

# The Digital Security Act 2018

## Online freedom of expression under threat?

**T**HE Digital Security Act (DSA) 2018 aims to ensure digital security by punishing offences committed through digital media. It was certainly necessary to prevent computer related crimes and deter online offences by making a law; however, it is not in any way justifiable to curb freedom of expression in the name of guaranteeing digital security. A close reading of the DSA reveals that the Act contains few provisions that are contradictory with freedom of expression as well as freedom of the press guaranteed by the Constitution of Bangladesh.

Article 39 of Bangladesh Constitution expressly recognises and guarantees freedom of thought, conscience, speech and freedom of the press. This constitutional provision is basically intended to ensure citizen's right to access to information, the denial of which amounts to the denial of the freedom guaranteed under the Constitution. Though the DSA refers to the applicability of the Right to Information Act 2009, the provision relating to the breach of the Official Secrets Act 1923 raises serious concern regarding the free flow of information. The relevant provision reads as follows: "If any person commits or abets to commit an offence under the Official Secrets Act 1923 through any computer, digital device, computer network, digital network or any other digital media, then he shall be punished with maximum 14 years imprisonment, or maximum 25 lac taka fine, or with both." This provision not only intimidates the journalists in terms of collecting and disseminating information but also threatens the principles of accountability and transparency which are the reinforcing pillars of good governance and people's empowerment.

The Act criminalises any activities that propagate or publicise something through digital media against the Liberation War of Bangladesh, Spirit of the Liberation War, Father of the Nation, National Anthem or National Flag. It is undeniable that in the age of digital age there remains possibility to distort the Spirit of the Liberation War



and to unduly defame the image of the State. Even we do not expect any attack upon the Spirit of the Liberation War and the very integrity of the Father of the Nation or the idea of our Statehood. But at the same time, it is reasonably deduced that the aforesaid vague and undefined terms without having any marginal line, might be used to harass and exploit people. The punishment of maximum ten years imprisonment for the aforesaid offence is also disproportionate in comparison with the nature of the offence. It is to be noted that if the degree of punishment becomes disproportionate and excessive in comparison with the degree of penal activities, then it might aggravate rather than mitigate the griev-

ance of the offender. The Act has also provided for its extra-territorial application and has gone on to say that if any offence defined under DSA is committed outside the territory of Bangladesh, the same shall be treated in a way as if it had been committed within the territory of Bangladesh.

The extreme criminalisation of information becomes evident when the DSA penalises the transmission and publication of any activities that creates hostility, hatred or acrimony among different classes or communities of people or destroys communal harmony or creates instability or chaos or deteriorates law and order situation or is likely to cause deterioration in law and order. Since the parameter of term 'deterioration of

law and order' is uncertain and mostly exercised based on the subjective interpretation of the law enforcing agencies, there remains much room to frighten people and thereby hinder online free speech.

The power of the police officer to arrest a person without warrant, even if there is only suspicion of crimes, raises serious concern. This provision poses threat to the principle of natural justice of the concerned individual and also jeopardises the due process of law. The wholesale permission of arrest without warrant by the police, provides ample scope of abuse without having any accountability measures and thereby restricts freedom of speech and of the press. It is apparent that the abusive

power of the police may curtail the constitutionally guaranteed rights to equality before law and to equal protection of law, right to be treated in accordance with law, right to life and personal liberty, right to protection against arbitrary arrest and detention, and right to fair trial in case of criminal prosecution.

The purpose of a law is to reflect the rising concerns of the society while upholding the spirit of the supreme law of the land which is the Constitution. A law should carry the conducive elements of expressing freedom rather than holding intimidating tools that ultimately make the people insecure.

- FROM LAW DESK.

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**LAW IN-DEPTH**

## Compensating the victims of road accidents

TAQBIR HUDA

**T**HE recently approved Road Transport Act 2018 has long been in the works but was accelerated for enactment by the Bangladesh Parliament in response to the groundbreaking student protests for road safety in August 2018. The Preamble to the 2018 Act states that it is being passed with a view to replacing the Motor Vehicles Ordinance 1983 keeping provisions largely unchanged save where change was necessary to modernise the

payment per trip instead of weekly wages, shoddy recruitment of unqualified drivers and operation of unfit vehicles etc.) can be addressed since these factors are in the full control of motor vehicle owners acting as employers. Thus it is only when motor vehicle owners are vicariously held liable for the negligence of their employees and forced to pay damages for accidents arising out of such negligence will they feel compelled to address these root causes. In this regard, Section 111 read with

*Shohoyota Tohobil* i.e. 'Financial Aid Fund' (one may wonder if its purpose is to compensate then why it is not called a compensation fund). Section 59 sets down the procedure a claimant must follow when they 'apply for financial aid' from this fund.

