

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

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(Please use this reference in your reply)

6 February 2023

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 43/4.

The purpose of this letter is to share with you my comments, concerns and advice regarding Bangladesh's proposed **Telecommunication Regulatory Commission regulation for digital, social media, and OTT platforms** (the "draft Regulation"), which was published online on 3 February 2022.

While recognizing the concerns regarding the societal impact of different forms of information, including on the online safety of children and other vulnerable groups that has led your Excellency's Government to propose this Regulation, I believe that the current draft contains some key provisions that could undermine this intended objective, as well as infringe international human rights rules and principles. In particular, the draft Regulation uses vague and broadly worded terms that would create legal uncertainty and risk incentivising the removal of legal content targeting both illegal and legal content that is perceived as harmful in potential violation of international human rights principles. I am concerned that your Excellency's Government is adopting a model of regulation where government agencies and private companies, rather than judicial authorities, effectively would become the arbiters of lawful expression. I am also concerned that the consultation process would not have involved a sufficiently broad diversity of relevant stakeholders.

According to the information received:

On 18 January 2021 the Supreme Court of Bangladesh issued an order to formulate guidelines for the regulation of OTT **Platforms to address obscenity in online platforms and to collect revenue**.

Subsequently, the Bangladesh Telecommunication Regulatory Commission (BTRC) published the draft Regulation on their website, followed by consultation in February and March 2022. The final version of the draft was submitted to the High Court in October 2022. The case will reportedly be heard at the end of February 2023.

Before explaining my concerns with the proposed Regulation, I wish to recall the obligations under article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh acceded on 6 September 2000.

Article 19(2) establishes State Parties' obligations to respect and ensure the right "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."

Article 19(3) sets out p the permissible restrictions on freedom of expression. There are three key elements to the restrictions.

First, restrictions must be “provided by law.” In evaluating the *provided by law* standard, the Human Rights Committee has noted that any restriction “must be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”.¹ Moreover, it “must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”.²

Second, restrictions must only be imposed to *protect legitimate aims*, which are specified under article 19(3) as “respect of the rights or reputations of others” or “the protection of national security or of public order (*ordre public*), or of public health and morals”. The term “rights...of others” under article 19(3)(a) includes “human rights as recognized in the Covenant and more generally in international human rights law”.³

Third, restrictions must be *necessary to protect one or more of the legitimate aims*. The requirement of necessity implies an assessment of the proportionality of restrictions in relation to the objective, must be “the least intrusive instrument among those which might achieve the desired result”.⁴

In light of these well-established standards under international human rights law, the draft Regulation raises the following concerns:

Broad scope of application

Any “Internet based service provider” distributing “content, a service or an application that is provided to the end-user over the public internet” falls within scope pursuant to section 1(3) of the draft Regulation. Additional requirements are placed on any “intermediary”, defined as “any person who on behalf of another person receives stores or transmits electronical records or provides any service with respect to such records and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online-market places and cyber cafes” (section 2.01(h)). Although social media intermediaries are not defined, they are explicitly included within the scope of the draft Regulation in section 6.01 and subject to additional requirements pursuant to section 7.

I am concerned that the draft Regulation would apply to an unduly broad array of online services providers and risks imposing disproportionate restrictions on small private intermediaries and non-profits.

Registration requirement

Section 4.01 of the draft Regulation requires “publishers” of online news, “curated content” or “web based programs” (including social media) to register with

¹ CCPR/C/GC/34.

² CCPR/C/GC/34.

³ CCPR/C/GC/34.

⁴ CCPR/C/GC/34.

the BTRC after obtaining a “no objection” certificate from the Ministry of Information.

To protect freedom of expression, international standards require the media to be operated independently of governmental control in order for the public to receive access to a wide range of opinions, especially on matters of public interest. Furthermore, as noted in the 2005 Joint Declaration of the special rapporteurs on freedom of expression, “[n]o one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting.”⁵ In addition, blocking of entire websites, IP addresses, social media or other online media is an extreme measure that is analogous to banning a newspaper or broadcaster that can only be justified in accordance with international standards.⁶ I am concerned that the registration process outlined in the draft Regulation may not respect the requirements of independence or procedural fairness, and may lead to the stifling of diverse views by the provider in order to avoid suspension or termination of its services by the authorities.

