

THE ENACTMENT OF DIGITAL SECURITY LAWS IN BANGLADESH: NO PLACE FOR DISSENT

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ABSTRACT

On December 16, 1971, following Bangladesh's emergence as an independent nation through a bloody war of independence, the founding fathers pledged to establish a society based on democratic values such as respect for the rule of law, fundamental human rights, and the dignity and worth of individuals. Since freedom of speech and expression is the lifeblood of a democratic society governed by the rule of law, the founding fathers made this right an integral part of the constitutionally entrenched bill of rights. However, this Article will demonstrate that the ideal of a society based on democratic virtues has been drastically weakened through the enactment of two digital security laws, namely the Information and Communication Technology Act (ICTA) and the Digital Security Act (DSA). The ICTA's broad scope, in particular Section 57, had been used by the current regime to launch an unprecedented crackdown on the fundamental human rights of individuals, particularly the freedom of speech and expression. Consequently, Section 57 was repealed through the enactment of the DSA. Notwithstanding the repeal of Section 57, several of its key features have found a place in the DSA and are already being misused by the regime to stifle dissent in the same manner. Thus, this Article will put forward recommendations for ensuring the promotion and protection of the democratic virtues on which Bangladesh was founded.

I. INTRODUCTION

A fundamental feature of a democratic society governed by the rule of law is the protection of the right to freedom of speech and expression.¹ It is understood that this right is not absolute due to

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1. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 635 (1990).

the necessity of imposing reasonable restrictions on it, for instance, to adequately contain grave threats posed to the security of the state and its citizens by war, external aggression, armed rebellion, civil war and violent or non-violent protests.² However, there is general consensus among the comity of nations that this right should enjoy continuous operation during ordinary times.³ Safeguarding the enjoyment of this right fosters open and meaningful dialogue in society, and consequently prevents the government from acting in contravention of the wishes and best interests of the citizens.⁴ Therefore, the guarantee of free speech and expression contributes to the establishment of responsible government, i.e. “government in compliance with the rule of law.”⁵ Facilitating free and open exchange of information and ideas about public issues also cultivates the development of a well-informed citizenry.⁶ The eternal vigilance of such a citizenry in turn acts as a safeguard against the dissemination of inaccurate facts and “noxious doctrines” in a democracy.⁷ As Justice Louis Brandeis observed:

[T]he [objective of the] state [is] to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary . . . order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies [T]he fitting remedy for evil counsels is good

2. M. EHTESHAMUL BARI, STATES OF EMERGENCY AND THE LAW: THE EXPERIENCE OF BANGLADESH 67, 200 (2017); *see also* JANET L. HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW 13–16 (1996) (describing when fundamental rights may be limited under the Canadian Charter of Rights and Freedoms).

3. Nicholas Grossman, *Free Speech in a Global Context*, MEDIUM (June 22, 2017), <https://medium.com/s/liberal-illiberalisms/free-speech-in-a-global-context-c5534b5eec25> [<https://perma.cc/PJ47-56KR>]; *see also* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 689–91 n.3 (2016) (“Free speech consequentialism ‘would support limitations on our right to free speech, if they for example, produced a society of enjoying more overall happiness.’”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3 (1971). *But see* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L. J. 1, 3 (2011) (“endeavors [made] to balance” free speech cannot be done in a “principled” manner and would “invit[e] . . . unbridled judicial activism”).

4. *See* GOV'T OFF. SWED., MINISTRY OF CULTURE, DEFENDING FREE SPEECH: MEASURES TO PROTECT JOURNALISTS, ELECTED REPRESENTATIVES AND ARTISTS FROM EXPOSURE TO THREATS AND HATRED 6 (2018).

5. *See* BARI, *supra* note 2, at 140.

6. Leonard M. Niehoff & Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstnacy of Bias*, MICH. J. RACE & L. 243, 247 (2017).

7. *Whitney v. California*, 274 U.S. 357, 375 (1927).

ones.” and “the remedy [for addressing bad speech] is more speech.⁸

Recognizing the utility of the right to freedom of speech and expression in a democratic society, the historic Declaration of Rights of Man and of the Citizen—considered the most important contribution of the French Revolution of July 1789—had for the first time designated it as “one of the most precious rights of man.”⁹ The Declaration has been a fundamental feature of all three French Constitutions, including the current one—the 1958 Constitution of the Fifth Republic.¹⁰ On the other hand, the failure on the part of the framers to incorporate a bill of rights in the Constitution of the United States was addressed three years after its ratification through the addition of a Bill of Rights, which comprises the first Ten Amendments to the Constitution.¹¹ The first of these amendments guarantees the freedom of speech.¹² The objective underlying the incorporation of this right was that without such guarantees, the government “would assume, and might be held to possess, the power of trespass upon those rights . . . which by the Declaration of Independence were affirmed to be unalienable rights.”¹³ The U.S. Constitution’s example in turn persuaded newly independent commonwealth nations to make free speech an integral part of their constitutionally entrenched bills of rights.¹⁴

In Bangladesh, which secured its independence from Pakistan on December 16, 1971, the founding fathers endeavored to establish a society based on democratic values, such as respect for the rule of law, fundamental human rights, and the dignity and the worth of individuals.¹⁵ These goals are evident from the third pre-

8. *Id.*

9. Declaration of the Rights of Man and Citizen art. 11 (1789), *reprinted in* FRANK MALOY ANDERSON, *CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789-1901* 58, 60 (1904) (“The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law”).

10. 1958 CONST. pmb. (Fr.).

11. For more about the battle over the inclusion of a Bill of Rights in the U.S. Constitution, see James R. Zink, *James Wilson versus the Bill of Rights: Progress, Popular Sovereignty, and the Idea of the U.S. Constitution*, 67 *POL. RES. Q.* 253, 256 (2014); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1137–42 (1991).

12. *See* Edward J. Eberle, *The Architecture of First Amendment Free Speech*, *MICH. ST. L. REV.* 1191, 1192–93 (2011); *see also* Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 *OHIO ST. L. J.* 659, 665–67 (2015).

13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 38 (2008).

15. BARI, *supra* note 2, at 7.

amble paragraph and Article 11 of the Constitution of Bangladesh.¹⁶ In an effort to give effect to this aspiration, the framers, among other things, incorporated an impressive *eighteen* fundamental rights in Part III of the Constitution including “the right of every citizen to freedom of speech and expression” and “freedom of the press.”¹⁷

However, the ideal of a society based on democratic virtues as envisaged by the framers of the Constitution of Bangladesh has been drastically weakened through the enactment of legislation for allegedly preventing cybercrimes. In 2006, the Information and Communication Technology Act (ICTA) was enacted, The broad scope of the ICTA, in particular Section 57—which made publication of “fake, obscene or defaming information in electronic form” punishable with imprisonment for a maximum term of fourteen years and with a maximum fine of USD 11,920,400¹⁸ was used by the current Bangladesh Awami League (BAL) regime to launch an unprecedented crackdown on the fundamental human rights of individuals, particularly the freedom of speech and expression.¹⁹ Consequently, Section 57 was repealed through the enactment of the Digital Security Act (DSA) due to concerns raised by civil society, opposition political parties, and human rights organizations at home and abroad about the abuse of Section 57.²⁰ But several of the key features of Section 57 have found a place in the DSA, thereby enabling the regime to misuse it in the same manner to crack down on dissent.

It is against the above background that this Article, in Part II, will examine the guarantees in the Constitution of Bangladesh concerning free speech, which in the words of Justice Mirza Hameedullah Beg of the Supreme Court of India is the “[a]rk of the Covenant of Democracy because public criticism is essential to the working of its institutions.”²¹ Subsequently, Parts III and IV will critically assess the ICTA and the DSA. Part V of the Article will seek to determine whether the relevant provisions of these laws are

16. *See, e.g.*, BANGL. CONST. art. 11.

17. *Id.* art. 39(2)(a).

18. Information & Communication Technology Act, 2006, § 57, *amended by* Information & Communication Technology (Amendment) Act, 2013, No. 42 of 2013, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 9, 2013 (Bangl.).

19. *See infra* Part III.

20. *See* Digital Security Act 2018, No. 46 of 2018, § 61, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.); *see also* Tuhin Shubhra Adhikary, *The Trap of Section 57*, DAILY STAR (July 7, 2017, 9:46 AM), <https://www.thedailystar.net/frontpage/bangladesh-ict-act-the-trap-section-of-57-1429336> [<https://perma.cc/32F8-QPD4>].

21. *Bennett Coleman & Co. v. Union of India*, (1973) 2 SCR 757, 829 (India).

compatible with the guarantees contained in the Constitution of Bangladesh for the establishment of a democratic society based on the rule of law and human rights. It will be demonstrated that these statutes have been used by the current regime to silence legitimate dissent, thereby substituting the rule of law with the rule of man. Consequently, recommendations will be put forward for ensuring the promotion and protection of the democratic virtues on which Bangladesh was founded.

II. THE IDEAL OF A DEMOCRATIC SOCIETY AND THE GUARANTEE OF FREE SPEECH IN THE CONSTITUTION OF BANGLADESH

The inhabitants of Bangladesh during their twenty-four year union with Pakistan longed to be a part of a democracy that would uphold the rule of law and the fundamental human rights of individuals.²² They frequently witnessed the subversion of the rule of law and the violation of their fundamental human rights under the guise of proclamations of martial law and emergency.²³ Consequently, the high ideal of democracy, among other things, inspired the people of Bangladesh “to dedicate themselves . . . in the war for national independence”²⁴ and to establish the “independent, sovereign People’s Republic of Bangladesh.”²⁵

The founding fathers sought to give effect to the long-cherished aspiration of the people by seeking to ensure that the newly independent nation was a liberal democracy. Accordingly, they pledged in the third preamble paragraph of the Constitution of Bangladesh, which came into force on December 16, 1972, that “it shall be a fundamental aim of the State to realise through the democratic process [a] . . . society . . . free from exploitation—a society in which the rule of law, fundamental human rights and freedom . . . will be secured for all citizens.”²⁶ Furthermore, Article 11 of the Constitution, contained in Part II of the Constitution titled “Fundamental Principles of State Policy,” states that the “[r]epublic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person

22. See BARI, *supra* note 2, at 6–7.

23. See *id.* at 39–47, 87–88; see also M. Ehteshamul Bari, *The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal*, 28 *TRANSNAT’L L. & CONTEMP. PROBS.* 27, 33 (2018).

24. BANGL. CONST. pmb1.

25. *Id.*

26. *Id.*

shall be guaranteed.”²⁷ The Constitution stipulates that the Fundamental Principles of State Policy shall be “fundamental to the governance of Bangladesh, . . . applied by the State in the making of laws, . . . a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens.”²⁸ Thus, it is evident that the Constitution makes it obligatory for the State among other things to ensure that the laws enacted by it maintain respect for the fundamental human rights of individuals and the dignity and worth of the human person.

