
The Challenges of Freedom of Expression and the Digital Security Act 2018

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Abstract

Bangladesh government has approved a contentious Digital Security Act (hereafter referred to as simply DSA 2018) aimed at tackling digital crimes, which may act as a barricade to muzzle freedom of expression in the country. Though Article 39 of the Constitution of Bangladesh recognizes freedom of expression as a fundamental right, the present law is silent regarding the scope and functions of the applicability in digital age. It is argued that the sanctioned law will have the chances of being misused by the Government. This paper shows that the law contains several broadly defined offences, with harsh sentences that could have a serious chilling effect on the right to freedom of expression in Bangladesh. The ratified Act would restrict freedom of expression in different ways. It particularly poses a threat of severe punishment for merely expressing a belief or opinion. This can lead to abuse by way of misinterpretation of law and empowering the authority to apprehend a citizen without warrant by the court. This paper explains and analyses how freedom of expression in the existing legal framework is challenged, and how the prudent legislative efforts, and judicial activism of various jurisdictions can be considered.

Keywords: Digital Crimes, Freedom of Expression, Severe Punishment, Misinterpretation of Law, Digital Security.

Introduction

Freedom of expression is one of the vital fundamental rights ensured by Article 39 of the Constitution of the People's Republic of Bangladesh 'subject to reasonable restriction imposed by law'.² It reinforces most other rights and

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² Article 39 of the Constitution of the People's Republic of Bangladesh runs as follows:

- (1) Freedom of thought and conscience is guaranteed.
- (2) 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 intention to contempt of court, defamation or incitement to an offence-
 - (a) the right of every citizen to freedom of speech and expression; and

allows them to embellish. The right to speak freely on important issues, access information and hold a power that to be accountable, all together play a vital role towards development process of any society. If the citizens are unable to communicate effectively their ideas, thoughts, views, they are often excluded from the meaningful participation in the society. The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception and restriction. The right to freedom of expression extends to different medium, including oral and written communications, the media, broadcasting, artistic works, commercial advertising and also public protest. But this is not absolute right. It carries with its special responsibilities, and may be restricted on several grounds. Example of this categories include restrictions which can be imposed to filtering access to certain internet sites, urging violence in a national security context, intentional violence against any person or group or in artistic works of another like intellectual property law rights (patent, industrial designs and models, trademark, copyright) etc.

The government has enacted Digital Security Act 2018.³ Experts point out of that provisions of Information and Communication Technology Act 2006 have been reproduced in the new law. The Act considers the secret recording of any information at any government, semi-government or autonomous institutions as espionage. Many journalists and online activists are in fear to come under this Act, who exposes political corruption by government officials for illegitimate gain by hidden recording can be treated as espionage.

The 2018 Act has been formulated to combat growing cybercrimes that are affecting organizations. The move came at a time when rights activists and journalists have been demanding repeal of section 57 of Information and Communication Technology Act 2006 for its 'widespread misuse'. The enacted law gives scope for silencing people's voice. Society stepped in the digital age, the definition of press and journalists has been extended. The media is now in everyone's hands, making each person a citizen journalist through social media. Freedom of the press may now seem vast in the online world. But historically, the press has always been under direct scrutiny of the different governments in Bangladesh. The laws that impose control over them may now be also applicable on 'social media activists' those are acting as citizen journalists. This is a big challenge of freedom of press in digital age.

The Concept of 'Freedom of Expression'

The term 'freedom' means the right to do or say what anyone wants without any person stopping or barricades him. The term 'expression' means thing that

(b) freedom of the press,
are guaranteed.

³ The Act was has been enacted on 08 October 2018 and came into force immediately.

people say, write or do in order to show their feelings, opinions, thoughts, views, ideas etc. Considering aforesaid explanation, it can be said that freedom of expression means that the right to say, write or do in order to show feelings without anyone's restrictions. Expression also includes having views or opinions, speaking aloud, publishing articles or books or leaflets, radio-television broadcasting, producing works of art, communication through internet, some forms of commercial information and many others. As such freedom of expression means to communicate ideas, views and thought without any obstacle and to make rapport to other by orally or in print or by any other way of communication.

The notion 'freedom of expression' can be understood from two approaches, inter alia 'equality of human being' and 'interest of political liberty'.⁴ Absolute freedom is what people desire and what people need. Everyone wants to enjoy absolute freedom of speech and self-expression. Therefore, it is not surprising that freedom of speech and expression has been granted as fundamental rights.

