

Policy Paper

Information Technology (IT) Bill 2019

From a feminist lens

Summary

The government of Nepal proposed the Information Technology (IT) Bill in 2017 in order to regulate and address the concerns around IT industry in Nepal. The bill is recently passed and covers a wide ranges of issues from e-commerce, tech innovation, cyber security to cyber bullying. It will replace the Electronic Transaction Act (ETA) of 2008. However, human rights activists, civil society groups, legal community and journalists raised concerns that the act will curtail freedom of expression online, breach data privacy and increase surveillance on citizens. Body & Data has analyzed the act focusing it's impact on marginalized communities including women, queer persons and indigenous groups, and their ability to exercise their right to freedom of expression and right to privacy¹.

The Act poses several challenges to an individual's rights to privacy, rights to access to information, right to freedom of expression and right to freedom of association and assembly. There is lack of clarity regarding personal data collection, sharing, and storing provisions. Unclear provisions and use of the data once consented set possibilities for function creep and profiling by corporations and governments. The act does not cover citizen's rights to access data provided by them, right to rectification, right to erasure or right to be forgotten – principles that govern the rights of individuals on the internet².

Vague language has been used in the clause related to 'cyber bullying', which could provide excessive power to the authorities to investigate and suppress individual right to expression including sexual expression online and could be

¹ For the analysis of the IT bill, Body & Data consulted with civil society members based on the in-house analysis of the bill and a desk review from a feminist lens. The consultation saw participation from lawyers, journalists, human rights activists, women rights activists who flagged their concerns regarding how the provision in the bill is going to affect the rights of their communities and curtails the freedom of expression and right to privacy of the civilians.

² We have the right to exercise and retain control over our personal history and memory on the internet. This includes being able to access all our personal data and information online, and to be able to exercise. Control over this data, including knowing who has access to it and under what conditions, and the ability to delete it forever. <https://feministinternet.org/en/principle/memory>

misused to restrict freedom of expression online, especially when it comes to socio-political opinions. Similarly, vague and expansive language labelled "obscene" materials in the clauses around sexual exploitation and production of pornographic contents do not account for consent between involved parties. This will curtail individual's practice of exploring and experiencing their sexuality and freedom of expression/ sexual expression. Nepali society looks at everything related with sexuality as something 'immoral'. This interpretation could be used to curtail and even criminalize behavior activities relating with sexuality even practiced with consent.

The definition of 'social networking companies' in the bill is unclear. It could include any social media, website or messaging app. The act asks for the registration of such companies in Nepal, could lead to targeted surveillance, content censorship, arbitrary shutdowns or blockage of such platforms. Past trends have shown that the authorities could abuse their power to silence criticism against them and block social media platforms by citing lack of registration in Nepal. This would restrict individual's rights to speech and creative expression further affecting rights to information and rights to association.

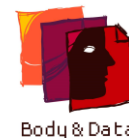
Analysis and Recommendation

Body & Data analyzed the most concerning provisions of the act through following lens citing relevant examples keeping into consideration the potential harm and risk. The recommendations are also proposed accordingly as follows:

Privacy

1. Article 67 prohibits "collection of personal details unless as provided as per the prevalent law, nobody should collect the personal details of anyone maintained in an electronic form." The article also says: "if the personal details of any individual have to be collected, the information about it including the purpose for collecting such details must be given to the individual concerned." In addition, article 67.3 allows sharing and exchange of personal detail of any individual if "under prevalent laws or under endorsement of the concerned individual".

The definition of 'legal persons' or 'entities' in the clause is unclear: is it person, company, service provider, government or someone else? The clause only mentions provision of giving information about the purpose of the data collection.



It does not address how the consent will be established. Not having a clear law on data protection including data collection and usage, there is a risk of data mining and misuse of personal data without informed consent of the subject of the data.

