



**Bangladesh
v. Shahidul
Alam**

January 2023

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHOR

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

EXECUTIVE SUMMARY



In August 2018, Shahidul Alam, a prominent photojournalist and social activist in Bangladesh, was arrested for commenting on and showing pictures he had taken of student protests in a Facebook Live video post and for discussing socio-political tensions that sparked the protests in a television interview. TrialWatch, a Clooney Foundation for Justice (CFJ) initiative, has been monitoring the proceedings against Alam, who faces up to 14 years in prison. Although the criminal provision under which the authorities arrested Alam was repealed soon thereafter, they have continued to pursue a criminal investigation against him, violating international standards established by the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is party. Precedent from India, the legal system and Constitution of which is similar to Bangladesh, is likewise consistent with the finding that Alam's rights have been violated.

In line with Bangladesh's international obligations, the investigation into Alam should be discontinued or quashed, ending what has already been a four-year saga. This report covers the case through a recent Bangladesh Supreme Court ruling against Alam, which cleared the way for the criminal investigation to proceed.

The case against Alam was registered under Section 57 of the Information and Communication Technology (ICT) Act, which among other things, criminalizes the publication of any online material deemed "fake and obscene," defamatory, or otherwise likely to "deteriorate law and order" or "prejudice the image of the State." Based on his Facebook post and television interview, Alam was accused of "spreading false information which included inciteful and crime-like statements broadcast ... through Facebook live, which hurt the image of the state by causing deterioration in the law and order situation" and for "hurting the emotions of tender-hearted students through confusing propaganda that created social unrest and motivated them to destructive deeds."¹

Section 57 of the ICT Act was repealed in October 2018. A restrictive savings clause established that only cases in which proceedings had been initiated before a court or that were at some stage of trial could continue: Alam's case, by contrast, was at the preliminary investigation stage and no charge sheet had been filed at the time of the repeal of Section 57.

Any clear reading of the statute should have prohibited further prosecution, meaning that the State's continued pursuit of the case violates the bedrock principle of *nullum crimen, nulla poena sine lege*: no crime and no punishment without law. Even if the savings clause left room for ambiguity, international standards, as paralleled by Indian precedent, establish that any doubts in criminal procedure or law should have been interpreted in favor of the defendant. In this case, the State has done the exact opposite, contorting itself to construe the law to Alam's disadvantage.

¹ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

Moreover, the High Court, to which Alam submitted a petition requesting the quashing of the case on the basis of Section 57's repeal, refused to hear the petition on its merits, a ruling that was upheld by the Appellate Division of the Bangladesh Supreme Court ("Appellate Division") on November 27. Instead, the High Court relied on procedural rules to find that Alam should have applied through a different jurisdictional mechanism, leaving the criminal investigation hanging over Alam's head and prolonging proceedings that started more than four years ago. In TrialWatch's view, this conduct contravenes yet another bedrock principle of international law, as also reflected in Indian precedent: that excessive formalism should not hinder access to a remedy.

Turning to the merits of the case, Alam's display of pictures of the student protests and comments on the government crackdown constituted routine journalism and activism. A review of the Facebook posts and interview at issue shows that he never encouraged or took part in violence: instead, he merely discussed the "pent-up" dissatisfaction that sparked the protests, provided updates on student injuries, and stated that the ruling party was using force and "fear" to maintain power. Initiating a criminal investigation on this basis violates – and continues to violate – Alam's right to freedom of expression.

Case Background and History

On August 5, 2018, Alam was arrested for making "inciteful statements" in a Facebook Live video post and an interview he gave to Al-Jazeera about road-safety protests that took place from July-August 2018: the protests were triggered by the killing of two students by a speeding bus at the end of July 2018. The First Information Report (FIR) filed by the police wrongly claimed that Alam had called for the overthrow of the government. While in police custody Alam was allegedly subjected to torture, as detailed in submissions to the National Human Rights Commission filed by Alam's wife.

