

SONARGAON UNIVERSITY



Research Monograph On

***“Digital Security Act, 2018 of Bangladesh: A study on the situation of Press
Freedom and Journalistic Investigation”***

A thesis submitted to the Department of Law and Sonargaon University (SU) in partial fulfilment of requirements for the award of the degree of Department of Law LLB (Hon’s)

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LETTER OF TRANSMITTAL

Date: 10th January, 2024

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Subject: Submission of Research paper.

Dear madam,

It is a great pleasure to submit our research on “**Digital Security Act, 2018 of Bangladesh: A study on the situation of Press Freedom and Journalistic Investigation**”. We have tried our level best to complete this research meaningfully and correctly, as much as possible. Though we are in the learning curve, this thesis has enabled us to gain insight into the core fact of the law and also helped us to find out the resemblance between section 57 of the ICT act and the digital security act. So it becomes an extremely challenging and interesting experience.

We will be highly grateful and oblige if you kindly accept our research paper and evaluate it with your judgment. Please feel free for any query or clarification that you would like us to explain. Hope you will appreciate our hard work and excuse the minor errors.

I hope you find this report satisfactory.

Sincerely yours

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DECLARATION

I hereby do solemnly declare that the work presented in this thesis entitled “**Digital Security Act, 2018 of Bangladesh: A study on the situation of Press Freedom and Journalistic Investigation**” has been carried out by me under Sharmin Jahan Runa, Assistant Professor and Head of the Department, Faculty of Law, Sonargaon University and has not been previously submitted to any other institution. The work presented here does not breach any copyright.

I further undertake to indemnify the university and my supervisor against any loss or damage arising from breach of the forgoing obligations.

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CERTIFICATION

This is to certify that, the research on “**Digital Security Act, 2018 of Bangladesh: A study on the situation of Press Freedom and Journalistic Investigation**” Is done by Rafid Ibtesham partial fulfilment of the requirements for Bachelor of Laws (LLB) degree from Sonargaon University. The research has been carried out under my guidance and record of the bona fide work carried out successfully.

The results embodied in this thesis have not been submitted to any other university or institute for the award of any degree or diploma.

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I express my deep gratitude to her, because without her help and guidance this study could not be accomplished. I shall be ever grateful to my honourable and designated supervisor for his individual suggestion, valuable time, important information and guidance during the study period that has greatly inspired me in preparing this report successfully.

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ABSTRACTS

As a human being it is our right to being free and think independently. As a citizen of Bangladesh our constitution has given us the opportunity of freedom of expression, freedom of speech and freedom of privacy. Now this is a time of modern technology and science. Today we express ourselves through internet. This an opportunity to become free and share our view, opinion, comment through cyberspace. But some acts restrict us using this opportunity like section 57 of the ICT act and some section of the Digital Security Act 2022. Section 57 is the most criticized and questionable section and that is why this section was repealed but in 2022 section 57 was again reflected in a new act which is “The Digital Security Act 2022”. In this thesis we will show that weather section 57 of ICT Act is reborn in The Digital Security Act? And weather the digital security act is contradictory to the constitutional right? Taking into account the provisions of the Worst Forms of Child Labour Convention, 1999 (No. 182), and Recommendation (No. 190), Members should identify types of domestic work that, by their nature or the circumstances in which they are carried out, are likely to harm the health, safety or morals of children, and should also prohibit and eliminate such child labour. Human Rights Watch has collected the testimonies of domestic workers in numerous countries; in most cases, the victims endured sexual violence because they were unable to escape, felt acute financial pressure to remain in their jobs, or were under threat of greater harm if they did report. Workers who did denounce their victimizers were often fired and, in the case of migrant domestic workers, immediately repatriated. The continuum of sexual violence ranges from propositions, threats of rape, and groping, to repeated rape.

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Chapter-1

Introductory Part

1.1 Introduction

One fine evening, when one of the researchers went to take the interview of an editor of a media house and vice-president of a journalists' association, he agreed to talk with the condition of not disclosing his name. Showing the vulnerability he said, "You know the situation of the country. If I openly tell anything regarding the negative sides of the law, I would have to face embarrassing comments from higher authorities-. Getting promise. he came up with lots of alarming situations of press freedom and freedom of expression such as the ownership pattern of the media, politicization of journalists and owners, threats and pressures from higher authorities and the legal situation as well. His expression of helplessness denotes the present situation of freedom of expression in the county. An editor of a house who is also a leader of journalists' community is feeling at risk and pressured to speak out on the regular problem the journalist are facing¹.

In the study. the situation of press freedom and journalistic investigation is studied where the aftermath scenario of passing the Digital Security Act (DSA) - 2018 was the main focus. Although the government and ministers are crying freedom of press is safeguarded by the governments and the new law, DSA-2018, is a new accumulation to enrich it, but strong protests and criticism are coming from the journalists, freethinkers and right workers. This situation motivated to study whether the law is creating any barrier for investigative journalists or not. Taking freedom of expression concept as the theoretical framework, the researchers analyzed the debated sections of the law as well as took in-depth interviews of the stakeholders to understand it.

The study revealed that journalists' basically investigative journalists are continuing their profession with the sense of fear and anxiety after passing the law which is ultimately resulting self-censorship and in the broader perspective it is contributing to curb the freedom of journalistic investigation as well as derailing the standard of freedom of expression

¹ "Old Wine in New Bottles"- Packaging current or old ideas and practices in a way which makes them appear to be modern innovations, particularly with the intention of keeping them alive or making them attractive to audiences who are unfamiliar with them or have some objection to them.

1.2 The Research Context

According to the definition of the Universal Declaration of Human Rights- 1948, the right to express any opinion without any interference, exchange views, information and ideas through any media are acknowledged as freedom of expression. (Universal Declaration of Human Rights ([1948] 2015)

As a cosigner country, Bangladesh acknowledged the freedom of thoughts and expression as fundamental rights in the Article 39 of the Constitution of Bangladesh. (The Constitution of Bangladesh, 2019)

In 1971 when the country got independence from the control of then Pakistan, it absorbed all the laws made in Pakistan period which were previously engrossed from British colonial laws. There were many debates about the spirit of laws which were mainly come from tyrannical colonial era.

In recent years when the Information Communication Technology Act (ICT Act)-2006 passed, journalists, freethinkers, social media activists, bloggers raised their voices against the Section 57 of it saying it was against free expression and more repressive than the previously formatted existing colonial laws. The act was amended in 2013 but this time the criticized sections made stronger with higher degree of punishment. Under the Section 57, deliberately publishing fabricated, provoking, offensive or penetrating material on web or any digital platform which are defamatory and have the potential to create turbulence in law and order situation of the country or hurt religious sentiments were criminalized. If anyone commit any offence under the section would get maximum 14 years of jail and/or a Taka 1 crore fine. (Shaon, 2018)

According to the finding of Habiba, Kundu, Rahaman & Rhaman (2017), while the section was prevailing in the country, many online activists, bloggers, social media users were censoring them as the section leaves room for subjective interpretation which eventually become a tool to harass people legally. (P-137-148)

Using the ICT Act at least 1,417 cases were filed between 2012 to June 2017. (Accessnow, 2018) Cyber Tribunal special public prosecutor Md Nazrul Islam Shamim said to the New

Age, in September 2017, 65-70 percent cases under the Section 57 could not be evidenced. On the other hand, many cases were totally false and filed to harass people². (Rashid, 2019)

1.3 Digital Security Act (DSA) - Bangladesh turned

into act on October 9, 2019 but before and after passing the law, several provisions of it were criticized home and abroad. (Daily Star (i), 2019)

After passing, within four months at least 63 people, including journalists, were arrested under it mostly for defaming the prime minister, father of the nation and government. A journalist of Council (*The Sampadak Parishad*), an association of editors of different media, issued a national dailies, where they, analyzing the law section by section, said the law is against the spirit of On the other hand, the cabinet secretary Shafiul Alam said in a press meet on January 29, the day when the cabinet approved the draft of DSA-2018, the law was made to ensure cyber security not to target journalists. (Dhaka Tribune (i), 2019)³

Given the both situation of the journalists and the government, the study intended to examine whether the law is really creating harsh situation for journalists or not. The prime research question was- Is the DSA- 2018 creating barrier in press freedom and journalistic

How was the law framed the discourses, 2) Is the discourses of law have any room to misinterpret and misuse, 3) How are the stakeholders of the law evaluating the situation, 4) Is the law compromising with the spirit of freedom of expression granted in Bangladesh constitution, 5) Is it anyhow creating barrier in journalistic freedom.