From the language of Article 39 of the Constitution, it is clear that, although freedom of thought and conscience is unlimited in Bangladesh, freedom of speech and expression and freedom of the press suffer from some restrictions. While Article 39 guarantees limited freedom of the press, Article 43 provides protection of home and correspondence to the citizen.⁵

In the context of Bangladesh, the idea, connotations, meanings and uses of the words and phrases such as, freedom of expression, freedom of speech, right to communication, right to information and access to information are intertwined and synonymous.

Freedom of Expression under Existing Legal Framework of Bangladesh

A newspaper cannot be held exempt from a search warrant authority or search for evidence of a crime. The press has no fundamental right to get governmental advertisement and the government is not under any obligation to publish its advertisement in any newspaper at all. If the government acts arbitrary or discriminate between newspapers its action will be void not only under Article 27 but also under Article 39.⁶

Freedom of the press is subject to the same restrictions as is the freedom of speech and expression: an imposition of excessive import duty may lead to a

⁴ Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* (17th edn, University Cashbook 2011).

⁵ Abu Nasr Md Gaziul Hoque, 'Mass Media Laws and Regulations in Bangladesh' (Singapore: Asian Mass Communication Research and Information Centre, 1992) p.25.

⁶ *Glulam v State*, AIR 1990 J & K, I.

high rise in the price of newspaper materially afflicting its circulation and such an imposition may be an unreasonable restriction of the freedom of speech and expression.⁷

The provision of Article 39 will be violated if the government cancels a declaration under the press law without giving an opportunity of being heard to the persons affected⁸ or the statutory authority refuses to authenticate a declaration of a newspaper because of the opinion of the police about the political background of the person making the declaration.⁹

Freedom of the press or freedom of the media is the principle that communication and expression through various media, including printed and electronic media, especially published materials, should be considered a right to be exercised freely. Such freedom implies the absence of interference from an overreaching state; its preservation may be sought through constitutional or other legal protections.¹⁰

The Constitution of Bangladesh, adopted in 1972, guarantees freedom of speech and expression but in reality, the press and media in Bangladesh do not enjoy the freedom promised by the document but rather have always operated within a heavily regulated framework. On many occasions it has been observed that the Government fails to appreciate media's legitimate efforts in criticizing government's functions and decisions, which often strains in relationship between the media and Government of Bangladesh. This triggers harsh decisions (shut downs, the cancellation of license or frequency and so on) being taken by the government against the media. According to a survey conducted by the International Press Institute (IPI) journalists in Bangladesh feel that the politicians fail to appreciate the importance of investigative and independent journalism and that the politicians fail to understand that holding government accountable is one of the fundamental roles of journalism. Bangladesh media are under the control of the government which allows the successive governments to exploit the power to broadcast media as a tool to propagate their political ideas and wishes to the mass people.

Today's world is the world of technology. The civilization of twenty first century is more or less depend on technology. In the coming future the use of technology would increase more efficiently and more widely. Technology is getting more frequently used and seems like a blessing for Bangladesh. In this phenomenon, there is no comprehensive analysis relating to freedom of expression in the legal framework of ICT Act, 2006 amended on 2013 and

⁷ *Indian Express Newspaper v India*, AIR 1958 SC 578.

⁸ *Bannet & Coleman v India*, AIR 1973 SC 106.

⁹ *Fazlul Karim Selim v Bangladesh*, 1981, BLD 344.

¹⁰ Freedom of the press or freed the media <https://en.wikipedia.org/wiki/Freedom_of_the_press#Bangladesh> accessed 4 April 2019.

DSA, 2018. These Acts are extensively conferred about the nature of cybercrimes and declares mammoth punishment for the offences.

Recognition of Freedom of Expression in International Instruments

Freedom of speech was formally identified as absolute human rights under Article 19 of the UDHR of 1948.¹¹ The main aim was to promote human, civil, economic and social rights, including freedom of expression and religion, amongst all its subscribing nations. It mainly states that- Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any means regardless for frontiers.¹²

In the *Sunday Times v UK*,¹³ as the court remarked freedom of expression constitutes one of the essential foundations of a democratic society. The ECHR is an international treaty to protect the human rights and fundamental rights. In the case of *Kokkinakis v Greece*,¹⁴ the European Court of Human Rights held that freedom of thought, conscience and religion as enshrined in Article 9 is one of the foundations of a democratic society within the meaning of the Convention. It is in its religious dimension or belief, in worship, teaching, practice and observance. One of the most vital elements that to have the law for right to hold certain beliefs. Article 9 is a qualified right, which means the right to freedom of thought, conscience and religion can lawfully be interfered with if it is in the interests of, for example, public safety or the protection of rights and freedom of others.

