

Use and misuse of defamation law and its impact on journalism



The Daily Star organised a roundtable titled "Use and misuse of defamation law and its impact on journalism" on September 14, 2019. Here we publish a summary of the discussion.

Mahfuz Anam, Editor & Publisher, The Daily Star

In a democratic society, we need defamation laws to protect individual reputation from false allegations. Unfortunately, in many cases, both in Bangladesh and abroad, this law is often misused to impose restrictions and curtail freedom of expression. It is high time we discussed how to prevent the misuse of this law.

Mohammad Golam Sarwar, Lecturer, Department of Law, University of Dhaka

The colonial rulers promulgated the Contempt of Court Act in 1926 to regulate the publication of judicial matters in the press and mass media. The law proved to be another black law as it was applied repressively against any sort of critique of judicial matters. But in 2013, the government repealed the 1926 Act and made a new Act on law of contempt. However, the High Court Division of the Supreme Court has annulled some of the provisions of the new Act and observed that this law has curbed the powers of the Supreme Court as it has given government officials and journalists a lot of protection that run contrary to Articles 27, 108 and 112 of the Constitution.

After the annulment of some provisions, we see a vacuum in the legal area relating to the contempt of court. At present, the 1926 Act is likely to prevail as the 2013 Act has been annulled. Hence, there remains a confusion as to the application of the contempt of court law with the possibility of misuse of the defamation law.

Dr Asif Nazrul, Professor, Department of Law, University of Dhaka

Globally, we are seeing misuse of the defamation law to gag freedom of expression. In Thailand, for example, there is a law to protect the reputation of the King's family which has been misused to criminalise any sort of criticism of the Royal family. Recently, a senior civil society leader of Thailand was brought to the court just because he questioned the veracity of an information regarding a King who died 600 years ago. Similarly, in Pakistan, the rape victims are facing defamation charges for reporting incidents of abuse. In India, big corporations are in an all-out war against journalists for reporting on high-level corruption cases.

On the other side of this grim reality, the Organisation for Security and Co-operation in Europe (OSCE) informs that 18 member-states of this organisation have already decriminalised defamation law in the last 10 years. Decriminalisation means there will be no criminal responsibility for defamation charges but civil responsibility will always be there. It is being observed that authoritarian regimes are imposing harsh defamation regulations to curtail freedom of speech and expression while democratic regimes are promoting freedom by decriminalising defamation laws.

In Bangladesh we are seeing serious misuse of the defamation law. Although according to our existing Penal Code and the Code of Criminal Procedure (CrPC) defamation falls under both criminal and civil law provisions, the punishments are not as harsh as in the new Digital Security Act.

Again, although the amendment to the CrPC, passed by the National Parliament on February 2, 2011, introduced a provision for issuing summons instead of arrest warrant in case of defamation charges, we are seeing a violation of this amendment in several cases. We can refer to the case of Barrister Mainul Hussain in this regard.

We are also seeing violation of the Section 198 of CrPC which stipulates that only an aggrieved person can file a defamation case. Now, even members of political organisations are filing defamation cases as aggrieved persons in case of anyone criticising their political leader. This is totally unacceptable.

If we do not check such misuse of defamation law, our freedom of expression and freedom of the media will be at stake in the near future.

Syed Ishtiaque Reza, Editor-in-Chief, Gazi TV

The worst sufferers of defamation cases are the local journalists outside Dhaka as they do not get adequate legal and

institutional support. The political division among journalists' associations has also exacerbated the problem. Due to this sharp divide, the journalists are failing to take a united position against repressive regulations such as the Digital Security Act. Moreover, self-censorship has plagued the media industry. Furthermore, investigative journalism has suffered a huge setback due to these fears.

Mizanur Rahman Khan, Joint Editor, Prothom Alo

I suggest building a consensus among the stakeholders to decriminalise defamation since the United Nations Human Rights Council (UNHRC) favours it and the trends suggest it is increasingly becoming a world order. "Publish at your own peril" appears to be our journalistic philosophy. We are witnessing harsher punishments. The Digital Security Act is the new draconian law that also deals with defamation at a time when the UNHRC succinctly suggests, "avoiding excessively punitive measures and penalties." In 2002, the UN Special Rapporteur on Freedom of Expression called to adopt civil defamation laws by repealing criminal defamation clauses. The United Kingdom, Cyprus, Romania, Estonia, Ireland and Jamaica have done it. Trinidad and Tobago did it partially. Even Pakistan had deleted defamation provision from its Constitution. It introduced a separate Ordinance that imposes only a fine and stated that there will not be a defamation suit against the editors and publishers after the lapse of six months of publication. They also kept the CrPC tool intact.

Though the Indian Supreme Court twice brushed aside the idea of decriminalisation, a private bill has been placed in Lok Sabha as the Right to Protection of Speech and Reputation Bill 2017 which sought decriminalisation of defamation. While the Indian Law Commission favours the decriminalisation of defamation, the Bangladesh Law commission in 2007 had refused to consider it which was requested by the then Caretaker Government.