1.4 Reviewing the Literature and Research Gap Identification

Free press is one of the most important constituents of democracy as it assists to keep balance between government and mass. Bangladesh, a third world democratic country, ensured the freedom of expression in Article 39 of its constitution. But according to the World Press Freedom Index, 2019 by the Reporters Without Borders, the country is now 150th which arose doubt about the situation of freedom in the country. Besides, after the emerge of DSA-

² “Freedom of Expression”- Article 39 of the Bangladesh Constitution

³ “Right to Privacy”- Article 32 of the Bangladesh Constitution

2018, the journalists, right bodies, civil society members from home and abroad are vocal saying the new law will curb the journalistic freedom⁴.

The conflict of journalistic freedom and legal regulations are being researched for many years in the country. More or less many of them found the principles of laws not always play positive role in safeguarding free press moreover develop barriers⁵.

Analyzing the legal situation regarding press and journalism, Khan and Kaarisma (2014) found, the tradition of long colonial legacy in law formation, laws were made to curb press freedom in British era so that their corruption would not be revealed. They also argued the passing of Right to Information Act- 2009 was a positive symptom of democratizing the information and increase the accountability in information flow. The democratizing is ensuring better access to information but still state plays a large role to manipulation the media and information flow.

From 2006 to 2018, the Information Communication Technology Act (ICT Act) -2013 was used against citizen journalists, bloggers, journalists and social media users. The Reporters Without Borders reported on 2018 that the impact of ICT Act- 2013 resulting self-censorship in media outlets. (Arman, 2018)

Habiba & et. al. (2017) found bloggers of Bangladesh, after the starting of the use of ICT Act- 2013 to detain online activists, started censoring their online contents, got self-censored. Many of the bloggers were harassed by the law as well⁶.

Afterwards, the DSA-2018 passed but criticized blaming that the new DSA-2018 not only infected by the negative elements of the ICT Act-2013 but brought more danger for investigative journalists through Section 32.

The Centre for Law and Democracy assessed the bill (before it was passed) in 2018, which found the bill contained some sections which were inconsistent with the international

⁴ Brad Adams, Asia director at Human Rights Watch- <https://www.hrw.org/news/2018/05/09/bangladesh-protect-freedom-expression>

⁵ <https://www.hrw.org/news/2018/05/09/bangladesh-protect-freedom-expression>

⁶ Wild West of old- The Old West, often referred to as the Wild West, encompasses the period after the Civil War, the rest of the 1800's, and the early part of the 20th century. There is much legend surrounding American History of the Wild West when it comes to American outlaws and lawmen. The odd thing is that on occasion, the two were interchangeable and a lawman might have been a bandit previously in another state.

standard of freedom of expression. The analysis recommended making the law clearer and compactly self-explanatory so that the scopes of misuse can be stopped.

So, from legal, social and security perspectives a number of researches have been done, still the DSA-2018 and its relevance with investigative journalism and press freedom yet to be studied. In this context the research was conducted with the objective of exploring some new contexts and dimensions to fill the gap⁷.

⁷ JYOTIRMOY BARUA, the Daily Sta4, The way they view it,20 sept 2018-
<https://www.thedailystar.net/frontpage/digital-security-act-2018-the-way-they-view-it-1636411>

Chapter-2

Conceptual Framework

2.1 The Concept of Freedom of Expression as Theoretical Framework

The General Assembly of United Nations (UN) accepted the Universal Declaration of Human Rights on 1948 which ensured Freedom of Expression as a fundamental right in its Article 19. It said, regardless of frontiers, the right of opinion and expression has ensured through any kind of media without interference. (Universal Declaration of Human Rights, 1948)⁸

This declaration is the recognition of political, social, economic and cultural rights of human beings though it has no legal bindings. But all country who have signed in the declaration are morally warranted to protect these rights. (Australian Human Rights Commission, 2019)

The First Amendment to the United States Constitution ensures that congress would not pass any kind of law which would curtail the right of freedom of expression or of the press. Though the freedom is not absolute as in some extreme cases such as child pornography, state security and obscenity the court and government agencies can interfere. (Ruane, 2014)

The Constitution of India also protected freedom of expression as basic human rights in its

(The Constitution of India, [1949] 2016) In case of Bangladesh, Article 39 (2) of its constitutions guaranteed freedom of expression and press with reasonable restrictions imposed by the law of the country. (The Constitution of Bangladesh, 2018)

So freedom of expression is a fundamental right where a human being regardless of class and creed can hold, share, and exchange their thoughts, opinions and beliefs through any kind of media. Sean MacBride (1980) argued that the standard of freedom of expression has no exception and it is applicable for all people by the virtue of their human dignity⁹.

⁸ When computer and communication technologies are combined, the result is known information technology or InfoTech- technology that merges computing with high speed communications links carrying data, sound and video. For example information technology includes personal computers.

⁹ UNICTRAL- United Nation Commission on International Trade Law

2.2 Methodology and Sampling

In this study, discourse analysis and in-depth interviewing methods are used to collect data and to conduct analysis. Mainly discourse analysis implemented to analysis the DSA-2018 where the language and its context were examined. Discourse analysis is mainly the study of language in a particular social context (Gale, 2010). here the discourses cannot be seen only through the meaning of its language but from meaning created by the users in a particular social context as well. (Shanthi & et al, 2015) investigating power relations in a society. Foucault contributed to state the starting point of discourse analysis for understanding subject. According to him, discourses (language having social context) became important when it is spoken out through a person (subject)¹⁰. (Jorgensen & Phillips, 2002)

So, through the method the texts of the law were analyzed aiming to identify the underlying power relation between the discourses and the social context of user and maker of the law. In the research, the discourses of some selective sections of the law were analyzed. The sections were identified depending on the statement made by the Editors' Council published in national dailies. As the research is about the situation of investigative journalism and press freedom in current Bangladesh in the context of the passing of DSA-2018, their statement was very relevant with the study as they analyzed the law section by section and placed their argument and objection regarding it. Their statement could establish that the sections were problematic for free journalism that is why the sections were taken as the sample of study.

Another method, in-depth interview, was applied collecting data. It is qualitative research method involves intensive individual interviews where the researcher tries to explore their ideas and evaluation of a particular subject. Here the number of respondents usually remains small. (Boyce & Neal, 2006)

In this research, in-depth interviews of five persons from four categories were conducted. leaders, one legal expert and one person from government authority. The population was selected through purposive sampling method.

¹⁰ When computer and communication technologies are combined, the result is known information technology or InfoTech- technology that merges computing with high speed communications links carrying data, sound and video. For example information technology includes personal computers.

Chapter-3

Data Analysis

3.1 Analysis of the troublesome parts section by section

After passing the Digital Security Bill-2018 in the Bangladesh Parliament on September 19, 2018, the Executive Director of the Transparency International Bangladesh Iftekharuzzaman live journalism can members, legal right campaigners expressed their disappointment after the passing of law. Some of stop the public voice in digital form¹¹.

What are the alarming elements of the law; considering that voices from all areas are coming against it? Here the objected sections- Section 8, 21, 25, 28, 29, 31, 32, 43 & 53 were analyzed.

The Section 8 of the law is one of the objected sections, where it is written:

Power to remove or block information and data: (1) If the Director General is satisfied that something that is published or disseminated in the digital platform falling within his domain may poses threat to digital security, he may request Bangladesh Telecommunication Regulatory Commission (BTRC) to remove such information or data or, in specific cases block the platform. (2) If it is evident to the law enforcing agencies that something published and disseminated through any digital device or digital medium can create disunity in the country, disrupt economic activities and security, defence, hurt religious values, create communal hatred or bad feelings, create turbulence in law and order situation then the law enforcing agencies can request the BTRC to remove such content or block it. (3) On receipt of such requests, BTRC while informing the government will take immediate actions to remove or block the content.

explanation and clear account about the given power of the DG and law enforcers as well as about the pre- determination of the crimes mentioned here¹².

The DG and police have given decisive power to take decision of content whether it nācreate

¹¹ UNICTRAL- United Nation Commission on International Trade Law

¹² Final report on the law of information technology by Law Commission of Bangladesh, pg. 1-2, available at www.lawcommission.gov.bd

clear enough, the possibility remains for these two entities to use the section by their singular perception and scopes to abuse it against any person. The international and regional standards recognized free press and freedom of expression as the core of guaranteeing human freedom and dignity. (Center for Law and Democracy, 2018) Nonetheless, these terms may compromise with the well-established standards of free speech and push the journalists to censoring their report¹³.

Section 21 criminalized propaganda against the Liberation War of Bangladesh, hurting the spirit of the war, Father of the Nation, National Anthem and National Flag. This section is also being blamed for its broadness, ambiguity and lack of proper explanation.

A law which is about crime and punishment should be clear and well-explained, there should not remain any overbroad and unnecessary regulatory. (Center for Law and Democracy, 2018) But here the terms are not elaborated enough so that the journalists as well as general mass may feel risky of getting harassed under the section as the country is very law abuse-prone.