The United Nations Human Rights Committee is a body which was establish by the human rights treaty named ICCPR. The main goal is that to distinguish the freedom of thought, conscience, religion or belief from the freedom to express religion or belief. The committee declares the freedom without any pre conditions. It does not allow any restrictions or limitations on the freedom of thought, conscience or to adopt a religion on one's choice or belief.

The American Convention on Human Rights is an internationally approved instrument to protect the human rights. It was signed by many countries in the Western Hemisphere in the year of 1969 on 22 November. It came into being after the eleventh instrument of ratification was deposited on 18 July, 1978. Article 13 of the American Convention on Human Rights declares that, every human being has the right to freedom of thought and expression which

¹¹ *US v Paramount Pictures*, 334 US 131.

¹² Universal Declaration on Human Rights which was adopted by the UN General Assembly on 10 December, 1948 <www.un.org/en/universal-declaration-human-rights/> accessed 4 April 2019.

¹³ (1979) 2 EHRR 245 at 280-81.

¹⁴ BAIL II: (1993) ECHR 20.

includes freedom to seek, receive and impart information and ideas of all kinds, either orally or in written form. While exercising the right, it shall not be subject to any prior censorship but shall be subject to subsequent liability, which shall be expressly established by law to the extent to ensure the national security. The government cannot abuse its power by giving restrictions or private controls over newsprint, radio broadcasting or that equipment in the dissemination of information.

The African Charter on Human and Peoples' Rights is an international instrument which was intended to promote the human rights and to ensure the freedom into the African continent. The African Commission on Human and Peoples' rights was set up in 1987 that is headquartered in Banjul Gambia. It is also named as Banjul Charter. In 1988, a protocol to the Charter was subsequently adopted. The African Charter on Human and Peoples' Rights guarantees the freedom of conscience, the profession and the free practice of religion. For this freedom, no one should be restricted by imposing any law.

Article 19 of the ICCPR states that, 'Everyone shall have the right to hold opinions without any interference. Everyone shall have the right to freedom of expressions; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in a print, in the form of art or through any other media of his choice.'

The above provisions contained the essential and universally relevant elements of the right to freedom of expression. The rights of man expressed in international covenants claims credibility only through flow of information across the border of the nations of the world.

It is inevitable that none of the fundamental freedoms enshrined in the UDHR and other instruments would be heard to be availed of without either acceptance by the respective states or support of world opinion for acceptance by the states.¹⁵

Article 19(3) carries the provision relating to the special duties and responsibilities may be subject to certain restrictions as for protecting the reputation or the rights of others and for the protection of national security or of public order or of public health or morals. So, for the protection of national security or public order, reasonable restrictions on freedom of expression can be given but not to grab the freedom of thought, conscience and expression of the citizens.

¹⁵ Md. Akhtaruzzamn, *Freedom of Press in South Asia* (Dhaka: Dhaka International University, 2012) 53.

Public morality is such a concept that cannot be described in a single word. The definition of public morality is not given in any universal standard. Public morality depicting pornography can be restricted for minors and also for adults. It can be given as an example for restrictions. But freedom of thought and expression should not be restricted. Article 18 of the ICCPR declares the right to freedom of thought, conscience and religion and Article 21 establishes the right to peaceful assembly. Article 22 gives the right to freedom of association.

The right to freedom of thought, conscience and speech, including the freedom to have expression, speech and freedom of press should be protected. Freedom of conscience and thought does not imply a right to refuse all obligations imposed by law. Limitations may not be imposed on the freedom to express opinion on one's choice. Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, freedom of thought, conscience and religion cannot be derogated from in any circumstances. Freedom of thought, conscience and of speech is a cornerstone of a democratic society and a society respectful of human rights.

The right to freedom of expression is protected by all these international human rights instruments that bind states, including Bangladesh, particularly relevant are Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). As a state party of ICCPR, Bangladesh must ensure that laws attempting to regulate electronic and internet-based modes of expression comply with Article 19 of the ICCPR. This analysis focuses on the possible conflicts of the law with international human rights standard and analyse its efficacy and compliance with international standards of freedom of expression.