2. Article 67.3 allows for sharing and transferring of personal details and is inconsistent with the first section of the law and article 28 of the Constitution of Nepal on right to privacy. The provision itself seems purpose specific, but the condition it provides might lead to functional creep, data mining and modelling by corporations and the government. Giving consent for one activity, one time does not mean giving it for different, several, increased or reoccurred activities. However, according to this clause, individual's data collected could be used anywhere, anytime after the initial consent beyond a specific purpose that the individual has consented for. This sets stage for a profiling and invasion of privacy on a wide scale through triangulation of data collected for various specific purposes. Profiling of individuals/groups and centralization of data will affect their use of services provided by state or non-state parties. This can put people at risk of surveillance, especially those who have already been marginalized in the history of the country.

Examples:

- Article 67.3 does not guarantee protection of one's personal data shared for a specific purpose and it can be used for other purpose. If a person's data collected during local election is shared and used for population research by authorities, or such data is shared from one department or ministry to another for a different purpose as opposed to what the data owner had consented to, it breaches the right to privacy of the person, unless consent for such purpose was taken during the collection of data.
- Sex work is neither legal nor illegal in Nepal but it is criminalized. There have been instances where sex workers have been arrested and prosecuted for other reasons, as simple as possessing condoms. If personal data of sex workers collected during health examination are used to profile them and/or is centralized, it puts them at higher risk including arbitrary arrest and search. In addition, they will less likely to go and access services such as health service or any administrative services by the state to avoid stigma or

further criminalization given the misuse of their information.

- Gender data is collected almost everywhere. The government of Nepal has an ambiguous third option called ‘Others gender’. While this provision of ‘others gender’ does not address the exact need of transgender, third gender and non-binary persons, it also risks them to pigeonholing. For instance, a transgender woman was given citizenship as “Others” because she is not allowed to register herself as “Female”; the card she will hold will contain this information and she will be forced to reveal this every places, where she has to present her citizenship. In context of Nepal, citizenship is necessary just everywhere. This will curtail her right to be able to determine if her gender identity is any of necessary to be shared, if she feels safe at a particular environment to reveal her identity or if she does not want to tell anyone that she is trans person at all. On the other hand, government asks District Administrative Office to keep separate records of people listed as ‘Others’ while anyone listed as (M)ale or (F)emale will be recorded together in a mainstream documentation file. With lack of any provision on safety, security and confidentiality of the database, people registered as “Others” are at a potential risk given the circumstances of how policies and practices will be headed towards and who will be in the position of determining what to do with the data collected.

Recommendation

- Collection of data should be relevant and limited to what is necessary for the purpose only and there should be clarity on who can collect data 'as per the prevalent law'.
- Collection and processing of data needs to be done through informed and freely provided consent and individuals should be given the option to withdraw consent or opt-out from sharing information. If the processing of data is for multiple purposes, consent should be provided for all of them.
- There should be proper policy on how the collected data will be stored safely and with security so that it does not leaks. Moreover, there should be a proper vision on until when will be the data retained and in what form will it be stored. Such provisions need to be explained to the persons whose data is being collected.
- People should have right to op-out not giving the data they don't consent or wish to give. No one should be forced to reveal information that are private

to them, such as their gender identity, whether or not they are transgender folks, whether or not they are non-binary individuals, whether or not they are gay, lesbian, bisexual, pansexual, asexual people.

Freedom of Expression including sexual expression

1. Article 83 prohibits “cyber bullying,” which is defined as continually harassing, teasing, demeaning, discouraging, insulting or scolding someone.

The categories of speech mentioned in the article above are too broad and vague to meet Article 19’s³ three-part test⁴ (that limits to FoE should be necessary, legitimate and proportionate). Terms like “continually” “demeaning,” “teasing,” “scolding,” “discouraging” are subjective and open to interpretation and gives the government broad discretion to pursue criminal actions against individuals based on arbitrary and subjective grounds.⁵ This article curtails rights to freedom of expression especially when it comes to political opinion.

Sexual violence online is not just an online issue. Online platforms shouldn’t be seen as a completely different space from the physical world. It is just an extension of the physical world and whatever happens in the physical world is also reflected in online platform. So, basically we don’t need two different laws when someone shows another person their genitals in person without the other party’s consent and a different law when someone shows another person their genitals online.

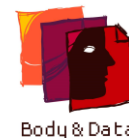
Recommendation

- Remove this article. Instead of creating a new law to address violence online, the use of existing laws that is applicable to similar crimes in offline spaces should be used.

