

## **Controversial Issues of Section-57 of the ICT Act, 2006: A Critical Analysis and Evaluation**

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**Abstract:** *One of the intrinsic instincts of human being is the desire of being free which sense makes them distinct from other animals. The State is on legal obligation to maintain, protect and promote them according to law. 'Freedom of Thought and Expression' and 'Right to Privacy' both are guaranteed by the Constitution of Bangladesh. As an emerging democratic country it bears more importance for the progress of democratic process and culture. Section-57 of the ICT Act, 2006 deals with Punishment for publishing fake, obscene or defaming information in electronic form, in appearance mostly contradictory with 'freedom of thought and expression' whereas under this section 'right to privacy' is highly focused bearing huge ambiguity therewith. In the era of information and technology right to privacy how much should be protected and possible to protect and maintenance is rational in real life, there should have minimum parameter and guidelines in law. Considering the reality removing ambiguity of the section for minimizing the suffering of mass people in enforcement of it is the demand of time. This article is on the ways to come out from these dilemmas.*

**Keywords:** *Right to Thought, Freedom of Expression, Right to Privacy, Ambiguity of Law, Law Enforcement.*

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### **I. Right to Thought, Freedom of Expression & Right to Privacy**

Freedom of thought is the precursor and progenitor of and thus is closely linked to other liberties, including freedom of religion, freedom of speech, and freedom of expression. World and nearly all democratic constitutions protect these freedoms. Though freedom of thought is axiomatic for many other freedoms they are in no way required for it to operate and exist. Conception of a freedom or a right does not guarantee its inclusion, legality, or protection via a philosophical caveat. Freedom of thought is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of this truth can be traced in our history, political and legal.<sup>1</sup>

#### **1.2. Recognition of 'Right to Thought' and 'Freedom of Expression' in International Instruments**

The United Nations' Human Rights Committee states that this, "distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally".<sup>2</sup> Such ideas are also a vital part of international Human Rights Law.<sup>3</sup> In the Universal Declaration of Human Rights (UDHR),<sup>4</sup> International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> which is legally binding on member states.<sup>6</sup> European Convention on Human Rights (ECHR)<sup>7</sup>, American Convention on Human Rights<sup>8</sup>, African Charter on Human and Peoples' Rights<sup>9</sup> recognized freedom of thought, expression and opinion as one of the prime concerns of the covenant. Freedom of thought is listed under Article-18 of the UDHR that stated, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Article-19 of this convention also guarantees that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference." Article-18 of the ICCPR says, "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others and the States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

Article-9 of the European Convention on Human Rights (ECHR) mentioned that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief,

in worship, teaching, practice and observance and freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Article-9(1) of the convention also guarantees that "the right to freedom of thought, conscience and religion; this right includes the freedom to change [one's] religion or belief." In the case of *Kokkinakis v. Greece*,<sup>10</sup> 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 one of the most vital elements that go to make up the identity of believers and their conception of life but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism in dissociable from a democratic society which has been dearly won over the centuries depends on it."

Article-10 of the Convention<sup>11</sup> says, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."<sup>12</sup> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."<sup>13</sup> As the substance of freedom of expression is intrinsically linked to limitations on its exercise, these two issues will be dealt with jointly in the light of the extensive jurisprudence and legal comments of the international monitoring bodies.

Article-13 of the American Convention on Human Rights says, "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."<sup>14</sup> The forgoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the right or reputation of others; (b) the protection of national security, public order, or public health or morals."<sup>15</sup> The right of expression may not be restricted by indirect methods or means, such as abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in dissemination of information, or by any other means tending to impede the communication and circulation ideas and opinions."<sup>16</sup> Notwithstanding anything contains in paragraph two of this section, the public entertainment may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."<sup>17</sup> Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitement to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."<sup>18</sup>