Case Studies on Freedom of Expression under ICT Act 2006 and DSA 2018

Being a democratic country, Bangladesh must do more to ensure press freedom. Media have been playing inevitable role in the world and Bangladesh as well. The role of media and its impact on the society became prominent since the restoration of democracy after 90s. But the way of the journey of the press is not always smooth. The institution is going forward facing different challenges in every day. These experiences contributed Bangladeshi media to achieve spirit, strength and skill through working various socio-political and cultural dynamics. It is always expected that the media will get enabling environment to work for society and culture. Bangladesh as a transition society has many vested interest groups who want to suppress the voice of the media. It's a continuous phenomenon for

Bangladeshi media. Media are still now facing different hurdles to enjoy their freedom as it was in the previous days.

On 18 August 2011, on the basis of the newspaper reports, the High Court Division Bench issued a suo moto order asking Khandakar to appear before the Bench. The court termed Khandakar's post as a 'derogatory statement'.¹⁶

In the year of 2010, twenty journalists have been arrested across the country. Most of the arrest held having the allegation of extortion and involvement in murder case or having illegal weapons or in some cases generating comments on court verdict and for taking stance that went somehow against the government. The journalists who are arrested are mainly editor, special correspondent, senior reporter, bureau chief and university correspondent. Journalist named Saiful Islam Swapon, Laxmipur correspondent of Jai Jai Din was not found. The ICT Act was used to muffle the voice of journalist Prabir Sikder, who had to serve jail for writing against an influential minister. Another activist named Dilip Roy has been incarcerated for his Facebook post. The charges brought against him were ridiculous. The above cases show that the ICT Act 2006 was misused for harassing the journalists for expressing their views. It is impendence that the current Digital Security Act 2018 may be misspent like before.

Barrister Mainul Hosein was arrested under the Digital Security Act for 'dishonouring journalist Masuda Bhatti and the female community'. The Chief Metropolitan Magistrate Court in Dhaka sent Barrister Mainul Hosein to jail after rejecting his bail petition in a defamation case filed for slandering female journalist Masuda Bhatti on a television program. With all this experience, it is a matter to worry about the raised Digital Security Act. If this trend continues, there will be no space for free voices in the digital sphere. The person who will say something against anyone, he can be brought under the law. It is difficult to grip any news from flourishing in the digital era.

Challenges of Freedom of Expression in Digital Bangladesh

Article 39 of the Constitution of Bangladesh recognizes the citizen right of speech and expression but not to cankered the security of the state or to spoil relationship with foreign states or public order or not to affect decency or morality or contempt of court or inducement of any offence. It may be noted that there are provisions in general laws prescribing the penalty for committing such acts or offences i.e. the Penal Code 1860, the Contempt of Courts Act 1926, the Foreign Relations Act 1932, the Official Secrets Act

¹⁶ Asian Legal Resource Centre, Bangladesh: Absence of Freedom of Expression contributes to non-existence of the rule of law, (5 September, 2014) <<http://www.alrc.net/doc/mainfile.php/hrc27/825/>> accessed 10 April, 2019.

1923 etc. There are some reasonable restrictions imposed under article 39(2) of the Constitution:

- (a) In the interest of the security of the state;
- (b) In the interest of friendly relation with foreign states;
- (c) In the interest of public order criticism of the government does not necessarily disturb public order must be something more than public inconvenience, annoyance and unrest;¹⁷
- (d) Act disturbing public safety;
- (e) Propaganda during war;
- (f) In the interest of decency and morality S.292 of the Penal Code, 1860 deals with obscenity;
- (g) In the interest of contempt of court and defamation: All publications which offend against the dignity of the court or are circulated to prejudice the course of justice will constitute contempt. Contempt of court consists of any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice. The contempt of court consists in any act done or writing or published which is circulated:
 - ❖ To bring a court or judge of the court into contempt or lower its or his authority,
 - ❖ To obstruct or interfere with the due course of justice or the lawful process of the courts such as commenting on a case pending in a court.
- (h) Defamation under Section 499 of the Penal Code;
- (i) Incitement to an offence;
- (j) Obscenity and vulgarity.

Section 57 of the Information and Communication Technology (ICT) (Amendment) Act 2013, it might lead to further arrests and harassment of political rights defenders. Given the tendency to infringe upon people's right to information, there is considerable possibility that the law may be misused in the name of preventing cybercrimes. This section indicates barricade to the press freedom. If someone violates the provision of Section 57, the penalty is minimum seven years and maximum of 14 years and a maximum fine of taka 1 crore which is repealed by the more draconian DSA 2018.