Broad prohibition of online content

Section 6.01 of the draft Regulation requires intermediaries to adopt terms of service that forbid users to “host, display, upload, modify, publish, transmit, store, update or share” a very wide range of information. Examples of prohibited categories include information that is “racially or ethnically objectionable”; “harmful to child”; “threatens the unity...of Bangladesh, friendly relations with foreign states, or public order”; “offensive, false, or threatening and insulting or humiliating”; or “hurts religious values or sentiment”. Intermediaries must advise users that violation of the terms of service could result in termination of access or usage rights (section 6.01(c)).

In addition, intermediaries must take down content that violates *any* law upon receiving a court order or notification by the Bangladesh Telecommunication Regulatory Commission (BTRC) or any authorised governmental agency (section 6.01(d)).

Under international law, all restrictions on the operation of intermediaries have to comply with article 19 (3) of the ICCPR, including the principles of legality, legitimacy and necessity.⁷

Many of the categories of prohibited content in the draft Regulation are vaguely defined and therefore would be susceptible to subjective interpretations. Such broad and vague definitions as “racially or ethnically objectionable”, “offensive, false, or threatening and insulting or humiliating” or “hurts religious values or sentiment”

⁵ The Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on the Internet, 21 December 2005 (<https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/resources>)

⁶ Joint declaration on freedom of expression and the internet, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 22 May 2011 (<https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/resources>)

⁷ Human Rights Committee: The Human Rights Committee has concluded that, under article 19 of the ICCPR, “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3.”

are well beyond the restrictions permitted by international law and likely to result in over removal of content by intermediaries as well as self-censorship among users, thereby having a direct chilling effect on freedom of expression.

The vague and broad terms of the language used would create legal uncertainty, thereby rendering it inconsistent with the article 19(3) requirements of legality, necessity and legitimacy.

It is to be noted that, in its General Comment 34, the Human Rights Committee clarified that article 19 ICCPR protects a broad range of expression, including “political discourse, commentary on one's own and public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.”⁸ This includes information that may be regarded as offensive, false or untrue by some people but is considered legitimate political discourse by others.⁹

In addition, the draft Regulation does not definitively indicate whether intermediaries face liability for their decisions to host or remove content (section 6.01(d)). That adds to the legal uncertainty.

Automated content monitoring and removals

Under section 7.04, social media intermediaries are required to use tools to “proactively identify” images depicting rape, child sexual abuse, or previously removed content. Although the text does not explicitly refer to upload filters and other content recognition technologies, this requirement would indirectly establish a general monitoring obligation that is likely to lead to filtering at the point of upload. The legal uncertainty would create pressure on intermediaries to err on the side of caution and implement content recognition technologies that risks censoring expression protected by article 19 of the ICCPR at the point of upload without adequately considering the context, e.g. fair comment, reporting, teaching, criticism, satire or parody. Content would be blocked with limited due process, which amounts to prior restraint and is an unjustified form of restriction on free expression.

Pursuant to section 6.01(d) of the draft Regulation, intermediaries must comply with court orders or notification by the BTRC for the removal of content that violates the Regulations or *any law* in force, within a timeframe of 72 hours. The Regulations would give the authority to issue take-down orders to the BTRC and governmental agencies without judicial oversight. Under international standards, content removal must be undertaken “pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy”.¹⁰

Additionally, creating obligations on companies to monitor and quickly remove user-generated content is likely to undermine the right to freedom of expression as intermediaries would feel pressured to excessively comply automatically with all takedown requests irrespective of merit, thereby over-restricting content without sufficient human oversight.

⁸ CCPR/C/GC/34 para 11.

⁹ CCPR/C/GC/34, paras. 11 and 49.

¹⁰ A/HRC/38/35, para. 66,

Retention requirement

Section 6.01(f) of the draft Regulation requires intermediaries to preserve any information that has been removed after a removal order from the authorities, and associated records, for a period of 180 days “for investigation purposes”. Section 6.01(g) requires the intermediary to preserve the registration information of users for 180 days after the cancellation or withdrawal of his registration.