The Constitution, as pointed out earlier in Part I of this Article, guarantees eighteen fundamental rights to establish a society based on democratic values.²⁹ Since freedom of speech facilitates public criticism essential for keeping the government accountable and accordingly is considered the “lifeblood of democracy,”³⁰ the founding fathers made this right an integral part of the constitutionally entrenched bill of rights. Article 39 of the Constitution, *inter alia*, provides:

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 press are guaranteed.*³¹

A perusal of Article 39 reveals that “reasonable restrictions” on the fundamental rights to freedom of speech, expression, and the press³² can only be imposed for: safeguarding the security of the nation; maintaining friendly relations with foreign states; upholding public order, decency, or morality; preventing the dissemination of information or material that is disrespectful towards a court; protecting the reputation of, depending on the circumstances of the case, an individual or the state; and protecting against incitement to an offense.³³ Thus, any law enacted by the Parliament imposing restrictions on these rights, in the first place, must be carefully designed to further one of the above objectives.³⁴ The restrictions must not be “arbitrary, unfair or based on irra-

27. *Id.* art. 11.

28. *Id.* art. 8(2).

29. *See id.* arts. 26–43.

30. *R. v Home Secretary* [2000] 2 AC 115 (HL) 126 (Lord Steyn) (Eng.).

31. BANGL. CONST. art. 39 (emphasis added).

32. *Id.*

33. *Id.*

34. *See R. v. Oakes*, [1986] 1 S.C.R. 103, 139 (Can.).

tional considerations.”³⁵ Second, the restrictions, notwithstanding their connection to the objectives listed in Article 39, must impair these fundamental rights “as little as possible.”³⁶ Finally, any limitation must be a proportionate means of achieving one of the goals identified by Article 39.³⁷ If the limitation imposed on these rights does not meet these criteria, then it will not satisfy the requirements prescribed by Article 39 of the Constitution.

Although it is permissible to impose reasonable restrictions on the right to freedom of speech and expression, the *scope* of this right is quite wide. The Supreme Court—the highest court of law in Bangladesh—in the case of *Dewan Abdul Kader v. Bangladesh*, has observed:

[A] right to express one’s own opinion absolutely freely by spoken words, writing, printing or in any other manner which may be open to the eyes and ears. It thus includes expression of one’s ideas on any matter by any means including even gestures, postures, banners and signs. It appears to us that this freedom is wide enough to include expression of one’s own original ideas and also expression of one’s opinion in the form of comments, explanations, annotations, solutions and answers to questions on the ideas expressed by others.³⁸

The Constitution also makes the right to have the Supreme Court enforce the fundamental rights itself one of the eighteen fundamental rights guaranteed by Part III of the Constitution. Article 44(1) of the Constitution provides: “The right to move the High Court Division [of the Supreme Court] . . . for the enforcement of the rights conferred by this Part is guaranteed.”³⁹ Thus, the founding fathers sought to translate their vision of establishing a liberal democracy into reality by enumerating elaborate provisions in the Constitution for not only capturing the spirit of such a democracy but also the means for its realization.

35. *Id.* at 139.

36. *Id.* (internal quotation marks omitted).

37. *See id.*; *see also* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT’L L.J. 1, 17 (1981); Mohd. Faruk v. State of Madhya Pradesh, (1970) 1 S.C.R 156 (1969) (India); N.B. Khare v. State of Delhi, (1950) S.C.R. 519 (India). Judges of Supreme Court of Bangladesh have liberally used Indian Supreme Court judgements to interpret reasonable restrictions and free speech under Bangladesh Constitution. *See Kader v. Bangladesh*, (1994) 46 DLR 596 (Bangl.).

38. *Kader v. Bangladesh*, (1994) 46 DLR 596 ¶ 11 (Bangl.).

39. BANGL.CONST. art. 44(1).

III. SECTION 57 OF THE INFORMATION AND COMMUNICATION
TECHNOLOGY ACT, 2006: THE BEGINNING OF THE END
FOR FREE SPEECH IN BANGLADESH

The Internet has provided individuals around the world a sense of empowerment by providing them with a platform for communicating their views to a wider audience. For instance, the growing use of social media has now enabled individuals to become the sources of innovative “ideas, plans and initiatives in an easier way than ever before.”⁴⁰ A prominent example of social media’s power was witnessed during the Arab Spring, when it became a potent tool for mobilizing support by showing the world human rights violations on the ground.⁴¹ Thus, the constructive use of social media was an essential component of the protestors exercising their right to freedom of speech.

But the Internet can also be used by criminals to commit a diverse range of criminal activities that “know no borders, either physical or virtual, cause serious harm and pose very real threats to victims worldwide.”⁴² These crimes, which are known as cybercrimes, can take many forms, including theft, fraud, and illegal gambling and can cost billions of dollars to the global economy.⁴³ These adverse effects of the Internet on the life and property of citizens ultimately persuaded the government of the Bangladesh Nationalist Party (BNP) to introduce a legal framework to regulate and govern cyberspace. On October 8, 2006 towards the end of the BNP government’s five-year tenure, the government used its majority in the Parliament to enact the ICTA.⁴⁴ The aim of the Act

40. Alejandra Guzman, *6 Ways Social Media is Changing the World*, WORLD ECON. F. (Apr. 7, 2016), <https://www.weforum.org/agenda/2016/04/6-ways-social-media-is-changing-the-world/> [<https://perma.cc/5K7T-FHD3>] (internal quotation marks omitted).

41. See Amy Mitchell et al., *The Role of Social Media in the Arab Uprisings*, PEW RES. CTR. (Nov. 28, 2012), <https://www.journalism.org/2012/11/28/role-social-media-arab-uprisings/> [<https://perma.cc/8YZM-BH3W>].

42. *Cybercrime*, INTERPOL, <https://www.interpol.int/en/Crimes/Cybercrime> [<https://perma.cc/YAF3-LH2M>] (last visited June 20, 2019).

43. *Id.*; see also JAMES LEWIS, CTR. FOR STRATEGIC & INT’L STUD., ECONOMIC IMPACT OF CYBERCRIME – NO SLOWING DOWN 6 (2018) (estimating the global cost of cybercrime at “as much as \$600 billion”).

44. See Information & Communication Technology Act, 2006, No. 39 of 2006, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2006 (Bangl.). The second BNP government, led by Begum Khaleda Zia, was formed on October 10, 2001 and completed its tenure on October 29, 2006. See Najma Chowdhury, *Lessons on Women’s Political Leadership from Bangladesh*, 34 SIGNS 8, 13 (2008); Shahid Alam, *Fathoming ICT (Amendment) Act, 2013*, DAILY STAR (March 8, 2015, 1:53 AM), <http://www.thedailystar.net/fathoming-ict-amendment-act-2013-14762> [<https://perma.cc/84L8-BQ86>].

is to “provide legal recognition and security of Information and Communication Technology.”⁴⁵

The majority of the provisions of the ICTA address various forms of cybercrimes, such as hacking, interference with computer systems or networks, and tampering with computer source code.⁴⁶ Disturbingly, however, Section 57 of the Act criminalized the publication or transmission of certain types of material online. Section 57 originally provided:

(1) 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.

(2) 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 [approximately USD 119,204.40].⁴⁷

Seven years after the enactment of the ICTA, Section 57(2) was amended on October 6, 2013 by the current BAL government to increase the maximum jail term for the offences stipulated under Section 57(1) from ten to fourteen years while the maximum financial penalty was increased from Tk. one crore to ten crores (approximately USD 11,920,400).⁴⁸

The origin of these provisions can be traced back to the U.K. Post Office (Amendment) Act, which made it an offense to send any message by telephone that was “grossly offensive or of an indecent, obscene, or menacing character.”⁴⁹ These provisions were later reproduced in the U.K. Post Office Act 1953.⁵⁰ Following the repeal of the U.K. Post Office Act, 1953, these provisions have been further modified to cater for the evolution of electronic communi-

45. Information & Communication Technology Act, 2006, No. 39 of 2006, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2006 (Bangl.).

46. *Id.* §§ 54, 55, 56.

47. *Id.* § 57. The currency of Bangladesh is called the Taka (Tk.). One crore is ten million, and one lakh is one-hundred thousand.

48. Information & Communication Technology (Amendment) Act, 2013, No. 42 of 2013, § 4, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 9, 2013 (Bangl.).

49. Post Office (Amendment) Act 1935, 25 Geo. 5 c. 15, § 10(2)(a) (U.K.).

50. Post Office Act 1953, 1 & 2 Eliz. 2 c. 36, § 66 (U.K.).

cation. The provisions in their present form are contained in Section 127 of the Communications Act, 2003⁵¹ which read as follows:

Improper use of public electronic communications network

- (1) A person is guilty of an offence if he –
 - (a) sends by means of a public electronic communication network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) cause any such message or matter to be so sent.
- (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he-
 - (a) sends by means of a public electronic communications network, a message that he knows to be false,
 - (b) causes such a message to be sent; or
 - (c) persistently makes use of a public electronic communications network.
- (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 [£5,000] on the standard scale, or to both.⁵²

Thus, the idea of regulating the dissemination of information via various modes of electronic communication has been a common feature of democratic governments. Although there are obvious similarities between the ICTA and its U.K. counterpart concerning the criminalization of publication or transmission of obscene material, it is striking that Section 57 went further by making it an offense to publish or transmit material online that was:

- (a) fake; or
- (b) likely to deprave and corrupt readers; or
- (c) detrimental to the law and order situation; or
- (d) prejudicial to “the image of the State or person”; or
- (e) hurtful to religious belief.⁵³

It is, therefore, evident that Section 57 authorized the imposition of restrictions on freedom of speech and expression on vague and nebulous grounds—each of which “embody wide areas of discretionary interpretation.”⁵⁴ Consequently, the executive branch of government was given substantial leeway to bring any speech and expression within the purview of these imprecise grounds, and to

51. Communications Act 2003, c. 21 § 127 (Eng.).

52. *Id.*

53. Information & Communication Technology Act, 2006, § 57, *amended by* Information & Communication Technology (Amendment) Act, 2013, No. 42 of 2013, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 9, 2013 (Bangl.).

54. Safia Naz & M. Ehteshamul Bari, *The Enactment of the Prevention of Terrorism Act, 2015, in Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960?*, 41 SUFFOLK TRANSNAT'L L. REV. 1, 6 (2018).

misuse the law for purposes other than that of protecting the legitimate interests of the State. The punishment stipulated in Section 57 was also significantly harsher than that provided for by its U.K. counterpart.

It should be stressed here that some of the grounds in Section 57 for penalizing the dissemination of information, such as that it was “obscene,” prejudicial to the interests of the state, or hurtful to religious sentiments, are already penalized under the Bangladesh Penal Code.⁵⁵ Furthermore, the punishments prescribed for these offenses under the Code are far less draconian.⁵⁶ Thus, the offenses that are scattered across a number of provisions of the Code were consolidated into a single place, namely Section 57 of the ICTA, and the punitive measures for these offenses were increased gratuitously, namely, a maximum of fourteen years imprisonment and a maximum financial penalty of Taka ten crores (approximately USD 11,920,400).⁵⁷

Initially, the operation of Section 57 was limited by the ICTA to prevent its misuse. For instance, the Act required a warrant to make an arrest.⁵⁸ Accordingly, only 426 complaints were filed under Section 57 from October 8, 2006 to October 5, 2013, and just a handful resulted in arrest or prosecution.⁵⁹ However, the same amendment that increased the punitive measures under Section 57 also removed the warrant requirement and made the

55. BANGL. PENAL CODE §§ 292 (obscene), 505A (prejudicial to the interests of the state), 295A (hurtful to religious sentiments) (1860).