He remained in detention for 107 days, until he obtained bail on November 15, 2018. In its bail order, the High Court noted that the allegations against Alam in the FIR did not match the statements made by him in the two videos. TrialWatch's own review of these videos corroborates the High Court's findings: Alam speaks about the protests, what caused them, the ensuing crackdown, and the risks they posed to the government but in no way invokes violence or urges overthrow of the government.

During Alam's time in custody, five provisions of the ICT Act, including Section 57, were repealed by the Digital Security Act (DSA) in response to widespread international criticism of the ICT Act (although the DSA has likewise provoked significant criticism since).

On this basis, Alam filed a writ petition before the High Court to challenge the continuation of the case against him. In March 2019, the High Court made an initial finding that the police did not have jurisdiction to investigate Alam's case due to the repeal of Section 57 and issued an interim order staying the investigation for three months. When the government appealed this order before the Appellate Division of the Supreme Court (Appellate Division), the Appellate Division directed the High Court to decide Alam's writ petition on its merits by December 2019.

However, the High Court did not hear the case for two years, and when the hearings finally took place in November and December 2021, the High Court dismissed Alam's

petition on technical grounds, stating that he should have used a different procedural mechanism and refusing to decide on the legitimacy of the continuation of the case against him. Alam subsequently filed a petition before the Appellate Division to challenge the High Court's judgment. On November 27, 2022, the Appellate Division dismissed his petition.

Legal Analysis

The proceedings against Alam undermine his fundamental rights as guaranteed under the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh acceded in 2000: primarily, his right not to be held guilty for an act that does not constitute a criminal offense (principle of legality), his right to access a remedy, and his right to free speech and expression. This conclusion is also supported by precedent from the Indian Supreme Court, which is persuasive because of the similarities between Part III of the Constitution of India and the Constitution of Bangladesh, which respectively guarantee fundamental rights, as well as similarities between the legal systems and specific laws of both countries.

First, Section 57 of the ICT Act, under which the case against Shahidul Alam was registered, was repealed when the DSA came into force. According to the savings clause of the DSA, cases under Section 57 of the ICT Act could only continue if at the time of repeal proceedings had been initiated before a relevant court or the court had taken cognizance (judicial notice) of the offense. Alam's case was at the investigation stage at the time of the repeal, meaning that it had yet to be brought before any court excepting bail proceedings. Thus, the continuation of the case against him without legal basis violates the principle of legality, *nullum crimen, nulla poena sine lege* (no crime and no punishment without law), which is mandated by Article 15 of the ICCPR. The Indian Supreme Court has also applied this standard, based on guarantees in the Indian Constitution, to hold that the natural consequence of repeal should be termination of pending proceedings under the repealed law except to the extent that a savings clause "winds up" cases that are sufficiently far along.

The principle of legality extends to a key corollary principle: that doubts regarding the scope of criminal laws and procedures should be resolved in favor of a defendant. The Indian Supreme Court has drawn on this principle, which is likewise reflected in English common law – followed by both India and Bangladesh – to hold that "in cases of ambiguity, the benefit of the same should enure in favour of the accused." While it is clear that the repeal and savings clause of the DSA does not preserve the criminal case against Alam, if there had been ambiguity in this regard (which there is not), it should have been resolved in Alam's favor. Nonetheless, the State has consistently seized opportunities to twist the law to Alam's detriment.

Second, the High Court's rejection of Alam's writ petition on technical grounds, and the Appellate Division's upholding of this ruling, has severely undermined Alam's right to access a court to claim justice. As a principle of international law, courts must avoid excessive formalism when applying procedural rules that would compromise the fairness of proceedings. Here, the Appellate Division directed the High Court to consider the merits of Alam's petition regarding Section 57's repeal, which the High Court after two years declined to do, stating that Alam should have filed his petition under a provision of the

Criminal Procedure Code instead of under a provision of the Constitution of Bangladesh. When considering analogous provisions in the Indian Criminal Procedure Code and Indian Constitution, the Supreme Court of India has held that High Courts have the authority to quash illegal criminal proceedings under either of these provisions, as both are aimed at securing the ends of justice. The High Court's decision in Alam's case – and the Appellate Division's recent dismissal of Alam's appeal, with the result that the criminal investigation can proceed unfettered – has not only imposed a disproportionate burden on Alam by delaying resolution of the proceedings but has also upset the overall notion of fairness, with the courts seemingly prioritizing procedural formalities over Alam's right to claim justice.

