

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the draft Digital Security Act, which raises serious concerns for the exercise of freedom of expression and access to information in Bangladesh.

According to the information received:

On 29 January 2018, Bangladesh's Cabinet approved a draft of the Digital Security Act 2018 ("the draft Act").

Bangladesh's Cabinet Secretary has stated that the draft Act is necessary to address an increase in cybercrimes and thefts of Bangladesh's Bank Reserves.

As it currently stands, the draft Act would, if approved, repeal and replace sections 54, 55, 56, 57 and 66 of the outgoing Information and Communication Technology ("ICT") Act. Additionally, criminal proceedings under the outgoing section 57 of the ICT Act will remain active and continue.

The draft Act would criminalize the use of electronic devices to: "ruin [...] communal harmony or create [...] instability or disorder or disturb [...] or is about to disturb the law and order situation", punishable by imprisonment of up to 7 years under section 31; harm "religious sentiments", punishable by imprisonment of up to 10 years under section 28; cause incitement "against another person or organization", punishable by imprisonment of up to 3 years under section 25; and carrying out acts of defamation, punishable by imprisonment of up to 3 years under section 29. Each of these offences, as approved, are derived from sections of the controversial, outgoing section 57 of the ICT Act which reportedly has been used to prosecute more than 700 cases since 2013.

Further, the draft Act would criminalize the use of digital devices to spread "propaganda and campaign against the liberation war of Bangladesh or spirit of the liberation war or Father of the Nation". This offence is punishable by imprisonment of up to 14 years under section 14 of the draft Act.

The draft Act also precludes certain of the offences from bail (sections 17, 19, 21, 22, 23, 24, 26, 27, 28, 30, 31, 32 and 34).

If a police officer believes that an offence outlined by the Act is being committed or that there is a possibility of evidence being destroyed, they are not required to obtain a warrant from the courts in order to arrest suspects and perform a search of their belongings (section 43).

While we do not wish to prejudge the accuracy of these allegations, we are concerned that the draft Act could be used to chill and penalize the legitimate exercise of the right to freedom of expression. Before explaining our concerns, we would like to reiterate your Excellency's Government's obligations to respect and protect the right to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by Bangladesh on 6 September 2000.

Article 19(1) of the ICCPR guarantees that all individuals "shall have the right to hold opinions without interference". Article 19(2) of the ICCPR provides that "[e]veryone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." State Parties have a positive obligation to respect and ensure that those who "impart information" on matters of public interest enjoy an environment that promotes these actions because a "free, uncensored and unhindered" press is essential to the public's enjoyment of the right to seek, receive, and impart information along with the enjoyment of other ICCPR rights (CCPR/C/GC/34).

The right to freedom of expression under Article 19 may only be restricted in accordance with Article 19(3). Article 19(3) states that restrictions must be "provided by law" and "necessary for respect of the rights or reputations of others" or for the "protection of national security or of public order (ordre public), or of public health or morals." It is not enough that these restrictions on the right to freedom of expression be enacted as domestic laws or regulations in order to satisfy the requirement that they are "provided by law". In order to comply with the requirements of Article 19(3), restrictions on the right to freedom of expression must be sufficiently clear, accessible, and predictable for the public to properly regulate its conduct. Finally, these laws restricting the right to freedom of expression must not confer "unfettered discretion" on those "charged with its execution" (CCPR/C/GC/34). The requirement of necessity implies that restrictions must be proportionate, in particular, they must be "the least intrusive instrument" among those which might achieve the desired result and must be "proportionate to the interest to be protected" (CCPR/C/GC/34) and (A/HRC/17/27). The principle of proportionality "must also take account of the form of expression at issue as well as the means of its dissemination" (CCPR/C/GC/34). The criteria for restrictions online are the same as for those offline.

The UN Human Rights Committee has concluded that defamation laws must be “crafted with care to ensure they comply with” Article 19(3). Such laws are more likely to be considered proportionate if they include defences such as the defence of truth or a defence for “public interest in the subject matter of the criticism” (CCPR/C/GC/34). The Committee has also urged States to “consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty” (CCPR/C/GC/34). The UN Special Rapporteur on freedom of expression has also observed that “[d]efamation concerns are not as strong on the Internet where the concerned individual can immediately reply to the article to address the harm caused. Similarly, protection children from inappropriate conduct online can be accomplished through the use of software and does not require significant government intervention to achieve (A/HRC/27/17).