In the Section 25, the offences regarding defaming, humiliating and embarrassing a person, damaging the image and reputation of state and so on are addressed as crime.

The investigation tries to find out irregularities, corruption and misdoing of people and after clear definition of the terms, the law is legalizing the punishment of journalists and newspapers council, 2019)

The Section 28

deliberately and knowingly and with the intention of hurting religious values or sentiments or with the intention to provoke such sentiment publishes or broadcasts information then such included here in an ambivalent way, nobody will feel comfortable to talk or report on the issues as well as do research on the religious issues, cultures and practices-malpractices¹⁴.

¹³ Under Section-57 of the Information & Communication, Technology Act, 2009 (Act No. XXXIX of 2006)

¹⁴ Obscene means offensive, rude or shocking materials because too obviously related to sex or showing sex. Adv. Md Jahangir alam, Understanding Cyber law in Bangladesh, Titu Publication, pg-169

In case of Section 29, publishing defamatory information mentioned in section 499 of the Penal Code (Act XLV of 1860) via website or/and electronic media will be penalized. But there remains an inconsistency in punishment degree. According to the Penal Code 500, the punishment for offences under Penal Code 499 is two years of imprisonment which is bail-able. On the other hand, for the same offences in different medium, will get three years of jail or Taka 5 lakh in fine or both which is non-bail-able.

The Section 31 deals with offenses and penalties for deterioration of law and order, etc. According to the subsection 31(1) it is written:

If a person deliberately publishes or broadcasts via a website or any digital platform anything that creates enmity, hatred or acrimony among different classes or communities, or upsets communal harmony, or creates unrest or chaos, or causes or begins to cause deterioration in law and order, then that activity of the said person will be considered a crime. (Digital Security Act-2018)

Here the objection is: the problems mentioned here is not necessarily can take place only for a digital media content, rather it depends on other social elements. Communal hatred, enmity are deeper social problem. Hence, the section is talking about a big social issue, which is positive.

The Section 32 which is about offences and penalty for committing crime under the Official Secrets Act, 1923. It said if any person break official confidentiality which is under the act using a computer and/or digital device and/or network will get maximum 14 years of jail or/and Taka 25 lakh in fine. If the person commits the crime for second time or repeatedly will get life sentence and/or a maximum fine Taka 1 crore. (Digital Security Act-2018) all right campaigners. Firstly, the section the authority made Official Secret Act (OSA)-1923 stronger. The OSA-1923 was formed under colonial British Government in undivided Indian Subcontinent to protect the then corrupted British Administration out of accountability. In 2009, Right to Information Act for ensuring more transparency and good governance. Here the inclusion of the offences of the OSA-1923 is making the spirit of Right to Information Act-2009 deemed.

The argument of the Council is if government did not make any information publicly accessible is called official secret. They, bringing the example of the recent news reports of

huge bank corruption in Bangladesh, said these kinds of information regarding irregularities are not publicly open, but for informing people and doing investigation journalists have to collect and report them¹⁵.

This is an example of using (misusing) law against journalists, though they were awarded prestigious Pulitzer Prize. the uncertainty of the law and also this situation is creating barrier of free investigation.

According to the DSC-2018, if anyone does any offences under this section, will have to face maximum seven years of jail and/or give Taka 25 lakh as fine. For those who commit the offence for the second time, will get life time imprisonment and have to pay taka 1 crore as fine. This section is highly getting resistance and criticism throughout national and international level for its nature.

Through this section the law enforcing agencies got the authority to enter any place, search electronic devices, any person, seize the devices and even arrest anybody on suspicion without any court warrant and where most of the offences are non-bailable. As the police have the

This section is not only threatening for the journalists but the whole media house as every media work in their own server, have their own online version. So, if the police suspect that Security Act-2018 even they can shut-down the whole station as well.

So here, the insecurity for journalists has grown because of some sections here is very open-ended and undefined coupled with the unlimited power of police. So, in a legally uncomfortable environment, journalists may not practice their works independently as well as media house may turn into just a public relation outfit.

Lastly, the section 53 describe about the segments of the law which are cognizable or not and bailable or not. According to it, 14 offences are non-bailable and cognizable offences out of 20 or so more provisions¹⁶.

¹⁵ Article 19 of ICCPR – 1. Everyone shall have the right to hold opinions without interference.

¹⁶ Everyone shall have the right to freedom of expression; this right shall include 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.

After the analysis of sampled sections of the DSA-2018, some common allegations are noticed such as: 1) unclear, vague and unnecessary terms, 2) high range of punishment, 3) huge power given to the law enforcement agencies, 4) room to misuse the law, 5) elements can be harmful for investigative journalism as well as overall freedom of expression and so on¹⁷.

The high degree of punishments as well as the nature of non-bailability are creating non-cooperative environment for journalists especially for investigative journalists. The main objective of the law is to curb the rate of digital offences and ensure cyber protection for the people, in large extent getting deemed for some unclear, vague and unnecessary terms. Some freethinkers and civil society members came up with the thought the elements of the ICT Act-2018.

¹⁷ Article 19(3) of ICCPR - The exercise of the rights provided for in paragraph 2 of this article

Chapter- 4

Background of the Information and Communication Technology Act 2006 and the Digital Security Act 2020

4.1 Origin and the concept of Technological law and Cyber law in international level:

In 1930s Germany, it was a criminal act to listen to “enemy broadcasters” from overseas. Anyone caught flouting this law faced imprisonment in a concentration camp. Today, Russian journalists referring to the invasion of Ukraine as a “war” - or defying the official Russian narrative at all - face 15 years in prison.

Controlling the media - and demonising journalists who don't toe the “correct” line - is nothing new. It has been adopted by rulers across the world throughout history - and not just by dictators¹⁸.

Bangladesh is just one supposedly democratic country, where the law is coming dangerously close to making journalism a crime¹⁹.

The Government of Bangladesh is currently planning to introduce yet another new set of laws under the banner of the “Bangladesh Telecommunication Regulatory Commission Regulation for Digital, Social Media and OTT Platforms”, a draft of which was published in February this year⁷.

A total of 45 international organisations have called on the government to withdraw it amid concerns over freedom of expression²⁰.

This is just the latest step in Bangladesh's long road towards curtailing freedom of speech, adding to the already existing, draconian 2018 Digital Security Act.

¹⁸ BDNEWS24.com- <https://bdnews24.com/bangladesh/2015/08/17/journalist-probir-sikdar-sued-for-libel-under-ict-act-for-writing-against-minister-khandker-mosharraf-hossain>

¹⁹ Comments of eminent Human rights

²⁰ The Daily Star- <https://www.thedailystar.net/news/mahmudur-held-in-skype-case>

There was widespread criticism over the misuse of Section 57 of the ICT Act by different human rights groups and civil societies. Section 57 of the Act authorises prosecution of anyone who publishes, in electronic form, material deemed fake, obscene, defamatory, or any material that “tends to deprave or corrupt” its audience. It also allows for prosecution if content may “cause hurt to religious beliefs”.

We for our own needs need to rethink the existing legal system and legal jurisprudence to overcome the emerging legal issues relating to “Information and Communication Technology”⁸. To this end, the countries around the world are amending the existing laws and enacting new laws known as cyber law that deals with legal issues associated with computer, internet and other similar types of technologies. Internationally, the enactment of UNICTRAL⁹ Model law in 1996 is a land mark step that creates baseline for the member state of the United Nations to enact cyber laws. USA, Singapore, India and Malaysia have enacted cyber laws. In 2006, the Government of Bangladesh enacted cyber law referred herein as Information and Communication Technology (ICT) Act, 2006.

4.2 Development of Information and Technological law in Bangladesh:

The Information and Communication Technology Act, 2006 is an outcome of Model Law on electronic commerce which was passed by the General Assembly of the United Nation in 1996. The Model Law establishes rules and norms that validate and recognize contracts formed through electronic means, sets default rules for contract formation and governance of electronic contract performance, defines the characteristics of a valid electronic writing and an original document, provides for the acceptability of electronic signatures for legal and commercial purposes and supports the admission of the computer evidence in courts and arbitration proceedings. The Model Law does not have any force but merely serves as a model to countries for the evaluation and modernization of certain aspects of their laws and practices in the field of communication involving the use of computerized or other modern techniques, and for the establishment of relevant legislation where none exists. Singapore enacted Electronic Transaction Act, 1998 and India recently enacted the Information Technology Act, 2000¹⁰.