In growing concern, Prime Minister Sheikh Hasina and several ministers had assured the journalist community not to worry about the Digital Security Act 2018. Journalists should not be apprehensive about the DSA if they do not run

¹⁷ *Abdul Latif Mirza v Bangladesh*, 1979 31 DLR (AD) 1.

false or fabricated news, or mislead the people, said Prime Minister Sheikh Hasina. She asked, replying to a question, at media that ‘I understand that journalists are very worried but who will address our apprehension? [or] if those who are being victimized? And how will you (journalists) compensate them’?¹⁸ But the inclusion of Official Secrets Act, 1923 will not only curb freedom of expression but also undermine the objectives of the right to information.

New Statutory Law (DSA 2018) Enacted by Parliament

As Bangladesh is developing day by day and the technological knowledge is increasing so cybercrime is also increasing. At first cybercrimes started with spam mails and Trojan attacks. For the legality and security for information and communication technology in 8th October, 2006 an Act was passed called the ‘Information and Communication Technology Act, 2006’. After 12 years another Act is passed named Digital Security Act 2018. Jyotirmoy Barua, Advocate, Supreme Court of Bangladesh, working on human rights, says on the view of Digital Security Act 2018, it is necessary of a law to check the digital crimes. Digital media must have freedom of expression. The law should be used against digital crimes but not to infringe the right of freedom of expression.

There is no scope to deny that the DSA 2108 is implemented to ensure the national digital security and people’s lives and assets from digital crimes but not to gag the voices of the mass media. In the time of digitalization, crimes are spreading at an alarming rate in the field of online communication system. Through the development of technology crimes have been developing in different ways and means. So, laws should be developed in such a way that crimes in the field of technological arena can be controlled in an iron hand. The provisions DSA 2018 is advantageous for the present society, if it is used in a perfect manner. But press media people are in fear of this law and asking for review for its handicapped manner of punishment. The DSA will be used to deal with defamation, hurting religious sentiments, causing deterioration of law and order and instigation against any person or organization through publishing or transmitting any material on a website or in electronic form. This provision stipulates up to 14 years jail or a fine up to taka 1 crore or both for spreading propaganda against the liberation war or the father of nations by using digital devices. Crimes under section 17, 19, 21, 22, 23, 24, 26, 27, 28, 30, 31, 32 and 34 are non bailable offences. Sections 54, 55, 56, 57 and 66 of the ICT Act have been abolished entirely by this Act.

¹⁸ Prime Minister Sheikh Hasina briefs the media at Ganabhaban in Dhaka on October 3, 2018.

Dissection of Digital Security Act 2018

The Digital Security Bill was passed with several minor changes as recommended by the parliamentary body. Section 3 of the new law includes a provision of the Right to Information Act 2009, which will be applicable in case of right to information-related matters. The law also includes a definition of the ‘Spirit of the Liberation War’ in section 21, which says, ‘The 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’. Section 21 of the law says anyone spreading negative propaganda against the Liberation War or the Father of the Nation, using digital devices or instigates to do so, can be sentenced up to 10 years in jail or a fine of up to Tk 1(one) crore taka or with both. If the person commits the offense for the second time or recurrently commits it, he will be punished with life imprisonment or with fine not exceeding 3 (three) crores or with both.

The provision of Section 25 says, if any person intentionally or knowingly sends information which is offensive or fear inducing, or which despite knowing it as false is sent, published or propagated with the intention to annoy, insult, humiliate or denigrate a person or publishes or propagates any information with the intention of tarnishing the image of the nation or spread confusion or despite knowing it as false in any website or through any digital medium, shall be penalized with imprisonment for a term not exceeding 3 (three) lacs taka or with fine. A person will face up to five years in jail or Tk 10 lakh or both for committing the offence for the second time, it said.

The provision of Section 28 says if any person or group intentionally or knowingly with the aim of hurting religious sentiments or values or with the intention to provoke publish or broadcast anything by means of any website or any electronic format which hurts religious sentiments or values then such activity is considered as offence and the offender will be sentenced to a term of imprisonment not exceeding seven years or fine not exceeding 10 lac taka or both. The person repeatedly commits the offence will be punished with imprisonment not exceeding ten years or fine not exceeding taka 20 lac or both.

Under section 29 of the said Act declares, if a person commits an offence of publication or broadcast defamatory information as described in Penal Code 1860 of section 499 in any website or in any other electronic format then he will be sentenced of imprisonment for three years and fine not exceeding 5 lac taka or both and committing the crime repeatedly, he will be punished not exceeding five years or fine taka 10 lac or both.

