

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

REFERENCE: OL
BGD 5/2014:

12 December 2014

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the National Broadcast Policy**, which appears to unduly restrict the freedom of media to broadcast.

According to the information received:

The National Broadcast Policy, was adopted by the Government of the People's Republic of Bangladesh on 5 August 2014, and published in official gazette on 7 August 2014.

This new policy contains a number of positive aspects.

I welcome the reference, in section 1.1, to article 39 of the Constitution of the People's Republic of Bangladesh, which guarantees the right of every citizen to freedom of thought, conscience, speech and expression as well as the freedom of the press.

Similarly, I appreciate the inclusion, in section 1.2, of "ensuring [the] independence (...) of broadcast media" among the aims of the new policy. As the Human Rights Committee observed in its General Comment No. 34 (2011), "a free, uncensored and unhindered press or other media constitutes one of the cornerstones of a democratic society" and "is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights".

I also appreciate that section 1.2 includes the “upholding [of] fundamental rights and personal liberty” and respect for “international regulations and standards in expressing opinions through broadcast media and upholding its freedom” among the stated objectives of the new broadcast policy. This reference to international legal standards reflects the commitment of your Excellency’s Government to promote and protect this right, as well as its recognition that these freedoms represent necessary conditions for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.

Notwithstanding these positive aspects, the new Policy contains a number of problematic provisions, which appear to unduly restrict the right to freedom of expression and opinion. In a spirit of co-operation and dialogue, and in line with the mandate entrusted to me by the Human Rights Council, I would like to bring to the attention of your Excellency’s Government the following concerns, which can be divided into three different categories:

1. Compulsory provisions

Article 19, paragraph 3, of the International Covenant on Civil and Political Rights, ratified by your Excellency’s Government in 1980, expressly lays down the conditions subject to which the right to freedom of expression may legitimately be restricted. First, restrictions must be ‘provided by law’; second, they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and third, they must conform to the strict tests of necessity and proportionality.

In my opinion, a number of provisions of the National Broadcast Policy, 2014, contain restrictions to the exercise of the freedom of media which do not appear to be in line with the provisions of article, 19, paragraph 3, of the Covenant.

Some provisions use terms which are vague and subject to overly broad interpretation or application. These include:

- section 3.2.1, according to which no programme or advertisement can broadcast any statement against the state and “public interest”;
- section 3.2.2, which prohibits providing “misinformation” or “distorted truth” in discussion programmes;
- section 3.6.5, which prohibits the broadcasting of programmes that display “criminal strategies that can help [raise] new ways [of] committing crimes”;
- section 4.2.8, which prohibits the broadcasting of scenes that are “damaging or unfriendly to the environment”;

- section 4.4.1, which prohibits the broadcasting of scenes where children are “causing chaos”;
- section 4.5.3, which prohibits the advertisement of any club or association which is not “socially or legally recognised”.

These provisions do not fulfil the strict requirements of article 19, paragraph 3. In particular, these provisions do not clarify what they intend to prohibit, leaving those subject to the jurisdiction of your Excellency’s Government uncertain about what is permitted and what prohibited. Statements and terms such as “against the state and public interest”, “misinformation” and “distorted truth”, “criminal strategies that can help [raise] new ways [of] committing crimes”, or clubs or associations that are “not socially recognised” do not clearly indicate their scope or object.

Other provisions are formulated in such a way that their scope and application remain unclear. These include:

- section 4.4.2, which prohibits advertisements that may cause a child “to be harassed in idealistic, mental or physical way”;
- section 4.4.5, which prohibits “any scene that inflicts mental stress on [children], old persons or ill persons”.

From the reading of section 4.4.5, for example, it remains unclear whether the prohibition refers to showing images of children, older persons or ill individuals who are in mental stress, or to showing images that can cause mental stress on these groups of individuals. Furthermore, the term “mental stress” is in itself ambiguous, since the level of mental stress that an image or programme can cause varies in accordance with the age and sensitivity of a person.

In this regard, I wish to recall that the Human Rights Committee stated in its General Comment No. 34 that to be characterized as a ‘law’, a norm “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”.

Furthermore, again as noted in General Comment 34, a law “may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”. On the contrary, it must provide “sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not”.

2. *Advisory provisions*

There are a number of provisions in the National Broadcast Policy that aim at providing guidance to the media and advertisement companies in order to

preserve “the culture, heritage, regional cultures, history, ideology and spirit of the great liberation war, social values and state principles of Bangladesh” by (cfr. section 1.2.11). These provisions include:

- section 3.2.3, which provides that “government-approved programmes of national interest”, such as speeches of the head of the state and the government or emergency weather update, should be broadcasted/circulated “in appropriate manner”;
- section 3.3.1, which provides that any programmes should uphold “the spirit and ideology of liberation war, fundamental principles of State policy and state ideology and principles of Bangladesh”;
- section 3.3.2, which requires programmes broadcasted on various national holidays to do so “with appropriate dignity”;
- section 3.4.1, which provides that programmes should “reflect the country’s culture, tradition and ideology”;
- section 3.4.4, which requires media broadcast to ensure the appropriate pronunciation of Bangla and avoid foreign accent in order to “prevent contamination of Bangla language and distorted pronunciation”;
- section 4.3.1, which requires that advertisements avoid referring to nationalistic subjects (e.g. national leaders, liberation war or national holidays) “to retain the integrity and auspiciousness of the events”;
- section 4.3.2, which provides that “advertisements that are conflicting with the culture of Bangladesh (...) or causing distortion of culture should be avoided”;
- section 5.1.1, which prevents broadcasting of programmes containing “mockery or derogatory remarks about the people of Bangladesh or disrespect of the national character of Bangladeshi people”.
- section 5.1.2, which prevents broadcasting which “depicts disunity or mass distrust”
- section 5.1.11 which provides that programmes that may create dispute or segregation among followers of different religions should be avoided.