56. The Penal Code prescribes a maximum of three months’ imprisonment or fine or both for dissemination of obscene material; two years’ imprisonment or fine or both for defamation; seven years’ imprisonment or fine or both for those prejudicial to the security of the state; and two years’ imprisonment or fine or both for insulting religious sentiments. *Id.* §§ 292, 500, 505A, 295A.

57. Information & Communication Technology Act, 2006, § 57, *amended by* Information & Communication Technology (Amendment) Act, 2013, No. 42 of 2013, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 9, 2013 (Bangl.).

58. Prior to the 2013 Amendment, a violation was a “non-cognizable offence,” which requires a warrant for arrest. *See* Information & Communication Technology Act, 2006, § 76(2), No. 39 of 2006, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2006 (Bangl.) (classifying violations as non-cognizable); BANGL. CODE OF CRIM. PROC. § 4(1)(n) (defining “non-cognizable offence” as requiring a warrant for arrest).

59. David Bergman, *No Place for Criticism: Bangladesh Crackdown on Social Media Commentary*, HUM. RTS. WATCH (May 9, 2018), <https://www.hrw.org/report/2018/05/09/no-place-criticism/bangladesh-crackdown-social-media-commentary> [<https://perma.cc/D7EV-22JS>].

offenses non-bailable,⁶⁰ thereby removing the legal checks for preventing the abuse of Section 57.⁶¹

The effects of these changes, coupled with the use of vague language in Section 57, resulted in unbridled and unfettered power for the law enforcement agencies. From October 6, 2013 to September 20, 2018, the approximate number of cases instituted under Section 57 increased to 1,300.⁶² Thus, the number of complaints had *tripled* since the amendment to the ICTA in 2013. In pursuance of the complaints, at least 1,200 individuals were arrested by the law enforcement agencies.⁶³ Those arrested on the basis of the complaints include prominent journalists, human rights activists, opposition leaders, and anti-corruption crusaders, who had expressed views in electronic form that were critical of the government of the BAL. The complainants were invariably ruling party activists.⁶⁴ However, ordinary citizens of the nation were not spared either. For instance, there were several instances where individuals were arbitrarily detained under Section 57 for merely liking posts on Facebook that were critical of the government and the ruling party,⁶⁵ liking and sharing posts on Facebook critical of Prime Minister Sheikh Hasina's official visit to India,⁶⁶ and posting and liking on Facebook even caricatures of Prime Minister Sheikh Hasina.⁶⁷ By removing the checks on Section 57 that existed prior to the 2013 amendment, it turned it into a weapon for the ruling party to stifle criticism directed towards it and its leader. The following examples demonstrate how the ruling party's misuse of Sec-

60. Meer Ahsan Habib, *The Limitations of ICT and Cyber Security Acts*, DAILY STAR (July 29, 2015), <https://www.thedailystar.net/op-ed/politics/the-limitations-ict-and-cyber-security-acts-118033> [<https://perma.cc/H2VZ-4XSB>].

61. *Id.*

62. The approximate number of complaints filed under Section 57 is based on reports produced by Human Rights Watch. See *No Place for Criticism*, *supra* note 59. Section 57 was repealed on September 20, 2018.

63. *Bangladesh: New Digital Security Act is Attack on Freedom of Expression*, AMNESTY INT'L (Nov. 12, 2018), <https://www.amnesty.org/en/latest/news/2018/11/bangladesh-muzzling-dissent-online/> [<https://perma.cc/YPZ7-Z9LN>].

64. See *New Digital Security Act is Attack on Freedom of Expression*, *supra* note 63.

65. *Bangladesh: Protect Freedom of Expression*, HUM. RTS. WATCH (May 9, 2018), <https://www.hrw.org/news/2018/05/09/bangladesh-protect-freedom-expression> [<https://perma.cc/D389-JURA>].

66. *Id.*

67. *Bdjobs CEO Arrested Under Article 57*, PROTHOM ALO (Apr. 25, 2018, 4:41 PM), <https://en.prothomalo.com/bangladesh/news/174647/Bdjobs-CEO-detained-under-article-57> [<https://perma.cc/GK3F-2WTJ>]; *HRW Asks Bangladesh to Protect Freedom of Expression*, DAILY STAR (May 10, 2018), <https://www.thedailystar.net/country/human-rights-watch-asks-bangladesh-protect-freedom-of-expression-digital-security-act-2018-1574356> [<https://perma.cc/JK9U-BKK7>].

tion 57 deprived citizens of their constitutionally guaranteed freedom of speech and expression.

A. Arrest of Mahmudur Rahman

One of the first prominent arrests made under Section 57 was that of Mr. Mahmudur Rahman, the acting editor of *Amar Desh*—a leading pro-opposition newspaper in Bangladesh—and former energy adviser to the BNP Government, on April 11, 2013.⁶⁸ In December 2012 under Rahman's editorship, *Amar Desh* published transcripts of Skype and email conversations between Justice Nizamul Huq, then-chairman of Bangladesh's International Crimes Tribunal, established for bringing to justice those responsible for committing war crimes during the war of independence from Pakistan,⁶⁹ and a Belgium-based Bangladeshi legal expert.⁷⁰ The transcripts cast serious doubts on the competency of the Tribunal to function independently of the wishes of the executive branch. They revealed that Justice Huq was being unduly pressured by members of the government to quickly deliver guilty verdicts against leaders of the principal Islamic Party of the country, Jamaat-e-Islami, who had been accused of committing war crimes.⁷¹ It is apposite to mention here that the Jamaat-e-Islami has been an integral part of the opposition electoral alliance led by the BNP.⁷² The transcripts further revealed that in exchange for the guilty verdicts, Justice Huq was promised a promotion from the lower division of the Supreme Court of Bangladesh, the High Court Division (HCD), to its higher division, the Appellate Division (AD).⁷³ These revelations seriously undermined public confidence in the

68. *Bangladesh Opposition Editor Mahmudur Rahman Arrested*, BBC NEWS (Apr. 11, 2013), <https://www.bbc.com/news/world-asia-22110132>; see also *Mahmudur Rahman Arrested*, BDNEWS24 (Apr. 11, 2013, 1:00 PM), <http://bdnews24.com/bangladesh/2013/04/11/mahmudur-rahman-arrested> [<https://perma.cc/LLW7-EUKE>].

69. *Trying War Crimes in Bangladesh: The Trial of the Birth of Nation*, ECONOMIST (Dec. 5, 2012), <https://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain> [<https://perma.cc/A28S-BM3F>].

70. *Bangladesh: Information and Communication Technology Act Draconian Assault on Free Expression*, INT'L COMM'N JURIST (Nov. 20, 2013), <https://www.icj.org/bangladesh-information-and-communication-technology-act-draconian-assault-on-free-expression/> [<https://perma.cc/J5RG-2VB7>].

71. ECONOMIST, *supra* note 69.

72. Nawaz Farhin Antara, *Will BNP Maintain Ties with Jamaat?*, DHAKA TRIB. (Aug. 28, 2018, 1:46 AM), <https://www.dhakatribune.com/bangladesh/politics/2018/08/28/will-bnp-maintain-ties-with-jamaat> [<https://perma.cc/25A6-NYXA>].

73. David Bergman, *7 Jan 2013: Molla Defense Retrial Application*, BANGL. WAR CRIMES TRIBUNAL (Feb. 19, 2013, 2:51 AM), <https://bangladeshwarcrimes.blogspot.com/2013/02/7-jan-2013-molla-defense-retrial.html> [<https://perma.cc/W26A-EV8Y>].

Tribunal to impartially administer justice, as the oft-quoted maxim goes: “[j]ustice should not only be done but should manifestly and undoubtedly be seen to be done.”⁷⁴

Following the publication of the transcripts, Justice Huq tendered his resignation as the Chairman of the Tribunal “citing personal reasons.”⁷⁵ However, the government was, as would be evident from the forthcoming discussion, infuriated by the publication of the transcripts because it derailed the delivery of questionable verdicts through Justice Huq.⁷⁶ Although the transcripts were first published by *The Economist* before *Amar Desh*, the government made Rahman a scapegoat for their publication. Without regard to the authenticity of the transcripts, he was arrested and charged, among other things, under Section 57 for “publishing fake, obscene, or defaming information in electronic form.”⁷⁷ Following his arrest, Rahman was subjected to torture, which included hammering iron nails “into his flesh and bones” and electric shocks,⁷⁸ in contravention of the Constitution’s prohibition of “torture or . . . cruel, inhuman, or degrading punishment or treatment.”⁷⁹ It is thus evident that the regime used Section 57 to victimize Rahman because he had attempted to hold those with power accountable and to enlighten the public about the manner in which the Tribunal was dispensing justice.

The arrest and subsequent torture of Rahman set in motion the disturbing practice of using Section 57 as the most efficient tool to institute a hostile environment for both traditional and citizen journalists critical of the government’s policies in contravention of fundamental rights such as the freedoms of speech and expression, freedom from torture, and freedom from cruel, inhumane, and degrading punishment or treatment.

74. *R. v Sussex Justices* [1924] 1 KB 256 at 259 (Lord Hewart CJ) (Eng.).

75. See *Bangladesh Opposition Editor Mahmudur Rahman Arrested*, *supra* note 68.

76. See *ECONOMIST*, *supra* note 69.

77. See *Bangladesh Opposition Editor Mahmudur Rahman Arrested*, *supra* note 68; see also *Confusion Over Case Against Mahmudur*, *BDNEWS24* (Apr. 12, 2013), <https://bdnews24.com/bangladesh/2013/04/12/confusion-over-case-against-mahumudur> [<https://perma.cc/53JD-U9S2>].

78. *Case History: Mahmudur Rahman*, *FRONT LINE DEFENDERS*, <https://www.frontlinedefenders.org/en/case/case-history-mahmudur-rahman> [<https://perma.cc/PC4A-A8B3>] (last visited July 31, 2019).

79. *BANGL. CONST.* art. 35(5).

B. *Persecution of Adilur Rahman Khan and ASM Nasiruddin Elan*

On August 10, 2013, Adilur Rahman Khan, the secretary of the prominent Bangladeshi human rights organization, *Odhikar*,⁸⁰ was arrested⁸¹ while on November 6, 2013, his colleague, ASM Nasiruddin Elan, the Director of *Odhikar* was also arrested.⁸² Both the arrests were made under the amended Section 57 of the ICTA.⁸³ A few months before their arrests, *Odhikar*, under their leadership, had published a report detailing brutality of law enforcement agencies at a *Hefazat-e-Islam* rally in Dhaka in May 2013.⁸⁴ In particular, the report brought to the fore the disturbing fact that sixty-one individuals had been killed by the police during its violent crackdown on the *Hefazat* activists at the rally.⁸⁵ Both Khan and Elan were charged and arrested under Section 57 for “publishing false images and information” concerning the police brutality at the *Hefazat* rally and for “disrupting the law and order situation of the country.”⁸⁶ However, the publication of objective reports on human rights violations by law enforcement agencies at the behest of the government is permissible under the Constitution of Bangladesh and as such, cannot under any circumstances constitute the basis of criminal liability.⁸⁷ Therefore, it is evident that the government misused Section 57 to retaliate against two prominent human rights defenders and to preclude them from pursuing their

80. *Odhikar* is one of the noted human rights organizations in Bangladesh that publishes annual Activity Reports on the human rights scenario in Bangladesh. See *About Us*, ODHIKAR, <http://odhikar.org/about-us/about-odhikar> (last visited July 31, 2019).