Third, even assuming that the case fulfilled the requirements of the repeal and savings clause and that it was right to order Alam to file through a different procedure, the proceedings violate Alam's right to freedom of speech and expression, guaranteed by Article 19 of the ICCPR. Alam's Facebook video and television interview, which constituted political commentary and journalism, should have been accorded heightened protection under Article 19. The interference with protected speech entailed by the criminal proceedings against Alam fails to meet the three-part test laid down by the UN Human Rights Committee, which monitors implementation of the ICCPR and requires any such restrictions to (i) be provided by law (the principle of legality), (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.

(i) Legality: The principle of legality requires that laws be clearly and precisely defined. Section 57 of the ICT Act was impermissibly vague, making it difficult for individuals to understand what speech was prohibited. Section 57 broadly criminalized the publication of "any material" deemed likely to "deprave and corrupt persons" or that "creates the 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." There was no definition of or limiting principles applied to these terms, which left their meaning uncertain. The resulting ambiguity made the law susceptible to arbitrary interpretation or application, affording the authorities excessive discretion. Notably, in 2015 the Indian Supreme Court struck down a law similar to Section 57 on the grounds that it was "void for vagueness," ruling that it failed to define "the criminal offence with sufficient definiteness."

(ii) Legitimate Objective: This part of the test requires that the State articulate a concrete threat posed by the speech at issue as well as a "direct and immediate connection" between the speech and the threat, so as to establish the legitimacy of the reason for interfering with freedom of expression. Invoking a threat to public order, the FIR against Alam refers vaguely to the possibility of anarchy and claims that "tender-hearted" students' feelings could be hurt but does not provide further details or evidence of such. The investigation into Alam thus falls short of the requirement of a close nexus between the speech to be restricted and the ostensible objective of the restriction, suggesting that the proceedings are instead based on his journalism and activism.

(iii) Necessity and Proportionality: The criminal proceedings against Alam are neither necessary nor proportionate, as required by Article 19. In line with necessity and proportionality requirements, only the gravest of speech offenses, such as incitement to violence, warrant criminal prosecutions and penalties. As noted above, Section 57

provides for up to 14 years in prison. Alam's Facebook video post and the interview he gave to Al Jazeera, as reviewed by TrialWatch, did not, in TrialWatch's view, come close to the level of gravity necessary to initiate criminal proceedings.

Conclusion

Alam appears to have been subject to criminal investigation purely for his journalism and activism, with the authorities unfairly construing the savings clause in the DSA to his disadvantage despite the fact that it clearly prohibits the continuation of proceedings against him. Further, Alam has been denied meaningful access to justice over the past four years. If the case is allowed to proceed and Alam is convicted, he faces up to 14 years in prison. Based on international standards, as paralleled by Indian precedent, the investigation against Alam should be discontinued or quashed.

BACKGROUND INFORMATION

A. POLITICAL & LEGAL CONTEXT

The Information and Communication Technology (ICT) Act was enacted by the government of Bangladesh in October 2006, ostensibly to prevent cybercrimes and regulate digital communications. Sections 54 to 67 of the ICT Act 2006 define a range of punishable acts with penalties of up to 10 years of imprisonment and varying fines.² In particular, Section 57 of the Act authorizes the prosecution of anyone who “publishes or transmits ... in electronic form any material” deemed “fake and obscene,” defamatory, or otherwise likely to “deprave or corrupt” its audience, while also enabling prosecutions arising from any online material that “creates the 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.”³