In the above context, the Law Commission of Bangladesh proposed to suggest enactment of a suitable law to facilitate electronic commerce and to encourage growth and development of information technology. Necessarily, such law has to be in conformity with the Model Law on electronic commerce. In 2006, the Government of Bangladesh enacted a suitable law titled ‘Information and Communication Technology’ Act 2006. Subsequently, government has amended the act for three times in 2008, 2009 and 2013²¹.

In order to facilitate e-commerce and encourage the growth of information technology, the Information and Communication Technology (ICT) Act, 2006 was enacted making provisions with a maximum punishment of 10 years imprisonment or fine up to taka 10 million or both. The Government used sections 46 and 57 of the ICT Act to ban the social networking site Facebook in May 2010. After the ban was imposed, sections 46 and 57 of the ICT Act were challenged in the Bangladesh High Court by Barrister Arafat Husen Khan, KaziAtaul-Al-Osman, and Rokeya Chowdhury. In July, the High Court asked the Government to show why the sections of the ICT Act should not be held unconstitutional for violating the right to freedom of expression. Instead of amending the ICT Act to ensure compliance with the Bangladesh Constitution and Bangladesh’s international law obligations, the Government revised the ICT Act through an Ordinance on 20 August 2013 so as to make the law even less human rights compliant²². On 6 October 2013, the Bangladesh Parliament passed the Information and Communication Technology (amendment) Act 2013, incorporating the provisions of the Ordinance into the ICT Act, 2006. The Government promulgated the ICT Ordinance at a time when the use of online platforms was becoming increasingly important for journalists and human rights defenders, especially in light of the Government’s violent response to widespread protests following verdicts of the International Crimes Tribunal.

After the abolishment of the Information and Communication Technology Act, 2006 the Parliament has passed the much-talked-about Digital Security Bill, 2018, which provides for stiff penalties for a wide variety of cyber infractions. The government will form a digital security agency and a digital in the chair. The other members of the council are the minister/state minister or deputy minister of Posts, Telecommunications and Information Technology Ministry, the minister/state minister or deputy minister of Law, Justice and Parliamentary Affairs Ministry, the prime minister’s principal secretary, the governor of

²¹ <https://www.thedailystar.net/country/journo-among-4-sued-under-57-ict-act-1428283>

²² <https://www.thedailystar.net/city/editor-khulna-daily-sued-under-section-57-1420465>

Bangladesh Bank, the secretary of the Posts and Telecommunications Division, the secretary of the Information and Communication Technology Division, the secretary of the Public Safety Division, the secretary of the Foreign Affairs Ministry, the inspector general of police (IGP), the BTRC chairman, and the director general of the Defense Intelligence Directorate. The director general of the Digital Security Council will act as member secretary. The proposed Digital Security Act was first presented to the parliament in April 2018. In May, Bangladesh Minister of Law, Justice and Parliamentary Affairs said that the proposed Digital Security Act would be revised in consultation with the journalist community after it drew massive criticism for suppressing the right to freedom of expression and press freedoms.

S.R.O. NO. 310-Law/2019.↓In exercise of the powers conferred by section 62 of the Digital Security Act, 2018, the Government is pleased to publish the following English translation of the Act to be called the Authentic English Text of the Act, and it shall be deemed to have been effective from the date on which the Act comes into force under subsection (2) of section 1 of the Act²³:

²³ <https://www.frontlinedefenders.org/en/case/golam-mujtaba-dhruba-prosecuted-under-information-and->

Chapter- 5

Comparative analysis between section 57 of the ICT Act 2006 and Digital Security Act 2021

5.1 Section 57 of the ICT Act and The ambiguity of this section:

The most controversial section in the Information and Communication Technology Act 2006 is section 57. This section is most criticized and questioned because of its nature. This section is considered to be the violation of freedom of expression. Section 57 of the ICT Act 2006 stated that “If any person deliberately publishes or transmits or causes to be published or transmitted in the website or in electronic form any material which is fake and obscene or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it or causes to deteriorate or creates possibility to deteriorate law and order, prejudice the image of the State or person or causes to hurt or may hurt religious belief or instigate against any person or organization, then this activity of his will be regarded as an offence. In providing punishment it says, “Whoever commits offence under sub- section (1) of this section he shall be punishable with imprisonment for a term which may extend to ten years and with fine which may extend to Taka one crore.”¹¹

This section penalizes the publication of three kinds of information in electronic form which is Obscene¹², Fake information, and defamatory statement. Therefore, the material that is deliberately or intentionally published in a website, or in an electronic form must be fake, obscene, and defamatory in nature. For which it causes to deteriorate or creates possibility to deteriorate law and order, its effects is such as to tend to deprave and corrupt persons who see, read, watch and hear such material. It also prejudice the image of the state or person, causes to hurt or may hurt religious belief and instigate against any person or organization²⁴.

Section-57(1) of the Act outlines the scope of cybercrime and appears most confusing. From the text of the Act it appears that even any innocent online posting can become a cybercrime, if the authority believes that it has provoked a third person to become derailed or dishonest. In other words, the crime doesn't depend on the offensive or illicit nature of the posted material. It depends

²⁴ <https://www.dhakatribune.com/bangladesh/crime/2017/06/07/afsan-chowdhury-sued-sec-57/>

on the readers or viewers personality and attitude. The question is, if a crime-prone person becomes derailed or dishonest by watching or reading a seemingly honest content then why an innocent content provider will be responsible for that crime-prone person's act? Need an expert opinion from any lawyer to make sure that we aren't missing something here. On the other hand the Information and Communication Technology Act, 2006 is far more ambiguous that leaves unprecedented and unchecked power at the hands of the "authority". According to article-57(2), such offender can be punished with a sentence of up to ten years imprisonment and a fine up to Taka one crore. Since cybercrime is being treated as a serious offence, the nature and definition of the crime needs to be unambiguous, transparent and clear in its expression. The ICT Act contains a number of vague, imprecise and overbroad provisions that serve to criminalize the use of computers for a wide range of activities in contravention of the right to freedom of expression, including the right to receive and impart information, protected under international law. Section- 57 of the ICT Act criminalized publishing or transmitting or causing to publish or transmit any material which is fake and obscene or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it or cause to deteriorate or create possibility to deteriorate law and order, prejudice the image of the State or person or cause to hurt or may hurt religious belief or instigate against any person or organization, then this activity of his will be regarded as an offence. This provision is incompatible with Bangladesh's obligations under Article-19 of the ICCPR¹³. The offences prescribed are vague and overbroad, the restrictions imposed on freedom of opinion and expression go beyond what is permissible under Article 19(3) of the ICCPR¹⁴ and the restrictions are not necessary and proportional to achieve a legitimate purpose²⁵.

There is a lot of ambiguity in the section 57 of the Information and Communication Technology Act, 2006. There is not only ambiguity in this section but also it's a threat to people's free speech, freedom of expression. According to some legal experts this provision is a threat to people's right to freedom of expression and speech. They believe the obscure interpretation of this section is in some way misleading and is allowing its misuse against reporter and social media users. This was a hidden power given to the law enforcement agency. "Section-57 is so vague that law enforcers can interpret it as they will to arrest anyone anytime."¹⁵ There is no any rule of procedure or guidelines to the law enforcing

²⁵ <https://www.thedailystar.net/country/withdrawal-case-against-two-newsmen-demanded-1416982>

agencies for applying this. This section is so flexible to interpret in any way and any sort of expression in public can be covered. This one is so obstruct and rough translation that a nude child sitting on father's lap image publication can also be interpreted as an offence under the section²⁶.

After the enforcement of Section-57 of the Information and Communication Technology (ICT) Act, 2006 particularly this section contains vague wordings, allowing its misuse against newsmen and social media users. The demand for its repeal intensified following the arrest of journalist Probir Sikdar¹⁶ who was arrested and sent to jail after he posted a status on Facebook, expressing fear that his life was in danger and that a Minister, a renowned businessman and a fugitive war criminal would be responsible if he were killed. Following the post, a party leader sued against him under the ICT act for "tarnishing the image" of the minister. Before getting released after a huge people's protest he had to endure mental torture in custody apart from physical sufferings. Mahmudur Rahman¹⁷, acting editor of a Bengali newspaper critical of the Government, has also been arbitrarily detained under the Act for publishing transcripts of a Skype conversation between former International Crimes Tribunal Chairman and a Bangladeshi legal expert living abroad. Four bloggers inter alia Asif Mohiuddin, Subrata Adhikari Shuvo, Moshir Rahman Biplob and Rasel Parvez are also facing trial under section-57 of the ICT Act for allegedly making derogatory comments about Islam and "hurting" religious sentiment. Applying this section has been arbitrarily detain Nasiruddin Elan, Director of prominent human rights organization Odhikar, has been arbitrarily detained and he was denied bail by the cybercrimes tribunal on 6 November 2013. Adilur Rahman Khan, Odhikar's Secretary, has also been charged under the ICT Act and still he is in detained²⁷.