81. See *Odhikar Secretary, Director Indicted*, DAILY STAR (Jan. 9, 2014), <https://www.thedailystar.net/odhikar-secretary-director-indicted-6046> [<https://perma.cc/2F5N-869E>]; Saad Hammadi, *Bangladesh Police Arrest Activist Over ‘Fabricating Information’ on Atrocities*, GUARDIAN (Aug. 11, 2013, 9:20 PM), <http://www.theguardian.com/world/2013/aug/11/bangladesh-arrest-activist-fabricating-information-atrocities> [<https://perma.cc/A7W6-HBR6>].

82. *Bangladesh: Arrest of Odhikar Director, A New Step in Persecution of Prominent Human Rights Organisation*, INT’L FED. FOR HUM. RTS. (Nov. 6, 2013), <https://www.refworld.org/docid/5289d0ce10.html> [<https://perma.cc/E88V-65NK>].

83. *Odhikar Secretary, Director Indicted*, *supra* note 82; see also *Bangladesh: Further Acts of Judicial Harassment Against Messrs. Adilur Rahman Khan and ASM Nasiruddin Elan*, INT’L FED. FOR HUM. RTS. (Jan. 13, 2017), <https://www.fidh.org/en/issues/human-rights-defenders/bangladesh-further-acts-of-judicial-harassment-against-messrs-adilur> [<https://perma.cc/P66Y-XCEG>].

84. *Assembly of Hefazate Islam Bangladesh and Human Rights Violations*, ODHIKAR (June 10, 2013), <http://odhikar.org/assembly-of-hefazate-islam-bangladesh-and-human-rights-violations/> [<https://perma.cc/BP7E-WQR7>].

85. *Id.*

86. *Bangladesh: Stop Judicial Harassment of Adilur Rahman Khan and A.S.M Nasiruddin Elan of Odhikar*, ASIAN F. FOR HUM. RTS. & DEV. (Jan. 18, 2017, 4:55 PM), <https://www.forum-asia.org/?p=22818> [<https://perma.cc/5GAR-EN58>].

87. See BANGL. CONST. art. 39.

human rights activities. These arrests are likely to have a chilling effect on the human rights activists of the nation.

C. *Arrest of Shahidul Alam*

Accidents have become a common feature of the chaotic roads in Bangladesh. According to one source, more than three thousand people die each year in road accidents in the country.⁸⁸ On July 29, 2018, following the tragic deaths of two students caused by a speeding bus in Dhaka, mass protests organized by high school students broke out demanding safer roads.⁸⁹ But the rapid spread of the student protests, which received support from all sections of society, was a deeper reflection of the growing discontent against the government of the BAL.⁹⁰ This discontent stemmed from that fact that the government of the BAL had retained power through a non-participatory and one-sided general election in January of 2014.⁹¹ In the absence of any democratic accountability, the government resorted to a number of tyrannical measures to maintain its iron-grip on power.⁹²

When the students refused to pay heed to the government's call to cease the peaceful protests demanding stricter road safety regulations, the government launched a violent crackdown on the protesters, injuring scores of students in the process.⁹³ Shahidul Alam, an internationally renowned photographer, documented

88. *Id.*

89. Laignee Barron, 'We Are Dreaming of Justice.' *Bangladeshi Students Demand Change After Traffic Deaths*, TIME (Aug. 9, 2018), <http://time.com/5362000/bangladesh-students-protests-traffic-justice/> [<https://perma.cc/6VKG-UXWV>]; Arafatul Islam, *Why Bangladesh Student Protests Are Not Just about Road Safety*, DEUTSCHE WELLE (Aug 8, 2018), <https://www.dw.com/en/why-bangladesh-student-protests-are-not-just-about-road-safety/a-45007297> [<https://perma.cc/9286-KV9K>].

90. Barron, *supra* note 89; Islam, *supra* note 89.

91. Bari, *supra* note 23, at 75–77. The virtually “voter-less” election was made possible by the Constitution (Fifteenth Amendment) Act, 2011, which repealed the system of “Non-Party Care-Taker Government” (NPCG) from the Constitution. The system of NPCG was incorporated to establish a neutral caretaker government upon the dissolution of the Parliament for conducting the general election in a free and fair manner. The repeal of this system convinced the BNP-led alliance that the election would be rigged in favor of the BAL, and accordingly, the BNP and its allies boycotted the general election. Consequently, the BAL and its allies won the right to form government by winning 154 of the 300 parliamentary seats unopposed. *Id.*

92. *Id.* at 78–85 (the “tyrannical measure[s]” include denying opposition activists of the right to demonstrate, disappearing opposition political leaders and activists, and undermining the independence of the judiciary).

93. See *Bangladesh Protest: How a Traffic Accident Stopped a City of 18 Million*, BBC NEWS (Aug 6, 2018), <https://www.bbc.com/news/world-asia-45080129> [<https://perma.cc/YW6F-7TPT>].

the violent attacks on the students by the police and the “armed goons” associated with the ruling party through a series of photos and live-recorded videos posted on Facebook.⁹⁴ Furthermore, in an interview given to *Al Jazeera* on August 5, 2018, he shed light on the larger factors behind the protests.⁹⁵ He remarked that they were the result of pent-up anger at the “looting of the banks and the gagging of the media,” and the “extrajudicial killings, disappearings, bribery and corruption” perpetrated by an “unelected government . . . clinging on by brute force.”⁹⁶ Alam’s outspoken remarks incensed the regime.⁹⁷ Plain-clothes policemen picked him up within hours of the interview being aired on *Al Jazeera*.⁹⁸ Alam was charged the very next day under Section 57 of the ICTA for resorting to “fantastical information to spread lies among the population, spreading information with intent to provoke, attempting to invalidate and question the government on the international stage, deteriorating the law and order situation, conspiring to spread fear and terror and abusing an electronic platform to do so.”⁹⁹ When he was produced before the Chief Metropolitan Magistrate’s Court in Dhaka, there were visible signs that he had been tortured by the police as “he was unable to walk by himself.”¹⁰⁰ Alam told the court: “I was hit [in custody]. [They] washed my blood-stained punjabi [a traditional Bangladeshi attire] and then

94. Beena Sarwar, *Here’s Why the Bangladesh Government Made a Huge Mistake by Jailing Shahidul Alam*, WASH. POST (Aug. 20, 2018), <https://www.washingtonpost.com/news/democracy-post/wp/2018/08/20/heres-why-the-bangladeshi-government-made-a-huge-mistake-by-jailing-shahidul-alam> [https://perma.cc/XGM3-E8S2].

95. *Id.*

96. Paul Barth, *Bangladesh Prevents Freedom of Opinion*, FAIR OBSERVER (Aug. 6, 2018) https://www.fairobserver.com/region/central_south_asia/bangladesh-shahidul-alam-arrest-free-press-latest-asian-news-this-week-32380/ [https://perma.cc/WYU3-3FKM]; *Bangladeshi Photographer Shahidul Alam Released from Prison*, GUARDIAN (Nov. 20, 2018), <https://www.theguardian.com/world/2018/nov/20/bangladeshi-activist-shahidul-alam-released-from-prison> [https://perma.cc/AM6A-7Y4Q] (alteration in original).

97. See Qumr Ahmed, *Why did Bangladesh Arrest Shahidul Alam?*, AL JAZEERA (Aug. 9, 2018), <https://www.aljazeera.com/indepth/opinion/bangladesh-arrest-shahidul-alam-180809112820231.html> [https://perma.cc/8CSA-G85U].

98. *Id.*

99. *Police Get Seven Days to Grill Shahidul Alam in ICT Case*, BDNEWS24.COM (Aug. 6, 2018, 7:36 PM), <https://bdnews24.com/bangladesh/2018/08/06/police-get-seven-days-to-grill-shahidul-alam-in-ict-case> [https://perma.cc/TJN9-MXQE] (internal quotation marks omitted).

100. Billy Perrigo, *What the Arrest of Photographer Shahidul Alam Means for Press Freedom in Bangladesh*, TIME (Aug. 7, 2018), <http://time.com/5359850/bangladesh-photographer-arrest-shahidul-alam-protests/> [https://perma.cc/PA2J-64AU].

made me wear it again.”¹⁰¹ Notwithstanding this, the Court placed him on a seven-day remand.¹⁰²

Following his arrest, Alam—termed by Amnesty International “a prisoner of conscience”¹⁰³—was detained under Section 57 for 107 days.¹⁰⁴ The Court rejected his bail petition on four separate occasions, before he was released on November 20, 2018.¹⁰⁵ The BAL government’s reliance on Section 57 for violently retaliating against Alam was aimed at sending a stern warning to those who wished to hold the government accountable by exercising their constitutionally guaranteed right to freedom of speech and expression. The persecution of Alam, who had simply expressed his views on an electronic platform, once again brought to the fore the wide and sweeping powers of the government under Section 57 to muzzle any constructive dissent against it or its policies.

As these examples show, following the amendment of Section 57 of the ICTA in October 2013, Section 57 was consistently used by the government of BAL to violently put down its critics. Consequently, the opposition political parties, civil society activists, and national and international human rights organizations repeatedly called on the government of Bangladesh to repeal Section 57.¹⁰⁶ Ultimately, on September 19, 2018, Section 57 was repealed through the enactment of the DSA.¹⁰⁷ However, the ICTA still

101. *Shahidul on Seven-day Remand*, NEWAGE (Aug. 7, 2018, 1:18 AM), <http://www.newagebd.net/article/47782/shahidul-on-seven-day-remand> [<https://perma.cc/56B5-B6QX>].

102. *Id.*; see also *100 Days On from Shahidul Alam’s Arrest*, DHAKA TRIB. (Nov. 13, 2018), <https://www.dhakatribune.com/bangladesh/court/2018/11/13/100-days-on-from-shahidul-alam-s-arrest> [<https://perma.cc/AH69-7TTL>].

103. Press Release, Amnesty International, Bangladesh: Photographer Facing 14 Years Declared Prisoner of Conscience (Aug. 7, 2018), <https://www.amnesty.org.uk/press-releases/bangladesh-photographer-facing-14-years-declared-prisoner-conscience> [<https://perma.cc/F7EQ-6QC6>].

104. Shafiqul Alam, *Bangladesh Photographer Freed After Months in Detention*, AGENCE FR. PRESSE (Nov. 20, 2018), https://www.yahoo.com/news/bangladesh-photographer-freed-months-detention-161543306.html?soc_src=community&soc_trk=tw [<https://perma.cc/H3G5-95EZ>].