The ICT Act came into force amid serious political turmoil in Bangladesh. In 2004, the then ruling Bangladesh Nationalist Party (BNP) amended the Constitution⁴ to use the nonpartisan caretaker government (CTG) system,⁵ which had ensured free and fair elections since 1996, to its benefit for the upcoming 2007 election.⁶ The opposition Bangladesh Awami League (BAL) refused to participate in the election and ultimately the military intervened, staging what was described by some as a “coup” in early 2007.⁷ At the end of 2008, the military-backed civilian government arranged an election, which resulted in a significant majority for the BAL. The BAL eventually scrapped the CTG provision in the Constitution in 2011 and has retained control over the Bangladeshi government since 2008.⁸

² The Information and Communication Technology Act 2006, available at <https://samsn.ifj.org/wp-content/uploads/2015/07/Bangladesh-ICT-Act-2006.pdf>.

³ *Id.* at Section 57.

⁴ The BNP government in 2004 amended the Constitution to extend the retirement age for Supreme Court judges, meaning that Chief Justice Hasan, who reportedly belonged to the BNP, could become the Chief Adviser of the Caretaker Government (CTG). The Thirteenth Amendment, which constitutionalized the CTG system in 1996, required the position of the Chief Adviser be given to the most recent past Chief Justice of the Supreme Court. See Global Security, “Caretaker Government, October 2006-January 2009”, accessed on October 21, 2022, available at <https://www.globalsecurity.org/military/world/bangladesh/pm-ahmed.htm>.

⁵ The Caretaker Government (CTG) managed general elections and served as an interim government during the transition from one elected government to another after the completion of tenure of the former. See The Lawyers and Jurists, “Caretaker Government in Bangladesh”, accessed on November 3, 2022, available at <https://www.lawyersnjurists.com/article/caretaker-government-in-bangladesh/>.

⁶ Ali Riaz, “How Bangladesh’s Digital Security Act Is Creating a Culture of Fear”, Carnegie Endowment for International Peace, December 9, 2021, available at <https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>; Bertelsmann Stiftung, “BTI Transformation Index: Bangladesh Country Report 2022”, accessed on October 15, 2022, available at <https://bti-project.org/en/reports/country-report/BGD>.

⁷ A civilian government supported by the army ruled the country as an interim government, stating a commitment to “cleaning up Bangladesh’s corrupt, thuggish political system so a free and fair poll can take place.” See Henry Chu, “Bangladesh ‘coup’ gets wide support”, Los Angeles Times, February 13, 2007, available at <https://www.latimes.com/archives/la-xpm-2007-feb-13-fg-bangladesh13-story.html>.

⁸ For the 2014 election, the incumbent BAL government did not heed the call by the opposition for the reinstatement of the CTG, and many of its candidates ran unopposed. The 2018 election also resulted in a

In October 2013, key aspects of the ICT Act were amended, resulting in an increase of imprisonment terms for some offenses and modification of certain procedural rules by categorizing, for example, offenses into bailable and non-bailable offenses and cognizable and non-cognizable offenses.⁹ Under the amended ICT Act, offenses under Section 57 were no longer bailable and, at the same time, became cognizable, meaning that the police could investigate a Section 57 case without a court order and arrest an accused person without a warrant.¹⁰ Following the 2013 amendments, the maximum imprisonment term for Section 57 violations was increased to 14 years from 10 years.¹¹ Prior to the 2013 amendment, all of the offenses provided for by the ICT Act were non-cognizable and bailable and the imprisonment term was limited to 10 years.