Regarding restrictions on government criticism and historical facts, the Human Rights Committee has concluded that “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition” (CCPR/C/GC/34). Accordingly, the Committee has also asserted that laws “penaliz[ing] the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression” (CCPR/C/GC/34).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

Based on the human rights law and standards discussed above, we are concerned that the draft Act affords your Excellency’s Government broad discretion to unduly penalize individuals for holding or sharing personal opinions, creating a chilling effect on legitimate exercises of the right to freedom of expression.

Speech and Content-Related Offenses Punishable with Criminal Penalties

The imposition of criminal offenses for various types of speech is in and of itself concerning, given the range of less punitive measures available to your Excellency’s Government – such as for example civil liability or educative measures. We are particularly concerned that section 29 of the draft Act imposes criminal liability and up to 3 years’ imprisonment for acts of defamation, in potential conflict with the Human Rights Committee’s observations that States parties should decriminalize defamation.

Excessive Severity of Criminal Penalties

Although the protection of public order and respect for the rights and reputations of others are legitimate aims for restriction under Article 19(3), the draft Act appears to be overzealous in its attempts to accomplish these aims. For example, section 28 of the draft Act would impose a prison sentence of up to 5 years for speech that “injures religious feelings”. Similarly, section 31 would authorize the imposition of a prison

sentence of up to 10 years for speech that “ruins communal harmony” or “creates instability”. Finally, section 29 of the draft Act like section 57 of the ICT Act before it, criminalizes online defamation, an act that is considered a civil liability issue in many other countries. These criminal penalties, particularly the possibility of custodial sentences, significantly outweigh the gravity of the underlying act, and may operate as a significant deterrent on people’s ability to exercise their right to freedom of expression.

Vague provisions in the Draft Act

The draft Act falls short of Article 19(3)’s requirement that restrictions on the right to freedom of expression be “provided by law” because many sections of the draft Act contain vaguely defined terms and enforcement authorities are empowered with “unfettered discretion” to investigate, search and arrest individuals in pursuit of crimes accomplished via digital devices. We are particularly concerned that various sections of the draft Act criminalize large categories of speech in vague and broad terms. For example, section 25 criminalizes publishing information that is “aggressive or frightening” and section 31 criminalizes posting information online which “ruins communal harmony or creates instability or disorder or disturbs or is about to disturb the law and order situation” and speech that “creates animosity, hatred or antipathy among the various classes and communities”. Similarly, section 28 criminalizes speech that “injures religious feelings”. These provisions do little to provide individuals with sufficiently clear, accessible and predictable information to properly regulate their conduct. Instead, such vague language may allow for broad and unpredictable interpretations which could criminalize nearly all forms of legitimate expression. As a result, these provisions may create an environment that has a chilling effect on freedom of expression, and where journalists, academics and human rights defenders may be disproportionately affected.

Procedures for Investigating and Prosecuting Violations under the Draft Act

We are seriously concerned that section 43 of the draft Act provides your Excellency’s Government with “unfettered discretion” to search or arrest individuals in criminal investigations without seeking prior court approval in the form of a search or arrest warrant. We are concerned that such warrantless searches may be applied to anyone present in the place where the officer makes an arrest. Furthermore, many of the crimes recognized under the draft Act are classified as “non-bailable” offenses for which there is no recourse for defendants awaiting trial. In light of the above, we are concerned that the draft Act falls short of Article 19(3), and risks chilling expression by authorizing unwarranted arrests for indefinite periods of time without bail in violation of due process principles.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations
2. Please explain how the Digital Security Act 2018 complies with your Excellency's Government's obligations to respect and promote freedom of expression under the Covenant.

I would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the UN Special Rapporteur on freedom of opinion and expression:

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>

Your Excellency's Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Michel Forst

Special Rapporteur on the situation of human rights defenders