Laws that require private actors to create large databases of user data accessible to the government raise concerns related to the principles of necessity and proportionality. In addition, States are required pursuant to article 17(2) of the ICCPR to regulate, through clearly articulated laws, the recording, processing, deletion, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as by private parties. There seems to be a lack of clear provisions to protect information gathered as a result of the Regulation, including guidance on the collection and retention of data by private companies and State authorities, as well as a proscribed process for mandatory deletion.

Undermining encryption

Section 7.03 of the draft Regulation requires a social media intermediary that provides messaging services, to enable “the identification of the first originator of the information on its computer resource as may be required by a judicial order passed by a court of competent jurisdiction or an order of the BTRC, which shall be supported with a copy of such information in electronic form (...)”.

The privacy and digital security implications of these provisions may have a potential chilling effect on freedom of expression. Intermediaries should only be compelled to release user data when ordered by judicial authorities certifying necessity and proportionality to achieve a legitimate objective.¹¹ The vaguely worded grounds for exercising the powers granted under these sections leaves open the possibility of the arbitrary exercise of executive authority, particularly in the absence of judicial oversight. These broad powers may result in the arbitrary targeting of anyone who may critically report on the government’s actions, including journalists, human rights defenders or political opponents.

These provisions would not be compatible with end-to-end encryption and anonymity tools. Encryption and online encryption are protected by international standards due to their critical importance in ensuring the rights to privacy and freedom of expression online.¹² Weakening end-to-end encryption poses unacceptable risks for everyone by creating opportunities to bypass existing protection that can be exploited by third parties. Users therefore risk being exposed to undue surveillance by both government and non-governmental actors, which can deter individuals from exercising their right to hold and share opinions that are protected under international law.

In the draft Regulation, grounds to order the tracing of a message’s first originator include “prevention [and] detection” of certain crimes as acceptable purposes for ordering the tracing of a message’s first originator, which is unacceptably vague and open to misuse. In addition, where the first originator is

¹¹ A/HRC/35/22, at para. 19.

¹² A/HRC/29/32.

located outside Bangladesh, liability is automatically assigned to the first individual within Bangladesh who retransmits the message.

Finally, the section might simply be incompatible with the services of some of the major social media and private messaging intermediaries, potentially leading to the withdrawal of such services from Bangladesh, negatively impacting connectivity, the free flow of information and ideas, and access to information, and affecting economic and social activities.

Code of Ethics in relation to digital media

The draft Regulation requires “publishers of news and current affairs content; publishers of online curated content” and “Web based programs/films/series” (section 8.01) to “perform and be loyal” to any directives/instructions/order/Code of Ethics published by the Ministry of Information (section 9.01). The Code of Ethics will apply to any “publisher” that “operates in the territory of Bangladesh” (meaning that it “has a physical presence in the territory of Bangladesh”) or “conducts systematic business activity of making its content available in Bangladesh” (defined as “any structured or organized activity that involves an element of planning, method, continuity or persistence”) (section 8.02).

The Ministry of Information will “co-ordinate and facilitate the loyalty to the Code of Ethics” by “publish[ing] a charter for self-regulating bodies”, “establish[ing] an Inter-Ministerial Committee for hearing grievances”, “refer[ring] to the Inter-Ministerial Committee” unresolved grievances and potential violations of the Code of Ethics “as it may consider necessary”; “issu[ing] appropriate guidance and advisories to publishers” and “issu[ing] orders and directions to the publishers for maintenance and loyalty to the Code of Ethics” (section 9.01-9.04).

The Code of Ethics, which is not yet available at the time of writing, may be used to exert control over online content through an opaque process that will not be subject to judicial or parliamentary oversight. The Ministry would be able to adopt and revise new rules for online content at its sole discretion and would wield significant power over online “publishers” which may feel obliged to adhere to them for fear of being referred to the Inter-Ministerial Committee for violations. No information is provided regarding the composition of the Inter-Ministerial Committee or its process for receiving or reviewing complaints, thereby heightening my concerns regarding the potential for abuse of process.