Enabled by the amendments, government authorities relied on the ICT Act to detain and prosecute individuals, including journalists, for expressing their views online, and came under increasing criticism.¹² According to Human Rights Watch, the Bangladeshi police submitted nearly 1,300 charge-sheets under the ICT Act from 2013 to April 2018, most of which were filed based on Section 57.¹³ Civil society raised concerns about the overbroad, “draconian” ICT Act and called for the Bangladeshi government to “work with domestic and international experts to draft a new law that fully upholds the principles of free speech and internet freedom.”¹⁴

landslide victory for the BAL. The next general elections are scheduled to be held in December 2023. See Ali Riaz, “How Bangladesh’s Digital Security Act Is Creating a Culture of Fear”, Carnegie Endowment for International Peace, December 9, 2021, available at <https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>; Aashish Kiphayet, “Bangladesh’s National Election in 2023: The Path of Light Remains Closed”, Modern Diplomacy, April 19, 2022, available at <https://moderndiplomacy.eu/2022/04/19/bangladeshs-national-election-in-2023-the-path-of-light-remains-closed/>.

⁹ Gazi Mizanur Rahman, “Resolving the Issue of Section 57 in ICT Act”, NEWAGE, September 9, 2017, available at <https://www.newagebd.net/article/23595/resolving-the-issue-of-section-57-in-ict-act>.

¹⁰ Shahid Alam, “Fathoming ICT (Amendment) Act, 2013”, The Daily Star, March 8, 2015, available at <https://www.thedailystar.net/fathoming-ict-amendment-act-2013-14762>.

¹¹ Reuters, “Factbox: Bangladesh’s Broad Media Laws”, December 12, 2018, available at <https://www.reuters.com/article/us-bangladesh-election-media-factbox/factbox-bangladeshs-broad-media-laws-idUSKBN1OC08S>.

¹² IFEX, “Bangladesh’s Ict Act Paved the Way for Hundreds of Lawsuits Over Online Speech”, July 21, 2017, available at <https://ifex.org/bangladeshs-ict-act-paved-the-way-for-hundreds-of-lawsuits-over-online-speech/>; Faisal Mahmud, “Bangladesh Editors Protest ‘Chilling’ Digital Security Act”, Al Jazeera, October 16, 2018, available at <https://www.aljazeera.com/news/2018/10/16/bangladesh-editors-protest-chilling-digital-security-act>; Sajidul Haque, “Bangladesh Passes Digital Security Act Ignoring Concerns It Will Muffle Media”, BDNEWS24, September 19, 2018, available at <https://bdnews24.com/bangladesh/2018/09/19/bangladesh-passes-digital-security-act-ignoring-concerns-it-will-muffle-media>.

¹³ Reuters, “Factbox: Bangladesh’s Broad Media Laws”, December 12, 2018, available at <https://www.reuters.com/article/us-bangladesh-election-media-factbox/factbox-bangladeshs-broad-media-laws-idUSKBN1OC08S>.

¹⁴ Human Rights Watch, “Bangladesh: Protect Freedom of Expression”, May 9, 2018, available at <https://www.hrw.org/news/2018/05/09/bangladesh-protect-freedom-expression>; see also ARTICLE 19, “Bangladesh: Release Photojournalist Shahidul Alam and Stop Violations to Free Expression”, August 7, 2018, available at <https://www.article19.org/resources/bangladesh-release-photojournalist-shahidul-alam-and-stop-violations-to-free-expression>.

In response to this backlash, the Bangladeshi government decided to repeal some of the provisions of the Act.¹⁵ In its May 2018 report under the Universal Periodic Review mechanism of the UN Human Rights Council, the government affirmed its commitment to repealing the ICT Act, stating that it was planning to introduce a new digital security law called the Digital Security Act (DSA) that would “establish[] balance between freedom of expression and public morality [and] interest.”¹⁶

The DSA came into force in October 2018, repealing five provisions of the ICT Act, including Section 57, with a savings clause.¹⁷ Even before the DSA was adopted, however, human rights activists and NGOs criticized the new law as also threatening freedom of expression.¹⁸ While the Bangladeshi government stated that the DSA was in part intended to resolve the vagueness of Section 57 of the ICT Act, some watchdog groups, including Human Rights Watch, deemed the new law to be “even broader and even more alarming” than the ICT Act.¹⁹ Correspondingly, members of the Editors’ Council, the body comprising Bangladesh’s leading newspaper editors, called for an overhaul of the law on the basis that the DSA was likely to grant the government the power to prosecute journalists on unsubstantiated grounds.²⁰

