

Advocacy Brief

PROMOTE DIGITAL CITIZENSHIP AMONG YOUTH IN BANGLADESH TO ACCELERATE FREEDOM OF EXPRESSION

01 OVERVIEW

Social media usage in Bangladesh is growing at an exponential rate, with over 9 million new users reportedly joining social media between 2020 and 2021, bringing the total number of users to 45 million.¹ However, the increased use of digital spaces such as social media has also been accompanied by novel legal restrictions regulating the type of content that can be shared on virtual platforms. The legal parameters of digital citizenship in Bangladesh were decisively set by the Digital Security Act 2018 (DSA), which has been criticised by a major NGO as “a big threat to democracy and the rule of law”.²

The objectives of this brief are twofold. Firstly, to identify pitfalls in the DSA and other related laws

which require urgent attention by formulating corresponding reform proposals. In this vein, the brief also provides recommendations for institutional reform, with a focus on law enforcement actions agencies. Secondly, to educate young people, including journalists and activists, on how to express themselves constructively in the digital sphere on social, cultural, economic and political issues without violating the law by outlining the legal restrictions, so they are able to conduct themselves as responsible digital citizens. Relatedly, parents, guardians and teachers may also use this brief to guide young people under their care to exercise their freedom of expression in the digital space constructively and safely.

02 METHODOLOGY

The preparation of this brief entailed legislative analysis of national laws regulating freedom of expression, such as the Penal Code 1860, Official Secrets Act 1925, Suppression of Violence Against Women and Children Act 2000, Bangladesh Telecommunication Act 2001, Pornography Control Act 2012, Children Act 2013, with a special emphasis on the Digital Security Act (DSA) combined with desk review of relevant secondary sources. These secondary sources include, but are not limited to a baseline study and formative research conducted by the Foster Responsible Digital Citizenship to Promote Freedom of Expression in Bangladesh (FRDC) project. A virtual consultation was held with experts to validate the key findings and recommendations of the brief, which was attended by Supreme Court lawyers, journalists and NGO activists. Further, this brief was then reviewed by independent experts.

03 KEY FINDINGS

▶ 3.1 FREEDOM OF EXPRESSION UNDER NATIONAL LAW

The Constitution of Bangladesh guarantees seventeen fundamental rights for all citizens.³ The freedom of thought, conscience, and speech is one such right, guaranteed by Article 39 of the Constitution. Article 39 allows this freedom to be limited only through ‘reasonable restrictions’ that must be imposed by law for seven specified reasons. These are: in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.⁴ Therefore, according to the Constitution, freedom of expression in Bangladesh can only be subjected to restrictions that have to be reasonable and fall into one of the seven specified grounds of restriction.

01. ‘Digital 2021: Bangladesh’, We Are Social and Hootsuite, <https://datareportal.com/reports/digital-2021-bangladesh>

02. ‘Article 19: DSA a big threat to democracy and the rule of law’, Dhaka Tribune (3 July 2021), <https://www.dhakatribune.com/bangladesh/2020/07/03/article-19-dsa-a-big-threat-to-democracy-and-the-rule-of-law>

03. Article 39, Part III, Constitution of Bangladesh.

04. Article 39(2), Part III, Constitution of Bangladesh.

**Finding
01**

Certain offences under the DSA pose an unreasonable restriction on the freedom of expression and their vague phrasing leaves room for misuse.

The DSA is of particular significance to digital citizenship and freedom of expression in social media as it has been repeatedly used to arrest citizens who expressed opinions on Facebook that were deemed to be defamatory to public officials or hampering the image of the state. Three open-ended provisions of the DSA are of particular significance as the ambiguous wording can subject even mild forms of dissent with severe penalties (Table 1). Additionally, a recent study suggests that Sections 25, 29 and 31 of the DSA were the three provisions under which individuals were most commonly arrested.⁵ It also found that 80% of cases under specific provisions of DSA recorded for trial by the Cyber Tribunal of Dhaka between January and May 2021, were filed under both Sections 25 and 29.⁶

