

INFORMATION COMMUNICATION TECHNOLOGY BILL

..... POLICY BRIEF



SAMRIDDHI
FOUNDATION

**Information Communication
Technology Bill**
:::: Policy Brief ::::

Background

Nepal, in the past decades or so, has witnessed a massive leap in terms of Information, Communication and Technology (ICT). Increasing Internet Service Providers (ISPs) along with increasing number of internet service users has facilitated the economic environment through access to goods and services over the internet and socio-political environment through access to a platform for expressing opinions. By and large, Nepal lacked a sufficient legal framework to regulate the sphere of Information, Communication and Technology. Although on paper the Electronic Transaction Act was enacted to regulate the exchange of information over the internet and facilitate it through electronic means, it became apparent after a few years that the said Act contained very little provisions relating to electronic transactions.

In the wake of the inadequacies of the previous Act, the Ministry of Information Communication and Technology has prepared a Bill to cover these inadequacies and to incorporate suitable new provisions as per the changing environment of information and technology.

2. Introduction

Laws relating to Information, Communication and Technology are enacted with the intention to ease development of the same; give legal effect to electronic signatures, and ease trade over the internet; and to curtail known and unknown cyber threats. However, while doing so, policy makers and legislators must not make provisions which restrict trade, give immense (and discretionary) power to government authorities, restrict civil liberties and give rise to uncertainty with regards to the meaning and application of any provision.

While laws should be simple and understandable, the same cannot be said with regards to the Information, Communication and Technology Bill; the Bill is full of technical jargons. However, question arises as to whether the technical jargons have been appropriately defined in a manner that it can easily be interpreted by adjudicators and lawyers alike and whether such definition is specific or too vague.

3. Provisions requiring further review

3.1 Definition

Section	Sub-section	Clause	Provision
2		C	Originator means someone who creates, stores and disseminates an electronic message
2		I	Digital signature means a signature pursuant to section 16
2		Y	Social media means any media which facilitates interactive communication either provided by a third party or created by the users themselves.

The definition of ‘originator’ under the Bill classifies anyone who creates, disseminates and stores information as an originator. This definition becomes especially problematic when internet service providers disseminate and store information on behalf of the original creator. Furthermore, it fails to distinguish between originators and intermediaries such as internet service providers and cyber cafes thereby failing to create and enforce criminal liabilities for each group as is necessary and as in practiced in other countries such as India.

The Bill fails to distinguish between a ‘digital’ and an ‘electronic’ signature; both are regarded as the same as per section 2(i) and the interconnected section 16. While a digital signature is only a tool to verify whether a document is authentic or not, electronic signatures are the digital manifestation of a handwritten signature that is protected with a digital signature, and is used to sign contracts concluded over the internet. No distinction between the former and latter is found in the Bill. The idea surrounding electronic signature is that as opposed to digital signatures, an electronic signature is regarded as intent to be bound by any legal instrument. This becomes essentially important with regards to enforcement of contracts where intent is a prerequisite.

Social media regulation is perhaps the most talked about provision that has been included in the Bill on Information, Communication and Technology. A regulation on social media is welcome given the cases of cyber bullying, stalking and harassing that has been witnessed all over the world through the use of such platform. However, the current bill seeks to regulate social media sites and then some. The major problem lies with the definition of social media, which states social media as any interactive communication means either provided by a third party or created by the users themselves. This means even e-mails and messaging platforms are now classified as social media. In addition to this, online business interactions and even in-house business softwares designed to facilitate flow of information within a specific enterprise will now fall under the purview of the regulation in the name of social media. The question now is whether a regulation of social media is sought to curb instances of defamation, statements and opinions which are against the sovereignty and national integrity or is meant to control personal conversations via e-mail and text messaging

services, business transactions and communications concluded through in-house softwares and/or third-party services. If the justification is the former, the present definition must be changed; if it is the latter, it would be a strong violation of the constitutional rights to privacy and freedom of speech; in any case, the definitions must be changed.