The African Charter on Human and Peoples' Rights stated "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."<sup>19</sup> The right to freedom of expression is also guaranteed by article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW)<sup>20</sup> and article-13 of the Convention on the Rights of the Child (CRC).<sup>21</sup>

The right to freedom of thought, conscience and religion also implies that every person has the unconditional right to have and adopt a religion of his or her choice. This freedom includes the right to change one's religion. Every person has the right not to be coerced or otherwise compelled to maintain, adopt or change a religion. The right to freedom of thought, conscience and religion, including the freedom to have, adopt or change religion according to one's choice, are protected unconditionally, although freedom of conscience does not imply a right to refuse all obligations imposed by law. No limitations may be imposed on the freedom to adopt or change a religion of 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 religion is a cornerstone of a democratic society and a society respectful of human rights.

### **1.3. Recognition of Right to Privacy in International Instruments**

The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose."<sup>22</sup> The right to privacy is a human right and element of various legal traditions which may restrain both government and private party action that threatens the privacy of individuals and this right is recognized more than 150 national constitutions."<sup>23</sup> Privacy rights are

inherently intertwined with information technology. Privacy uses the theory of natural rights and generally responds to new information and communication technologies. Right to privacy is explicitly stated in the Universal Declaration of Human Rights that, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>24</sup>

Article-17 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.<sup>25</sup> This Article Says, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation."<sup>26</sup> Everyone has the right to the protection of the law against such interference or attacks.<sup>27</sup> The European Convention on Human Rights (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe. Article-8 of the European Convention on Human Rights is considered to be one of the Convention's most open-ended provisions.<sup>28</sup> It is stated that everyone has the right to respect for his private and family life, his home and his correspondence.<sup>29</sup> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>30</sup> This Article provides a right to respect for one's 'private and family life, his home and his correspondence', subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'. In American Convention on Human Rights mentioned, "Everyone has the right to have his honour respected and his dignity recognized."<sup>31</sup> No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.<sup>32</sup> Everyone has the right to the protection of the law against such interference or attacks.<sup>33</sup>

#### **1.4. Extension of Freedom of Thought and Expression**

While freedom of thought is absolute, there may be restrictions of freedom of expression, because expressions of opinion and feeling are actions that affect others and therefore, may also harm them. There can be cases where the expression of an opinion causes harm directly, e.g. by attacking someone's reputation. In such cases, the expression is directed regulated by the Harm Principle.<sup>34</sup> But, as in other cases of harmful action, we should not immediately conclude that society should try to prevent every attack on someone's reputation. One criterion that the law currently uses is whether the attack constitutes slander (if spoken) or libel (if printed). If the expressed opinion is true, then even if it does harm someone else's reputation, it is allowed. If it is shown to be false, then there are legal penalties for the person who expressed it. A similar situation applies to expressing false opinions about someone that causes them financial harm. But expressions of offensive opinion that does not cause harm should not be restricted under any circumstances. Mill says, 'opinions lose their immunity, when the circumstances are such as to constitute their expression a positive instigation to some mischievous act'. Limiting that expression of the opinion is not limiting every expression of it. The opinion can still be expressed in other ways on other occasions, e.g. generally through the newspapers. There must be a fairly direct connection between the expression and the action taken. If there is not, then society should only seek to prevent the harmful action and not also the expression of opinion that such an action would be right.<sup>35</sup>

#### **1.5. Limitations of Freedom of Thought and Expression**

For any practice to be protected under the right to freedom of thought, conscience and belief, such practice should fall within the acceptable definition of thought, conscience, religion or belief. Anything else that falls without it cannot be protected under this right. This is what has been called 'the conceptual or inherent limitations'. The first limitations, subject of our study are the textual limitations. They are the restrictions to the right of religion that can be found within the texts of the various human rights instruments subjects of our study.

