October 2012>

⁶⁶ <http://www.nepalnews.com/HOME/index.php/business-a-economy/9472-id-cards-compulsory-to-browse-Internet-from-cyber-cafes.html>, <accessed on 18 October 2012>

In July 2011 the NTA directed ISPs to provide information of all subscribers who use a bandwidth of 1 Mbps or more. Reports say that the ISPs are providing Multi Router Traffic Grapher (MRTG) data of subscribers for network traffic monitoring to the NTA.⁶⁷ The NTA and the police say that they are using this data to control VOIP calls. The NTA has permitted voice operators with licenses for International Long Distance (ILD) services to provide VoIP services. The NTA has also permitted ISPs to provide Internet telephone (IP Telephony) services. However, it is illegal for ISPs to terminate incoming international VOIP calls in Nepal.

According to the latest report by the NTA, it has collaborated with the Nepal Police in the monitoring of services provided and developed a mechanism, in coordination with ISPs and the Nepal police, to provide operational data relating to telecommunication services to the police.⁶⁸ Under this mechanism, Nepal police have nominated focal points within organizations and upon requests from such focal points ISPs must provide operational data to the police. However, it is not clear what kind of data constitutes 'operational data', who has access to such data, how long such

⁶⁷ <http://www.nepalitimes.com.np/issue/2011/07/22/ThisIsIt/18395/print#.UKitsYeTyp0>

, <accessed on 20 October 2012>

⁶⁸ Nepal Telecommunication Authority, *Annual Report 2011-2012*, available at <http://nta.gov.np/ne/public-notice-3/304-2012-10-10-10-56-26>, <accessed on 5 November 2012>

data will be stored by the agency obtaining it and how such data will be destroyed.

2.3.3. Data protection

There is no specific data protection law in Nepal. Thus, it is not clear which individuals or agencies have access to personal data, how and for what purpose the data collected can be used, or by which procedures and mechanisms the collected data is stored.

The Nepalese legal regime is silent concerning in which circumstances the right to privacy or data protection can be infringed. 'Except in circumstances as provided by law' is not specific and adequate to regulate a fundamental right guaranteed by the Constitution. According to international standards, the right to privacy can be limited under certain exceptional circumstances such as for the purpose of administration of criminal justice, prevention of crimes or for combating terrorism. However such restriction must be clearly provided by the law.

Earlier this year when sitting judge of Supreme Court of Nepal Ranabhadur Chand was shot dead, investigation authorities obtained more than 500,000 call details and more than 30,000 SMS records including content from the telecom service providers. Such records were obtained without any judicial or independent approval.⁶⁹ Citing violation

⁶⁹<http://www.thehimalayantimes.com/fullNews.php?headline=Secrecy+right+Act+soug+ht&NewsID=346347> and

of fundamental rights of privacy some human rights activists have filed a writ petition in the Supreme Court and the case is ongoing.⁷⁰ There is an immediate need to pass specific laws on the right to privacy and data protection.

2.3.4. Surveillance

There are reports which suggest that the Government of Nepal has been engaged in Internet surveillance in the past. During the royal takeover, teams from the royal army and the NTA had visited service providers' offices to check the servers. According to RSF the authorities forced some providers to install software to filter emails. Because of this in May 2005 Mercantile, the largest ISP, stopped handling customers' emails for more than 48 hours citing technical reasons. However, the report further states that Mercantile has not confirmed that the filters were installed.

http://www.myrepublica.com/portal/index.php?action=news_details&news_id=41423

<accessed on November 1, 2012>

⁷⁰[https://www.privacyinternational.org/reports/nepal/ii-legal-](https://www.privacyinternational.org/reports/nepal/ii-legal-framework#footnote1_kihpwdw)

[framework#footnote1_kihpwdw](https://www.privacyinternational.org/reports/nepal/ii-legal-framework#footnote1_kihpwdw) <accessed on November 1, 2012>

Chapter 3

Finding, Conclusions and Recommendations

3.1. Finding and Conclusions

In a country like Nepal, going through a political transition from absolute monarchy to constitutional monarchy and then from a constitutional democracy to a republican state, freedom of expression in general, and on the Internet in particular, has a significant impact on the lives of citizens and the future of the country. The Internet is gradually becoming an important source of information, communication and entertainment in Nepal. Internet services are gradually becoming available in most parts of Nepal, including mountainous regions, where electricity and telecom services are available. Recently, Internet services have become much cheaper than in the past due to Nepal Telecom's Asymmetric Digital Subscriber Line (ADSL) Internet service and NCell datacards as well as wi-fi services. Furthermore, with the increase in computer literacy, easy access to and availability of Internet even through mobiles, the use of Internet in Nepal has been rapidly increasing.