There are some more case filed under this section, which are, July 3 Nazmul Hossain, a senior reporter of Jamuna Television, was sued for his June 23 Facebook post. The plaintiff, Hazrat Ali Belal, a lawyer of Dinajpur Bar Association, named three others for sharing the post which demeaned the images of judges and judicial system in the country¹⁸. In June 14, a case was filed against Kazi Motaher Rahman Babu, editor of local daily in Khulna

²⁶ <https://www.thedailystar.net/country/2-kushtia-journos-sent-jail-1403341>

²⁷ <https://www.dhakatribune.com/bangladesh/law-rights/2017/07/13/will-happen-section-57-cases/>

Somoyer Khobor, and its former reporter Shohag Dewan. Two officials of the district's Chief Metropolitan Magistrate's Court accused them of publishing reports with misinformation¹⁹. In June 13, a case was filed against bdnews24.com staff reporter Golam Mujtaba Dhruba for his report published on 11 June 2017. The plaintiff was a senior assistant judge of Manikganj²⁰. In June 6 Brac University teacher and senior journalist Afsan Chowdhury was sued by Lt Gen (ret'd) Masud Uddin Chowdhury. Lt Gen (ret'd) Masud Uddin Chowdhury filed a defamation case for one of Afsan Chowdhury Facebook posts²¹. In May 16, Nipun Chandra Das, Dashminaupazila correspondent of the Asian Age, and Sanjoy Banerjee, upazila correspondent of the Dainik Janata, were sued. Sikder Golam Mostafa, secretary of Dashminaupazila Awami League in Patuakhali, filed the case following their reports on torture of a Hindu woman by a local gang who attempted to grab her land²⁸.

In April 29, a private company filed a case against Ahmed Razu, executive editor of Natunsomay.com. He was accused of publishing two reports that allegedly tarnished the image of the company²³. In April 15, Ali Reza Ripon, brother of Narayanganj City Corporation Mayor Selina Hayat Ivy, filed a case against five local journalists for publishing reports that allegedly tarnished their image. The accused are Habibur Rahman Badal, editor and publisher of Dandy Barta; Raju Ahmed, editor of Narayanganjer Alo; its publisher Mobarak Hossain Kamal, Sifat Al Raman Linkon, head of news of Narayanganjbarta24.com, and its executive editor Mahmud Hasan Kachi. In March 30, Journalist Hasibur Rahman Rizu sued Hasan Ali, Kushtia correspondent of Bangla Vision and bdnews24.com, and Aslam Ali, staff correspondent of local Bangla daily Darpan, allegedly for their derogatory posts on Facebook against him²⁴. In March

25, Morsalin Babla, editor and publisher of Juger Chinta in Narayanganj, saw a case filed against him by Sohel Ali, president of Fatullahthana Jubo League, over publishing of a report. In March 1, Rajshahi University correspondent of Dainik Alokito Bangladesh, Mostafij Mishu was sued for his report on the formation of RU Chhatra League committee. Minarul Islam, a former leader of the BCL unit, filed a case under The Digital Security Act 2018.

Another famous case was filed on August 6 against Shahidulalam. Inspector Md. Mehedi Hasan of the Detective Branch of police (north zonal team) filed the case against

²⁸ http://bdlaws.minlaw.gov.bd/bangla_pdf_part.php?act_name=&vol=%E0%A7%AA%E0%A7%AE&id=1261
28 ibid

ShahidulAlam with Ramna police station where he said the noted photographer tried to instigate students and create instability in the country by spreading false information and rumors on social media²⁹.

All these cases were filed under section 57 of Information and Communication Technology Act 2006. According to statistics provided by prosecutors of the Cyber Security Tribunal, around 740 cases have been filed across the country under the ICT Act in the last four years, with 60% of them lodged under the controversial Section 57. The increasing number of Section 57 cases has raised concerns that it is being misused to harass people. There were only 3 such cases filed in 2013, 33 cases in 2014, 152 cases in 2015, 233 cases in 2016 but this number has increased exponentially each year since with a record 319 already filed for 2017²⁶. The reason behind filing these cases are almost the same that one person published or transmitted something in the electronic form which causes defamation or hurts the feelings of any person's religious belief. For which this section raised a lot of questions and criticized a lot nationally and internationally. That is why journalists and general people started protesting against such draconian sections and wanted to abolish section 57 of the ICT Act.

Resemblance of section 57 of the ICT Act into the Digital Security Act:

There are currently deliberations in Bangladesh to replace the ICT Act. However, the Digital Security Bill 2018, which seeks to replace existing provisions of the ICT Act, is being opposed by civil society. Section 57 immediately faced criticism from several groups, notably the Moulik Odhikar Shurokkha Committee (Committee for the Protection of Fundamental Rights). The act has been called draconian in its implementation and criticized for how it can be interpreted by law

enforcement agencies. Numerous journalists and students and teachers have been imprisoned under Section 57, which incited further outcry from numerous civic leaders and journalists. There would be every chance of the act being misused against people's right to express themselves after it is passed by the Jatiya Sangsad³⁰.

²⁹ Adv. Md Jahangir alam, Understanding Cyber law in Bangladesh, Titu Publication, pg-169

³⁰ <https://www.thedailystar.net/politics/news/writ-seeks-high-court-division-barrister-mainul-jail-1652872>

The government as section 57 of the Information and Communication Technology Act was kept in the proposed law with some changes, despite assurances in the past of eliminating the controversial provision³¹.

As we know that Section 57 deals with defamation, hurting religious sentiments, causing deterioration of law and order and instigating against any person or organization through publishing or transmitting any material in websites or in electronic form. It stipulates maximum 14 years in prison for the offences.

But the new Digital Security Act is nothing more than an attempt to rebrand the existing ICT Act, as the problematic language of Section 57 of the ICT Act has returned as Section 32 of the Digital Security Bill 2018. The Digital Security Bill also splits the offenses under Section 57 into four separate sections (21, 25, 28, and 29) with varying levels of punishment, from three to 10 years' jail term. These section considered to pose serious threat to freedom of expression and media.

If we see Section 8 which includes provisions about blocking or removing any information in the digital media over any content deemed hampering harmony, public order, or creating communal hatred, among other things²⁷. Section 21 states anyone 'spreading negative propaganda against the Liberation War or the Father of the Nation, National Anthem and national flag' using digital devices or instigating to do so would be punished with imprisonment for up to life term²⁸. According to Section 25, a person may be jailed up to five years for 'deliberately publishing or broadcast on a website something attacking or intimidating or which can make someone feel disgruntled or knowingly publishing or broadcasting false or distorted information²⁹. Section 28 states if anyone hurts religious sentiments, they may face jail up to 10 years³⁰. Section 29 states a person may face up to three years if they defame someone as stipulated in section 499 of the Penal Code through a website³¹. Section 31 states a person may face up to seven years in prison if they are found to have deliberately published or broadcast something on a website which can spread hatred and create enmity³². As per Section 32, if a person commits any crime or assists anyone in committing crimes under colonial era Official Secrets Act, 1923, through electronic medium, he or she may face a maximum 14 years in jail³³. Section 43 allows a police officer to search

³¹ Md. Shariful Islam, (2013) Human Rights and Governance: Bangladesh, Hong Kong: Asian Legal Resource Center

or arrest anyone without any arrest warrant³⁴. Section 21, 28, 31 and 32 are classified as non-bailable offenses³².

Now if we compare the digital security act with the section 57 of the ICT act, we can see that they are almost same in nature. As before we have said that section 57 of the ICT act mainly focuses on publishing or transmitting any obscene material, fake information, and defamatory statement in the internet in electronic form³⁵. On the other hand, The new Digital Security Act also used to deal with defamation, hurting religious sentiments, causing deterioration of law and order, and instigating violence against any person or organization by publishing or transmitting any material on any website or in electronic media.

In this view we can see that in recent case On October 24, advocate Sumona Akther Lily, a member of the AL's youth and sports related sub-committee, filed the case against Barrister Mainul Hosein under the Digital Security Act for “dishonoring journalist Masuda Bhatti and the entire female community”.³⁶ In this case Barrister Mainul Hosein was sued for making defamatory statement in a talk show. In his statement in the anger he called journalist Masuda Bhatti a ‘characterless’, which is a defamatory statement. He was sued under section 29 of the Digital Security Act 2018.