Systemic limitations are the second type of limitations. The right to freedom of religion is protected within the corpus of international human rights. The challenges that affect the interpretation and application of human rights generally have an adverse effect on the right to freedom of religion. To hold the State responsible for such violations, the State must have participated in the violation; if not it must have acquiesced to the violations. Many instances of human rights abuses do not meet this threshold. Non State Actions and individual perpetrators of human rights, since they are not addressees under the International Human Rights System, often escape without reprimand and without regard to the rights of the individual. Though these are in essence

illegalities, the fact that they impede on the rights of the individual, in this case the right to freedom of religion has an overall limitation effect of the enjoyment of such rights.

The other limitations may be summed up by explaining following terms or expressions frequently used in national and international Human Rights Instruments for imposing restrictions on blanked freedom of expression, such as-

#### **1.5.1. Prescribed by Law**

The term 'Prescribed by law' in Human rights instruments has been described and requiring that the law limiting the rights must have been a 'national law of general application which is consistent with the Covenant, was force at the time the limitation is applied; that the law is not arbitrary or unreasonable; must be clear and accessible to everyone. Together with these conditions there is a need that adequate safeguards and effective remedies are against illegal or abusive imposition or application of limitations on human rights.' According to the Human Rights Committee prescribed by law means 'the laws authorizing the application of the restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution'

#### **1.5.2. Public Order**

'Public Order' is considered as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded disciplined. The meaning of public order must be placed in the context of the right to be limited and that the state agents or organs charged with the maintenance public order must be subject to supervision of the exercise of their power by parliament, the courts or competent independent bodies.

#### **1.5.3. Public Health**

'Public Health' may be invoked as a ground for limiting the rights only to allow a State to combat serious threat to the health of its population or to individual members of the population. The measures must be aimed at preventing disease or injury, or providing care for the sick or injured.

#### **1.5.4. Public Morality**

"Public Morals", this will vary from culture to culture and from time to time, however for the State to invoke this as a reason for limiting a right, it must demonstrate that the limitation is necessary to maintain respect for the fundamental values of the community concerned.

#### **1.5.5. Public Safety**

The principles define 'Public Safety' as 'protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property'. However this 'cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.'

#### **1.5.6. The Right and Freedom of Others**

'The rights and freedoms of others' has not been defined but the principles state that they include rights both in the covenant and those not included in the covenant, the covenant rights being the basic minimum of individual rights.

## **II. Right to Thought and Freedom of Expression in Bangladesh**

In the context of Bangladesh the idea, connotations, meanings and uses of the words and phrases such as 'freedom of expression', 'freedom of speech', 'right to communication', 'communication right', 'right to information' and 'access to information' are intertwined and synonymous. The notion 'freedom of expression' can be understood from two approaches, inter alia 'equality of human being' and 'interest of political liberty'.<sup>36</sup> In equality view, free speech rights serve an overarching interest in political equality and on the second view, people are entitled to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons. Having freedom of speech, one can communicate ideas without any suppression or interference or punitive action. The rights protect individual's ability to think and to express thoughts in material form, including written, filmed, staged, or otherwise depicted visually. It protects all speech, however offensive or unpopular. It is the bulwark of liberty.

With the guarantee of free communication, an individual gets a chance to fight to preserve rights and freedom and a chance to reverse the course of a country that has strayed from those ideals. The right of free speech ensures the freedom to advocate one's views and to bear the possible consequences, including disagreement with others, opposition, unpopularity and lack of support. An individual-centered idea of free