3.1.1 Recommendations

- Appropriate and specific definitions
- Defining originators and intermediaries as two specific and distinct entities
- Defining and making provision for both digital signature and electronic signature
- Defining social media in line with the current and widely-accepted international standards

3.2 Contract concluded through electronic means to be enforceable

Section	Provision
10	Contracts concluded through electronic means to be valid and enforceable

One of the most commendable features of the Bill is the incorporation of provision giving legal effect to contracts concluded through electronic means. It is a welcome step that facilitates commercial transaction between businesses and to a certain extent reduces time taken and costs involved when concluding contracts between domestic and foreign enterprises. Nevertheless, the current prevailing provisions relating to Law of contracts found in the Country Civil Act, 2074 and Country

Civil Procedural Act, 2074 makes the provision of the Bill moot. As per the Bill, contracts concluded electronically in accordance with the prevailing laws on contract and the Bill itself is enforceable in Nepal. But the provision fails to clarify whether such contracts need to be registered in line with section 36(2) of the Civil Procedural Act, 2074. Interestingly if contracts concluded electronically need to be further attested by the ward office, the whole point of the current provision made by the Bill i.e. facilitation of trade and reduction in time taken to conclude contracts and simplicity in procedure while concluding contracts becomes unlikely. It will neither facilitate business transactions nor create a business-friendly environment.

3.2.1 Recommendation

Providing for enforceability of contracts concluded via electronic signature and further clarifying whether such contracts need to be attested or not.

3.3 Delivery of goods and services

Section	Provision
15	Different goods and services to be not provided in case of purchase of goods and services over the internet

To a certain extent, the registered Bill attempts to regulate online businesses. Section 15 of the Bill provides that different goods and services other than that delivered must not be delivered and goods and services must be delivered within the time specified. The provision itself is not problematic but when read along with chapter 15 section 95, the provision seems a bit harsh. Section 95 makes untimely delivery and

delivery of wrong items an offence whereby a fine of upto Rs one lakh can be levied. Surprisingly section 15 fails to consider Force Majeure i.e. factors beyond human control such as civil unrest, natural calamity etc. which may affect delivery time. In such instances a fine of upto Rs one lakh sounds a bit extreme considering the fact that Nepalese Laws on contract recognizes the principle of Force Majeure as a means to be exempt from contractual liability. The provision of the Bill can result in wrongful punishment of online businesses when delivery of goods and services and proper delivery cannot be made owing to factors beyond their own control.

Additionally, the matter that the provision seeks to regulate is a matter of Law of sale of goods which has been provided in Country Civil Act, 2074, although it lacks provision relating to sale of goods over the internet. A much better approach would have been the incorporation of the said provision in the laws pertaining to Sale of Goods.

3.3.1 Recommendation

Inclusion of Force Majeure as a means to be exempt from contractual liability under agreements concluded at the time of trade over the internet.

3.4 Permission for using electronic equipments designed for protection of electrical system

Section	Sub-section	Clause	Provision
81	1	a	Permission to be taken in order to use electrical equipments designed for the protection of electrical systems or softwares that can be used to commit any offence

Business houses and cloud storage facilities regularly use equipments for the protection of their electrical systems. The rationale behind the requirement of permission to use those equipments is unknown. Any enterprise, in order to function, has to use equipments that secure their own electrical systems i.e. link of interconnected electrical equipments. The provision requiring permission to use these equipments is rather unnecessary, seeing as how it serves no purpose at all but only creates bureaucratic hassle by requiring users to seek permission by mentioning the reasons for such use and submission of application.

Furthermore, the provision also states that for using any software which can be used to commit any offence, permission is to be taken. This begs question whether the use of text messaging softwares such as Viber and Whatsapp require permission from the government authority. The named softwares can be used to harass a person which is an offence in Nepal; therefore it falls under section 81 whereby permission must be taken. In Nepal 4.5 million people use viber; should all those people

take permission from Ministry of Information Technology and Communication to use the said software? Does the Ministry even have the capability to entertain requests of 4.5 million people who should supposedly seek permission? The use of any software and equipment is dependent upon the person using it. It can either be used for the purpose for which it is designed, or otherwise (like committing an offence). By subjecting every person to require permission to use an equipment designed for safety of electrical systems or softwares which could be used for committing an offence (most softwares can be used to commit an offence depending on its use), the Ministry of Information Communication and Technology has effectively created a regime which controls the choices made by the general populous. The problem still lies with the fact that a general category is provided as opposed to a specific category. Perhaps when the regulations under the bill is made more clarification on this issue will be provided,

3.4.1 Recommendation

Instead of mandatorily calling for permission to use softwares, a better approach would be to make a provision to punish for offences under the prevailing laws which result out of the use of softwares and equipments.