Section 31 of this Act says any person intentionally publish or broadcast any kind of file in any website or digital format which will create hostility, hatred

or adversity among people or destroy any communal harmony or create or disorder or deteriorates or threatens to deteriorate the law and order then that activity of that person will be considered as an offence. The person committed that that offence will be penalized for a term to seven years or fine not exceeding 5 lac or both. If any person recurrently commits it, will be punished with up to ten years or 10 lac taka fine or both.

Under section 32 of this Act says if any person commits or aids or abets in committing an offence under the Official Secrets Act 1923 through computer, digital device, computer network, digital network or through any other digital medium then he will be punished for a term of imprisonment not exceeding fourteen years or with fine not exceeding 25 lac or both. Committing the offence for second time, the offender will be punished with life imprisonment or with fine not exceeding taka 1 crore or with both.

According to the approved law, the government will form a Digital Security Agency to ensure national digital security to combat cybercrimes. A director general will lead the body for any digital security purpose or to take necessary steps, there will be a council named National Digital Security Council. The Prime Minister of the People's Republic of Bangladesh will be the chairman. To fulfil the object of this council, with the advice or approval of the chairman, the council may cooperate as member at any time, a person with specialized knowledge or representative of a relevant body as Bangladesh Computer Samity (BCS), Bangladesh Association of Software and Information Services (BASIS) or a suitable representative from mass media on recommendation from Ministry of Information to fulfil the purpose of this Act.

According to Section 43 of the Digital Security Act 2018, if a police officer has a reason to believe that an offence under this Act 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 possibility of being made scare in some other way, then the officer, upon recording the reason for his/her belief, can enter and search the said place and if interrupted, take necessary action in accordance with the code of Criminal Procedure. The officer can seize the computer, computer systems, computer network, data information or other objects which were used in committing the crime or documents that can aid in proving the offence that are found in that place with conducting the search. The police can search any person's body present in the place and also can arrest anyone present in the said place if suspected of committing or having committed an offence under this Act. After conducting the search, the police officer has to submit search report to the tribunal. This Section 43 of this Act gives the chance to a police officer to arrest without warrant. Unfortunately, in Bangladesh this power can be abused by the law enforcers.

Pitfalls of the DSA 2018

The new Digital Security Act 2018 is supposed to replace the most controversial Information and Communication Technology (ICT) Act 2006, which was enacted to control cyber related crime in Bangladesh. But Section 57 of this Act has been used against journalist in many cases. The law enforcers arrested so many people under this Section without warrant. In the year of 2013, with the amendment of this Act, the controversial section was amended as non-bailable section and the maximum penalty was 14 years imprisonment. Many people were arrested under this section only to say in front of the media or in the Facebook. In the year of 2017, at least 25 known journalists were harassed by under this Section, even several bloggers and Facebook users were arrested under this Act, for expressing their views in social media.

The government has decided to put an end of the ICT Act and to introduce the Digital Security Act, 2018. The necessity of the digital security has to be established to prevent the cybercrimes and to maintain security and peace in the society. But experts point out that many of the ICT Act's provisions have been reproduced in different forms in the enacted law, which still carry up to 14 years in prison.

Before the enactment of the Digital Security Act, there was a discussion of removing the most controversial ICT Act. The announced Digital Security Act contains a very similar provision with ICT Act. Many general people including the law analyser and the journalists are talking to have the similar provisions in the new enacted Act which is another introduction as in the name of Digital Security Act 2018. Most of the sections impose the same penalties for the similar offences with a huge amount of fine. The Digital Security Act is not satisfactory on several points as it is somehow the replacement of the old ICT Act, which is more draconian than the previous law. The vague wording will allow to abuse as before those who will try to express their opinion. Those people will be benefited who do not want freely and independently reported news and information.

The approved Act would suppress freedom of expression in different ways. That are particularly alarmed about the threat of severe punishment for merely expressing a belief or opinion in media or internet, the blurred version of the law could lead to misconstruction, non-availability of bail for certain offences and also empower the law enforcement agency to detain a citizen without warrant by court, which is a denunciation in digital era.

Recommendations to Modification of the DSA 2018

The Digital Security Act 2018 demands amendments of certain Acts for the first step for incorporation of the Internet into Bangladesh's legal framework. There is still a long way to go before the Bangladeshi legal system incorporates and accepts the internet fully. Some provisions of this Act need to be amended. In the global context where cyber control mechanisms are important, the state must adopt to push cyber laws. Cybercrimes are a new class of crimes to Bangladesh rapidly expanding due to extensive use of internet. Getting the right lead and making the right interpretation are very important in solving a cybercrime.