speech advocates autonomy of the individual within a public sphere. Communication is a basic element in the formation of human relationship and the idea of freedom of expression is rooted in the sense and ability of communication. Without having the scope of communicating and talking to other people, no individual, community, group or any other institution would be able to exist, or prosper. The ability to communicate or the general right of communication make it possible to exchange opinions, thoughts and meanings; and enables people to express them and show their own points of view. Communication represents individual's identity and human dignity. With the right to communicate and express personal thoughts, ideas, and opinions, people feel themselves treated equally. It validates human equality. The freedom of expression is protected if individuals or institutions have the rights to communicate on the public sphere. The role of communication and media in exercising democratic political participation in society to communicate knowledge the terms and means by which knowledge generated by society is communicated or blocked for use by different groups endurances of civil rights in communication the exercise of civil rights relating to the processes of communication in society and have cultural rights in communication the communication of diverse cultures, cultural forms and identities at the individual and social levels. Freedom of expression is a cornerstone of all form of freedom. It is essential in enabling democracy to work and public participation in decision-making. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas; and are not able to express their views freely. It is thus not only important for individual dignity but also to participation, accountability and democracy. Violations of freedom of expression often go hand in hand with other violations, in particular the right to freedom of association and assembly. The right to freedom of expression upholds the rights of all to express their views and opinions freely.

### **2.1. Freedom of Expression in Bangladesh**

The prevalence of the freedom of expression in country can be understood by the following indicators presence of free and independent media, literature and the different form of cultural expressions, free religious institutions, scope of assembling and staging demonstration freely, forming political or quasi-political organizations, trade unions and peasant organizations and their opportunity to bargain collectively, scope to form free professional and other private organizations, presence of independent judiciary, rule of law in civil and criminal matters, official, legal, social and cultural mindset to treat people equally under the law, remaining police under direct civilian control, presence of state mechanism to protect people from political terror and from unjustified imprisonment, exile or torture; scope to hold open public discussion and free private discussion, personal autonomy; no state control to travel, choice of residence, or choice of employment; no indoctrination and excessive dependency on the state; scope to secure property, to establish private businesses without unduly influence by government officials, the security forces, or organized crime groups; presence of gender equality; and opportunity to choice of marriage partners, and size of family.<sup>37</sup>

Under its Article-39, the Constitution of Bangladesh guarantees the freedom of thought and conscience, and of speech. Recognizing it as a constitutional right, second paragraph of the Article says, 'the right is guaranteed subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'<sup>38</sup> Although the constitution provides for freedom of expression subject to 'reasonable restrictions,' the press can be constrained by national security legislation as well as sedition and criminal libel laws. The punishment for sedition ranges from three years to life in prison. The 15th amendment to the Constitution includes language that equates criticism of the constitution with sedition. There are laws which can help protections for the right to freedom of expression and information, including media freedom in Bangladesh, such as the Community Radio Installation, Operation and Broadcast Policy, 2008; The Right to Information Act, 2009 and the establishment of an Information Commission under this Act; the National Policy on Information and Communication Technology (ICT), 2009 and The Whistle Blowers Act, 2011. The Right to Information Act, 2009 guarantees the rights to all information held by public bodies, simplifies the fees required to access information, overrides existing secrecy legislation, and grants independence to the Information Commission tasked with overseeing and promoting the law, according to the press freedom group.

### **2.2. Barriers to Freedom of Expression in Bangladesh**

In a country, the extent to which people enjoy freedom of expression depends on the extent to which democratic process is practiced, prevalence of political rights, press freedom, rule of law, and corruption; and human rights be ensured. The freedom of expression and right to communicate information can come under attack in a variety of ways formal laws and informal censorship. The freedom and rights often are restricted by using different laws, including privacy laws, in the name of 'public good' and 'hate speech'. Informal censorship refers to a variety of activities by public officials ranging from telephone calls and threats to physical attacks to prevent or punish the publication of critical material. Moreover, fraud, publishing without a valid license, sedition, and contempt of court and extortion charges are also used to restrict the rights. In Bangladesh,

journalists are threatened and attacked by different organized crime groups, party activists, and Islamist groups. Some journalists practice self-censorship when reporting on sensitive topics like the military and judiciary. Threat to journalists' physical safety comes from security forces, including the police and military intelligence. Reporters and photographers come under attack while covering political protests or other sensitive events. Content blocking, access to the Internet, violation of the right to privacy, hate speech, surveillance and the intimidation of individuals who take to the internet to voice critical opinions by the executive and judiciary are also the barriers to the freedom of expression and right to information in Bangladesh.