We do not have any such exhaustive verdicts from our apex court on Article 39. Repealing the 1926 Contempt of Court Act was a welcome move in 2013, but it is a pity that the High Court Bench which found the law unconstitutional is yet to release full judgment even after six years of its ruling.

Barrister Aneek R Haque, Advocate, Supreme Court of Bangladesh

For me, the test of democracy is not in freedom of speech, rather in freedom after speech. I challenged the constitutionality of Section 198 of the CrPC in the High Court Division bench of Justice Syed Refaat Ahmed and Justice Md Iqbal Kabir. A ruling has already been issued in this regard. We should also be careful about clickbait journalism that has plagued the media industry.

England has brought libel and slander under civil law. Why cannot we do the same as we follow similar legal system?

Faruq Faisel, Regional Director, Article 19

I have three proposals: defamation law should be decriminalised; there should be a law regarding crimes against journalists; and the Press and Publication Act needs to be updated.

S. M. Shameem Reza, Associate Professor, Department of Mass Communication and Journalism, University of Dhaka

We need to promote good and ethical journalism. Many media outlets, particularly local newspapers and broadcasting media, do not follow the standard practice of publishing rejoinders even if they seriously harm a person's reputation by providing wrong information. National newspapers can take a lead in sensitising local newspapers and broadcasters about the good practices in journalism. Good journalism also creates demand for freedom of expression and speech among the general people. For example, earlier newspapers used to maintain some sort of self-censorship in publishing negative news about countries that have strong bilateral relations with Bangladesh. Now, although the restriction

Legal harassment against journalists, media workers and human rights defenders (2016-October 2019)

Year	Criminal defamation cases*	Criminalisation of online expression**	Alleged vexatious cases under various criminal laws***	Total unwarranted application of laws
2016	78	22	25	125
2017	65	76	24	165
2018	31	71	20	122
2019 (till October)	47	62	16	125

* Under Section 499 of the Penal Code 1860.
 ** On grounds of false information, tarnishing the image of the State or of individual, provocation, obscenity, hurting religious sentiments.
 *** Most of the cases were filed on alleged involvement in extortion under the Penal Code 1860.
 Source: Freedom of Expression in Bangladesh: Annual Reports 2016, 2017, 2018 & Monthly Freedom of Expression Reports January 2019-October 2019 published by Article 19 (Bangladesh).
 Article 19 monitors major dailies including national and local newspapers, online portals and TV channels to collect information on violations of freedom expression. Simultaneously, they gather information through countrywide journalist networks and verify all the primary and secondary data.

clause regarding publication of news on foreign countries is still there, media outlets are much more vocal as strong demand for such news has been created among the general public. Media should also play a role in creating awareness among people about the importance of freedom of speech and expression.

Advocate Manzill Morshed, President, Human Rights and Peace for Bangladesh (HRPB)

Article 39 gives me the right to freedom of speech and expression; but to what extent I should express, how much I can and cannot express, depends on the situation. When there is martial law, the constitution is suspended, and we no longer have freedom to exercise our constitutional rights. But today we have a democratic government, and therefore, I do not have to exercise self-restraint while talking here or in front of the media. But now, people who talk about justice, law or execution of laws, are restraining themselves. A major reason behind such attitudes is the fear of misuse of law.

Sayed Ahmad, Asia Coordinator, Front Line Defenders

In our country, the lawmaking process needs to be looked into because, here laws are being made to curtail rights. The second issue is that we, activists, sometimes identify a law as repressive but unfortunately sometimes even we use this law for ourselves, against someone else. Aren't we morally weakening this issue?

In 2018's Universal Periodic Review, most recommendations were with regard to freedom of expression and opinions. Within those, some recommendations were specifically about decriminalisation of defamation. But the government did not pay any heed to the recommendations regarding decriminalisation of defamation, especially when the government placed criminalisation of defamation provision in the new Digital Security Act 2018.

Barrister Jyotirmoy Barua, Advocate, Supreme Court of Bangladesh

There is much doubt about whether we can term the restrictions that are stated in Article 39 of the Constitution as "reasonable" or not. All the repressive laws that have been enacted were basically based on these restrictions. As long as our Constitution gives the mandate to put these restrictions, more repressive laws, such as Section 57 of the ICT Act 2006 or the Digital Security Act, will be enacted. And we will never be able to prove that there is any fault in the lawmaking process. If we look at Section 57, we would see how the restrictions of Article 39 of the Constitution were used to create a vague provision. The restrictions of Article 39 have been giving legitimacy to these laws. So, basically, a lot of laws are being made taking advantage of the vagueness of the paragraphs on "reasonable restrictions"

stated in Article 39. If we do not challenge and change these restrictions, we will see many more repressive laws in future.

Dr Qazi Zahed Iqbal, Advocate, Supreme Court of Bangladesh

There is more of a problem with our mindset than with the law. When the law was formulated, it was said that there would be no misuse. But those who are applying this law are doing it according to their will. Gramsci in his "cultural hegemony" theory says that the state does not always impose its thoughts on people; it creates an environment where people think what the state is doing is right.