Experts argue that the nature of the offences under the DSA, particularly Section 25, 29 and 31, violate the Article 39 of the Constitution as the restrictions are not reasonable and severely limit the fundamental right to thought, conscience and speech.⁷

From the numerous points of criticism, the following aspects can be highlighted: The fact that Sec. 25 prohibits "fear inducing" statements is considered as misguided and susceptible to abuse. The legal term is clearly too broad and covers legitimate concerns, especially since the "fear-inducing" statement does not have to be false. There may be good reasons to point out uncomfortable shortcomings and dangers, which then lead to justified concern among recipients. It is therefore a legal and legitimate exercise of freedom of expression. Moreover, it is not apparent that a statutory restriction provided for in Article 39(2) of the Constitution would cover fear-inducing statements. The "security of the state" can precisely be protected by references to grievances. Also, the restriction of "public order" has to be interpreted in accordance with Article 19 of the ICCPR as a sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.

The threat of punishment in Sec. 31 contradicts principles of the rule of law, because it fails to require a subjective element of fault. The subjective-intentional moment of sec. 31 refers only to the act of publishing or transmitting. A more proportionate regulatory alternative would have been that the conditions that should be prevented by Sec. 31 must be intentionally caused by the person making the statement. However, not all of the social conditions that are protected in detail can be based on the constitution's barriers. In particular, the case group of "communal harmony" does not constitute a concretization of the "public order" in Art. 39 sub. 2 of

Offence	Description	Punishment
Section 25. Publishing, sending of offensive, false or fear inducing data-information, etc.	(1) If any person in any website or through any digital medium- a. Intentionally or knowingly sends such information which is offensive or fear inducing, or which despite knowing it as false is sent, published or propagated with the intention to annoy, insult, humiliate or denigrate a person or b. Publishes or propagates or assists in publishing or propagating any information with the intention of tarnishing the image of the nation or spread confusion or despite knowing it as false, publishes or propagates or assists in publishing or propagates information in its full or in a distorted form for the same intentions.	Up to three years imprisonment and/or up to three lac taka fine.
Section 29. To publish, broadcast, etc., defamation information.	(1) If a person commits an offence of publication or broadcast defamatory information as described in section 499 of the Penal Code (Act XLV of 1860) in any website or in any other electronic format.	Up to three years imprisonment and/or up to five lac taka fine.
Section 31. Offence and punishment for deteriorating law and order, etc.	(1) If any person intentionally publishes or transmits anything in website or digital layout that 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.	Up to seven years imprisonment and/or up to five lac taka fine.

Table 1: Three key offences under the DSA

the constitution (see above). On the contrary, the core concern of the fundamental right of freedom of expression is to offer protection to persons who make inconvenient statements.

As currently designed, the requirements diminish the legal certainty of all persons who wish to offer critique or share controversial statements. In this way, a significant chilling effect is exerted on the exercise of freedom of expression, unconstitutional and also a violation of Bangladesh's commitments under international law.

05. No Space for Dissent: Bangladesh's Crackdown on Freedom of Expression Online, Amnesty (2021), 16.

06. Ibid.

07. Ibid; See also: Staff Correspondent, 'Digital Security Act: HC questions two sections', The Daily Star (25 February 2020), <https://www.thedailystar.net/frontpage/news/digital-security-act-hc-questions-two-sections-1872433>

Finding
02

For most offences under the DSA, the accused can be arrested without warrant and does not have a right to bail. Therefore, those accused of any of these offences can be arrested right away and detained in prison even if no warrant was obtained or no trial has yet been conducted, posing a threat to freedom of expression..

Substantive offences aside, the DSA is particularly controversial for the invasive procedural powers it affords to law enforcing agencies, such as the police. As shown in Table 2, the offences covered by fourteen provisions of the DSA are both cognizable and non-bailable, meaning arrest can be made by the police without even needing to obtain a warrant, and receiving bail is not a matter of right but judicial discretion.⁸ Therefore, anyone accused of an offence covered by any of these fourteen provisions can be arrested right away and detained in prison even if no warrant was obtained or no trial has yet been conducted. This shows the extremely harsh nature of the DSA, and goes against the government's commitment to reduce the number of under-trial detainees in prisons to meet Indicator 16.3.2 under Target 16.3 of the Sustainable Development Goals (SDGs) (which measures unsentenced detainees as a proportion of overall prison population), as arrests made relating to cognizable and non-bailable offences tend to contribute to prison overcrowding.⁹ Arguably, it also goes against

Article 31 of the Constitution which guarantees right to personal liberty as a fundamental right, and Article 9(3) of the ICCPR which prohibits detaining persons awaiting trial as a 'general rule'.

