

Bill to amend and integrate laws relating to the constitution and operation of Nepal Special Service

Background: While Nepal stands proud as one of the leading countries in South Asia to ratify the important International Human Rights Treaties such as International Covenant on Civil and Political Rights (ICCPR), sadly it lags behind in domesticating these legal standards in the national spheres. On the national frontier, it does not necessarily standardize the provision of international principles. The establishment of national laws to protect the constitutionally guaranteed right to privacy and freedom of expression upholds similar fate. Article 17 of ICCPR quotes, *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"*. Yet, the current proposed bills allow the government appointees to infringe on the citizen's rights without reasonable justification.

Right to Privacy has a rather short history in Nepal. It was enshrined for the first time in Constitution of Kingdom of Nepal 1990, which successfully follows in the present Constitution of Nepal 2015. One addition in the current constitution from its predecessor is a proviso, "except in accordance with the law" giving a backdoor as an exception to otherwise exclusive right. Currently, several new laws has been passed and proposed in the Parliament which imposes limitation on several fundamental rights, such as right to privacy, freedom of expression, right to information and communication, etc. Several proposed bills such as Information Technology, Nepal Special Service, Advertisement, Media Council, etc. have certain derogatory provisions which directly curtail aforementioned rights of the citizens. One common feature among the proposed laws is the expansion of censorship and surveillance by the state.

Thus, it is understood imperative to review Nepal Special Service Bill registered in parliament-secretariat, to provide progressive criticism for an inclusive law that adheres to the internationally established standards, Constitution of Nepal, General laws, Precedent established and most importantly the Human Rights Principles.

Introduction: "Bill to amend and integrate laws relating to the constitution and operation of Nepal Special Service" is recently introduced in the parliament-secretariat by Prime Minister and Cabinet's Office. A significant debate has sprung among the legal and civil service community anticipating the detrimental consequences on Right to Privacy and subsequently to Freedom of Expression, if the enactment were to be implemented as is.

Clause 10 of the bill consists of following provisions:-

Special Provision for the information collection;

- (1) Audio or Audiovisual conversation at the individual or institutional level that is suspicious can be kept under surveillance, monitored or intercepted.
- (2) Intelligence agent shall have power to collect the information from the service providers communicated through the computer, mobile phone, internet or digital medium.
- (3) The service providers are required to provide aforementioned information on demand.
- (4) Such information should be used for the same purpose it was intended during collection.
- (5) When necessary, the agent can be mobilized within the country or outside Nepal as a part of secret mission. The regulation, appointment and mobilization concerned with such mission will be kept secret.
- (6) A separate procedure to be applied in order to carry out the secret mission.

All the clauses except for 10(4) directly infringe on individual rights to speak freely and maintain their privacy, which is explained below.

Article 16 of the constitution of Nepal has guaranteed right to live with dignity; Article 17 enshrines freedom of opinion and expression to its citizens, Right to communication and Right to privacy is protected under Article 19 and Article 28 respectively. In order to publish or display any opinion, art, literature, editorial or news, freedom of expression is a must. Therefore, the fundamental rights such as right to publication as well as right to privacy of people's property, body, residence, literature, data and character has also been protected under Constitution of

Nepal. While some exception to these rights is acknowledgeable, understandable and appropriate, however such reservations are not absolute. The bill gives absolute authority to the state to infringe over the important fundamental rights, which does not pass appropriate or reasonable exception test. On top of it, Nepal Special Service Bill provides unrestricted rights to the state to collect information through supervision and interception of communication of any individual or institution. What makes the condition depressing is the fact that Government of Nepal has purchased surveillance equipments from abroad which is totally against privacy rights and freedom of expression.

Currently, Nepal has experienced some major backslide in the area of privacy protection. Similarly, the leaders of the investigating authority in the past have misused their authority, position and power to harass the individual, institution and the targeted members of the government through surveillance.

In 2016, one of the notorious instance is recorded of the then Chief of Commission on the Investigation of Abuse of Authority (CIAA) Lok Man Singh Karki. He was filed an impeachment for tapping the phones of numerous high profile politicians, businessmen, journalists, lawyers and civil society activists without a legal authorization¹. To meet this end, Karki sought budget from the Ministry of Finance to set up a state-of-the-art surveillance system, and chose high-level police officers with training in electronic surveillance.

In 2013, an audiotape in which a man alleged to be Maoist leader Krishna Bahadur Mahara was heard requesting a Chinese businessman for Rs. 500 million fuelled speculation that phone calls are being tapped in Nepal. This trend gives rise to speculations that a mission deployed in Nepal has their own equipment to intercept calls.

