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Upholding right to freedom of expression through Internet

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In Bangladesh, like in many countries of the world, the Internet has fast become one of the key instruments for the exercise of the right to freedom of expression. It combines within one medium the means to receive as well as express and disseminate information, ideas and opinions, be it in the form of writing or multimedia.

Freedom of expression and privacy are fundamental human rights guaranteed in our constitution. More than ever, technological advances, particularly the Internet, make it easier for people to publish and respond to news, information and opinions. It is now the common view shared by many legal intellectuals around the world that the governments should cooperate to improve respect for international human rights principles and to fashion regulations that take account of the Internet's global scope.

There are few countries like Bangladesh which have adopted laws to control Internet's content. From the human rights perspective, any regulation of Internet ought to balance between privacy

and freedom of expression. The privacy issues at stake so far have been (i) how to ensure the privacy of personal data and (ii) how to balance the privacy of communication against law enforcement's need for interception and access to online communications. The content issues have been (i) how to control illegal content and (ii) how to control legal but potentially harmful content without unduly infringing on the right to freedom of expression. In Bangladesh, the laws relating to the operation and blocking of websites/putting restriction on internet access are contained, inter alia, in the ICT Act 2006, the relevant provisions of which are as follows:

* **Section 46** of the Act provides powers for the government to block any website on the grounds of sovereignty, integrity, security of the state, public order and safety and 'the prevention of incitement of any offence under the Act.'

* **Section 57** establishes several offences under the Act including among others acts whereby any person who 'sees, hears or reads any website or electronic communication and is thereby encouraged to become immoral or dishonest,' or 'any harm is caused to the image of the country or of any person.'

Section 46 of the Information and Communications Technology Act, 2006 (Act 39 of 2006), purports to grant wide and unfettered powers to the government to direct any law enforcing agency by issuance of an order with written reasons to restrict imparting of information through any computer resource if in their opinion such prevention is necessary and reasonable on a wide array of grounds, including sovereignty, integrity and security of the state, maintaining friendly relation with other states, public order and security and to prevent incitement of any offence under the Act.

Section 57 of the ICT Act 2006 is framed in vague and uncertain terms and purports to penalise the intentional publication or circulation of any information which is false, obscene or of such nature that in a given context any person reading, hearing or viewing the same may be caused to suffer a moral lapse or become dishonest, or which results in defamation, or causes or is likely to cause deterioration of public order, or hurt the image of the state or any person, or hurts or is likely to hurt religious sentiments, or creates any incitement to violence against any person or association. Section 46 read with Section 57 of the ICT Act confers upon the Bangladesh Telecommunications Regulatory Commission (BTRC), respondent no. 3, a wholly unfettered discretion to restrict and prevent access to websites and to penalise the dissemination or communication of information through websites, based solely on his/her subjective satisfaction, which is arbitrary and capricious, and violative of the fundamental rights guaranteed under Articles 38, 39 and 43 of the Constitution of Bangladesh.

On May 29, 2010, the social networking website 'Facebook' (www.facebook.com) was blocked wholesale by the Bangladesh Telecommunication Regulatory Commission (BTRC) on the basis that some “unethical” pictures of Prime Minister of Bangladesh Sheikh Hasina had been uploaded on Facebook by someone.

Thereafter, a writ petition (No. 4719 of 2010) was filed on June 6, 2010, challenging the ban then imposed on access to Facebook, and also challenging the constitutionality of Sections 46 and 57 of the ICT Act. As Facebook access was restored at 11pm on the day before the writ was filed, the petitioners did not pursue the issue of the ban in the hearing. They, however, continued their challenge to the ICT Act provisions, comparing it to similar, but far less draconian, legislation from other countries. They asked the Court to strike down these provisions as being unconstitutional, focusing on it being a breach of the fundamental right to freedom of expression. Article 19 of the Constitution guarantees the right to freedom of expression. It clearly provides that while this right may be restricted, any such restriction must be 'reasonable,' 'prescribed by law' and further have a nexus/connection to specific constitutionally permissible grounds (for example, that it does not amount to defamation or incitement to an offence).

Analysing the challenged sections, the petitioners pointed out that these provisions are vague and uncertain in their terms, and incapable of definition; they provide the government with arbitrary powers as there is no objective standard or guideline to ascertain when these offences have been committed; they are unreasonable and there is no objective basis or guideline for determining when these provisions would apply; the penalties prescribed are disproportionate to the offence; they violate fundamental rights to freedom of expression, freedom of association, the right to be treated in accordance with law, guaranteed under Articles 39, 38 and 31 of the Constitution, and Article 19 of the International Covenant on Civil and Political Rights.

After hearing the petitioners on July 26, 2010, the High Court directed the Ministry of Information & Communication Technology among others to show cause as to why Sections 46 and 57 of the ICT Act 2006, allowing for blocking of websites and electronic communications, and providing for prosecution of certain offences, should not be held to be ultra vires (beyond the authority) of the Constitution, and in violation of fundamental rights to freedom of expression and freedom of association.

Recently, the cabinet approved the draft of the ICT (Amendment) Ordinance-2013 proposing to empower law enforcing by transforming the bailable offences to non-bailable, the non-cognisable offences will become cognisable and the highest punishment will go up from 10 years to 14 years imprisonment. As a result, this new amendments will make the law even more draconian and curtail freedom of speech and expression even further.

Any content regulation must not fall below the standards set by international human rights law, and must take into account the special nature of the Internet.

While states can legitimately take action to regulate Internet content, under international human rights law any limitations on expression must remain within the strict parameters set by Article 19(3) of the International Covenant on Civil and Political Rights:

[Restrictions on the right to freedom of expression] shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (order public), or of public health or morals.

This means that any restriction must meet a strict three-part test, as recognised by the Human Rights Committee. Any restriction must (a) be provided by law; (b) be for the purpose of safeguarding one of the legitimate interests listed; and (c) be necessary to achieve this goal. However, any legislation aimed at regulating Internet content should furthermore recognise that the Internet is not like any other medium. In many cases, it will not be possible to extend general norms to the Internet, or to apply the standards that are normally applied to, for example, broadcasting, to Internet content. The special nature of the Internet will need to be taken into account.

The Internet offers great potential for the exercise of the right to freedom of expression and freedom of information. However, like any tool for expression, it can be used in good and in bad ways. Therefore, attempts to regulate Internet content as well as access to the Internet have tended to focus on restricting the availability of certain content and, in some cases, restricting access to the Internet altogether. While it is acknowledged that freedom of expression is not an absolute right, but that does not mean that the Internet should be used by governments as an excuse for curtailing existing liberties.

Bangladesh has taken no initiative yet to provide policy guidelines for internet governance and monitoring the compliance of internet governance in the country. It is high time for the government to take urgent initiative to work on this. Internet governance requires national guidelines on interoperability issues. However, there is no agency working towards building guidelines for solving interoperability issues.

Although the right to freedom of expression can be restricted, the circumstances under which this may be done have to be narrowly defined. It is necessary that national mechanisms give a clear indication of the extent to which regulation of the Internet is compatible with the international legal guarantee regarding freedom of expression.

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