It is debatable whether these provisions contain actual restrictions to the right to freedom of expression. One could argue that these provisions do not impose actual obligations, but aim to provide guidance to the media on how to report on certain issues of particular importance for Bangladesh. The use of the auxiliary verb “should” seems to support the advisory nature of these provisions. However, the very fact that doubts exist on their actual nature may result in a climate of

intimidation of the media which would, in turn, result in a de facto restriction of the freedom of media.

If these provisions are construed as introducing actual restrictions to the right to freedom of expression, it would be doubtful whether they could be justified in the light of the permissible exceptions set out in subparagraph (b) of article 19, paragraph 3 of the Covenant (protection of national security, public order (...) or morals).

It may be argued that at least some of the grounds for restriction in the provisions referred to above (see for example the reference to the culture, tradition and ideology of the country) cannot be construed as permissible exceptions pursuant to article 19, paragraph 3, of the Covenant.

Finally, whatever the nature of these provisions, the ambiguous way in which they are drafted makes it difficult, if not impossible, to ascertain which conduct is permissible or not, thereby conferring an overly broad deference to those entrusted with the implementation of the policy.

For example, it would be difficult to identify standards to determine whether a TV programme reflects the fundamental principles of state ideology or the culture of Bangladesh, since the policy does not provide any relevant guidance.

Furthermore, many of these provisions aim at protecting only the social, cultural, philosophical and religious values of Bangladeshi people, and prove problematic when assessed against the overarching principles of discrimination and equality set out in article 2, paragraph 1, and 26 of the Covenant. In this regard, the Human Rights Committee affirmed in General Comment No. 34 that “laws restricting the rights enumerated in article 19, paragraph 2, (...) must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant”.

With regard to the concept of morals, the Human Rights Committee has observed in General Comment No. 22 that “the concept of morals derives from many social, philosophical and religious traditions”, and that consequently, limitations for the purpose of protecting morals “must be based on principles not deriving exclusively from a single tradition”. Furthermore, the Human Rights Committee pointed out that any such limitations “must be understood in the light of universality of human rights and the principle of non-discrimination”.

3. Penalties for non-compliance

The National Broadcast Policy, 2014, does not introduce any penalty for the violation of its provisions. Reportedly, the Minister of Information, H.E. Mr.

Hasanul Haq Inu, publicly stated on 11 August 2014 that the Policy aims to provide guidance to broadcast and advertising companies, rather than imposing legally binding obligations. This could be the case for some of the provisions I have referred to in part 2 of this letter. However, all the provisions mentioned in part 1 introduce actual restrictions to the right to freedom of expression.

Section 1.3.2 of the National Broadcast Policy states that an institutional structure and necessary laws and regulations for the implementation of the policy will be developed in the future.

In particular, chapter 6 of the policy provides that a Broadcast Commission will be established by law to receive complaints about programmes, information and advertisements from “the people” and to “take action based on the complaints” (sections 6.1.1 and 6.1.3). Pursuant to sections 6.2.1 and 6.2.3, the Broadcast Commission will take “appropriate measures” against individuals and broadcast or advertising companies who have violated the policy, and will ensure the imposition of appropriate penalties, which will be determined by the law establishing the Commission. The Broadcast Commission will also be able to send “recommendations to the Government” on the “necessary measures” to take against these companies or individuals (section 6.1.7, letter (d)).

According to section 7.5, the Ministry of Information “will provide necessary decisions regarding all relevant issues” until the Act, Rule and Policy regarding broadcast and broadcast commission are enacted. The Ministry can also adopt decisions “on any matter relating to broadcasting that is not mentioned in the policy” (section 7.4). Taken together, these provisions seem to suggest that the Ministry may take measures against individuals and broadcast or advertising companies who have violated the policy, and ensure the imposition of penalties even in the absence of the appropriate legislation referred to in section 6.2.3.

Altogether, references to future legislation to determine penalties for the violation of the policy and the wide powers conferred to the Ministry of Information up until the adoption of this legislation are sufficient to create a deterrent effect that may be used against the media and restrict its freedom of expression on particularly sensitive subjects.

In view of all of the aforementioned comments, I would like to call on your Excellency’s Government to take all steps necessary to conduct a comprehensive review of the National Broadcast Policy, 2014, ensuring its compliance with international human rights standards.

It is also my responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to my attention. Therefore, I would be grateful for any additional information and any comment you may have on the above mentioned allegations. I also welcome any clarifications on measures taken to ensure the compliance of the National Broadcast Policy with Bangladesh’s obligations under

international human rights law and standards, particularly with regard to the right to freedom of opinion and expression. I would also be pleased to meet with representatives of your Excellency's Government in order to discuss the Policy in the context of the concerns noted above.

I would welcome a response within 60 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

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