In another case is where Detective Branch of Police (DB) has detained a man accused in a case filed under the Digital Security Act from Bhola. Under instructions by the Bhola Superintendent of Police (SP), DB, alongside a team of district Cyber Crime Unit and Sadar police, detained Md Shamsuddin Bacchu, 25, from his own house in Ward No 6 of Bapta union in Bhola Sadar on Wednesday midnight. Shamsuddin was accused of writing vulgar posts and sharing mocking photos of Prime Minister Sheikh Hasina and other respected personalities.³⁷

In 15 and 16 October 13 cases have been lodged under the Digital Security Act with the court ordering investigation of five cases and First Information Report (FIR) in two. Six were dismissed. Of the 13 cases lodged in the last two days, one was for hurting religious sentiment by threatening to destroy a Buddhist monastery. One case was for calling someone a terrorist while another was for making obscene comments aimed at a girl. One woman accused her former husband of publishing private photos of her on Facebook, Messenger, Viber and IMO. In another case, a woman lodged a case stating that her image was distorted³⁸.

³² Muhammad EkramulHaque,, (2011), The Bangladesh Constitutional Framework and Human Rights, Dhaka University Law Journal, Volume 22, Number 1, pp-55

In all these cases we found that some of the cases were filed under section 29 of the Digital security Act for defamatory statement, some of the cases were filed under section 28 for hurting someone's religious belief, and some case were filed under section 25 of the Digital Security Act for publishing obscene or distorted images of any person. On the other hand all this ingredients also found in the section 57 of the Information and Communication Technology Act 2018³³. Because in before we have said that section 57 of the ICT Act mainly focuses on publishing or transmitting any obscene material, fake information, and defamatory statement in the internet in electronic form³⁴.

The offences defined in it are not new types of offenses. If, for example, someone is accused of defamation through a digital media, the law regarding defamation is already there. We don't need a new law for this. This was also true of the vague definitions in Section 57 of the ICT Act, which people have protested. However, a law is needed to ensure safe online environment for people; not to punish them. So the ICT Act, 2006, could have been amended to make it more effective as Section 3 of the Digital Security Act says that this is not a stand-alone law, and should be seen as supplementary.⁴⁰

³³ <http://en.banglatribune.com/others/news/16317/Digital-security-act-sees-13-cases-in-two-days> 39 Supra note 18

³⁴ <https://www.dhakatribune.com/bangladesh/nation/2018/10/12/man-arrested-from-bhola-under-digital-security-act>

Chapter- 6

Digital Security Act violates the Constitutional Fundamental Rights

6.1 Fundamental Rights under the constitution:

Bangladesh was born as an independent state through a historic war which happened in exercise of people's right to self –discrimination. The state has emerged to establish and maintain an ordered society wherein life and liberty of the individuals would be secure and they would live with dignity and honor.⁴¹ . The constitution of Bangladesh guarantees all the major internationally recognized human right.⁴²The constitution of Bangladesh protects human rights these have been incorporated both in justifiable and unjustifiable forms.⁴³ They are supreme fundamental law of the state and they provide the normative framework for protection of human rights and access to justice for all people. The constitution of Bangladesh in its part 3 contains a set of judicially enforceable fundamental rights. In this part, 18 fundamental rights have been identified. All of them can be classified into two category- civil and political rights.⁴⁴ In practice violation of those rights has been widespread in recent days in Bangladesh³⁵.

The term fundamental rights is very technical one, for when certain human rights are written down in a constitution and protected by constitutional guarantees they called fundamental rights. They are called fundamental rights in the sense that they are placed in supreme or fundamental law of the land which has a supreme or fundamental law of the state³⁶.

Part three of the constitution enumerates a host of rights called fundamental rights. The fundamental rights in Bangladesh are listed under Articles 27 to 44 and the jurisdiction of the high court Division of the Supreme Court to enforce the rights is defined in Article 102 of Part VI of the Constitution of 1972 Articles 27 and 28 of the Constitution states that all citizens are equal before law and are entitled to equal protection of law, and the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. Article 31 and 32 ensures

³⁵ http://bdlaws.minlaw.gov.bd/bangla_sections_detail.php?id=1261§ions_id=47461

³⁶ Mahmudul Islam (2012), Constitutional Law of Bangladesh, 3 rded, Dhaka, Mullick Brothers

the protection of the law, and to be treated in accordance with law, is the inalienable right of every citizen, and no action detrimental to the life, personal liberty, body, reputation or property of any person shall be taken except in accordance with law. Equality of opportunity, for all citizens in respect of employment or office in the service of the Republic irrespective of religion, race, caste, sex or place of birth, ensured by Article 29. Nothing in this article shall impede the State from making special provision in favor of any specific backward section of citizens. Article 33 of Constitution illustrates that, no arrested person shall be detained in custody without being informed of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Article 34 prohibits forced labor, and any violation of this provision shall be an offence punishable in accordance with law. Nothing in this article shall apply to obligatory labor by persons undergoing lawful punishment for a criminal offence, or required by any law for public purposes. Article 35 states that no person shall be convicted of any offence except for contravention of a law in force at the time of the commission of the act accused as an offence, nor be subjected to a penalty greater than, or different from, that which might have been caused under the law in force at the time of the commission of the offence. Freedom of movement has ensured by Article 36. As per Articles 37 and 38 every citizen shall have the right to form associations or unions, to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of morality, public order or public health. Freedom of thought and conscience is guaranteed in Article 39 of the Constitution. Subject to any reasonable restrictions imposed by law 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 the right of every citizen to freedom of speech and expression, and freedom of the press are guaranteed. Article 40 provides that subject to any restrictions imposed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. Article 41 provides that every citizen has the right to profess, practice or propagates any religion, and every religious community has the right to establish, maintain and manage its religious institutions. Article 42 of the Constitution every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law. According to Article 43 every citizen shall have the

right to be secured in his home against entry, search and seizure, and to the privacy of his correspondence and other means of communication³⁷.

Article 44 guarantees the right of every citizen to move the High Court Division in accordance with clause (1) of Article 102 for the enforcement of any of the fundamental rights conferred by Part III of the Constitution. Apart from constitution of Bangladesh regarding human rights, Bangladesh now incurs obligations under international human rights law with regard to human rights. It acceded to the ICCPR in 2000 and the ICESCR in 1998 and therefore it has the obligations to implement rights recognized in there treaties. The UN Charter contains some important provisions regarding human rights. Thus interim Constitution through above declaration ultimately recognized human rights.

6.2 Violation of Constitutional Fundamental Rights through the Digital Security Act:

The much-debated Digital Security Act is not only repeal section 57 of the Information and Communication Technology Act but also violates the fundamental right which is guaranteed by the constitution of Bangladesh. Article-39 of the Constitution of Bangladesh guarantees the freedom of thought and conscience, and of speech. Subject to any reasonable restrictions imposed by law 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 the right of every citizen to freedom of speech and expression, and freedom of the press are guaranteed⁴⁶

According to business dictionary Freedom of expression means „Right to express one's ideas and opinions freely through speech, writing, and other forms of communication but without deliberately causing harm to others' character or reputation by false or misleading statements³⁸. In the context of Bangladesh the idea, connotations, meanings and uses of the words and phrases such as „freedom of expression“, „freedom of speech“, „right to communication“, „communication right“, „right to information“ and „access to information“ are intertwined and synonymous. The notion „freedom of expression“ can be understood from two approaches, inter alia „equality of human being“ and „interest of political

³⁷ Md. AbdulHalim,, (2016), Constitution, Constitutional law and Politics: Bangladesh perspective, Dhaka, CCB Foundation, pp-100

³⁸ Ibid-pp96

liberty”.⁴⁸ In equality view, free speech rights serve an overarching interest in political equality and on the second view, people are entitled to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons. Having freedom of speech, one can communicate ideas without any suppression or interference or punitive action. The rights protect individual’s ability to think and to express thoughts in material form, including written, filmed, staged, or otherwise depicted visually. It protects all speech, however offensive or unpopular. It is the bulwark of liberty³⁹.

The Digital Security Act will be used to deal with defamation, hurting religious sentiments, causing deterioration of law and order, and instigating violence against any person or organization by publishing or transmitting any material on any website or in electronic media. Through some sections of the Digital Security Act it obstruct freedom of speech, expression and thought which is guaranteed by the constitution of Bangladesh. Sections 8, 21, 25, 28, 29, 31, 32 of the Digital Security Act.