Regrettably, the Act seems to use the term 'compensation' and 'financial aid' for the purposes of claims under this fund interchangeably and does not seem to adequately appreciate the difference between the two, which is problematic since 'aid' is always

death or injury in any given case. Additionally, it is important to bear in mind that fines can only be imposed on those who incur criminal liability, which would not apply to motor vehicle owners (i.e. the employers) since vicarious liability does not operate in criminal law. As such, if the landmark case of *Catherine Masud v Kashed Miah and Others* (where vicarious liability was imposed on different types of bus owners for the road crash that led to Tareque Masud's death to pay 4.4 crore in compensation), was to be filed under the 2018 Act, rather than the 1983 Ordinance, the claimant would simply not be able to impose compensation liability on the bus owners.

Another major setback of the 2018 Act is its failure to impose a mandatory duty of insurance on motor vehicle owners (including third party risks) as section 109 of the 1983 Ordinance did (and in fact section 46(1) of the 2017 Road Transport Bill did as well). This is a crucial omission since insurance plays a cardinal role in speeding up compensation claims in road accident cases.

While it is appreciable that the law introduces a state administered fund for the exclusive purpose of granting relief to road accident victims, such an introduction should not replace the victim's preexisting right to sue for compensation under the 1983 Ordinance, rather it should exist in addition to this right as they serve two distinct purposes. While the fund ought to provide immediate and interim relief to victims in the short term, more substantial compensation ought to be claimable from a civil compensation tribunal in the long term. As such, it must be recognised that a road accident victim's right to sue for compensation and their ability to apply for financial aid are certainly not one and the same.

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law and satisfy the demands of the day. Unfortunately, upon primary inspection of Chapter 9 of the Act- which deals with compensation claims for road deaths and injuries- it can be said that the new law arguably leaves victims in a worse off situation than the 1983 Ordinance.

The major issue with the Act is the non-operation of vicarious liability within compensation claims. The imposition of vicarious liability is crucial because it is one of the main ways in which the root causes of road accidents (e.g. rash driving incentivised by

Section 128 of the 1983 Ordinance granted victims the right to sue for compensation not only from insurance providers but also motor vehicle owners in the event insurance coverage was inadequate, therefore imposing vicarious liability on employers for the purposes of compensation.

Unfortunately, Chapter 9 (namely sections 52 and 53) of the 2018 Act replaces this right of the victim to sue for compensation with a right to 'apply for compensation' from a rather charitably titled 'Arthink

gratuitous whereas compensation is an entitlement as of right.

Section 57 of the Act states that this fund will be established from five main sources: grants from the Government, contributions from motor vehicle owners, fines obtained under the Act and grants from motor vehicle owners' and workers' associations. This, therefore virtually nullifies the operation of vicarious liability in compensation claims since it imposes no specific compensation liability on the motor vehicle owner whose employee (i.e. the chauffeur) causes a road

**COURT CORRIDOR**

## 'Adultery' decriminalised in India



**R**ECENTLY, the Supreme Court of India has become very enthusiastic to declare the archaic Victorian value influenced laws unconstitutional. In the beginning of this month, the Supreme Court of India decriminalised consensual same sex intimacy between two adults. Following that on 27th of September, the Indian Supreme Court ruled that adultery is not a crime, scrapping an "archaic" law saying that the "husband is not the master of the wife". The entire judgment relies on the themes of 'constitutional morality', 'individual dignity', 'sexual agency', 'gender parity' and 'transformative vision of constitution'.

While scrapping the archaic provision of law, the Supreme Court said that adultery can no longer be regarded as a crime but it can be, "without a shadow of doubt", a ground of divorce. The Chief Justice said, "adultery might not be the cause of an unhappy marriage; rather it could be the result of an unhappy marriage. Mere adultery can't be a crime unless it attracts the scope of Section 306 (abetment to suicide) of the Indian Penal Code 1860. Thinking of adultery as a criminal offence is a retrograde step. Making adultery a crime is retrograde and would mean punishing unhappy people".

Previously women who committed adultery got indemnity from law as the law only made the offence punishable for men. It was noted in the judgment that

Section 497 treated men and women unequally, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is "consent or connivance" of the husband of a woman who has committed adultery, no offence can be established. Section 497 is also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. This section reflected the Victorian value of patriarchal society by objectifying women as the property of men.

Another interesting fact of this judgment is that in 1985, a judgment authored by Justice Yeshwant Chandrachud, father of Justice Chandrachud, in *Sowmithri Vishnu v Union of India* had upheld the constitutional validity of the section. His own son after 33 years has overruled the judgment in *Joseph Shine v Union of India* in 2018. It portrays how the social value and constitutional perception changes over time. While overruling his father's judgment, Justice Chandrachud empathetically observed that the realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law.

COMPILED BY LAW DESK (SOURCE: LIVELAW.IN.)