### **III. Right to Privacy & Its Limitations**

Privacy is the degree to which an individual can determine which personal information is to be shared with whom and for what purpose. The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others and to control the extent, manner and timing of the use of those parts we choose to disclose.<sup>39</sup>

#### **3.1. Limitations of Right to Privacy**

It is admitted that the exact contours of the present era are impossible to determine the limitation but several guiding principles from tort law and intellectual property law are applicable. They may be:<sup>40</sup>

1. The right to privacy does not prohibit any publication of matter which is of public or general interest. In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested and that have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.
2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.
3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
4. The right to privacy ceases upon the publication of the facts by the individual or with his consent.
5. The truth of the matter published does not afford a defense. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published.
6. The absence of 'malice' in the publisher does not afford a defence.

With regard to remedies, a plaintiff may institute an action for tort damages as compensation for injury or alternatively request an injunction. Criminal penalties should be imposed for violations of the right to privacy with reference to the authority of the legislature.

### **IV. Right to Privacy in Bangladesh**

Right to privacy is an important part of personal liberties. Human life is not complete without right to privacy. It strengthens human dignity and other values. It is also the ability of an individual or group to seclude themselves, or information about themselves, and thereby express them selectively.<sup>41</sup> The Constitution of the People's Republic of Bangladesh provides a group of provisions, under part III, which contain the fundamental rights. Unfortunately, the right to privacy is not specifically mentioned in any of those provisions. Does it mean the constitution does not regard the right to privacy so fundamental?<sup>42</sup> Some provisions of the People's Republic of Bangladesh has discussed about privacy indirectly. There could be interpretation on it. Article-43 of the Bangladesh Constitution also guarantees the privacy of home and correspondence and in communications.<sup>43</sup> This says, "Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health (a) to be secured in his home against entry, search and seizure; and (b) to the privacy of his correspondence and other means of communication." In the case of *Bangladesh v. H.M. Ershad*<sup>44</sup> it was held that neither police officer, nor any other public functionary can enter into the house of any citizen and conduct any search or seize anything unless he is duly authorized under any law. If the restriction imposed has no nexus with the specified matters or is in excess of the requirement for which it is imposed, or if the object can be achieved by any less rigorous means, or if the law does not provide a way of checking arbitrary or illegal exercise of the power of search and seizure, it will be found invalid.<sup>45</sup> Moreover, in 2011, a woman went to beauty parlour and found a hidden close-circuit camera TV. A write petition has been filed by the Bangladesh Human Rights Foundation. In this case, The High Court ordered the government to take out all close-circuit TV cameras from beauty parlours.<sup>46</sup>

## **V. The Section-57 of the Information & Communication Technology Act, 2006**

The concern section of the Information & Communication Technology Act, 2006 stated, "If any person deliberately publishes or transmits or causes to be published or transmitted in the website or in electronic form any material which is fake and obscene or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it or causes to deteriorate or creates possibility to deteriorate law and order, prejudice the image of the State or person or causes to hurt or may hurt religious belief or instigate against any person or organization, then this activity of his will be regarded as an offence. In providing punishment it says, 'Whoever commits offence under sub-section (1) of this section he shall be punishable with imprisonment for a term which may extend to ten years and with fine which may extend to Taka one crore.'<sup>47</sup>