The dangerous part of this anti-law behavior is the *malafide* intention to misuse information for illegal economic benefits, rather than for investigative or security purposes. To everyone's surprise, Chief of National Investigation Department (NID) Dilip Regmi wrote a personal letter with 406 pager reports up on Karki's request about personal and financial details of 42 politicians, 62 bureaucrats, 39 retired bureaucrats and 52 retired and servicing security officers.

¹ <https://archive.nepalitimes.com/article/from-nepali-press/The-surveillance-state,3382>

Additionally, a case was also filed at Supreme Court in 2012 against the Nepal Police for retrieving SMS and phone-call records of over 500,000 individuals during the investigation into the murder of Supreme Court Justice Rana Bahadur Bam. Various newspaper report noted that police personnel went beyond the scope of the murder investigation, reading for “entertainment” the private messages sent by the cell phone users².

In this context, it is noteworthy to state the decision of Supreme Court in the case of Tara Nath Dahal vs. the Government of Nepal, 2016³ wherein, the court had ordered to mandatorily take the permission from the District Court if the phone surveillance is sought during the course of investigation. The bench of Chief Justice Kalyan Shrestha and Judge Debendra Gopal Shrestha issued the writ of mandamus and said it is illegal to gather mass data of innocent public. Furthermore, the judgment mandates to prevent the dissemination of information in an illegal manner and to hold responsible those involved. The case was filed in response to the unauthorized collection of mass data.

Nevertheless, the bill is inconsistent with the precedent established by the Supreme Court. Contrary to the verdict, the Bill under Clause 10(2) (1) states that the concerned agency is required to merely take permission from Chief Investigation Director, not the judiciary. The bill fails to adhere with the decision of the Supreme Court. It neglects to include the role of an independent judiciary to grant the permission in such cases for a fair and just decision making process. It is against the norm of check and balance, which is one of the core components of rule of law.

The problem diagnosed in Nepal Special Service Bill vis-à-vis Privacy and FOE

i. Act contradictory to the constitution

Article 28 of the Constitution of Nepal guarantees Right to privacy to its citizens. It specifically states that, "The privacy of any person, his or her residence, property, document, data, correspondence and matters relating to his or her character is inviolable⁴ [...] Further, Privacy Act 2018, Section 12(1) explains that every person shall have the right to keep the personal data

² <https://www.recordnepal.com/category-explainers/digital-privacy-national-identity-card-civil-liberty-nepal/>

³ Taranath Dahal et. al vs Government of Nepal, 2016

⁴ Article 28, Constitution of Nepal

or details related to him or her confidential. Section 12(2) of same act mentions while collecting personal or family data of any person, his or her consent shall be obtained. The proviso of the section entitles that if any data are demanded for the reason of national security or peace and order, none shall deny providing such information. This provision requires people to give approval of their information for national security purposes. Yet, the good news is it still requires the involvement of the concerned person in providing such information to the authorities. Whereas, the Special Service Act Amendment Bill gives unrestricted authority to access and subsequently monitor and intercept anyone's data without the person's knowledge, let alone approval.

ii. Lack of Adherence to the principle of Check and Balance

The bill solely mentions that the permission of head of department to be taken. This is contradictory to the principle of Separation of Power and Check and Balance. It becomes imperative for the intelligence authorities to take the permission of the judiciary before conducting surveillance on the individual. The intelligence authorities are more likely to interpret the terminologies like "national security or suspiciousness" as per their convenience to monitor the people who has a critical point of view against the government. In the past, the Journalists, Youtuber and Bloggers who had critical opinion towards the government actions were arrested for acting "indecently" and "immorally", interpreting the terminologies in its widest sense.

iv. Principle established in Adhar Judgment Vs. Current Bill

It is undeniable that privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. While determining whether the restriction on Right to privacy is just, it has to qualify through the proportionality test. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness.⁵

⁵ Adhar Judgement, pg. 158

However, the present bill allows the intelligence agencies to invade on the personal or professional data independently. Unlike United States, it does not require agencies to get the approval of an independent authority before accessing individual's data. In the USA, FISA Court is authorized to give the approval to the Intelligence as stated in FISA Act. In the Bill, the intelligence is not liable to an independent judiciary, rather merely with their own head of department. Lack of accountability towards an independent body increases the chances of arbitrary use of power. The independent bodies are crucial for double checking the invasion. The independent bodies are crucial for an unbiased judgment and ensure adherence to the principle of check and balance.