105. *Id.*

106. See *BNP Demands Repeal of Section 57*, INDEPENDENT (Jul. 22, 2017), <http://www.theindependentbd.com/arcprint/details/105358/2017-07-22> [<https://perma.cc/B49H-65XY>]; *Section 57 to be Scrapped*, INDEPENDENT (Nov. 30, 2017), <http://www.theindependentbd.com/arcprint/details/125962/2017-11-30> [<https://perma.cc/3W3X-BPFG>].

107. Sajidul Haque, *Bangladesh Passes Digital Security Act Ignoring Concerns It Will Muffle Media*, BDNEWS24.COM (Sep. 19, 2018, 8:52 PM), <https://bdnews24.com/bangladesh/2018/09/19/bangladesh-passes-digital-security-act-ignoring-concerns-it-will-muffle-media> [<https://perma.cc/P7E4-3YBW>]; see also *Bangladesh Country Report — Freedom on the Net 2018*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-new/2018/bangladesh> (last visited July 31, 2019).

remains in force without Section 57.¹⁰⁸ The DSA, like the ICTA, has been enacted for combating digital crimes. The preamble of the DSA stipulates that the object of the Act is to “ensur[e] National Digital Security and enact laws regarding Digital Crime Identification, Prevention, Suppression, Trial.”¹⁰⁹ Thus, the pretext of drafting this law seems logical because it is within the legitimate interests and necessity of the state to ensure its digital security and that of its citizens. However, this pre-textual legitimacy, as would be evident from the forthcoming discussion, has neither been reflected in the various provisions of the DSA nor in the government’s practices applying them.

IV. THE DIGITAL SECURITY ACT: OLD WINE IN A NEW BOTTLE?

It was hoped that the DSA would be an improvement on the ICTA by not imposing unreasonable restrictions on fundamental human rights and by reducing the scope of government abuse. This Section will examine the extent to which this expectation has been fulfilled.

The DSA criminalizes a number of cybercrimes, including illegally entering information infrastructure;¹¹⁰ unlawfully accessing or damaging computers, computer systems, or computer networks;¹¹¹ destroying or alternating of computer source code used on computer programs, systems or networks;¹¹² digital or electronic forgery and fraud;¹¹³ identity fraud;¹¹⁴ cyber terrorism;¹¹⁵ and hacking.¹¹⁶ Thus, it is manifestly evident that the DSA seeks to address a wider range of cybercrimes than the ICTA. Further, a number of provisions in the DSA penalize the dissemination of various types of information online, thereby limiting the enjoyment of the fundamental rights to speech, expression, and the press. This Section will reveal that the provisions of the DSA imposing restrictions on those fundamental rights are, in some respects, more draconian than those that had been prescribed by the repealed Section 57 of the ICTA. In an effort to substantiate

108. Haque, *supra* note 107.

109. Digital Security Act 2018, No. 46 of 2018, pmb., THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.).

110. Digital Security Act § 17.

111. *Id.* §§ 18, 19.

112. *Id.* § 20.

113. *Id.* §§ 22, 23.

114. *Id.* § 24.

115. *Id.* § 27.

116. *Id.* § 34.

this assertion, the discussion will focus on Sections 8, 21, 25, 28, 31, 32 and 43 of the DSA.

A. *The Relevant Provisions of the DSA*

1. Section 8

Section 8(1) of the DSA bestows on the Director-General of the Digital Security Agency the power to decide if any information published or disseminated through digital media constitutes a threat to the digital security of the nation.¹¹⁷ If the Director-General finds a threat, then he can request that the Bangladesh Telecommunication Regulatory Commission (BTRC) remove or block such information.¹¹⁸ Similarly, Section 8(2) of the DSA authorizes law enforcement agencies to request the BTRC, through the Director-General of the Digital Security Agency, to remove or block any information published or disseminated through digital media on various grounds, such as disruption of the unity in the country, disruption of its economic activity, its security, defense, or public order, or causing racial hatred and hurting religious sentiments.¹¹⁹ Thus, both of these Sections of the DSA permit the removal of content from digital platforms on vague and nebulous grounds.

The vesting of such subjective powers of interpretation in the Director-General and law enforcement agencies risks allowing the suppression of different views or those critical of the policies and actions of the government of the day. Take, for instance, a hypothetical journalist exposing corruption between private industries and government ministers on digital platforms. If that exposure led to the suspension of any project or developmental activity, then the executive branch may direct the Director-General or law enforcement agencies to remove or block such revelations for disrupting the “economic activity” of the nation.

2. Section 21

Section 21 of the DSA makes it an offense to use digital platforms to spread propaganda against Bangladesh’s liberation war, the spirit of the liberation war, the “Father of the Nation” Sheikh Mujibur Rahman—also the father of the current Prime Minister—

117. Digital Security Act 2018, No. 46 of 2018, § 8, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.).

118. The Bangladesh Telecommunication Regulatory Commission (BTRC) is responsible for regulating all matters concerning the telecommunications sector of the nation. *See* Bangladesh Telecommunications Act, 2001, No. 18 of 2001 (Bangl.).

119. Digital Security Act § 8(2).

the national anthem, or the national flag.¹²⁰ It stipulates a maximum punishment of ten years in prison, a hefty fine of Tk. one crore (approximately USD 119,204.40), or both for the commission of such an offense.¹²¹ The Act has defined the “spirit of the Liberation War” as “[t]he high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the national liberation struggle.”¹²² This definition is reproduced verbatim from the second preamble paragraph of the Constitution of Bangladesh.

It is striking that Section 21 does not provide any examples of the types of information that, if disseminated online, would be considered as spreading propaganda against the liberation war or its spirit. This risks law enforcement abusing this provision by prosecuting academics, researchers, and journalists who have critically examined the events of the liberation war and whether the actions of the government of the day are consistent with the “spirit of the liberation war.” Likewise, any constructive criticism of the actions taken by Sheikh Mujibur Rahman after his ascension to power following Bangladesh’s independence from Pakistan, such as annihilating the spirit of liberal democracy by declaring Bangladesh a one-party state,¹²³ could be construed as spreading propaganda under Section 21.

Further, Section 21’s criminalization of opinions about historical facts is inconsistent with Bangladesh’s obligations under the International Covenant on Civil and Political Rights (ICCPR).¹²⁴ The Human Rights Committee in interpreting the ICCPR has observed that laws penalizing the articulation of opinions regarding histori-

120. Digital Security Act § 21.

121. *Digital Security Law Will be Fixed, MPs Tell Journalist*, DHAKA TRIB. (May 22, 2018), <https://www.dhakatribune.com/bangladesh/law-rights/2018/05/22/mps-assure-amendment-of-digital-security-act> [<https://perma.cc/BWA8-VPMT>] (updated May 23, 2018); Arafat Islam, *Bangladesh New Digital Security Law Alarms Journalists*, DEUTSCHE WELLE (Feb. 1, 2018), <https://www.dw.com/en/bangladeshs-new-digital-security-law-alarms-journalists/a-42377844> [<https://perma.cc/7MS7-23L9>].

122. Rashidul Hasan, *Digital Security Bill Passed*, DAILY STAR (Oct. 2, 2018, 7:30 PM), <https://www.thedailystar.net/politics/bangladesh-jatiya-sangsad-passes-digital-security-bill-2018-amid-concerns-journalists-1636114> [<https://perma.cc/75A3-CLQA>].

123. See BARI, *supra* note 2, at 176.

124. See *id.* at 10; see also International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR]. Bangladesh acceded to the ICCPR on September 6, 2000. United Nations, Multilateral Treaties Deposited with the Secretary-General, 4. *International Covenant on Civil and Political Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no_IV-4&chapter=4&clang=_en (updated daily).

cal facts contravene the obligation that States Parties have towards the protection of freedoms of opinion and expression.¹²⁵

3. Section 25

Section 25 of the DSA prescribes a punishment of three years' imprisonment or Tk. three lakhs (approximately USD 3,588.15) or both for the use of digital platforms for sending, publishing, or broadcasting any offensive, false or intimidating information, which annoys, insults, humiliates or denigrates a person or which tarnishes "the image of the nation."¹²⁶ The use of vague words, such as "annoy," "insult," and "humiliate" as grounds for criminalizing the dissemination of information online makes the provisions of Section 25 susceptible to abuse. Each of these words can have varied meanings depending on the circumstances. Consequently, whether the dissemination of information in a particular case contravenes the terms of Section 25 would largely depend upon the subjective assessment of the executive branch. Thus, Section 25 has the potential of becoming a convenient tool to intimidate, individuals—such as investigative journalists and activists working to expose corruption and irregularities within the government. Any report on illegal or corrupt activities of governmental organizations or ministers may be construed as causing "annoyance" and "humiliation" to someone.

But the most disturbing element of Section 25 is the inclusion of the power to penalize the dissemination of information online on the broad and imprecise ground that such dissemination "tarnish[ed] the image of the nation,"¹²⁷ because a wide range of information can meet this definition. Consequently, Section 25 could

125. See Human Rights Committee, General Comment No. 34: Article 19 Freedom of Opinions and Expression, ¶ 9, U.N. Doc CCPR/C/GC/34 (Sept. 12, 2011), <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [<https://perma.cc/GK6S-S2VF>] [hereinafter General Comment No. 34].

126. Digital Security Act 2018, No. 46 of 2018, § 25(1)(a), (b), THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.). This section provides:

publishing or distributing offensive, 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 offensive or intimidating in nature; or if a person publishes or distributes any information despite knowing that it is false to annoy, insult, or discredit a person, or (b) brings the image of the State into disrepute 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

Id. (translation by the author).

127. Digital Security Act § 25(1)(b).

be used by the party in power to suppress the dissemination of information critical of it.

The government of the BAL has in recent times resorted to a number of tyrannical measures—such as extrajudicial killings and enforced disappearances—to systematically annihilate its critics, thereby maintaining its grip on power.¹²⁸ A strong argument could be made that any academic work critically examining the human rights violations perpetrated by the regime, or any reports documenting the extrajudicial killings and disappearances, could conveniently be swept under the rubric of tarnishing “the image of the state.” This argument is further bolstered by the fact that the regime of BAL had relied on the broad and vaguely worded provisions of the former Section 57 of the ICTA to stage an unprecedented crackdown on its critics.¹²⁹ In light of the above discussion, it can also be argued that Section 25 of the DSA, like Section 57 of the ICTA before it, will not only have an adverse impact on the right to freedom of speech and expression, but also on other core human rights, such as arbitrary detention, torture, and other forms of cruel, inhuman or degrading treatment or punishment.