### **5.1. Controversies of Section-57 of the Information and Communication Technology Act, 2006**

Most other parts of the text are understood but section-57(1) of the Act outlines the scope of cyber crime and appears most confusing. From the text of the Act it appears that even any innocent online posting can become a cyber crime, if the authority believes that it has provoked a third person to become derailed or dishonest. In other words, the crime doesn't depend on the offensive or illicit nature of the posted material. It depends on the readers' or viewers' personality and attitude. The question is, if a crime-prone person becomes derailed or dishonest by watching or reading a seemingly honest content then why an innocent content provider will be responsible for that crime-prone person's act? Need an expert opinion from any lawyer to make sure that we aren't missing something here. On the other hand the Information and Communication Technology Act, 2006 is far more ambiguous that leaves unprecedented and unchecked power at the hands of the 'authority'. According to article-57(2), such offender can be punished with a sentence of up to ten years imprisonment and a fine up to Taka one crore. Since cyber crime is being treated as a serious offence, the nature and definition of the crime needs to be unambiguous, transparent and clear in its expression. The ICT Act contains a number of vague, imprecise and overbroad provisions that serve to criminalize the use of computers for a wide range of activities in contravention of the right to freedom of expression, including the right to receive and impart information, protected under international law. Although the right to freedom of information is not absolute, the re the restrictions contemplated under the Act do not fall within the scope of exceptions permissible under international law, including Bangladesh's treaty obligations. Section-57 of the ICT Act criminalized publishing or transmitting or causing to publish or transmit any material which is fake and obscene or its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it or cause to deteriorate or create possibility to deteriorate law and order, prejudice the image of the State or person or cause to hurt or may hurt religious belief or instigate against any person or organization, then this activity of his will be regarded as an offence. This provision is incompatible with Bangladesh's obligations under Article-19 of the ICCPR. The offences prescribed are vague and overbroad, the restrictions imposed on freedom of opinion and expression go beyond what is permissible under Article 19(3) of the ICCPR and the restrictions are not necessary and proportional to achieve a legitimate purpose.

### **5.2. Points of Ambiguity**

Section-57 of the Information and Communication Technology Act, 2006 is the synonymous to ambiguity and a threat to people's free speech freedom of expression. According to the legal experts this provision is a threat to people's right to freedom of expression and speech. They believe the vague narrative of this section is misleading and is allowing its misuse against newsmen and social media users. 'Section-57 is so vague that law enforcers can interpret it as they will to arrest anyone anytime.'<sup>48</sup> There is no any rule of procedure or guidelines to the law enforcing agencies for applying this. This section is so flexible to interpret in any way and any sort of expression in public can be covered. This one is so obstruct and rough translation that a nude child sitting on father's lap image publication can also be interpreted as an offence under the section.

### **5.3. Recent Experience of Enforcement of This Section**

Section-57 of the Information and Communication Technology (ICT) Act, 2006 particularly this section contains vague wordings, allowing its misuse against newsmen and social media users. The demand for its repeal intensified following the arrest of journalist Probir Sikdar who was arrested and sent to jail after he posted a status on Facebook, expressing fear that his life was in danger and that a Minister, a renowned businessman and a fugitive war criminal would be responsible if he were killed. Following the post, a party leader sued against him under the ICT act for 'tarnishing the image' of the minister. Before getting released after a huge people's protest he had to endure mental torture in custody apart from physical sufferings. Mahmudur Rahman, acting editor of a Bengali newspaper critical of the Government, has also been arbitrarily detained under the Act for publishing transcripts of a Skype conversation between former International Crimes Tribunal

Chairman and a Bangladeshi legal expert living abroad. Four bloggers *inter alia* Asif Mohiuddin, Subrata Adhikari Shuvo, Moshir Rahman Biplob and Rasel Parvez are also facing trial under section-57 of the ICT Act for allegedly making derogatory comments about Islam and 'hurting' religious sentiment. Applying this section has been arbitrarily detain Nasiruddin Elan, Director of prominent human rights organization Odhikar, has been arbitrarily detained and he was denied bail by the cyber crimes tribunal on 6 November 2013. Adilur Rahman Khan, Odhikar's Secretary, has also been charged under the ICT Act and still he is in detained.

## **VI. Concluding Remarks & Recommendations**

Freedom of expression is an important indicator of a democratic society and development. If freedom of expression is prevail in a country or society, other democratic rights and freedoms will automatically be ensured.

