

Review of the Information Technology Bill 2019

By Center for Media Research - Nepal

The Information Technology Bill 2019 was registered at the lower house of the Parliament by the Communication and Information Technology Ministry on February 14, 2019. It was sent to the Development Committee of the Parliament on February 18, 2019 for the further discussion and the Committee returned it with some recommendations on December 29, 2019. Although the main opposition party Nepali Congress has opposed some provisions of the bill, the bill is expected to pass when it's presented at the ruling NCP-controlled House.

The CMR-Nepal did the first extensive review of the Bill along with recommendations for amendments which was published on May 10, 2019 on the web, distributed to the lawmakers and media rights organizations.

The following is the translation of the review of the Bill, updated with changes suggested by the House Committee, as of January 15, 2020.

Introduction

The Bill seeks to regulate two major areas in the IT field. First, it seeks to develop, promote and regulate information technology currently covered by the Electronic Transaction Act 2008 (ETA) and regulate the validity, integrity and reliability of records and signatures. The other area it wants to regulate are cyber-crime and social media.

The ETA had covered the cybercrime and content of the internet in Section 47.¹ Using the Section 47 of the ETA, more than 180 cases have been filed against the accused in connection of using online media or social media. Legal experts have pointed out contradiction of the Section with the constitution and it has been misused by the state authority and individuals against journalists as the Section allows to criminally prosecute any content published online differently than the same content published in the newspaper. A study commissioned by CMR-Nepal found that in all but two cases, the court has released on bail the accused in his first appearance and the cases were never moved forward. It remained the tool to threaten and put journalists in custody.

The proposed Bill raises several concerns with respect to curbing of individual freedom of expression online. The bill was passed by the Development Committee without addressing the concerns pledged by the stakeholders who pointed out that the Bill has lots of grey areas that could curb freedom of speech online and increase surveillance of personal data. The Committee recommended 36 amendments to the Bill. However, experts noted that those recommendations made the Bill more restrictive and giving discretionary power to the state authority.

¹ Section 47. Publication of illegal materials in electronic form: (1) If any person publishes or displays any material in the electronic media including computer, internet which are prohibited to publish or display by the prevailing law or which may be contrary to the public morality or decent behavior or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities shall be liable to the punishment with the fine not exceeding One Hundred Thousand Rupees or with the imprisonment not exceeding five years or with both. (2) If any person commit an offence referred to in Sub-section (1) time to time he/she shall be liable to the punishment for each time with one and one half percent of the punishment of the previous punishment.

The Bill also has failed to look into the high number of users on the social media platform and its possible impact on the freedom of expression. As there are hundreds of social media platforms and are in the process of developing, the best option to regulate social media platforms is to opt for co-regulation because of the very nature of social media that transcends the state boundaries so, self-regulation mechanism is also one of the means to tackle such concerns raised rather than only making a policy choice of regulation by the state.

Co-regulation is an option that needs to be reconsidered at the most where social media should also engage in handling of complaints that they receive as self-regulating process by the social network management.

The Bill has drawn flak from civil society with respect to the provisions that the Bill was not able to decriminalize the use of social media that could abstain user's use their freedom of speech online, high fines and jail sentences and the provision of tribunal court which is believed that such court cannot operate freely from government control.

Main Problems with the Bill

1. The vague definitions with wide scope of interpretations of offences that aims to control and instill fear among public while criticizing government or state authorities on internet-based platforms.
2. The ridiculously stricter punishment for the offences (for example, punishment for writing offensive comments on social media is higher than punishment for rape attempt.)
3. Government control over appointment and dismissal of the judged of the court to oversee cyber-crime which violates the fundamental principle of independent judiciary which shall remain free from government interference and influence.

Problematic Provisions in the Bill

The preliminary section of the Bill defines "social network" as an internet and information technology-based system that facilitates the transmission of content created by facilitators and users who can communicate interactively with each other. This definition is vague that could include in its purview the online news media sites, which needs to be addressed by specific media law. Clarity on what it means to be a social networking sites is deemed necessary to be defined.

1. Chapter 1 Section (1.3) states that the Act will be applicable throughout Nepal and is also applicable to any person who resides anywhere who have violated the Act.

The information technology transcends the national boundary. Explaining this sort of transnational forms of medium is especially important since it can be operated from anywhere. As the law clearly states that the law applicable throughout Nepal, but further elaborating its applicability to any person residing anywhere is abstract.

As the latest developments in information technology have changed the traditional definition of public communication, the scope of viewpoint has to be broadened.

2. In Section 83, it states that cyber bullying is not allowed: No acts are allowed to continuously distress, tease, and insult, discourage, humiliate or rebuke others using the electronic medium.

Such provisions are also included in Criminal Code of Nepal, Part 2, Chapter 10 Discrimination and other humiliating behavior, and Part 3 Chapter 2 Act of Defamation. However, the definition and punishment is different thereby contradicting with each other.

With respect to involvement of conducting such acts, Section 93 sub-section 23 that deals with the punishment section states that guilty personnel can face fine of Rs. 100,000 or five years of imprisonment.

Whereas the provision of Defamation Act in its Section 307 has the provision of sentence of two-years imprisonment or Rs. 20,000 fines or both. In case of defamation done through electronic or other mass communication medium one-year imprisonment and Rs. 10,000 is added to the earlier provisions.