This ulterior motive of the regime regarding the use of Section 25 is in direct contravention of the observations of the U.N. Human Rights Committee:

[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. States parties should not prohibit criticism of institutions, such as the army or the administration.¹³⁰

Furthermore, courts throughout the world have made it manifestly evident that criticism of authority is protected under the right to freedom of speech and expression. For instance, the U.S. Supreme Court in *New York Times Co. v. Sullivan* held that criticism of the actions and inactions of public officials and public figures does not give rise to liability in any action for defamation unless “actual malice” on the part of the defendant can be proved.¹³¹ In

128. Bari, *supra* note 23, at 78–85; see also Ben Farmer & Nicola Smith, *Bangladesh Accused of Using War on Drugs to Hide Political Assassinations*, TELEGRAPH (June 1, 2018), <https://www.telegraph.co.uk/news/2018/06/01/bangladesh-accused-using-war-drugs-hide-political-assassinations/> [https://perma.cc/UP3Q-XEH2]; Saif Khalid, *End Disappearances and Extrajudicial Killings: HRW, AL JAZEERA* (July 6, 2017), <https://www.aljazeera.com/news/2017/07/disappearances-extrajudicial-killings-hrw-170705191258625.html> [https://perma.cc/F5ZH-5UUV].

129. See *supra* Part III.

130. General Comment No. 34, *supra* note 125, ¶ 38.

131. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964).

the same vein, the European Court of Human Rights observed in *Handyside v. United Kingdom* that freedom of expression “is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population.”¹³²

4. Sections 28 and 31

Sections 28¹³³ and 31¹³⁴ of the DSA read together prohibit the publication or circulation via digital platforms any information which hurts religious values or creates “hostility, hatred or animosity among different classes or communities of people,” destroys “communal harmony,” creates “instability or chaos,” or deteriorates “law and order.” While the state is well within its right to make laws that promote religious and communal harmony by minimizing the scope for conflict, such an objective must not unduly interfere with an individual’s right to freedom of speech and expression.

The absence of any guidance in Sections 28 and 31 as to the types of speech and expression, if disseminated online, might adversely affect the religious and communal harmony of the nation empowers the executive branch to impose disproportionate restrictions on freedom of speech and expression. Consequently, it is possible that critical discussion of things such as women’s property rights under Islamic Law or of an unlawful fatwa, could be prosecuted under Section 28 for causing religious disharmony.

Moreover, the words “deteriorates law and order” used in Section 31 for criminalizing the dissemination of information online do not connote any precise definition. Accordingly, Section 31 can be relied on by the government to silence legitimate dissent on the ground that its dissemination deteriorated the law and order situa-

132. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1979) (internal quotation marks omitted).

133. Digital Security Act 2018, No. 46 of 2018, § 28, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.) (“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 in any website or electronic system then such actions will be considered a crime”) (translation by the author).

134. *Id.* § 31. This section provides:

if a person deliberately publishes or broadcasts via a website or any digital platform anything that creates “hostility, hatred” or animosity among different classes or communities of people, or “destroy[s] . . . communal harmony,” or creates instability or chaos, or deteriorates law and order, then that activity of the said person will be considered a crime.

Id. (translation by the author)

tion of the nation. For instance, the publication of any reports critical of the government's failure to effectively deal with labor unrest can be labelled as spreading rumor that will "create unrest or disorder" or deteriorate the law and order."¹³⁵

5. Section 32

Arguably, one of the most dangerous provisions of the DSA is Section 32, which prescribes a maximum jail term of fourteen years or a fine not exceeding Tk. twenty-five lakhs (approximately USD 29,783.75) or both for the commission or assisting the commission of an offense under the Official Secrets Act.¹³⁶ The Official Secrets Act—which is based on the colonial-era legislation of the same name—is aimed at protecting state secrets, using a computer, digital device, computer network or digital network.¹³⁷ The broad scope of Section 32 has deliberately been preferred for strangling investigative journalism. Investigative journalism often involves secretly recording evidence via digital devices for exposing irregularities and corruption within the government, thereby ensuring accountability and transparency in the conduct of state affairs.¹³⁸ Section 32 would be a sword hanging over the heads of investigative journalists by instilling in their minds the constant fear of arrest, a hefty fine, or both. Thus, under the guise of protecting state secrets, the government of BAL has sought to insulate itself from the scrutiny of the press and citizens.

6. Section 43

Finally, in the same manner as the ICTA, the DSA in Section 43 empowers law enforcement agencies to search, seize, and arrest without seeking warrants from courts.¹³⁹ The conferral of such

135. *Id.* § 31(1).

136. Digital Security Act § 32. Providing:

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, computer network, digital network" or any other digital media, they will get a maximum penalty of 14 years in jail or Tk 2.5 million in fines, or both; 2) if a person commits a crime 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.

Id. (translation by the author); see also Official Secrets Act 1923, No. 19 of 1923, §§ 1–16, GAZETTE EXTRAORDINARY, Apr. 2, 1923 (Bangl.).

137. Digital Security Act § 32.

138. See, e.g., *Secret Filming Guidelines*, CHANNEL 4, <https://www.channel4.com/produces-handbook/c4-guidelines/secret-filming-guidelines> [<https://perma.cc/3U59-MW3U>] (last visited July 31, 2019).

139. See Digital Security Act § 43. Providing:

wide power on law enforcement agencies gives rise to the fear that it would be used to indiscriminately detain critics exercising their constitutionally guaranteed freedom of speech and expression. This fear is bolstered in light of the past experiences with similar provisions of the ICTA.

It is therefore evident that the DSA has gone further than the repealed Section 57 of the ICTA in the use of vague and nebulous expressions for criminalizing the dissemination of information online, thereby imposing significant burdens on the constitutionally guaranteed rights to freedom of speech, expression, and press. Consequently, there is a high probability that the DSA will be used by the executive arbitrarily and capriciously to dispense with “a very large amount of protected and innocent speech.”¹⁴⁰ This apprehension is further compounded by the fact that the DSA empowers the police to make arrests without a warrant based on their subjective reasoning, rather than after a formal inquiry into whether someone has disseminated potentially disparaging or prejudicial information online.¹⁴¹ Furthermore, the DSA has provided new avenues to the executive branch to impose unwarranted restrictions on the fundamental rights to free speech, expression, and the press. For instance, the DSA empowers the Director-General of the Digital Security Agency and law enforcement agencies to recommend the removal or blocking of content based on their subjective assessment.¹⁴² Strikingly, the DSA also seeks to stifle investigative journalism by making it an offense to secretly record any information at any department of the government using digital devices.¹⁴³

Further, the DSA has stipulated significantly harsh sentences for the publication and distribution of even political satire and the participation in discussion or debates about various issues

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 a possibility of evidence being lost, destroyed, deleted or altered or being made scarce in some other way, then the officer,” upon putting in writing “the reason for his/her belief, can undertake the following tasks: a) Enter and search the said place and, if intercepted, take necessary action in accordance with the Code of Criminal Procedure; b) Seize the computer, computer systems, computer network, data-information or other objects” used in committing the crime “or documents” that can help prove the crime while conducting a search in the said place; c) Bodily search anyone present in the said place; “d) Arrest anyone present in the said place if suspected of committing or having committed” a crime under this law.

Id. (translation by the author).

140. *Singhal v. Union of India*, AIR 2015 SC 1523 ¶ 83 (India).

141. *Digital Security Act* § 43.

142. *Id.* § 8.

143. *Id.* § 32.

online.¹⁴⁴ The lowest punishment under the DSA is one year in prison, but on average the punishment ranges from four to seven years.¹⁴⁵ Strikingly, the Road Transport Act, passed on the same day as the DSA and following mass student protests demanding stricter laws for regulating the chaotic roads of the country, provides for a maximum punishment of five years in prison for killing people in road accidents, whereas a journalist under the DSA can be sentenced to *fourteen* years in prison for investigative journalism.¹⁴⁶ The prescription of a fourteen year jail term under the DSA is harsher than the imprisonment term of ten years that had been fixed by the former Section 57 of the ICTA. Furthermore, the offenses specified in fourteen different Sections of the DSA have been made non-bailable.¹⁴⁷

Thus, it is apparent that the DSA is even more oppressive than the ICTA. Further, it is difficult to justify the enactment of yet another digital security legislation while the ICTA is in force. The DSA like the ICTA, has been framed for combating cybercrimes. If the government felt the necessity of introducing stricter regulations to deal with a wider breadth of cybercrimes, such an objective could have easily been achieved by amending the ICTA.

B. *Misuse of the Provisions of the DSA*

Ahead of the general election of December 30, 2018, the ruling BAL began using the DSA as a tool to victimize its political adversaries and journalists. For instance, days before the election, unverified telephone conversations between BNP Parliamentary candidates and their activists were conveniently leaked on social media.¹⁴⁸ These conversations allegedly revealed that the BNP candidates were either spreading “false information” or ordering their

144. *Id.* §§ 21, 25, 32.

145. Digital Security Act 2018, No. 46 of 2018, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.)

146. *Compare* Road Transport Act 2018, No. 47 of 2018, § 105, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.) (“If any person due to reckless driving seriously injures or causes the death of another person, the driver will be penalized with imprisonment for a term not exceeding 5 (five) years or a fine not exceeding Tk. 5 (five) lakhs or with both.”), *with* Digital Security Act § 32.

147. Digital Security Act § 53(1). These include the provisions related to spreading propaganda against the liberation war and its spirit, the Father of the Nation, national anthem or flag; the dissemination of information that hurts religious sentiments; and for violations of the Official Secrets Act using digital platforms. *Id.*

148. *BNP Candidate Rony Accused in Digital Security Case Over ‘Leaked Phone Call’*, BDNews24.COM (Dec. 21, 2018, 2:12 PM), <https://bdnews24.com/bangladesh/2018/12/21/bnp-candidate-rony-accused-in-digital-security-case-over-leaked-phone-call> [<https://perma.cc/T5PL-XQH9>].

activists to attack “ruling party men and police.”¹⁴⁹ Consequently, the ruling party activists sued these candidates under Section 31 of the DSA for circulating via digital platforms information that deteriorated “law and order.”¹⁵⁰

During the election, the BAL resorted to widespread electoral malpractices to influence the outcome of the election in its favor.¹⁵¹ These included stamping and stuffing of ballot papers in ballot boxes both the night before the election and on the day of the election, turning away voters from polling stations in a deliberate bid to prevent them from voting, forcing them to cast their vote for the symbol of the ruling party, and ousting opposition polling agents from polling booths.¹⁵² However, the government and its machineries went overboard in their attempts to rig the election, which is evident from several features of the election. First, in some constituencies “the number of votes cast” was significantly “higher than the total number of voters” in those constituencies.¹⁵³ Second, there were a number of constituencies where the BAL won “99.9 percent of the votes.”¹⁵⁴ The BAL-led alliance, owing to these electoral irregularities, scored a crushing victory over its opponents, winning 288 of the 300 parliamentary seats.¹⁵⁵ Thus, Bangladeshis were robbed of the opportunity to elect a government truly reflective of their will for the second time in five years.¹⁵⁶

149. *Rony, 5 Others Sued Under Digital Security Act in Patuakhali*, UNITED NEWS BANGL. (Dec. 21, 2018, 6:25 PM), <http://www.unb.com.bd/category/bangladesh/rony-5-others-sued-under-digital-security-act-in-patuakhali/8943> [<https://perma.cc/J9QT-E2Z4>]; *Kushtia BNP Candidate Sued in Digital Security Act*, DAILY STAR (Dec. 18, 2018, 4:13 PM), <https://www.thedailystar.net/bangladesh-national-election-2018/kushtia-4-seats-bnp-candidate-syed-mehdi-sued-in-digital-security-act-2018-1675447> [<https://perma.cc/5Q5F-PPT7>].