In the Official SDG Progress Report 2020, the Government of Bangladesh noted with concern that the proportion of un-sentenced detainees in the country was found to be as high as 83.60 per cent in 2018, which is more than double its target of reducing the figure to 40% by 2030.¹⁰ Therefore, it recognised the need for 'more intensified efforts in meeting the target'. One such effort could be to reform the DSA to make all offences under bailable and non-cognizable.¹¹

The offences covered by only six provisions of the DSA are non-cognizable and bailable, meaning that the police need to obtain a warrant before arrests are made, and arrestees have a right to bail.¹² Only one offence under the DSA is compoundable, meaning the complainant can opt to reach a compromise with the accused instead of pursuing it in court and

instead of pursuing it in court and seeking punishment.¹³ However, if any offence non-cognizable or bailable offence is committed by a person more than one time, then those too shall become cognizable and non-bailable.¹⁴

Additionally, Section 43 of the DSA grants police the power to search premises, seize devices, search and arrest individuals without so much as obtaining a warrant if they have 'reasons to believe that an offence under this Act has been or is being committed, or is likely to be committed in any place or any evidence is likely to be lost, destroyed, deleted or altered or made unavailable in any way'.¹⁵ Needless to mention, such a broadly worded provision granting sweeping powers to the police opens itself to misuse.

Offence	Whether a warrant is needed before accused can be arrested (i.e. non-cognizable offence)	Whether the accused has a right to bail (i.e. bailable offence)	Whether the case can be compromised between parties (i.e. compoundable)
Sections 17, 19, 21, 22, 23, 24, 26, 27, 28, 30, 31, 32, 33 and 34.	No	No	No
Sections 18(1)(b), 20 and 25, Sections 29 and 47(3)	Yes	Yes	No
Section 18(1)(a)	Yes	Yes	Yes

Table 2: Bail and warrants for offences under the DSA

08. Section 53(a), DSA.

09. SDG Indicator 16.3.2 measures un-sentenced detainees as a proportion of overall prison population.

10. Sustainable Development Goals: Bangladesh Progress Report 2020 (SDGs Publication No. # 23), General Economics Division, Bangladesh Planning Commission, Ministry of Planning, Government of the People's Republic of Bangladesh (2020), <https://www.sdg.gov.bd/re-source/108/0#1>.

11. Ibid.

12. Section 53(b) read with Section 53(c), DSA.

13. Section 53(c), DSA.

14. Section 53(d), DSA.

15. Section 43, DSA.

**Finding
03**

In addition to the DSA, there are at least six other laws, such as the Pornography Control Act 2012, which pose significant, lesser-known legal restrictions on the kind of content that can be shared and published, including in the digital space.

In addition to the DSA, there are various other national laws relating to freedom of expression and digital citizenship in Bangladesh (Table 3). There are certain other lesser-known laws which can also pose legal risks to the digital citizenry of young people. One such law is Section 14 of the Suppression of Violence against Women and Children Act 2000, which prohibits the disclosure of the identity of a rape survivor in print or electronic media. On the other hand, the Pornography Control Act 2012 also contains broad and open-ended provisions which criminalise the production, participation in and circulation of what is considered to be pornographic material. The Act defines pornography as ‘any obscene dialogue, acting, gesture, nude or half-naked dance that is sexually arousing, which is captured and displayed in movies, video images, audio visual images, still images, graphics or any other means and which has no artistic or educational value.’¹⁶ It is unclear what would be considered “sexually arousing” and the basis on which it would be assessed whether a certain form of media lacks artistic or educational value. Due to these ambiguities, in 2020, this Act was used to arrest a film director for directing a scene which depicted a rape survivor being harassed by the police as it was considered to be pornographic content.¹⁷