The practice of Special Service in USA

Intelligence agencies are required to take permission/approval from the Foreign Intelligence Surveillance court before intercepting/monitoring phone details. Additionally, Intelligence agencies are answerable and accountable to an independent judiciary. Since, right to privacy and its practices have been tried and tested for more than a century in developed countries like USA, invasion of privacy is often made a subject of international dialogue and often redefined to limit the access of authorities.

Lesson to be learned

Cases of privacy infringement are often hidden from public eyes, some are hardly investigated, and most are silenced from the public pressure. In a young democracy like Nepal's, rulers and the system itself will have plenty of room to misuse and abuse their power for all the wrong reasons. This is especially common in young democracies where we are struggling on a daily basis to force the system and actors within the system to abide by the rule of law⁶.

Taking in consideration some of the past events and scenarios, the future of privacy right and subsequently freedom of expression seems vulnerable to infringement and unauthorized access.

Threat to Journalism as a profession

⁶ <https://myrepublica.nagariknetwork.com/news/let-me-talk/>

If state authorities are given power to retain data records from service providers or intermediaries, it will expose journalists to secret state surveillance making them as well as their confidential sources easily discoverable.

In the profession of Journalism, the confidentiality of the news sources should always be respected. It is one of the ethically and principally recognized rights of the Journalists. The protection of Journalistic sources is one the key rights necessary to exercise their duty as "Public Watch Dog". Additionally, indentifying the harm and problems concerning social interest such as corruption, tax invasion, mismanagement of funds etc. is made possible. However, high surveillance capacity and power given by the bill, the whistle blowers are increasingly in high risks.

Any intervention to Journalistic sources must be treated with serious caution. Necessary legal safeguards must be put in place to prevent the authorities from abusing such special rights. However, there are certain circumstances where a journalist must disclose their sources, for an instance, in highly sensitive cases. In such condition, the order to reveal such sources should be granted solely to judiciary, with careful consideration of all the interests involved. Moreover, such order should only be given when there are not any other sources to discover the criminal. These safeguards must be ensured to journalists by adding these provisions in the concerned bill.

Taking reference from Canadian law, Journalist Source Protection Act 2017⁷ was introduced to amend the Canada Evidence Act⁸ to protect the confidentiality of journalistic sources. The enactment also amended the Criminal Code⁹ so that only a judge of a superior court of criminal jurisdiction may issue a search warrant relating to a journalist. In the context where Nepal does not have specific laws for the protection of whistle blowers, with high surveillance power of the state, they can be tracked and prosecuted.

At the present with the confidential sources of Journalist, they are able to expose the social ill and power mishandling by the state without fear. If the bill is authenticated, there is no doubt that the self censorship among the journalist and their sources will prevail. Thus, the journalist can keep secrecy of their sources and deny from giving out sources when interrogated.

⁷ https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_22/FullText.html

⁸ <https://laws-lois.justice.gc.ca/eng/acts/C-5/>

⁹ <https://laws-lois.justice.gc.ca/eng/acts/C-46/>

Recommendation/Suggestions: It is well-noted that the surveillance is a central part of investigation procedure and reasonable access must be granted to maintain national security. It is unfortunate that Nepal does not consist of law that directs submission of collected data before the courts with proper monitoring or to keep such data within the frontier of investigation. Similarly, the proposed bill does not define the boundaries within which the agencies should limit their conduct which amplifies the possibility of data misuse. Likewise, the lack of such standards will also intensify the likelihood of mishandling state's surveillance equipments. Therefore, following recommendations are highly suggested for amendment purpose.

a. The bill should repeal Clause 10(2) wherein the intelligence agencies can directly monitor or intercept calls and conversations by merely getting approval from the department head.

Thus, Nepal Special Service bill should incorporate a separate section authorizing district court to order or approve the search warrant to intelligence agencies. Furthermore, the court should only issue search warrant when and if convinced that there is no alternative medium by which the desired information can be reasonably obtained.

b. A new provision should be added mentioning, "The permission to intercept the conversations to be granted only when it is deemed required". The court should not be obligated to give the permission in every case submitted before it.

c. "A separate complaint clause" should be added in the bill. If the concerned party has reasons to believe that their data is or/and can be misused, they should be given right to complain about such act. This provision will address the issue of unnecessary/illegal/unethical invasion over the public's privacy. Thus, a complaint clause is a must to hold the agencies accountable as well as prevent infringement to the right to privacy and subsequently freedom of expression and media's rights on protection of sources, among others.