150. *Id.*

151. *See Polls Anomalies in 47 of 50 Seats*, DAILY STAR (Jan. 16, 2019, 12:00 AM, updated Jan. 24, 2019, 12:17 AM), <https://www.thedailystar.net/bangladesh-national-election-2018/bangladesh-election-2018-irregularities-47-out-50-seats-tib-1687840> [<https://perma.cc/AFS4-6ZKC>].

152. *Id.*

153. *Digital Security Act: Two Journos Sued in Khulna Over 'False Info' on Poll Results*, DAILY STAR (Jan. 2, 2019, 12:00 AM), <https://www.thedailystar.net/bangladesh-national-election-2018/khulna-journalist-arrested-under-digital-security-act-1681558> [<https://perma.cc/T37V-RNEF>].

154. Shafquat Rabbee, *A Deeper Look at the Bangladesh Election*, AL JAZEERA (Jan. 1, 2019), <https://www.aljazeera.com/indepth/opinion/deeper-bangladesh-election-190101225409342.html> [<https://perma.cc/H9LU-MWQ9>].

155. *Id.*

156. Since the BAL government had retained power in January 2014 through a “voterless general election,” the outcome of the recent general election deprived the people of Bangladesh for the second time in five years of the opportunity to elect a government of their choice. For a detailed analysis, see Bari, *supra* note 23, at 75–77.

Notwithstanding credible reports from civil society organizations, human rights organizations and international media outlets on the malpractices perpetrated by the ruling party during the election,¹⁵⁷ local media conspicuously refrained from reporting such irregularities. It seems that the media censored themselves for fear of persecution under the draconian DSA. This fear is not unfounded because the DSA imposes undue restrictions on investigative journalism.¹⁵⁸ On January 2, 2019, just two days after the election, Mr. Hedayet Hossain Mollah, a reporter for a leading English daily, the *Dhaka Tribune*, was arrested under the DSA.¹⁵⁹ Mollah was one of a handful of local investigative journalists who had reported that in one of the constituencies the total number of votes cast was 22,419 more than the registered voters.¹⁶⁰ This report cast doubt on the idea that the general election was conducted in a free and fair manner.¹⁶¹ Consequently, Mollah was charged under the DSA for publishing “false, fabricated and provocative information” about the general election using electronic devices, such as laptops.¹⁶² Thus, within three months of the enactment of the DSA, the ruling party has proceeded to take advantage of its sweeping powers to oppress its opponents.

157. *Polls Anomalies in 47 of 50 seats*, DAILY STAR (Jan. 24, 2019), <https://www.thedailystar.net/bangladesh-national-election-2018/bangladesh-election-2018-irregularities-47-out-50-seats-tib-1687840> [<https://perma.cc/9BTG-QWYF>]; see, e.g., *Bangladesh: Election Abuses Need Independent Probe: Free Journalists Held for Reporting Vote Rigging*, HUM. RTS. WATCH (Jan. 2, 2019, 9:00 PM), <https://www.hrw.org/news/2019/01/02/bangladesh-election-abuses-need-independent-probe#> [<https://perma.cc/YXZ6-KBW4>]; *Bangladesh Election: Opposition Demands New Vote*, BBC (Dec. 30, 2018), <https://www.bbc.com/news/world-asia-46716605> [<https://perma.cc/EC8B-6HZJ>]; Verena Holzl, *They Threaten Everyone: Sheikh Hasina's Landslide Win in Bangladesh Marred by Voter Suppression*, TIME (Dec. 31, 2018), <http://time.com/5490744/bangladesh-elections-sheikh-hasina-rigging-allegations/> [<https://perma.cc/S9EN-ERLR>]; Serajul Quadir, Krishna N. Das, & Zeba Siddiqui, *Bangladesh PM Takes Bid Lead as Opposition Rejects Poll Alleging Vote Rigging*, REUTERS (Dec. 30, 2018), <https://www.reuters.com/article/us-bangladesh-election/pm-hasina-confident-as-bangladesh-goes-to-the-polls-idUSKCN1OS006> [<https://perma.cc/7HJV-Y7TA>]; Editorial Board, *Bangladesh's Farcical Vote*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/opinion/editorials/bangladesh-election-sheikh-hasina.html> [<https://perma.cc/3G6A-XNZD>].

158. See *supra* Part IV.A.

159. *Bangladeshi Journalist Arrested for Reporting Election Irregularities*, GUARDIAN (Jan. 2, 2019), https://www.theguardian.com/world/2019/jan/02/bangladeshi-journalist-arrested-over-election-irregularities-reporting?CMP=share_btn_tw [<https://perma.cc/PFC7-24YN>].

160. *Id.*

161. *Id.*

162. *Id.*; see also *Digital Security Act: Two Journos Sued in Khulna Over 'False Info' on Polls Results*, DAILY STAR (Jan. 2, 2019), <https://www.thedailystar.net/bangladesh-national-election-2018/khulna-journalist-arrested-under-digital-security-act-1681558> [<https://perma.cc/WA9W-RS9E>].

V. DO SECTION 57 OF THE ICTA AND THE VARIOUS PROVISIONS
OF THE DSA SATISFY THE REQUIREMENTS OF
THE BANGLADESHI CONSTITUTION

A. *Compatibility with the Requirements Prescribed by Article 39
of the Constitution of Bangladesh*

It might be recalled from the discussion in Part II of this Article that it is only permissible under the constitutional scheme of Bangladesh to impose "reasonable restrictions" on the fundamental rights to speech, expression, and press for the purposes listed in Article 39 of the Constitution.¹⁶³ Furthermore, these derogating measures must be proportional to those objectives. This Section will examine whether the repealed Section 57 of the ICTA and Sections 8, 21, 25, 28, 31, and 32 of the DSA satisfy the requirements prescribed by Article 39 of the Constitution for legitimately imposing restrictions on the fundamental rights to speech, expression, and press.

A common feature of the provisions of the ICTA and DSA is that they seek to impose broad restrictions on the fundamental rights to speech, expression, and press on the grounds of preserving public order, protecting the reputation of the individual and that of the state, and preventing the incitement to an offense. All of these grounds are permissible under Article 39 of the Constitution.

Before analyzing the intersection of the relevant provision of the ICTA and DSA with the above criteria enumerated in Article 39 of the Constitution, it is necessary to shed light on the meaning of expressions, such as public order and "incitement to an offence" as used in Article 39.¹⁶⁴ The expression "public order" as used in Article 39 of the Constitution of Bangladesh means a "state of tranquility which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established."¹⁶⁵ On the other hand, the phrase "incitement to an offence" in the context of Article 39 refers to speech and expression that instigates someone to commit an offense.¹⁶⁶ The jurisprudence developed by constitutional courts

163. See *supra* Part II.

164. BANGL. CONST. art. 39(2).

165. Romesh Thappar v. Madras, (1950) SCR 594, 598 (India); Brij Bhushan v. Delhi, (1950) SCR 605, 611 (India).

166. The term "incitement to an offence" used in Article 39 of the Constitution of Bangladesh is same as that contained in Article 19(2) of the Indian Constitution. Constitutional courts in India have given "incitement to an offence" a strict interpretation by observing that the phrase refers to action which incites a person to commit a violent or

in different jurisdictions suggest that reasonable restrictions on the fundamental right to speech and expression on the grounds of preserving public order and preventing the incitement to an offense are permissible only if such restrictions satisfy the “clear and present danger test.”¹⁶⁷ This test was first expounded by the U.S. Supreme Court in the 1919 case of *Schenck v. United States* in the following words:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the Legislature] has a right to prevent. It is a question of proximity and degree.¹⁶⁸

In its current form, this test states that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁶⁹

It is pertinent to stress here that messages or materials disseminated using digital platforms may fall in the domain of “advocacy” or may simply discuss a particular point of view without inciting anybody to commit an offense at all. However, neither Section 57 of the ICTA nor the relevant provisions of the DSA, such as Section 8, distinguish between speech or expression that advocates a particular cause or policy and speech or expression that incites the com-

serious or aggravated offence. See, e.g., *Singhal v. Union of India*, AIR 2015 SC 1523 ¶¶ 12, 13, 20, 118 (India). See generally Sarah Sorial, *Hate Speech and Distorted Communication: Rethinking the Limits of Incitement*, 34 L. & PHIL. 299, 300 (2015) (“‘Incitement’ captures and regulates more overt forms of racism, on the grounds that they are more likely to provoke or incite violent conduct. The category of ‘incitement’ also ensures that speech is more generally protected because the law does not capture the actual content of the speech act, only the ‘inciting’ manner in which it was expressed.”).

167. The “clear and present danger test” is used in the U.S. and India. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Singhal v. Union of India*, AIR 2015 SC 1523 (India).

168. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (internal citations omitted).

169. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968) (per curiam)). While it is not followed, courts in India have discussed this test when explaining the “reasonable restrictions” allowable under the Indian Constitution. See *Rangarajan v. Jagjivan*, (1989) 2 SCR 204, 212 (India). The “reasonable restriction” analysis used in India is substantially the same as that used in Bangladesh. See generally Afroza Begum, *Disrespecting Constitutional Safeguards for Fundamental Rights in Bangladesh: A Bird’s Eye View from the Indian Context*, 49 J. INDIAN L. INST. 3 (2007).

mission of an offense against public order. In light of the failure of these provisions to appreciate such a distinction, it can be argued that these provisions have the impact of restricting all forms of online communication.

Moreover, these provisions do not require proof that the dissemination of certain messages or materials online has actually caused harm to public order or tranquility. Rather, offenses under these provisions are committed as soon as messages are sent for the purpose of causing hurt or annoyance.¹⁷⁰ However, merely causing hurt, disturbance, and annoyance are not offences *per se* even under the Bangladesh Penal Code. They can be the ingredients of an offense but cannot be offenses themselves.¹⁷¹

On the other hand, defamation is defined in Section 499 of the Bangladesh Penal Code as:

Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or published [sic] any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation or such person, is said . . . to defame that person.¹⁷²

This definition of defamation and its manifestation in Section 25 of the DSA show a dichotomy. The very essence of defamation involves causing harm or injury to the reputation of a person.¹⁷³ However, the punishment prescribed by Section 25 of the DSA for disseminating defamatory information using digital platforms does not necessarily have reputational damage as a basic ingredient.¹⁷⁴ Something can be grossly offensive or annoying for a person without causing injury to his reputation. For instance, a critical analysis of the manner in which a minister in the government has been performing the functions of his office may result in annoyance to the minister, but that cannot necessarily be brought under the

170. See Digital Security Act 2018, No. 46 of 2018, § 25, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.).

171. See, e.g., BANGL. PENAL CODE §§ 87, 92, 99, 100, 103, 105, 115, 151, 182, 188, 268, 280, 284, 286, 287, 294, 296, 297, 307, 308, 323, 324, 325, 326, 326A, 327, 328, 329, 330-7, 338, 338A, 350, 364A, 367, 375, 382, 386-7, 390, 394, 397, 440, 452, 455, 458, 459, 460, 506, 510.