Also, the definition of the words lacks clarity of what it means by distress, insult, tease, discourage, humiliate or rebuke leaving wide scope for interpretation.

3. Section 86 deals with ban on production, collection, distribution, publication, exhibition, spread and purchase of obscene materials:

The definition of 'obscene' is not clear. What does it mean to be obscene and what kind of acts are obscene? Further definition such as indicating the materials of child pornographic content and other pornographic content could be a definition. The definition is important because what is considered as obscene for one community is not the same to other community.

4. Section 91 deals with registration and regulation of social media: It states that any person wanting to operate social media should register in the government department, and social media that are already in operation before the formulation of the Act needs to register. If registration is not done, there is provision to block unregistered social media.

The issue of regulating social media has been widely considered valid around the world. Different countries have started to formulate regulation in the context that people using their right to freedom of expression have started to incite violence, spread hate and infringe on the privacy of others. For example, in Germany, The *Netzwerkdurchsetzungsgesetz* (NetzDG) law that was passed at the end of June 2017 imposed heavy fines on social media platforms that said if the sites do not remove "illegal" posts within 24 hours they could face fines of up to 50m euro.

However, a major problem with the law regulating social media is that social media platforms are transnational and global companies. They transcend countries, communities and neighbourhood and the social media sphere is like a world of its own. It would be problematic and impractical to have a global standard of conduct

on social media since every country is different. The law around social media use needs to be sensitive to the socially acceptable traditions of various countries.

Another concern with the law regulating social media is that the government simply does not understand how the world of social media works so it would be extremely difficult to legislate it without the due knowledge of its processes. Legislating the problem away with significant fines and sanctions may not be as effective as we might think as the world of social media is constantly in flux and the law would continually have to play “catch-up”.²

In this context, calling for social media giants to register according to the law of Nepal, if they do not have an office in Nepal, is not practical. The law could call for the local agent of the company to deal with the issues regarding social media concerns and violations, which could be a means to regulate other financial dealings that the social media have been doing from Nepal.

The provision of block the social media if they don't register is direct violation of internet freedom. It allows government to block any social media sites anytime.

5. Section 92: If anyone posts contents that are offensive, the government department can issue a directive to withdraw such content or information.

This provision can directly affect the freedom of the speech and can result to prior restraint of individual rights to freedom of expression, which can also be interpreted as an intention to control the platform. Whether such posts in the platforms are in contravention with the prevalent law, it should be decided by the court of law rather than the understanding of the government department.

6. Section 94: This section includes provisions that deals with the content that are prohibited:

- a. Any act which may undermine the sovereignty of Nepal, territorial integrity, nationality of Nepal or the harmonious relations between the Federal Units or the harmonious relations between various castes, tribes, religions or communities, or any act of hatred or defamation or act that incites such activities or acts to treason or acts of incitement or the harmonious relations between various castes and communities related materials.
- b. Any act of incitement to caste based untouchability, hatred to labour, incitement to crime, act that undermines peace and security and acts that are prohibited by the law to publish and broadcast materials that may be contrary to public decency or morality related materials.
- c. No acts are allowed such as repeatedly teasing, misleading, insulting, discouraging, rebuking and threatening, create hatred or confusing the receiver of the information.

² <https://www.trin.cam.ac.uk/wp-content/uploads/Dorothy-Biyere.pdf>

- d. Any materials that are prohibited by law to sell and distribute and advertising such materials in the form of publication, broadcasting or exhibition.
- e. Anyone engaged in character assassination without evidence or materials deemed to cause slander and defamation as per the prevalent laws are not allowed.
- f. Other acts against this law.

Sub-section 2 and 3, has the provision to authorize the department to issue a directive to the social media institution to remove such content or ask to remove the content. It would be responsibility of the social media to remove such content.

Despite the provisions, the authority provided to the department is problematic, none of the government institution should be allowed give a decision on the issues mentioned above.

The cases related to character assassination cannot be decided by such institution but should be decided by the court of law. Such institution should be allowed the rights to investigate and provide the decision to the case. In case of Section 1 ‘c’ such provisions can lead to producing the content and message as wanted by the authority if incase it is political issue, this can result to control of the freedom of expression.

- 7. Section 96 has the provision of punishment: The punishment determined by the Act in case of publishing material against the prevailing laws are harsh as compared to other laws. For example if any person is engaged in the acts of “repeatedly teasing, misleading, insulting, discouraging, rebuking and threatening, creating hatred or confusing the receiver of the information,” the punishment is 5 years of jail and Rs.1,500,000 fines or both. Comparing this with other heinous crimes such attempted murder, the punishment is 10 years of jail sentence and Rs. 100,000 fines.

Some punishment provisions in this Act contravenes with the provision of other Act, for example with respect to the punishment provisions on privacy in this Act, the fine is Rs. 500,000 and sentence of 3 years imprisonment or both, but the Criminal Code’s provision is Part 3 Chapter 1 Section 298 has the provision related to violation of privacy through electronic means, where if such violation is done, the punishment is 2 years of imprisonment or Rs. 20,000 fines or both.

- 8. Chapter 17 Section 115 to 119 hold the provision for the Information Technology Court. The Act proposes to establish the Information Technology Court, until the formation of the court, the cases registered shall be judged by District Court.

There are concerns over government forming its own court, appointing the office bearers, and prepare and interprets the law itself.

The appointment provision and tenure of the office bearers shows the intent of the government, whether the office bearers remain accountable to the people or the government.

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