The Digital Security Act 2018 is being passed and the law challenges the press freedom and also the citizen's liberty. It also imposed a long-term imprisonment and huge fine. But the international instruments like UDHR, ICCPR and ECHR emphasize the freedom of speech, expression and conscience.

No doubt technological defense is better than legal remedy in preventing hi-tech crimes, but there is always a chance of destruction of such defenses as these are not of perpetual nature. People who are more advance in technology can smash the security wall anytime. So, legal and other related remedies are obligatory to fight the war against the said circumstances. In addition to the present remedies the state can commence some new course of actions which are being trailed by some developed hi-tech states of the world. The recommendations relating to the Digital Security Act, 2018 are enumerated as:

Section 21 of the Digital Security Act declares punishment for propaganda against liberation war, father of nation. But the word propaganda is not explained anywhere in this Act. Every person ought to understand that the religious and cultural traditions of others that should be appreciated and Article 2(a)-the state religion of the Constitution of the People's Republic of Bangladesh must be respected. The provision under Section 28 says about hurting religious sentiments or values or with intension to provoke if any person publishes or broadcast anything by websites or electronic format that is considered as offence. But the provision does not give any clear concept of hurting religious sentiments.

Article 39(2) of the Constitution of the People's Republic of Bangladesh implies reasonable restrictions imposed by law in the interest of the security of the state, public order, decency or morality must not be used as an excuse to offend the government interests and as a tool of opposition repression. Section 32 of the Act demands a complete removal to ensure freedom of expression in the country to ensure justice to all. As a democratic state, transparency should be maintained in all spheres of activities done by the government. But the government is able to hide any information in the shade of the Official Secrets

Act, 1923. The title of Section 32 should be replaced as ‘Crime and Punishment using computer and digital spying’ instead of ‘breaching government Secret Offence and Punishment’.

Article 70 of the Constitution of the People’s Republic of Bangladesh is controlling voting freedom by the nominated candidate against the party, which is limiting the power of the Member of Parliament. It is a controversial clause and goes against democratic norms. The parliament should be a place for broader democratic debate for which amendment of Article 70 is necessary. As the law-making process is vested on the parliament members, so if the members are not free to give their opinion, they are not able to criticise any law which is contradictory with the constitution.

The DSA 2018 needs some clarifications to avoid vagueness in the definition clause. Definitions put in this Act, are not specific and many provisions have been justified by oppressive measure under the broad umbrella of national security. A strong law is needed to ensure the security of digital information. The Penal Code 1860 was found insufficient to cater to the needs of new crimes emerging from Internet expansion. Even some of the traditional crimes such as conspiracy, solicitation, securities, fraud, espionage etc. are now being committed through Internet which necessitates a new law to curb them. It was in the background that the ICT Act 2006 was enacted in Bangladesh for prevention and control of cybercrimes. Prior to the enactment of this Act, the law applicable to cyber offences was the Penal Code 1860 which was enacted long back in 1860 when no one even thought of computer technology or cyber criminality. The law should be made carefully to maintain privacy of critical and sensitive data.

Section 43 empowers the police to search, seizure and arrest without warrant if the officer believes of an offence under this Act, can arrest without warrant. There is a probability of misapplication of the provision by the law enforcers. This section needs some clarifications and guidelines so that any reasonable person can get relieve from harassment. The provisions of non bailable offences under Sections 17, 19, 22, 23, 24, 26, 27, 28, 30, 31, 32, 33 and 34 is a barrier to utilize freedom of expression which should be removed to ensure the fundamental of rights of the citizens. The punishment of jail term is very high in this Act. The provisions of punishments should be reduced in the enacted digital security law. Proportionate punishment should be announced according to the nature of crime.

Concluding Remarks

Blackstone and Dicey defined press freedom in term of the absence of prior restraints. A newspaper or publisher might be liable to a criminal prosecution or any civil action for damages in respect of a work which has already been

published, but pre-publication censorship is incompatible with the freedom. In some circumstances, the courts may grant an injunction to prevent a publication, on the ground that it would amount to a breach of confidence or contempt of court. In these cases, there is a judicial prior restraint which can be contrasted with the absence of provision for an administrative censorship. The former is a loss serious infringement of press freedom than the latter, since there is at least an opportunity to contest the grant of injunction in open proceedings before an impartial tribunal. In *New York Times v US*,¹⁹ the court said that prior restraints on publication whether administrative or judicial, permanent or temporary could never be justified outside wartime and national emergency. Films, radio and television and videos have all subject to various censorship schemes.