172. See BANGL. PENAL CODE § 499 (1860).

173. See Andrew T. Kenyon, *What Conversation? Free Speech and Defamation Law*, MOD. L. REV. 697, 712-13 (2010); see also David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, TEX. L. REV. 199, 204 (1976).

174. See generally Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J. LEGAL STUD. 603, 607-10 (2009) (discussing the history of the importance of reputation).

rubric of defamation.¹⁷⁵ But the wording of Section 25 of the DSA has the impact of criminalizing such a critique. Thus, it is evident that the DSA is not at all aimed at penalizing defamatory statements, but rather, it unduly burdens the fundamental rights to speech, expression, and press by making it an offense to constructively criticize the functioning of the government.

It is necessary to mention here that merely referencing words—such as public order, inciting the commission of an offense, and defamation, in the DSA and Section 57 of the ICTA—as a basis for imposing restrictions on the fundamental rights to speech, expression, and press does not satisfy the criteria prescribed by Article 39 of the Constitution. The limitations imposed by Section 57 of the ICTA and the relevant provisions of the DSA are not “reasonable restrictions” as envisaged by Article 39 of the Constitution. Rather, they are arbitrary, excessive, and disproportionate to achieving the objectives identified by Article 39. Consequently, the current regime has relied on these provisions to crack down on dissenters.

B. *Analysis of Section 57 of the ICTA and Relevant Provisions of the DSA through the Lens of the Constitutional Principle of Human Dignity*

In the contemporary world, human dignity, the basis of human rights, has become the cornerstone of constitutionalism. The inclusion of human dignity as the central theme of the U.N. Charter and the Universal Declaration of Human Rights galvanized modern democracies to recognize this concept in domestic constitutions.¹⁷⁶ The recognition of human dignity as a constitutional principle by nations across the world signifies a commitment to ensure that any law enacted by legislature would uphold human dignity. Since the guarantee of freedom of speech and expression enables individuals to articulate their own ideas as “reasoning, autonomous beings,”¹⁷⁷ such guarantee is considered one of the

175. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1979).

176. See U.N. Charter pmbl; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948). According to one study, by 2012, 162 countries had incorporated the concept of human dignity into their respective Constitutions. See Doron Shultziner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, AM. J. COMP. L. 461, 461 (2013).

177. William Ruger, *Free Speech Is Central to Our Dignity as Humans*, TIME (June 3, 2016), <http://time.com/4355651/free-speech-human-dignity>; see also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 664–65 (2008) (discussing treatments of human dignity in constitutions).

most basic sources of human dignity.¹⁷⁸ Thus, the imposition of any undue restriction on the fundamental right to speech and expression violates the moral dignity of individuals.¹⁷⁹ In light of this reality, the Constitution of Bangladesh makes it mandatory for the State to ensure that the laws uphold the fundamental human rights and the dignity of the human person. The question remains whether Section 57 of ICTA and the relevant provisions of the DSA are consistent with the principle of human dignity, which is an inherent part of the Constitution of Bangladesh.

Article 39 of the Constitution of Bangladesh expressly guarantees, among other things, the fundamental rights to speech and expression, which are central to the dignity of the human person.¹⁸⁰ The language used in Section 57 of the ICTA and the relevant provisions of the DSA is vague, arbitrary, and susceptible to misuse by the executive branch of the government. Furthermore, the punishments prescribed by these provisions are also disproportionate and excessive. These digital security laws have consequently been used by the current government to stifle free speech and expression, thereby impeding the ability of Bangladeshis to challenge the status quo of injustice. Thus by imposing unreasonable restrictions on free speech and expression through the enactment of digital security laws, the government has violated the Constitutional requirement that “respect for the dignity” of the human person shall be applied in the making of laws.¹⁸¹

VI. CONCLUSION AND RECOMMENDATIONS

The foregoing discussion reveals that the ICTA, which by means of Section 57 criminalized the dissemination of various types of information online on grounds that do not carry any precise connotation, was initially enacted in 2006 to ensure the digital security of the nation. However, in October 2013, the current government of the BAL inserted an amendment into Section 57 of ICTA that not only increased the punishment for disseminating certain types of information, but also did away with the safeguards for preventing abuse of this provision. This in turn marked the beginning of

178. HEYMAN, *supra* note 14, at 37.

179. *See id.* at 39; *see also* JOHN MILTON, AREOPAGITICA AND OF EDUCATION 29–30 (George H. Sabine ed., AHM Publishing Corp. 1951) (1644) (noting that to impose unwarranted censorship on an individual’s freedom of speech and expression “is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him”).

180. HEYMAN, *supra* note 14, at 37. *See generally* JUDITH BLIJDEN, DIGNITY AND FREE SPEECH (2016) (arguing that “human dignity sufficiently justifies freedom of speech”).

181. BANGL. CONST. arts. 8(2), 11.

the use of Section 57 for brutally cracking down on dissenters.¹⁸² The unrestrained exercise of the powers under Section 57 to silence opposition activists, journalists, human rights activists, and civil society members violated the fundamental rights to freedom of speech and expression, and freedom from torture.¹⁸³ On September 19, 2018, following repeated calls by relevant stakeholders to repeal Section 57, the government repealed Section 57 of the ICTA through the enactment of yet another digital security law, the DSA. The ICTA, however, still remains in force alongside the DSA.

Instead of being an improvement, the DSA has proved to be more draconian. It has not only gone further in employing broad and imprecise grounds for empowering the executive branch of government to arbitrarily penalize the publication or circulation of information online, but has also stipulated harsher punishments for such dissemination, thereby unduly burdening the fundamental right to freedom of speech and expression. Furthermore, the executive has arrogated to itself, through the DSA, the power to put down investigative journalists performing their duties using digital devices.¹⁸⁴ Consequently, the BAL regime has already begun to take advantage of the wide powers under the DSA to suppress both its political adversaries and investigative journalists critical of its actions.¹⁸⁵

Therefore, it is manifestly evident that the wide powers granted by the digital security laws in Bangladesh, which not only fall foul of the requirements prescribed by Article 39 but also those stipulated by Article 8(2) of the Constitution,¹⁸⁶ have served as a means for the BAL government to violently shield itself from public and media scrutiny, thereby discarding the rule of law and violating the fundamental human rights guaranteed by the Constitution. The BAL regime's commitment to the "principle of silencing the voice" of its critics through the arbitrary exercise of the powers under the digital security laws has enabled it to become "a source of terror to all its citizens and . . . create[] a country where everyone lives in

182. *See supra* Part III.

183. BANGL. CONST. arts. 35(5), 39(2).

184. Digital Security Act 2018, No. 46 of 2018, § 32, THE BANGLADESH GAZETTE EXTRAORDINARY, Oct. 8, 2018 (Bangl.).

185. *See supra* Part IV.B.

186. *See supra* Part V.

fear.”¹⁸⁷ The abuse of powers under the digital security laws necessitates the initiation of the following reforms.

First, since both the ICTA and DSA have primarily been designed to combat cybercrimes, it is hard to justify their parallel operation. Therefore, the ICTA should be formally repealed because the DSA covers a more comprehensive list of cybercrimes.

Second, the wide power given to the Director of the Digital Security Agency and law enforcement agencies under Section 8 of the DSA to recommend, on the basis of their subjective satisfaction, for the BTRC to remove or block information from digital platforms, should be repealed. Section 8 should be amended to require the Director-General of the Digital Security Agency and law enforcement agencies to demonstrate that such recommendations have been made on the basis of an objective assessment of the threats posed to the security or economic progress of the nation. Further, the power to recommend the removal of content from digital platforms should only be exercised when there are sufficient grounds on which a reasonable person would believe that the publication or dissemination of such content through the digital media disrupts the security or economic activity of the nation.

Third, Sections 21, 25, 28, 31, and 32 of the DSA should be repealed. The use of vague expressions in these provisions provides the executive with powers of remarkable scope to persecute academicians, researchers, civil society activists, human rights defenders, and investigative journalists who seek to critically examine its actions or inactions. In this context, the observations of the Indian Supreme Court on the vagueness of a similar Indian law are instructive:

where no reasonable standards are laid down to define guilt in a Section which creates an offense, and where no clear guidance is given to either law abiding citizens or to authorities and courts, *a Section which creates an offense and which is vague must be struck down as being arbitrary and unreasonable.*¹⁸⁸

Finally, Section 43 of the DSA, which empowers law enforcement agencies to search, seize, and arrest without warrants should also be abolished. This provision is especially troubling in light of disturbing experiences with the use of similar powers under the ICTA.

187. Mark Thomson, *That's Not the Only Way, Harry*, TIME (May 13, 2011), <http://nation.time.com/2011/05/13/thats-not-the-only-way-harry/> [<https://perma.cc/ATN8-S5VW>] (quoting Harry S. Truman).

188. Singhal v. Union of India, AIR 2015 SC 1523 ¶ 52 (India) (emphasis added).

The implementation of the above reforms would enable the public and the media to criticize the government and its policies without fear of any undue repercussions, and would ensure accountability in government. Thus, these reforms have the merit of not only safeguarding the enjoyment of the fundamental rights to freedom of speech and expression and to freedom of the press, but also ensuring the maintenance of the rule of law. As Justice Michael Kirby observed:

There is no doubt that nurturing good governance is essential to ensuring respect for human rights. Without the rule of law, independent courts and the other institutions of a modern society—essential components of good governance—the promise of human rights may remain just that: a promise unfulfilled. Enforcement of fundamental freedoms when it matters may be impossible. The lesson of history is that transparent, responsible, accountable and participatory governance is a prerequisite to enduring respect for human dignity and the defence of human rights.¹⁸⁹

The BAL claims to be the sole upholder of the spirit of the liberation war.¹⁹⁰ But it must realize that resorting to draconian measures for silencing legitimate dissent is fundamentally inconsistent with one of the high ideals which inspired people to fight and “sacrifice their lives in” the war for independence from Pakistan,¹⁹¹ as is evident from the third preamble paragraph of the Constitution “to realize through the democratic process a . . . society . . . free from exploitation—a society in which the rule of law, fundamental human rights and freedom . . . will be secured for all citizens.”¹⁹²

189. Hon. J. Michael Kirby, *Human Rights - Essential for Good Governance*, Seminar on Good Governance Practices for the Promotion of Human Rights (Sept. 15, 2004), <https://www2.ohchr.org/english/issues/development/governance/compilation/docs/JusticeMichaelKirby.pdf> [<https://perma.cc/VPQ3-GXYA>].

190. *BNP Doesn't Believe in Liberation War Spirit: Quader*, DAILY STAR (Apr. 17, 2017), <https://www.thedailystar.net/politics/bnp-doesnt-believe-liberation-war-spirit-quader-1392304> [<https://perma.cc/83NL-MW6T>]; *CPB, BaSad Reject Quader's Call for Alliance with Awami League Before Election*, BDNEWS24.COM (Oct. 2, 2018, 9:28 PM), <https://bdnews24.com/politics/2018/10/02/cpb-basad-reject-quaders-call-for-alliance-with-awami-league-before-election> [<https://perma.cc/B8GJ-UTRY>].

191. BANGL. CONST. pmb1.

192. *Id.*