³ Article 19 of Universal Declaration of Human Rights (UDHR) talks about right to freedom of opinion and expression that includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media (online and offline) regardless of frontiers. (http://www.claiminghumanrights.org/udhr_article_19.html)

⁴ Article 19’s three-part test says that any restriction in person’s freedom of expression must meet three conditions which are a) it must be provided by law, b) it must respect the right of reputation of others and protection of national security, public order, public health or morals c) and must be necessary to achieve the legitimate purpose. (http://www.claiminghumanrights.org/opinion_expression_definition.html)

⁵ ICNL. 2019. Summary Legal Analysis, Nepal’s Information Technology Act, 2075



2. Article 86 prohibits “production, collection, distribution, publication, exhibition, transmission or purchase/sale” of pornographic materials using the electronic system to produce, collect pornographic materials.

The definition of ‘pornographic materials’ is not clear in the provision, and its implication could be problematic. The law criminalizes even those who record, store or share any sexual materials (photos and videos) with their consent, as anything sexual is seen as pornographic. The law criminalizes production, collection, distribution, publication, exhibition, transmission or purchase/sale of pornographic materials. In this case, even to produce/ record sexual content (nude photos, film sexual activities, engage in phone sex etc.) with consent is criminalized. The law does not differentiate between production of sexual content with and without consent or sharing of such content with or without consent from the parties involved.

Recording or/and sharing of intimate images and videos with consent is part of sexual expression thus, this law curtails freedom of sexual expression of an individual. It limits one’s practice of exploring and expressing their sexuality. Blanket approach in developing such kind of laws does not serve its purpose to provide justice and further restrict victim/survivor to access legal service.

To make it simple, individual's sexual expression online could be categorized into two different things:

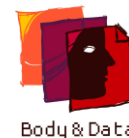
- a) Creating sexual content of an individual / individuals with their consent.
- b) Creating sexual content of an individual / individuals without their consent.

Also:

- a) Sharing those sexual content with the consent of people involved.
- b) Sharing those sexual content without the consent of people involved.

Consent should be the premise of criminalizing someone instead of the act itself. In which, creating and sharing of sexual contents without the consent of people involved should be criminalized rather criminalizing activities related to sexuality itself with blanket approach. Digital platforms have made people gaining sexual pleasure, explore their sexuality and practice their sexuality even easier.

Particularly for gay, lesbian, bisexual, pansexual, transgender, non-binary, intersex, and all of the queer persons and people with diverse sexual fantasies and kink use



digital platform to seek people who share the same sexual interest which is often not possible, risky and unsafe in the physical world.

Examples

- People share intimate conversation and materials (photos, videos and video calls) through internet with their sexual and romantic partners/interests. Such content and action are deemed ‘pornographic’ according to the Act, despite taken and shared with consent. Expressing and exploration of one’s sexuality through producing and/or sharing of sexual materials through digital media should not be criminalized as long as there is freely given and informed consent involved.
- One might take nudes for pleasure with or without the purpose of sharing it with anyone. Taking nudes can be used as a way to know yourself, and represent yourself in your own terms, and can be an opportunity to empower people beyond the mere reproduction of sexy pictures of women already in mainstream and digital media.⁶ With this law in place, even taking nudes and storing them even in their own gadgets that might give pleasure is criminalized.

Recommendations

- Instead of categorizing all sexual content as "pornographic materials" the law should acknowledge consensual aspect in such content created and only criminalize non-consensual production and sharing of those materials.
- There needs to be a separate clause against child pornography, which will regulate its production instead of a blanket ban on overall production and uses of porn.

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

⁶ Arrow for Change. 2016. Sexuality, Sexual and reproductive health and rights, and the Internet. *Safer Nudes! A sexy guide to digital security.*

The article includes not just sexual violation but also online relationship with ‘purpose’ of sexual violations and defraud. The clause is unclear on the definition of ‘online relations’. How do we prove an ‘intention’ or who is the burden of proof placed on? The article is vague as it focuses on the intention of certain actions. Moreover, proving one's intention is not an easy task and the burden of proving sexual violations is mostly placed on the survivors. Hence, the law could be misused as it allows the authorities to decide the purpose of certain action/activity.