In present context, the person tries to express opinion becomes arrested, untraced or dead. The laws itself has limitation with Article 39(2) of the Constitution of People's Republic of Bangladesh over the freedom of speech and expression. Article 70 puts obstacle, which deals with the cancellation of membership of Parliament members for voting against their own political party. Section 57 of the ICT (Amendment) Act 2013, it might lead to further arrest and harassment of political rights defenders. The government has formulated the Digital Security Act 2018 to combat growing cybercrimes that are affecting organizations. The move came at a time when rights activists and journalists have been demanding repeal of section 57 of Information and Communication Technology Act for its 'widespread misuse. The enacted law gives scope for silencing people's voice. The Digital Security Act is not contentment on various issues as Section 32 of the law will go against securing transparency in running affairs. Freedom of expression is a demand to protect the constitutional fundamental rights. In such a situation, there is a notable probability that the law may be abused in the name of impeding cybercrime and may be a threat of freedom of press and expression.

Freedom of expression is a demand to protect the constitutional fundamental rights. In a sovereign state, it is the citizen's right and desire to exercise freedom of thought, conscience and speech as a reflection of democracy. If the government imposes any law which is contradictory with the fundamental rights of the constitution then that inconsistent law shall be void. All rights and provisions should be given effect to by the courts by harmonious interpretation if necessary. It is true that digital security has to be ensured in order to prevent cybercrimes. The government has formulated the Act to resist cybercrimes that are affecting many ordinary people along with public and private organizations. But the provisions of Digital Security Act 2018 are controversial. It is also not desirable to curtail fundamental rights of freedom of expression in the name of digital security. The provisions would allow authorities to level espionage charges against anyone under this Digital

¹⁹ 403 US 713 (1971).

Security Act. Any journalists, academic, researcher, and online activist may be charged of spying when they try to collect necessary information or publish any report. It will narrow down the space of journalism and a cursed challenge to access the freedom of expression in digital Bangladesh.

REFERENCES

Cases

- Associated Press v NLRB, 301 US 103.
- Bal Bharati Public School v Directorate of Education.
- Bannet & Coleman v India, AIR 1973 SC 106.
- Bridges v California, 314 U.S. 252 (1941).
- Express Newspaper v India, AIR 1958 SC 578.
- Fazlul Karim Selim v Bangladesh, 1981, BLD 344.
- Glulam v State, AIR 1990 J & K, I.
- Indian Express Newspaper v India, AIR 1958 SC 578.
- New York Times v US403 US 713.
- Palko v State of Connecticut, 302 U.S. 319 (1937).
- Sakal Papers v India, AIR 1962 SC 305.
- Virendra v Punjab, AIR 1958 SC 986.

Legislations

- Code of Criminal Procedure 1898.
- Public Examination (Crime) Act 1980.
- The Constitution of the People's Republic of Bangladesh.
- The Penal Code 1860.
- The Information and Communication Technology Act 2006 (Amendment on 2013).
- The Digital Security Act 2018.
- The Official Secrets Act 1923.
- The Contempt of Court Act 1926.
- The Children Act 2013.

International Instruments

- African Charter on Human and Peoples' Rights.
- American Convention on Human Rights.
- European Convention on Human Rights (ECHR).
- International Covenant on Civil and Political Rights (ICCPR).
- Universal Declaration on Human Rights (UDHR).

Books

- Akhtaruzzamn M, *Freedom of Press in South Asia* (Dhaka: Dhaka International University, 2012) 53.
- Sullivan K M and Gunther G, *Constitutional Law* (17th edn, University Cashbook 2011).

Internet Materials

- Asian Legal Resource Centre, Bangladesh: Absence of Freedom of Expression contributes to non-existence of the rule of law, (5 September, 2014) <<http://www.alrc.net/doc/mainfile.php/hrc27/825/>> accessed 10 April, 2019.
- Freedom of the press or freed the media <https://en.wikipedia.org/wiki/Freedom_of_the_press#Bangladesh> accessed 4 April 2019.
- Universal Declaration on Human Rights which was adopted by the UN General Assembly on 10 December, 1948 <www.un.org/en/universal-declaration-human-rights/> accessed 4 April 2019.