According to section 21 If an individual makes propaganda against The Liberation War, Spirit of Liberation War, Father of the Nation, National Anthem and National Flag or assist in such a process then such an action will be considered as a crime.⁴⁹ According to Section 25 if someone uses a website or digital media to intimidate anyone, he or she may face three years in jail or Tk300,000 in penalties.⁵⁰ Also section 28 says if anyone hurts another’s religious sentiments as defined by the Penal Code, he or she will face 10 years’ jail time or a Tk2 million fine, or both.⁵¹ As per Section 29, if a person publishes information with the intent to defame someone, he or she will face three years in jail or Tk500,000 fine, or both.⁵²

Section 31 says Crimes and penalty for deterioration of law and order.⁵³ 32 says about the Offence and penalty for breach of Official Secrets.⁵⁴

All of these are issues that came under Section 57 of the ICT Act. They are retained in the Digital Security Act in an elaborated manner. Section 57 of the ICT Act was abolished for the misuse of this section. The new law would frighten the public even more than Section 57 of the ICT Act did previously. After enact the law it’s already start to misuse the laws and obstruct the freedom of speech, expression and thought. On August 6, Inspector Md. Mehedi Hasan of the Detective Branch of police (north zonal team) filed the

³⁹ Article 39 of the constitution of People’s Republic of Bangladesh

case against Shahidul Alam in Ramna police station where he said ‘the noted photographer tried to instigate students and create instability in the country by spreading false information and rumors on social media’.⁵⁵

Freedom of press is also a part of freedom of expression. “The right is guaranteed subject to any reasonable restrictions imposed by law 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.”⁵⁶ Article 39(2) ensures the freedom of press but it is not unlimited, hence it follows that before publication or communication of one’s opinion, the State has no right to restrain it. So any sort of pre-censorship on the media is unconstitutional. As **Lord Mansfield** says, “press has the liberty to publish anything but if it infringes on anyone rights then it will face the consequence of his temerity⁴⁰”.

6.3 The grounds of restriction and examples of laws regulating the restrictions may be summed up as follows:

Security of the state- The penal Code 1860, The Post Office Act 1869, The Telegraph Act 1885. Friendly relation with foreign states: The Foreign Relations Act, 1932. mPublic Order: The Special Powers Act 1974 and Emergency Provisions of the Constitution (Article 141B and 141C) Decency or Morality: The Indecent Advertisement Prohibition Act 1963.

Contempt of Court: The Contempt of Court Act, 1926 Defamation: Section 499 of the Penal Code. The civil law relating to defamation is still unmodified in Bangladesh and courts follow the English law of tort subject to single modifications. Incitement to an Offence: The Penal Code 1860⁵⁷. But it is seen that, this section is misinterpreted and misused by the Government and new laws passed like ICT Act and the new Digital Security Act in the name of protection and security of cyber space which violate the freedom of speech, expression and thought of the press.

The Digital security act also obstruct the right to privacy or the protection of right to personal liberty which is guaranteed by the Constitution of Bangladesh under Article 32 of the constitute. “It says No person shall be deprived of life or personal liberty save in accordance with law”.⁵⁸Section 8, 43 and 53 of the digital security act violates the fundamental rights. Article 8 gives the power to the Director General and the law

⁴⁰ Article- 32 of the Constitution of the People’s Republic of Bangladesh

enforcement agencies to remove or block information and data.⁵⁹ Section 43 talks about Search, Seizure and Arrest without Warrant. This is by far the most dangerous of the provisions of the law. This empowers the police to enter any premises, search any computer system, seize any computer network and its servers, bodily search any body and also ARREST anybody on suspicion.⁶⁰ Section 53 Offenses are cognizable and bailable. Under this law out of the 20 or so provisions dealing with crimes and punishment 14 are cognizable and nonbailable.⁶¹ Given the fact that police have the power to arbitrarily arrest without warrant and on mere suspicion, this law presents a real threat to media freedom as so many offences have been made cognizable and nonbailable. The above mentioned section is a serious threat of the protection of right to liberty. The situation of harassing people vigorously has been going on since the act passed of this year⁴¹.

⁴¹ If in any website or electronic system publishes or broadcasts anything that hurts religious values and religious sentiments etc: (1) if any person or group deliberately and knowingly and with the intention of hurting religious values or sentiments or with the intention to provoke such sentiment publishes or broadcasts information then such actions will be considered a crime.

Chapter- 7

Contravention of Independent Journalism by the Digital Security Act 2020

7.1 Ethical norms and values of the independent journalism in relation of freedom of expression:

The Code of Ethics and Prices in Television, Radio, Online, anywhere in the world, have been detailed in the editorial policy. This policy has been created to help you make tough editorial decisions.⁶² The value of journalism is true and correct information, neutrality, freedom, public interest, accountability to viewers.

The essence of some parts of the policy will be highlighted. It is not complete at once, and the policies can be interpreted differently in the context of some special events. Journalist who wants to 'break' the news first must need to ensure the authenticity of the news. The truth is very important for journalists. He should monitor the incident and collect information himself. A 'breaking story' is not acceptable to serve solely on a news agency or social media site. All information for fairness should be considered equally in all aspects of his mind, with an open mind. The information that should be publicly publicized is sometimes available only from anonymous sources. The information is not being disclosed by the name of the last street, and the right to remain anonymous is not easy. The journalist needs to make sure that when he promise to keep the identity of a source confidential, he have to save that promise.⁶³ If the information provided by anonymous sources is included in the ceremony, then the editor has the right to know the identity of the source. If he wants to include children or teenagers at his ceremony, he have to first agree with them. Generally, he have to agree to the parents of the child. Or the legal guardian of the child or any other person who has legal responsibility for the child, such as the headmaster of the school, they have to get permission. The lesser the child or the age of the teenager, the guardian's consent will be as important. When gathering information about accidents, natural disasters, public discontent, violence, war, the right to know the right information of the people and the compassion for the affected people - the balance between these two aspects should be maintained. Whenever there is a need to interview an injured or sad person in an accident or a disaster, it should be arranged for interviews with their friends or relatives⁴².

⁴² Offence and penalty for breach of Official Secrets—1) If a person commits a crime or assists someone in committing a crime under the Official Secrets Act, 1923 (Act No. XIX of 1923) via a computer, digital device,

Today more than ever, independent journalism plays a fundamental role in creating and maintaining healthy, democratic societies. So much information is now available, and so much of it is intentionally or not untruthful, that journalism has to strengthen its role as the professional verifier, explainer, and contextualize. With deception ubiquitous in the digital era, journalism must be free to bark at power when it is abusive or corrupt, and to uncover activities that have been hidden or distorted by governments or corporations.⁶⁴

Paul Salopek says “all good journalism is independent. Everyone benefits from it. And the more diverse the independent news sources, the better. When only a few big media outlets dominate the news coverage, certain voices don’t get heard. That said, whether the reporting is generated by legacy companies or independent journalists, the mission should be the same: to report without fear or favor, uninfluenced by powerful political, commercial, or other special interests.”⁶⁵

Digital Security Act obstruct the norms and values of the laws relating independent Journalism:

Keeping the provision for bail, the government is going to formulate the Digital Security Act with the aim to remove all controversies and ambiguities involving Section 57 of the Information and Communication Technology Act. The Act suffers from vagueness and uses many terms that can be misinterpreted and used against the media. The Digital Security Act will create an atmosphere of fear and intimidation which will make journalism and especially investigative journalism virtually impossible. In addition to media professionals the law will create panic among all users of computers, computer network, etc.

When the ICT Act was made in 2006, the government said journalists had nothing to fear as its aim was to prevent cybercrimes and punish cyber criminals. The reality is journalists and people who exercised their constitutional rights to freedom of speech suffered imprisonment and harassment under Section 57 of the ICT Act. The same is now being said that Journalists have nothing to worry about the Digital Security Act, but the apprehension is that journalists will again face the same kind of harassment by this law.

The purpose of the law as mentioned in its preamble is to “ensure digital security and prevent crimes committed on digital platforms”⁶⁶. Hence we should not have been worried

computer network, digital network or any other digital media, they will get a maximum penalty of 14 years in jail or Tk 25 lakh in fines, or both.2) If a person commits a crime mentioned in the sub-clause (1) for a second time or repeatedly, they will be sentenced to life in prison or a maximum fine of Tk 1 crore, or both.

about the law. But the problem is that the Digital Security Act goes much beyond its defined scope and ventures into the territory of media and journalism. The law goes against the very nature and practice of independent journalism that stands to protect people's right to know and exposes abuse of power and corruption.

The Digital Security Act deals with the digital world which is ever evolving. Digital technology is all pervasive from national security to food production to health services to financial transactions, and media are no exceptions. While other fields mentioned above may require “regulations” media needs “freedom”. The Digital Security Act is focused only on the “regulation” aspect and totally neglects the need for media freedom. This is one of the fundamental flaws of the Digital Security Act making it so dangerous for the media⁴³.

A frightening aspect of the Digital Security Act is the enormous arbitrary power given to the police who may arrest a journalist just on suspicion of a so-called crime that he thinks may be committed in the future. The police are allowed to make such arrests which have been made mostly non-bailable without any warrant. In practical terms this will bring journalism under police control.