The law can be used to criminalize consensual sexual conversation in platforms such as dating apps or social media. The focus is on the content of the conversation instead of whether or not the involved parties are doing it willingly or not.

Examples

- There are example of elopements in which two young consenting adults are engaged in romantic or/and sexual relations. In such cases, the law could be misused to prosecute the powerless or marginalized individuals. Laws sanctioned don't exist in isolation from various social factor like caste, class, political affiliation, religion, gender identity and sexual orientation. Thus, this law could marginalize the marginalized further by including the component of online communication in it.
- Dating apps are commonly used by people these days to meet their sexual and romantic interests and explore their sexuality. People who seek for same-gender relationships or relationships outside the gender binary are often at more risks with ‘moral policing’ of provisions like these.

Recommendations

- The law criminalizes defrauding along with sexual expression using online platform which are two separate things. This could be used as tool of moral policing. Therefore, the clause should be revised to decriminalize any kind of conversation including romantic, sexual or erotic conversation between two or among more than two consenting adults.

4. Article 91 of the act states that it is mandatory for social network sites to register at the Department (of Information and Technology) to operate in Nepal, and will

be banned for not doing so. Here, the definition of social network is too vague, it could include any social media, website or messaging app. Mandatory registration in Nepal would mean that many of the networks will not be able to operate in Nepal.

Internet has become an integral part of people's lives in Nepal. For many, internet means solely social media and they use it for information, organizing and entertainment. With the social media companies not being able to operate in the country, many will not be able to access information of their choice and their means of communication will be disrupted. It also curtails the rights to assembly, which is against basic human rights as ensured by the constitution of Nepal. The government will be able to censor the online content and surveillance against any individual or groups could increase. A policy brief from ICNL suggests that the mandatory registration provision of social networks means prior censorship and interference on the right to freedom of expression given the chances of procedure being tedious, costly and arbitrary⁷. This raises the question of what legitimate aim - protecting national security, public order or public health or morals - the government of Nepal is pursuing by requiring social networks to register. The marginalized groups in Nepal who have been fighting against the existing socio-economic and political climate would be mostly affected.

By having social networks registered in Nepal, the government is seeking more and direct influence over the companies, which will allow it to access information and personal detail of individuals or groups.

5. Article 92 of the law gives the Department of Information and Technology direct power to remove any content through social network, which is commonly referred to as a notice-and-takedown system.⁸ This article creates censorship concerns due to: (a) required registration of social networks; (b) prohibitions from using unregistered social networks; and (c) undefined regulations of social networks. It might enforce restriction on content on social media platforms on basis of vague limitations and expansive terms such as "offensive content" with no safeguards for arbitrary prosecution or shutdowns that violates freedom of expression of individuals.

⁷ ICNL. 2019. Summary Legal Analysis, Nepal's Information Technology Act, 2075

⁸ Ibid

Examples

- For many people within the queer community, Facebook is sometimes the only space to express themselves and find their community, as there are limited opportunities to do so offline. Transgender, third gender and non-binary people use these platforms to express themselves and connect through their own network, while it is a risk to do same in the physical world in the society. People who aren't heterosexual, who seek relationships with the same gender, cannot do so in offline platforms due to social stigma and discrimination. Therefore, social media platform is used by people who do not fit into the gender norms of the society or people who are not (only) attracted to the opposite gender. With the restriction imposed by this law, either the space such as Facebook will not be available or privacy of individuals involved will be compromised, exposing them to threats.
- The Nepal Telecom recently banned online video game PUBG (April 11, 2019) upon instruction from the Minister of Communication and Information stating that the game had a negative effect on the behavior and study of children and youths⁹. However, the Supreme Court lifted the ban within a few days. Giving authority to Department of Information and Technology instead of setting up of an independent body gives bureaucrats power to censor the internet.

Recommendations

- Definition of 'social network' needs to be made clear and the registration requirement of social network in the country should be removed.
- The laws on content regulation is already been addressed by other laws, thus the duplication needs to be avoided.

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⁹ <https://www.newsweek.com/pubg-banned-nepal-harm-children-india-china-agree-1394268>