For example, Section 43 of the DSA gives law enforcement agencies the power to arrest individuals and conduct searches and seizures without a warrant in connection with potential DSA cases.²¹ In addition, Section 16 permits complaints to be filed by “any other person” to the Director General of the Digital Security Agency, whose office implements the DSA and has broad discretion to investigate matters deemed detrimental to “critical information infrastructure.” This means that private parties who have not been harmed by the alleged acts of accused persons can initiate cases under the DSA.²² Moreover, fourteen out of the twenty provisions that define offenses and punishments under Chapter

¹⁵ Sajidul Haque, “Bangladesh Passes Digital Security Act Ignoring Concerns It Will Muffle Media”, *BDNEWS24*, September 19, 2018, available at <https://bdnews24.com/bangladesh/2018/09/19/bangladesh-passes-digital-security-act-ignoring-concerns-it-will-muffle-media>.

¹⁶ *See id.*; UN Human Rights Council, “Bangladesh National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21”, U.N. Doc. A/HRC/WG.6/30/BGD/1, February 26, 2018, para. 33.

¹⁷ According to Section 61 (2) of the DSA, “proceedings or cases initiated before, or taken cognizance by, the Tribunal under the repealed sections” could continue if they were pending at any stage of trial. The Digital Security Act 2018, Section 61, available at <https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>.

¹⁸ Human Rights Watch, “Bangladesh: Scrap Draconian Elements of Digital Security Act”, February 22, 2018, available at <https://www.hrw.org/news/2018/02/22/bangladesh-scrap-draconian-elements-digital-security-act>.

¹⁹ Reuters, “Factbox: Bangladesh’s Broad Media Laws”, December 12, 2018, available at <https://www.reuters.com/article/us-bangladesh-election-media-factbox/factbox-bangladeshs-broad-media-laws-idUSKBN1OC08S>.

²⁰ Faisal Mahmud, “Bangladesh Editors Protest ‘Chilling’ Digital Security Act”, *Al Jazeera*, October 16, 2018, available at <https://www.aljazeera.com/news/2018/10/16/bangladesh-editors-protest-chilling-digital-security-act>.

²¹ The Digital Security Act 2018, Section 43, available at <https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>.

²² *Id.* at Section 16.

VI of the DSA render offenses cognizable and non-bailable, creating the risk that accused persons can be arrested arbitrarily and detained indefinitely.²³

Other concerns relate to the fact that the DSA retains the essence of repealed provisions of the ICT Act, with similarly harsh penalties.²⁴ For example, Section 29 of the DSA criminalizes online defamation, like Section 57 of the ICT Act, providing for up to five years (three years for a first-time offender) in prison. Section 28 of the DSA provides for a prison sentence of up to ten years (five years for a first-time offender) for speech that intentionally “hurts religious sentiment and values.”²⁵

Further, the repeal and savings clause of the DSA permits cases under the repealed sections of the ICT Act, including Section 57 of the ICT Act, to continue if they had reached a certain stage. On this basis, cases against writers, journalists, human rights defenders, and public figures that were registered under Section 57 of the ICT Act are still ongoing, despite the ICT Act’s repeal.²⁶

According to a Carnegie Endowment for International Peace report, from October 2018 to December 2021 more than 1,500 cases were filed under the DSA.²⁷ In 754 cases for which case information was available, about 25 percent of the accused persons were journalists and almost 30 percent of them were politicians. Journalists and politicians accounted for more than 40 percent of the subset of accused who were arrested. In addition, of the 418 individuals who filed DSA complaints and for whom data was available, over 31 percent were law enforcement agencies and government officials, and over 40 percent were individuals affiliated with political parties.²⁸

B. CASE HISTORY

Shahidul Alam is an award-winning Bangladeshi photojournalist, teacher, and social activist. He is the founder of both the Pathshala South Asian Media Institute in Dhaka and Chobi Mela, a prestigious international photography festival held in Dhaka. On August 5, 2018, Alam was arrested for posting a Facebook Live video about road-safety protests that occurred in July-August 2018, which were sparked by the death of two

²³ The DSA states that “the offences specified in sections 17, 19, 21, 22, 23, 24, 26, 27, 28, 30, 31, 32, 33 and 34 shall be cognizable and non-bailable.” *Id.* at Section 53.