Law	Restriction imposed
Penal Code 1860	Prohibits defamation and libel
Official Secrets Act 1925	Prohibits disclosure of state secrets
Suppression of Violence Against Women and Children Act 2000	Prohibits publication of image or information of any victim of any crime covered by the law
Bangladesh Telecommunication Act 2001	Prohibits misuse of radio or telecommunication (e.g. sending false or obscene message)
Pornography Control Act 2012	Prohibits production, participation in and circulation of pornographic material)
Children Act 2013	Prohibits the publication of any report, photo or information relating to any ongoing cases under the Act which is against the interest of the child or makes them identifiable ¹⁸

Table 3: Laws regulating freedom of expression in Bangladesh

3.2. FREEDOM OF EXPRESSION UNDER INTERNATIONAL LAW

**Finding
04**

International human rights law, namely Article 19 of the International Covenant on Civil and Political Rights, requires state restrictions on freedom of expression to be reasonable.

Article 19 of the Universal Declaration of Human Rights (UDHR) grants everyone the right to freedom of opinion and expression, which includes the freedom to hold opinions without interference. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) further elaborates on the dimensions of this right by stating that it 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.’¹⁹ Like Article 39 of the Constitution of Bangladesh, Article 19 of the ICCPR allows the

right to freedom of expression to be restricted, but only if the restriction is provided by law, is in pursuance of a legitimate goal, namely (a) for respect of the rights or reputations of others or (b) for the protection of national security or of public order (ordre public), or of public health or morals; and 3. necessary (legitimate) with a view to these ends.²⁰ As the ICCPR was ratified by Bangladesh in 2000, the government must ensure that restrictions on freedom of expression meet the threshold set by Article 19 of the ICCPR.²¹

16. Section 2(c), Pornography Control Act 2012.

17. Pallavi Pundir, Bangladesh Police Invoked Anti-Porn Law to Crack Down on a Film About Gender Violence, Vice News (30 December 2020), <https://www.vice.com/en/article/g5bwpw/bangladesh-police-invoked-anti-porn-law-to-crack-down-on-a-film-about-gender-violence>

18. Section 81, Children Act 2013.

19. Article 19, ICCPR.

20. Article 19(3), ICCPR

21. For an overview of Bangladesh's ratification status of human rights treaties, see: 'Ratification Status for Bangladesh', UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN

**Finding
05**

Bangladesh has continuously expressed its commitment to protect freedom of expression in line with international human rights law but United Nations treaty bodies have expressed concern over the unreasonable restrictions in place.

The Government of Bangladesh has repeatedly made commitments at the international level to ensure the protection of freedom of expression of its citizens in line with safeguards under international human rights frameworks which it has ratified, such as the ICCPR. For instance, in its last report to the Committee of Civil and Political Rights in 2015, in relation to its commitments to protect freedom of expression under the ICCPR, the Government of Bangladesh recognised that:²²

01

The right to freedom of expression and speech includes the right to express freely one's conviction and opinion on any matter orally or by writing, printing or any other mode related therewith.

Prior to the enactment of the DSA, Section 57 of the Information and Communication Technology Act 2006 (ICTA) had been widely criticised as curbing freedom of expression in Bangladesh, with the International Commission of Jurists considering it to be "incompatible with Bangladesh's obligations under Article 19 of the ICCPR".²³ Due to the criticism surrounding the ICT Act, in 2018, the Government of Bangladesh reported to the UN Human Rights Committee that it has repealed the ICT Act and approved Digital Security Bill in its place with 'a view to establishing balance between freedom of expression and public morality & interest'.²⁴ It further added that:²⁵

02

The GoB believes that safe working environment for journalists is fundamental to freedom of press and impunity for crimes against the media professionals affects this right. Therefore, any incident of use of violence against media professionals to thwart them is addressed with utmost

seriousness. The [Law Enforcement Agencies] LEAs respond to the incidents of valance [sic] and assault against the journalists as diligently as possible. For instance, in the case of the murder of Abdul Hakim Shimul in February of 2017, the Police took immediate actions and arrested 38 accused persons including the sitting Mayor of the concerned Municipality.