There are two issues of concern here -- the power of the Director General and the power of the law enforcement agencies. The power to block contents will hit the heart of publication either in print or online. Any report may be blocked or a photograph may be confiscated that may lead to disruption of any media outlet⁶⁷. “MuktiJuddherChetona” (Spirit of Liberation War) is a vague term and is very subjective and cases can be brought against journalists as interpretations can vary. We reiterate that we are in favour of protecting the great legacy of our Liberation War for the future generations. However, when laws are being framed we need to be very clear and specific. Given its present form, not only journalists but historians, researchers and even creative writers like novelists will also suffer. It may even result in people not writing or researching much on our Liberation War fearing misinterpretation and the possibility of punishment.⁶⁸

This will directly affect all investigative reporting in the media. Such reports are usually about some irregularities performed by institutions and individuals. Corrupt people will use this law to intimidate journalists and media organizations and try to prevent publication of

⁴³ Search, Seizure and Arrest without Warrant—1) If a police officer has a reason to believe that a crime under this law has been or is being or will be committed in any place, or there is a possibility of it happening, or if there is

such stories on the pretext that the reports have attacked or intimidated them. Actually every such report can be said to fall under one or more of the above categories and can be used to harass the media. Any investigative report that reveals corruption about a person or an institution is bound to “irritate”, “embarrass” or “humiliate” someone. This provision will make it impossible to publish any negative report about any corrupt person. This will reduce newspapers to PR outfits. Journalism of even the most rudimentary investigative nature will become impossible. The second part of this provision talks about “spreading confusion”. Without specifying the meaning of “confusion”, it may become a weapon of media harassment. What is confusing to one may not be confusing to another. This will surely create a new avenue to intimidate the media. For example, question maybe come as what constitutes the damaging of “image/ reputation” of the State? Recently journalist has reported about the corruption in the banking sector by unscrupulous business groups. They also reported that the banks face grim crisis. Does it constitute damaging the “image/reputation”? Journalist often report corruption in the law enforcement agencies, about the “custodial deaths” “disappearances”, and “extra-judicial killings”. If someone interprets all these reports as damaging the “image” of the State then this law legalizes punishment of journalists and newspapers for making such reports as all newspapers have websites⁴⁴.

The term “religious sentiment” is a much undefined term how can a reporter know how and when religious sentiment has been hurt? This term lends itself to diverse interpretations and no journalist will feel comfortable about reporting on such issues. This will prevent journalistic scrutiny over a large area of the society. The recent reporting on the sexual harassment by catholic priests would not have been possible if those countries had a law preventing reporting that “hurts” religious sentiments. Criticizing unlawful fatwa or women's property rights may be interpreted by some as “hurting” their religious values. This section can lead to widespread harassment of journalists.⁷⁰

This is a sweeping restrictive law from the colonial times that was promulgated to protect the British administration from any sort of accountability. It is shocking to see it being

⁴⁴ Publishing or distributing attacking, false or intimidating information or data: (1) If any person using a website or any digital device-(a) deliberately or knowingly distributes any information or data that is attacking or intimidating in nature; or if a person publishes or distributes any information despite knowing that it is false to irritate, humiliate, defame or embarrass or to discredit a person Or (b) Damages the image and reputation of the State or spreads confusion or with the same purpose publishes or distributes fully or partially distorted information or data despite knowing that it is false, and if any one assists in such actions then all such actions of the individual will be considered a crime.

incorporated for digital platforms. Anything that is not made public by the government is deemed an “Official secret”. Let us take one example. We have published dozens of reports about bank defaults based on Bangladesh Bank's findings. All such reports can be said to have violated the official Secrets Act. All government reports which have not been made public, say, on pollution or child nutrition, are a part of the Official Secrets Act. Is journalism of any worth possible without the use of such official reports? And why should using them be a “crime” as people have a “Right to Know” under the Right to Information Act, especially when all such reports are funded by public money. Our reporters often use their mobile phones to take pictures of such documents. So they can be thrown in jail up to life-term, right? Proponents of this law may find our examples to be “ludicrous”. But real life examples from the use of section 57 of the ICT Act give journalists no reasons for comfort⁴⁵.

This is by far the most dangerous of the provisions of the law.

This empowers the police to enter any premises, search any computer system, seize any computer network and its servers, bodily search any body and also arrest anybody on suspicion. First, the threat of arrest without warrant will naturally prevent a journalist from doing

their work. When police get the power to arrest without warrant, and on mere suspicion then media freedom will be buried under this law. Given the fact that 14 out of 20 provisions of punishment are nonbailable the threat of arrest becomes like the “Damocles' Sword” constantly hanging over the head of every journalist, causing mental stress. This will prevent all forms of real journalism and make our media nothing more than public relations and propaganda outlets.

Even if the law is not implemented (and why not if the law exists?) the environment of fear will prevent journalists from doing their job. The fear of arrest will become a regular part of the “mental environment” and debilitate a journalist from taking legitimate risks that he or she regularly take to file their stories. The “emotional stress” that it will create should not be underestimated. It can easily be expected that people in power will abuse this law, provoke or “manage” law enforcers to threaten or even arrest journalists for any story that will reveal something that the rich and powerful will want to hide.

⁴⁵ Sullivan, Kathleen M., (2011). Constitutional Law (17th edit.), University Cashbook.

The most dangerous side of this law is that since every newspaper and TV station works on digital system, by giving the power to confiscate a computer, a network of computers including servers, the law enforcing agencies have been given, in effect, the power to shut down a newspaper or TV station or a news portal by confiscating its computers, computer system, computer network and other equipment. Thus without closing down a media outlet, this clause opens up the possibility of stopping the publication of a newspaper or the operation of a TV station by the law enforcing agencies⁴⁶.

⁴⁶ [https://www.dhakatribune.com/bangladesh/law-rights/2018/08/10/the-question-of-section-57-56-Article-39\(2\)-of-the-Constitution-of-the-People's-Republic-of-Bangladesh](https://www.dhakatribune.com/bangladesh/law-rights/2018/08/10/the-question-of-section-57-56-Article-39(2)-of-the-Constitution-of-the-People's-Republic-of-Bangladesh)

Chapter 9

Concluding Part

9.1 Conclusion:

Although being an independent country the application of democracy exists but it cannot always fulfill the demand of whole nation. Considering the urge of operation on freedom of expression should be the first priority of any government and it cannot be throttled by the people on self- motive. Media, press, civil society plays a vital role in democracy and that should not be curtailed through the embezzlement of law. Freedom of expression does not mean that one can say whatever s/he wants on a public platform. The freedom of expression is neither unlimited nor unconditional. Furthermore, the Constitution of Bangladesh also recognizes that the right to freedom of expression is guaranteed subject to reasonable restrictions imposed by law in the interests of maintaining public order within the country. Public Order is the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded disciplined. The meaning of public order must be placed in the context of the right to be limited and that the state agents or organs charged with the maintenance public order must be subject to supervision of the exercise of their power by parliament, the courts or competent independent bodies. At the end it is seen that The Digital Security Act is a reflection of the section 57 of the ICT Act and it is against our constitution, against our fundamental rights, against freedom of speech and freedom of journalism and, as such, against democracy so the government should repeal those sections of the Digital Security Act which resembling section 57 of the ICT Act.

9.2 Recommendation:

1. Human Rights Watch, in its World Report 2022, said authorities use the Digital Security Act (DSA) to “harass and indefinitely detain” journalists, activists, and others critical of the government, resulting in a chilling effect on expression of dissent.
2. Section-2(1)(g) of the Digital Security Act 2018 should be amended and the word ‘adverse effect’ should be struck out and serious damage should be inserted,
3. Section-19 of the Digital Security Act 2018 should be struck out in its entirety. Should it be retained it should be amended and include, dishonest intention and unlawful entrance and should provide for public interest defense,
4. The requirement intent to procure economic benefit for oneself or for another should be inserted in section-23of the Digital Security Act 2018,
5. Section-24 of the Digital Security Act 2018 should be struck out entirely. If it should be retained, it must be amended and insert serious harm and dishonest and intentional harm to invoke criminal sanction,
6. Public interest defence should be included that can outweigh the harm and to secure public interest under this Act,
7. Section-32 of the Digital Security Act 2018 should be struck out in its entirety. Should it be retained, the unduly broad punishment under section-32 should be struck out and the punishments given under the “Official Secrets Act 1923” may be applicable for in this Act,
8. Section-43 of the Digital Security Act 2018 should be struck out entirely. Any investigative powers entrusted to any police officer of search must be defined, proportionate and where they implicate the rights and property of individuals, include strict requirements for judicial review, the International conventions should be given preference in amending the criticized provisions of this Act,
9. there should include public interest defense and harm test to measure the severity of the offence and to inflict punishments,
10. there should be provisions safeguarding victims from false complaints.

Chapter 10

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