1. If the government wants to keep it, there should be rules of procedure specifying how the act would be applied until then, the law should not be enforced.
2. The concerned Ministry (ICT), has yet to enact the rules of procedure, there is a possibility that the law will be misused. As soon as possible it should enact rules of procedure regarding this section. In the absence of the rules of procedure, the law should be applied cautiously.
3. This section has to be erased from the concerned Act as it has gone much beyond the reasonable restrictions put by the constitution on freedom of speech. Act is adopted to promote and protect human rights not to violate these.
4. Law enforcing agencies *inter alia* police should be guided properly in enforcing this section. Without warrant authority is one kind of blank license to them that should be rethinking.
5. Section-57 of the ICT Act, 2006 is a clear violation of the rights enshrined in article-39<sup>49</sup> of the constitution of Bangladesh. That's why provision should be amended and should be making clear as per the constitutional guarantee prevail and international obligation of the state remains protected.
6. Any national censorship authorized body may be created through proper law but such kind of blank authorizing law should be erased for the better development of democracy.
7. Citizens should be made properly educated and aware of writing and posting anything in the form of electronic contents that may affect anyone's religious belief.
8. Hard law is violated immensely. Going through this experience of the history penalty provided under this section may be reconsidered, amended therefore and new form of punishment may be provided.
9. This section should be clarified properly, so that the social media user can maintain social communication without any sort of fear and threat of arrest, and
10. As a modern welfare state, peoples' will should be honoured first. Only the good will of the people can be the ultimate solution in this regard.

By exercising the freedom, people can participate in decision-making through free access to information and ideas. To understand the presence of freedom of expression and right to information, we need to understand the local political context, history and cultures. Bangladesh is politically a highly polarized and divided country. The guarantees of the rights do not depend only on the relevant laws, but social, political and cultural processes. Despite presence of all difficulties, it can be argued that there is certain level of freedom of expression in Bangladesh than any other developing countries. This section is not compatible with many international obligation under several international covenant particularly Article-19 of the International Covenant on Civil and Political Rights (ICCPR), which Bangladesh ratified on 6 September 2000. The offences prescribed under this section are vague and overbroad; the restrictions imposed on freedom of opinion and expression go beyond what is permissible under Article 19(3) of the ICCPR and the restrictions are not necessary and proportional to achieve a legitimate purpose as well. The Government of Bangladesh must repeal or amend the Section-57 of the Information and Communication Technology Act, 2006 because it is being used to assault freedom of expression and freedom from arbitrary detention. This should be done for ensuring rule of law, rule of justice, and the stability of democratic process and establishment of long term democratic culture in Bangladesh.

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<sup>1</sup>. Palko V. State of Connecticut, 302 U.S. 319 (1937).

<sup>2</sup>. Human Rights Committee 102<sup>nd</sup> session Geneva, 11-29 July, 2011 General comment No. 34

<sup>3</sup>. International human rights law is the body of international Law designed to promote and protect at human rights the international, regional, and domestic levels. As a form of international law, international human rights law is primarily made up of treaties, agreements between states intended to have binding legal effect between the parties that have agreed to them and conventional customary international law, rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. Other international Human Rights Instruments while not legally binding contribute to the implementation, understanding and development of international human rights law and have been recognized as a source of political obligation.

<sup>4</sup>. Article-19 of the Universal Declaration of Human Rights, 1948.

<sup>5</sup>. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49



<sup>6</sup>. International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article-49.

<sup>7</sup>. The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedom in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953.

<sup>8</sup>. The American Convention on Human Rights is an international Human Rights Instruments. It was adopted by many countries in the Western Hemisphere on 22 November, 1969. It came into force after the eleventh instrument of ratification was deposited on 18 July, 1978.

<sup>9</sup>. The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created. The protocol came into effect on 25 January, 2005.