As the Internet use in Nepal increases, the issue of freedom of expression on the Internet, along with other cross-cutting issues such as Internet access, cybercrime, online pornography and criminalization of legitimate expression, are taking the center stage. At present, Nepal lacks some

necessary rules and regulations regarding the Internet and, accordingly, the government sometimes exercises its power over communications in an arbitrary manner.

The key findings of the study are as follows:

- The use of Internet in Nepal is rapidly growing for the purpose of communication, information and entertainment.
- In rural parts of Nepal, the infrastructure is not well developed which is an obstacle to improving Internet access. There are many villages in Nepal where electricity and phone lines are still unavailable. Consequently, they are still a long way from accessing modern technologies including Internet.
- Marginal communities, including people with disabilities, face acute difficulties in accessing and using the Internet.
- Language is one of the key obstacles to greater Internet use in Nepal. The Internet is not yet Nepali language friendly.
- There is a lack of online content that is local and relevant to Nepal.
- There is no transparent mechanism for blocking or filtering Internet in Nepal and state has practiced sporadic arbitrary blocking. Statutory laws have provision of broad and ambiguous justifications for restricting freedom of expression and opinion on the Internet.

- There is a lack of proper mechanisms and processes and at the same time little opportunity to legally challenge in case of blocking of websites/internet by the government.
- There are no specific laws to explicitly proscribe and punish child pornography on the internet. Concerns of stakeholders regarding availability of content subject to legitimate restriction such as child pornography and hate-speech in Nepalese websites are gradually increasing.
- There are relatively few threats to Internet freedom at present – however learning from the past, it is important to remain vigilant. One of the most serious incidents was in 2005 when King Gyanendra’s first reflex after he seizing power was to cut off Internet access to the outside world and to block online opposition publications, especially those seen as close to the Maoist rebels. Bloggers discussing politics or human rights did so under constant pressure from the authorities.⁷¹
- One emerging threat to freedom of expression online in Nepal relates to the protection of the right to privacy. Privacy online is not well protected, of particular concern are the provisions requiring people to register with their personal details in order to access the Internet in cybercafés.

⁷¹http://en.rsf.org/article.php3?id_article=15613

- Nepal also lacks data protection laws. Many businesses hold personal information that should not be shared with others. But due to lack of data protection laws, personal information is often misused by the organizations. For example, customer phone numbers are regularly shared among businesses for marketing purposes.

3.2. Recommendations:

This study has identified a number of issues that affect freedom of expression over the Internet in Nepal. Below are recommendations, based on the finding of the research, to bring Nepal in line with the recommendations made by the UN Special Rapporteur for Freedom of Expression and Opinion.

- It is very expensive to obtain an ISP license in Nepal. A policy should be introduced to simplify licensing and the fees for obtaining a license should be reduced. Additionally, the policy should be formulated and implemented to address the standards of Internet services to be provided by the ISP.
- The government and regulator should provide equal treatment to all service providers. There should be no preferential treatment to any particular service provider.
- There should be laws, mechanisms and processes, which narrowly defines situations for blocking of internet in exceptional conditions

with opportunity to legally challenge in case of blocking of websites/internet by the government.

- Regarding the content available on the Internet, the government has not been able to enforce legitimate restrictions on child pornography and hate speech. There should be a specialized body to regulate the content available on the Internet.
- As the Internet offers a wide range of opportunities, the Government of Nepal should formulate and implement policies to best utilize the opportunities created by the Internet to promote e-governance, e-marketing, e-banking, e-shopping etc.
- Regarding access to the Internet, the government of Nepal should undertake special IT initiatives to improve access for people with disabilities and other marginalized groups.
- Given that Internet access in rural areas is insufficient, efforts to strengthen and update existing infrastructure should be undertaken. This includes making computer education compulsory in schools, and establishing telecenters and National Information Centers.
- The government should consider establishing an independent regulatory body to protect freedom of expression on the Internet.
- There is a lack of proper procedure regarding the collection, use and sharing of the personal data of Internet users in Nepal. Therefore a privacy and data protection law should be developed and enacted immediately.

blocking in the findings or recommendations despite this coming up many times in the report. Nor was there anything on criminalization of legitimate content.



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