Enforcement

Through a simple “written request” to the BTRC, the Ministry of Information will be empowered under the proposed Regulation to “stop/block/remove any content which threatens the sovereignty, integrity, or security of Bangladesh, international relations, public order or causes incitement to the commission of any cognizable offence or prevents investigation of any offence or is insulting other nation or creates enmity, hatred, or hostility among different classes or communities of the society or destroys communal harmony or creates unrest or disorder or deteriorates or advances to deteriorate the law and order situation” (section 10). The BTRC’s authority to “stop/block/remove” content is derived from the pre-existing Bangladesh Telecommunication Regulatory Act 2001 (as amended 2010), section 66A.

In “any case of emergency nature”, the BTRC may further block information where it is within the grounds set out in section 141A of the Constitution of the People’s Republic of Bangladesh and submit a “specific recommendation” under section 8 of the Digital Security Act, 2018 (section 11.01).

In addition, the Digital Security Agency may “in case of emergency nature”, where it is “necessary and justifiable”, block access to any online content, and issue interim measures to the “persons, publishers or intermediary” “without giving him an opportunity of hearing” (section 11.02).

The sections above may violate the requirements of article 19(3) with respect to restrictions on free expression: namely, that a law must not confer “unfettered discretion” on those “charged with its execution”.¹³ Further, the sections appear to infringe the principle of proportionality under article 19 ICCPR, which requires that restrictions must be “the least intrusive instrument” among those which might achieve the desired result and must be “proportionate to the interest to be protected”.¹⁴

As noted in the Preamble of the draft Regulation, significant powers have already been delegated to the BTRC pursuant to the Bangladesh Telecommunication Regulation Act 2001 (as amended in 2010) and the Digital Security Act 2018. My predecessor has expressed concern that Bangladeshi authorities require only executive branch approval to access communications data on the grounds of security and public order, and I reiterate this concern.¹⁵ I encourage your Excellency’s Government to carefully review and clarify the delineation between these laws and the authorities of the BTRC and Ministry of Information, as well as the draft OTT Regulations issued by the Ministry of Information to ensure their conformity with international standards.

Violations of the draft Regulation are subject to the sanctions set out in section 64 and 66 of the Bangladesh Telecommunication Regulation Act, 2001, which can include heavy fines or imprisonment. An employee may be held personally liable if they “failed to ensure due diligence while discharging its duties under the Act and rules made hereunder” (section 7). I encourage your Excellency’s Government to refrain from imposing disproportionate sanctions on intermediaries, particularly criminal liability, given their significant chilling effect on freedom of expression.¹⁶

Concluding observations

In light of the above, I call on your Excellency’s Government to reconsider its approach to regulating online content.

Although the BTRC has been reviewing new content regulation since at least January 2021 when the High Court Division issued a directive calling for regulation to address online content and OTT, my understanding is that there has been limited opportunity for broad public participation in consultations or public hearings. I therefore encourage your Excellency’s Government to undertake further review and consultation on the draft legislation through a public and inclusive process. The process should include public consultations, with both governmental and non-governmental stakeholders, including civil society and the private sector working in

¹³ CCPR/C/GC/34.

¹⁴ CCPR/C/GC/34 and A/HRC/17/27.

¹⁵ A/HRC/35/22 at para. 19.

¹⁶ A/HRC/38/35.

the area of freedom of expression, privacy and digital rights, as well as representatives of vulnerable and marginalised groups. I believe that such stakeholder consultations are critical to ensure that the final text is compatible with Bangladesh's international legal obligations, in particular with articles 17 and 19 of the ICCPR. As well, I encourage your Excellency's Government to clarify how the Regulation will relate to other existing or proposed content regulation, in particular the draft OTT Regulations recently published by the Ministry of Information and Broadcasting.

In addition, I encourage your Excellency's Government to publish detailed transparency reports on all content-related requests issued to intermediaries, whether under the Regulation as adopted or otherwise, and to ensure adequate opportunities for users to challenge and/or appeal decisions made with respect to their data.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis of the Draft Regulation.
2. Please provide your observations on how the Digital, Social Media, and OTT Platforms Regulation is consistent with your Excellency's Government's obligations under international human rights law, especially the requirements of articles 17 and 19 of the Covenant.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I stand ready to provide Your Excellency's Government with any technical advice it may require in ensuring that the Regulation is fully compliant with international human rights obligations.

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

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