When we talk about correcting the laws, we fail to understand that only by correcting the laws, the problems will not be solved. We need to think if we can bring any cultural change.

There is no problem with Section 198 of the CrPC where an "aggrieved" person can file a defamation suit. Under Section 403, there is no scope for filing more than one case for one offence. The fundamental question here is whether we can prosecute a person more than once for committing one offence. So why are there so many cases for the commission of one offence? Under the law, only one case will remain valid, brought by the person who is defamed. So, we should properly explain what it means by "person aggrieved" and settle this once and for all. If we can settle the issue under Section 403, the rate of unnecessary case-filing will come down. We can work on two fronts. First, to use the existing laws most positively for immediate remedy. Second, we need a cultural change to avoid such situations.

Khairuzzaman Kamal, Secretary General, Bangladesh Manobadhikar Shangbadik Forum

The journalist community is the main victim of the Digital Security Act or ICT Act. We, from the Bangladesh Federal Union of Journalists (BFUJ) or the Journalists' Forum, took to the streets whenever these laws were used against any of our fellow journalists at the grassroots level. We protested when cases were filed under the ICT Act against 17 journalists of Bangladesh Crime Reporters' Association or when cases were filed against our fellow journalists outside Dhaka. And we got some remedies.

It is regrettable that the National Human Rights Commission (NHRC) is not playing its expected role to uphold journalists' rights and freedom of expression. We need a social movement together with the lawyers and the members of civil society and put pressure on the NHRC to uphold the rights of journalists.

Saleem Samad, Reporters Sans Frontiers (RSF)

Reporters without Borders (RSF) is a media rights defender based in Paris. We are trying to build a network with all media rights defenders to discuss the issue of decriminalisation of the defamation law and the Digital Security Act,

which is curbing freedom of expression. RSF has warned Bangladesh against the defamation law and went to international forums with this issue.

Aynun Nahar Siddika, Advocate, Supreme Court of Bangladesh

What we need to understand is why a particular law is formulated in the first place and how acceptable the law is to the public. If laws are not for the welfare of the people, then we can definitely challenge the defamation law.

Sarkar Barbaq Quarmal, Assistant Professor, Department of Media Studies and Journalism, University of Liberal Arts Bangladesh

The media has played a great role in all our social movements. During the last 20 years, at least two media houses have definitely earned people's trust: The Daily Star and Prothom Alo. But if these newspapers go into defensive mode and resort to self-censorship, they will definitely lose credibility among the public. This is the most detrimental impact of these repressive laws on journalism.

Khursid Alam Khan, Lawyer, Anti-Corruption Commission, Bangladesh

It is absolutely the discretion of the concerned magistrates and judges whether they would grant bail to the accused or not; they are not bound to grant bails. I think there is an inherent defect in the defamation cases. At present, defamation cases are filed under Section 500 in the Magistrate Court as a petition of complaint. This is called a CR case. The Magistrate then examines the case under Section 200 of the CrPC. After examination, he can send the case for judicial inquiry, or he can prosecute the case after taking cognizance. My view is that if someone has to be prosecuted under Section 500 for a charge of defamation, it cannot be done overlooking Article 39 of the Constitution, since Article 39 is well-connected with Section 500. In cases where Section 500 clashes with Article 39, what can a magistrate do?

A Magistrate does not have jurisdiction to interpret Article 39. So, the question is, can a magistrate, who does not have the authority to interpret Article 39, prosecute someone under Section 500? If a Magistrate prosecutes someone and convicts him, the convict will have to appeal before the session judge. But again, can a session judge deal with Article 39 Absolutely not. Only the constitutional court can do so. Therefore, I suggest that defamation cases should be brought under the original jurisdiction or a special statutory jurisdiction of the High Court Division. If we can do this, there will be no scope for filing hundreds of cases for one offence.

Mizanur Rahman Khan

I respectfully differ with the idea of bringing the cases of defamation to the original jurisdiction of the High Court Division. Instead, I think we should focus on the separation of the judiciary. During the tenure of this government, there were three judgements of the Appellate Division regarding the matter of separation of the judiciary from the executive. The original Article 116 of the Constitution needs to be restored. Unless we bring the issue of judicial independence into discussion, these problems will not be solved. Journalists must believe wholeheartedly that judicial independence is a must for ensuring press freedom.

Mahfuz Anam

I propose that we should work together to create some sort of a public opinion on these issues. As a newspaper, what we can do is to bring these issues to the public domain through holding regular discussions, with multiplicity of interpretations. Our aim would be to make the public aware about these laws. There is the letter of the law and there is the spirit of the law. It seems, we are moving away from the spirit and are being confined to the letter. A citizen wants to live in an environment where he/she can feel that he/she is protected by law. In a civilised society, the law provides a framework which gives one freedom and protection. Therefore, we should think about how we can remove the uncertainties of our laws and make them more people-friendly.