3.5 Prohibition on production, distribution, collection and communication of indecent material

Section	Provision
86	Prohibition on production, collection, communication and distribution of indecent material

To a certain extent, production, distribution, collection and communication of indecent material can be justified, but its justifications can only be made when what is restricted in the name of indecency is actually considered indecent by the society and the general populous. The intent behind the said provision seems to be to curtail indecent activities but legislators have failed to understand that society in the past decade or so has taken a giant leap in terms of what is considered indecent. Furthermore, Nepal's constitutions provides the freedom to profess any form of work, the said prohibition and the provisions which seeks to give legal effect to prohibiting any profession that is discretionarily concluded as being indecent violates constitutional rights as enshrined in the Constitution of Nepal, 2015.

An effective law must be specific and not vague; the provision itself is subject to interpretation in that, what is deemed indecent has not been defined. While we move forward in terms of changing socio-political scenario, laws enacted and proposed have failed to address the changes and leaps made in terms of societal and individual thinking.

In the absence of any definition of indecency, the provision of the Bill gives discretionary power to the government and its agencies to prohibit anything be it pictures, videos, clips etc. For instance, the said provision can even restrict theaters from running a movie with some form of sexual content in the name of indecency. The provision not only effects individuals but also businesses such as production companies who may never get to screen a movie by virtue of the mere fact that some form of sexual content was present or movie theaters who may not get to screen a movie, to which rights were acquired by paying large sums of money, in the name of indecency, a word which

is subject to the interpretation of the regulating authorities. Such discretionary power should never be conferred upon regulatory bodies for the simple reason that when such powers are conferred, a government becomes autocratic and all virtues of democracy are lost.

3.5.1 Recommendation

- Providing a list of non-exhaustive activities which are considered indecent,
- Providing the judiciary the power to determine whether any new matter not falling under the non-exhaustive list as decent or indecent.

3.6 Liabilities of service providers

Section	Subsection	Clause	Provision
89			Service provider to be held liable if information disseminated is in violation of the prevailing law

The registered Bill provides an exemption on criminal liability to service providers. The provision entails that when the service provider acts as only a third party whose duty is limited to dissemination of information, they are exempt from liability. This is to a certain extent correcting the wrong done by not classifying originators and intermediaries as two distinct entities.

While there exists a list of conditions that exempt service providers from criminal liability, the bill through a rather surprising proviso undermines the exemption provided. Sec 89 states that when a service provider is acting in the

capacity of a third party it will bear no criminal liability but its proviso provides that if even when acting as a third party and disseminating information, if the information is in violation of the prevailing law the service provider will be held liable.

This is especially problematic given the vast amount of information that service providers disseminates. It calls for them to become more vigilant in disseminating information and perhaps even checking the information which simply is not feasible. This is a rather surprising provision that finds its way into the bill and if the provision is not amended severe repercussions will be felt.

3.6.1 Recommendation

Removal of the proviso

3.7 Mandatory registration of social media companies

Section	Subsection	Clause	Provision
91	1,2,3		Mandatory registration of new and preexisting social media companies

Many countries have enacted laws that allow them to tax social media companies. The reason for such taxation is justifiable and even necessary for developing and least developed nations whose primary source of income is revenues generated through tax. The draft Bills's intention as stated on many instances by Minister of Information Communication and Technology has been to tax social media companies who generate enormous amounts of revenues within Nepal. However, what the Ministry

of Information Technology and Communication has failed to realize is that mandatory registration of such companies is not a necessity for taxation. Registration of such companies will create several problems for instance, whether or not social media companies need to establish a branch office in Nepal to register or whether such companies should invest in a Nepalese company to get the same legal effect has not been clarified.

The prevailing laws on registration of companies i.e. Companies Act, 2063, Foreign Investment and Technology Transfer Act, 2074 and Industrial Enterprises Act, 2074 allow the registration of foreign companies when either a subsidiary comes into operation within the territory of Nepal or through investment in Nepalese company in the form of foreign direct investment or through a joint venture agreement between a Nepalese and foreign company. Clarification with regards to what registration entails is required, requiring social media companies to register through either of the means already prescribed would in reality have a different effect, they could either completely pull out and stop providing services to which the people of Nepal have become accustomed to or in the future demotivate social media companies from providing services in Nepal.

The larger problem lies with the definition of Social Media itself. As pointed out earlier, the provisions of the Bill pertaining to social media can apply to a myriad of third party service providers such as Gmail, Hotmail, Viber, Whatsapp, Facebook, Google, Wire, Line, Twitter etc. Moreover, it must be ascertained whether the Ministry of Information Communication Technology has the required human resources to register and regulate the vast number of companies that fall under the purview of social media as per the provisions of the current bill.