²⁴ Ali Riaz, “How Bangladesh’s Digital Security Act Is Creating a Culture of Fear”, Carnegie Endowment for International Peace, December 9, 2021, available at <https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>.

²⁵ The Digital Security Act 2018, Section 28, available at <https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>.

²⁶ Freemuse, Drik and PEN International, “Joint Submission to the mid-term Universal Periodic Review of Bangladesh by Freemuse, Drik, and PEN International”, December 4, 2020, available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/UPR/NGOsMidTermReports/Freemuse-Drik-PEN-International-Bangladesh.pdf>; *see also* CIVICUS, “Bangladesh: Drop charges against Odhikar Leadership & Stop Harassment of Human Rights Defenders”, December 15, 2021, available at <https://www.civicus.org/index.php/media-resources/news/5517-bangladesh-stop-harassment-of-human-rights-defenders>.

²⁷ Ali Riaz, “How Bangladesh’s Digital Security Act Is Creating a Culture of Fear”, Carnegie Endowment for International Peace, December 9, 2021, available at <https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>.

²⁸ *Id.*

students in a traffic accident.²⁹ In the video, Alam provided updates on students injured during the protests and displayed some images of the protests.³⁰ While displaying one image, he commented that the ruling BAL party was clinging to power despite losing popular support. Alam's arrest was also prompted by an interview³¹ he gave to Al Jazeera that same day regarding the socio-political situation in the country.³²

Arrest and Allegations of Torture

The information below is based on reporting from Front Line Defenders and a submission made to the National Human Rights Commission (NHRC) by Alam's wife, Ms. Rahnuma Ahmed, on August 7, 2018.

At around 11.30 pm on August 5, 2018, according to the submission by Ahmed, Alam was at his home in Dhaka when a group of 40-50 men in plainclothes reportedly seized him by force, handcuffed him, blindfolded him, and transported him to a detention facility.³³ The group also reportedly broke the building's CCTV cameras and disconnected the intercom system before arresting Alam.³⁴ According to Front Line Defenders, he was held overnight without the authorities providing his family or lawyers with information about his whereabouts.³⁵

Although Alam was arrested on August 5, 2018, the police's First Information Report (FIR) under Section 154 of the Code of Criminal Procedure was only registered on August 6, 2018.³⁶ A FIR is a police record of the first information received about the alleged commission of a cognizable offense (an offense where a police officer may arrest someone without a warrant).

On August 6 at around 5 pm, Alam was produced before the Court of the Chief Metropolitan Magistrate in Dhaka, barefoot and walking with difficulty.³⁷ He informed the Court that he was tortured while in police custody—specifically, that a weight was placed on his head, that he was hit in the face, and that he was threatened that worse things

²⁹ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

³⁰ For this report, CFJ fully reviewed the Facebook video post published by Alam. See Facebook Post by Alam, available at https://m.facebook.com/story.php?story_fbid=10156666223500152&id=540020151.

³¹ For this report, CFJ fully reviewed the interview given by Alam. See YouTube Video "Analysis: What Incited Protests in Bangladesh", available at <https://www.youtube.com/watch?v=J9j3EgM62Q>.

³² High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018.

³³ Submission of Ms. Rahnuma Ahmed to the Bangladesh National Human Rights Commission, Re: Memo No. NHRCB/Complaint/104/18-1277(2), October 21, 2018; see also The Daily Star, "Photographer Shahidul picked up from Dhanmondi house", August 6, 2018, available at <https://www.thedailystar.net/city/photographer-shahidul-alam-picked-dhanmondi-bangladesh-1616599>.