<sup>10</sup>. BAIL II: (1993) ECHR 20

<sup>11</sup>. European Convention on Human Rights, 1950

<sup>12</sup>. Under Article-10(1) of the European Convention on Human Rights, 1950

<sup>13</sup>. Under Article-10(2), *ibid.*

<sup>14</sup>. Under Article-13(1) of American Convention on Human Rights, 1969

<sup>15</sup>. Under Article-13(2), *ibid.*

<sup>16</sup>. Under Article-13(3), *ibid.*

<sup>17</sup>. Under Article-13(4), *ibid.*

<sup>18</sup>. Under Article-13(5), *ibid.*

<sup>19</sup>. Under Article-8 of the African Charter on Human and Peoples' Rights, 1981

<sup>20</sup>. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it was instituted on 3 September, 1981 and has been ratified by 189 states.

<sup>21</sup>. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November, 1989 entry into force 2 September, 1990, in accordance with article-49.

<sup>22</sup>. Yael Onn, et al., *Privacy in the Digital Environment*, (2005), Haifa Center of Law & Technology, pp. 1-12.

<sup>23</sup>. [https://en.wikipedia.org/wiki/Right\\_to\\_privacy](https://en.wikipedia.org/wiki/Right_to_privacy), last date of access 13.10.2015

<sup>24</sup>. Under Article-12 of the Universal Declaration of Human Rights (UDHR), 1948

<sup>25</sup>. Human Rights Committee, 32<sup>nd</sup> session Adopted: 8 April, 1988, General Comment No.16

<sup>26</sup>. Under Article-17(1), International Covenant on Civil and Political Rights, 1966.

<sup>27</sup>. Under Article-17(2), *ibid.*

<sup>28</sup>. Elizabeth Wicks; Bernadette Rainey; Clare Ovey, Jacobs, White and Ovey, *European Convention on Human Rights*, (2014). Oxford University Press. p. 334.

<sup>29</sup>. Under Article-8(1) of the European Convention on Human Rights, 1950.

<sup>30</sup>. Under Article-8(2), *ibid.*

<sup>31</sup>. Under Article-11(1), American Convention on Human Rights, 1969

<sup>32</sup>. Under Article-11(2), *ibid.*

<sup>33</sup>. Under Article-11(3), *ibid.*

<sup>34</sup>. The harm principle holds that the actions of individuals should only be limited to prevent harm to other individuals. John Stuart Mill articulated this principle in *On Liberty*, where he argued that, 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' An equivalent was earlier stated in France's Declaration of the Rights of Man and the Citizen of 1789 as, 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.'

<sup>35</sup>. <http://documents.routledge-interactive.s3.amazonaws.com/9781138793934/A2/Mill/MillTruth.pdf>, dated 19/11/2015

<sup>36</sup>. Sullivan, Kathleen M., (2011). *Constitutional Law* (17<sup>th</sup> edit.), University Cashbook.

<sup>37</sup>. Source: adopted from different sources of Freedom House (<http://www.freedomhouse.org>); Committee to Protect Journalists (CPJ) (<http://www.cpj.org/>), and Reporters Without Borders (<http://en.rsf.org/>)

<sup>38</sup>. Under Article- 39(2) of the Constitution of the People's Republic of Bangladesh

<sup>39</sup>. Yael Onn, et al., *Privacy in the Digital Environment*, Haifa Center of Law & Technology, (2005) pp. 1-12

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<sup>44</sup>. *Bangladesh v H. M Ershad*, 52 DLR (AD) 162

<sup>45</sup>. See Islam, n.13 at 277

<sup>46</sup>. 6 News editor. (2011), *Persona CCTV Probe Time Extended*, bdnews24.com, 10 October. <<http://bdnews24.com/bangladesh/2011/10/13/persona-cctv-probe-time-extended>>

<sup>47</sup>. Under Section-57 of the Information & Communication, Technology Act, 2009 (Act No. XXXIX of 2006)

<sup>48</sup>. Comments of eminent Human Rights activist Sultana Kamal

<sup>49</sup>. Article-39 ensures 'the right of every citizen to freedom of speech and expression'. It also guarantees freedom of the press.

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