3.7.1 Recommendation

A much better way would be to require VAT registration (an approach followed by the Bangladeshi government) of companies rather than registration of Companies themselves. This would also mean that laws pertaining to VAT registration must be changed to allow for registration of companies without requiring an actual physical presence. Another possible way to tax social media companies would be to follow the approach suggested by the European Commission i.e. to register profits and tax businesses where they have a significant interaction with the users regardless of the country of registration. Nepal and India share the same peril with regards to taxation in that Companies having physical presence, which is determined through registration, can only be taxed. A far better way would be to amend the prevailing tax laws to provide for taxation based on consumer interaction rather than actual physical presence as is suggested by the European Commission. This will ensure that the Nepalese government is not robbed of precious revenues while also making sure that Nepal's policies are friendly and one that attracts foreign companies, something which we are in dire need of.

SN	Section	Sub-section	Clause	Provision	Problem	Recommendation
1	2		C	Originator means someone who creates, stores and disseminates an electronic message	Definition fails to distinguish between originators and intermediaries and can be interpreted to mean that intermediaries are also originators	Exclusively pointing out that originator does not include an intermediary and providing a separate definition of intermediaries as is done in India.
2	2		I	Digital signature means a signature pursuant to section 16	Fails to distinguish between electronic and digital signatures	Defining both digital and electronic signatures and providing the purpose for which each signature can be used.
3	2		Y	Social media means any media which facilitates interactive communication either provided by a third party or created by the users themselves.	Definition can incorporate multiple text messaging platforms along with in house business softwares designed for internal communication,	Exclusively pointing out that social media does not include interactive business communication tools as is done in Australia and changing the definition in a manner which is more specific with regards to what classifies as social media

4	10			Contracts concluded through electronic means to be valid and enforceable	Causes conflict of laws by allowing enforceability of contracts authenticated through digital signature which gives rise to uncertainty and does not clarify whether such contracts need to be further attested.	Clarifying whether such contracts need to be registered or not.
5	15			Different goods and services to be not provided in case of purchase of goods and services over the internet	Fails to exempt companies from contractual liability due to force majeure	Inclusion of principle of force majeure as a way to be exempt from contractual liability and fines under section 95 for failing to deliver goods and services on the date specified
6	81	1	a	Permission to be taken in order to use electrical equipments designed for the protection of electrical systems or softwares that can be used to commit any offence	Gives rise to bureaucratic hassle for use of required equipments instead of preventing commission of crime	Punishing offences arising out of use of electronic equipments and softwares instead of seeking mandatory permission.

7	86			Prohibition on production, collection, communication and distribution of indecent material	Fails to define indecent material and confers discretionary power to regulatory bodies	Providing for a list of activities deemed indecent and granting power to the judiciary to decide on the decency of any activity not falling in the list.
8	89		a	Service provider to be held liable when information disseminated is in violation of the prevailing law	Completely goes against the exemptions on criminal liability provided to the service providers	Removing the proviso
9	91	1,2,3		Mandatory registration of new and preexisting social media companies	Unclear provisions as to whether social media companies need to register as per the prevailing laws i.e. by opening a branch office or subsidiary or entering into a joint venture or providing direct investment or whether no such requirements need to be met	Taxation of social media companies on the basis of interaction with consumers rather than actual physical presence within the territory of Nepal.



Samriddhi, The Prosperity Foundation is an independent policy institute based in Kathmandu, Nepal. It works with a vision of creating a free and prosperous Nepal.

Initiated in 2007, it formally started its operations in 2008. The specific areas on which the organization works are:

- i. Entrepreneurship development
- ii. Improving business environment
- iii. Economic policy reform
- iv. Promoting discourse on democratic values

Centered on these four core areas, Samriddhi works with a three- pronged approach—Research and Publication, Educational and Training, Advocacy and Public Outreach.

Samriddhi conducts several educational programs on public policy and entrepreneurship. It is dedicated to researching Nepal's economic realities and publishing alternative ideas to resolve Nepal's economic problems. Samriddhi is also known for creating a discourse on contemporary political economic issues through discussions, interaction programs, and several advocacy and outreach activities. With successful programs like “Last Thursdays with an entrepreneur” and “Policy Talkies”, it also holds regular interaction programs bringing together entrepreneurs, politicians, business people, bureaucrats, experts, journalists, and other groups and individuals making an impact in the policy discourse. It also hosts the secretariat of the ‘Campaign for a Livable Nepal’, popularly known as Gari Khana Deu.
(more information at www.samriddhi.org)