However, as soon as the DSA was enacted, experts criticised the DSA not only incorporates ICTA's Section 57 but is even more restrictive than it.²⁶ In March 2021, following the death in custody of a writer who had been arrested under the DSA, the UN High Commissioner for Human Rights Michelle Bachelet issued a statement urging the government to review the DSA:²⁷

03

Bangladesh urgently needs to suspend the application of the Digital Security Act and conduct a review of its provisions to bring them in line with the requirements of international human rights law.

22. International Covenant on Civil and Political Rights: Initial reports of States parties due in 2001 (Bangladesh), CCPR/C/BGD/1 (2015), Para 202. See also: Najnin Begum, 'Implementation Mechanism of Human Rights Treaties in Bangladesh: A Critical Analysis' Australian Journal of Asian Law (2016) 17(2) 337.

23. International Commission of Jurists, South Asia, Rule of Law Programme, Briefing Paper on the amendments to the Bangladesh Information Communication Technology Act 2006 (2013) 3, <https://www.icj.org/wp-content/uploads/2013/11/ICT-Brief-Final-Draft-20-November-2013.pdf>

24. Universal Periodic Review: National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 (Bangladesh), A/HRC/WG.6/30/BGD/1 (2018), para 33.

25. Ibid, para 34.

26. Muzzling Dissent Online: Bangladesh - Amend the Digital Security Act, Amnesty International (2018).

27. Bangladesh: Bachelet urges review of Digital Security Act following death in custody of writer, Office of the High Commissioner of Human Rights, United Nations, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26815&LangID=E>.

3.3. YOUTH PERCEPTIONS ON FREEDOM OF EXPRESSION IN BANGLADESH

Finding 06

Most young people remain unaware of the DSA

A study by Dnet suggests that most university students are 'deeply unaware' of the DSA and its accompanying penalties.²⁸ A baseline study by Friedrich Naumann Foundation for Freedom (FNF) Bangladesh and Dnet also found that while 46% of university students said that they have some knowledge of the DSA, 26% of students never heard about the law.²⁹ The remaining 28% of students reported being fully aware of the DSA.³⁰ Female respondents appeared to have less knowledge of the DSA than male respondents.³¹



Finding 07

Fear of DSA coupled with harassment from law enforcement agencies among youth limit their freedom of expression

Out of those students who did know about the DSA, most expressed their fear of facing prosecution under the DSA if they 'criticize the policies of the government' and consider the law 'as a major obstruction to their freedom of thought and conscience.'³² They also felt that the law is (mis)used by the law enforcement agencies to 'suppress or control use of digital media.'³³ Additionally, 57% of the university students were not fully satisfied with the regulation procedure of the DSA as they felt it 'does not allow them to express their ideas and thoughts responsibly.'³⁴ One student from the University of Dhaka expressed:³⁵



The Digital Security Act was enacted to prevent cyber bullying but it is being used to curb our freedom of expression. It has an inverse relation with the Right to Information Act.

External pressures which caused young people to limit their freedom of expression include fear of political harassment, fear of the DSA and fear of torture by and harassment from the law enforcing agencies.³⁶ Therefore, they felt uncomfortable sharing opinions on matters that might be deemed to be controversial, such as politics, religion, or deemed to be defamatory to the country.³⁷ Accordingly, they feared that expressing their opinions on such issues on public platforms would risk their own personal safety and that of their family's.³⁸ On the other hand, they were more comfortable sharing their opinions on topics that could be considered to be 'non-controversial' and therefore not a risk to their safety. These included topics such as fashion, sports, recipes, issues relating to women empowerment and 'anything that brings pride for the country.'³⁹

28. Formative Research to Design Capacity Building Tools and Campaign Strategy On Responsible Digital Citizenship for Freedom of Expression by the Youth in Digital Media, DNET (2021).

29. ASM Amanullah and Syed Tanim Ahmed, Fostering Responsible Digital Citizenship to Promote Freedom of Expression in Bangladesh: Baseline Report (2021), Friedrich Naumann Foundation for Freedom (FNF Bangladesh), Dnet and Global Research & Marketing (GRM), 25.

30. Ibid.

31. Ibid, 38.

32. Ibid, 21.

33. Ibid, 22.

34. Ibid, 26.

35. Ibid, 21.

36. Formative Research to Design Capacity Building Tools and Campaign Strategy On Responsible Digital Citizenship for Freedom of Expression by the Youth in Digital Media, DNET (2021),

37. Ibid, 14.

38. Ibid, 13.

38. Ibid, 13.

39. Ibid.

Recommendation 1

Make all offences under the DSA bailable and non-cognizable so those accused of committing offences can only be arrested with a properly issued warrant from court and have a right to bail, which will help reduce the number of pre-trial prisoners

As the vast majority of offences under the DSA are cognizable and non-bailable offences, the accused can be arrested without warrant and does not have a right to bail. This severely restricts the rights of those accused of committing offences under the DSA, and can include those who have cases filed against them for exercising their freedom of expression. Therefore, Section 53 of the DSA should be amended so all offences under the DSA are bailable and non-cognizable, so cases filed under the DSA do not contribute to the number of pre-trial detainees and overcrowding of prisons. This would help realise the government’s commitment under SDG Indicator 16.3.2 of reducing the proportion of pre-trial detainees to 40% by 2030.

Recommendation 2

Recommendation 2: Repeal sections 25, 29 and 31 of the DSA to remove key barriers to freedom of expression and ensure compliance with international human rights law.

Sections 25, 29 and 31 of the DSA pose an unreasonable restriction on freedom of expression and the vague phrasing of these provisions also make them open to misuse. Therefore, these three provisions should be repealed, or amended to be brought in conformity with Article 39 of the Constitution and

Recommendation 3

Amend Section 43 of the DSA so the police requires a properly issued warrant from court to conduct searches, arrests and seizures and the scope for misusing DSA to harass individuals exercising their freedom of expression is reduced.

Section 43 of the DSA which grants police extremely wide powers to search premises, seize devices, search and arrest individuals without a warrant if they merely have ‘reasons to believe’ that an offence under DSA ‘has been or is being committed, or is likely to be committed’ or if any evidence is ‘likely to be lost, destroyed, deleted or altered or made unavailable in any way’ should be amended so that any search of premises or individuals, seizure of device or arrest of individuals can only take place with a properly issued warrant from the Court.

Recommendation 4

Ensure training and strict monitoring of Law Enforcement Agencies on the use of DSA to prevent its misuse and introduce training sessions on cyber safety law for lawyers, prosecutors and judges so genuine victims are able to seek and obtain justice

A strict monitoring mechanism must be introduced so that law enforcement agencies, such as the police, who are granted sweeping powers under the DSA are properly trained and monitored to prevent abuse of powers against citizens. Legal experts recommended that training sessions on proper implementation and interpretation of cyber safety laws, including the DSA, should be introduced for lawyers, prosecutors and judges as this remains a niche area of law that is well understood only by a handful of legal practitioners, thereby leaving victims of cyber harassment or bullying with limited choices for good legal representation. A particular focus should be on the function of fundamental rights and especially freedom of expression as defensive rights against the state. The importance of freedom of expression lies precisely in expressing opinions that might challenge common narratives, and contradict the majorities and those in power. These training sessions could help address this knowledge gap which in turn can help strengthen enforcement of legal safeguards on cyber safety. In order to ensure transparency on the use of DSA, experts recommended that official statistics should be published on DSA cases, particularly on the offences under which cases are filed, and who the cases are filed by, which would help generate public confidence on DSA as a tool for ensuring cyber safety.

Conduct awareness campaigns with young people on the provisions of DSA to combat their state of unawareness and to ensure victims of cyber offences know their rights.

Research has shown that young people remain deeply unaware about the DSA. Those that do know of it have expressed their fear about it being misused against them. Therefore, the government should conduct awareness raising activities targeting young people in colleges and universities, promoting the fair use of the DSA, so that students are not only aware of their rights and obligations under the DSA, but also so their fears are heard and addressed.



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