³⁴ Committee to Protect Journalists, "Bangladeshi photographer Shahidul Alam detained after post about Dhaka protests", August 5, 2018, available at <https://cpj.org/2018/08/bangladeshi-photographer-shahidul-alam-detained-af>.

³⁵ Front Line Defenders, "Shahidul Alam Falsely Charged and Tortured", November 20, 2018, available at <https://www.frontlinedefenders.org/en/case/shahidul-alam-falsely-charged-and-tortured>.

³⁶ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

³⁷ Front Line Defenders, "Shahidul Alam Falsely Charged and Tortured", November 20, 2018, available at <https://www.frontlinedefenders.org/en/case/shahidul-alam-falsely-charged-and-tortured>.

would be done to him and that his wife would be picked up.³⁸ He also informed the Court that the police made him wash his blood stained clothes and put them on before coming to court.³⁹ Despite these allegations, the Magistrate's Court neither recorded Alam's statement so that it could be forwarded to the police for investigation of the allegations nor directed him to be examined by a medical practitioner, as required by Section 4 of the Bangladesh Torture and Custodial Death (Prevention) Act 2013.⁴⁰ Instead, Alam was denied bail and remanded to police custody for another 7 days, from August 6 to August 12, 2018.

According to the NHRC submission, the High Court (the second highest judicial authority in Bangladesh) ordered the government to arrange for Alam's medical examination at a hospital.⁴¹ The Attorney General filed an urgent appeal against the order. However, Alam had already been examined by this time.⁴² On August 9, 2018, the High Court received the medical report from the hospital, which declared Alam to be "physically and mentally sound," even though he had not been examined by a psychologist.⁴³ The report did not refer to any allegations of torture and did not explain the nature of the medical examinations conducted. The High Court directed the government to arrange for another medical examination of Alam with respect to potential psychological trauma.⁴⁴ The report on the second examination also found Alam to be "psychologically stable" and did not include information about the nature of the examinations conducted or any statements made by Alam to the doctors.⁴⁵

After seven days in police custody, Alam was produced before the Court of the Chief Metropolitan Magistrate on August 12, 2018 and again remanded to jail.⁴⁶ The police reportedly did not inform Alam's family or lawyers of the time and place of the hearing and therefore it took place in the absence of his lawyer.⁴⁷ Thereafter, Alam was repeatedly denied bail by the Chief Metropolitan Magistrate and the Metropolitan Sessions Judge – for the last time on September 11, 2018.⁴⁸ The High Court ultimately ordered Alam's release on bail on November 15, 2018.

³⁸ Submission of Ms. Rahnuma Ahmed to the Bangladesh National Human Rights Commission, Re: Memo No. NHRCB/Complaint/104/18-1277(2), October 21, 2018, para. 3.

³⁹ Front Line Defenders, "Shahidul Alam Falsely Charged and Tortured", November 20, 2018, available at <https://www.frontlinedefenders.org/en/case/shahidul-alam-falsely-charged-and-tortured>.

⁴⁰ Submission of Ms. Rahnuma Ahmed to the Bangladesh National Human Rights Commission, Re: Memo No. NHRCB/Complaint/104/18-1277(2), October 21, 2018, para. 4.

⁴¹ *Id.* at para. 5.

⁴² *Id.* at para. 6.

⁴³ *Id.* at para. 7.

⁴⁴ *Id.*

⁴⁵ *Id.* at para. 8; *see also* Medical Board, Bangabandhu Sheikh Mujib Medical University, Report No. BSMMI/Hospital (Admin)/2018/165, August 12, 2018.

⁴⁶ Front Line Defenders, "Shahidul Alam Falsely Charged and Tortured", November 20, 2018, available at <https://www.frontlinedefenders.org/en/case/shahidul-alam-falsely-charged-and-tortured>.

⁴⁷ Submission of Ms. Rahnuma Ahmed to the Bangladesh National Human Rights Commission, Re: Memo No. NHRCB/Complaint/104/18-1277(2), October 21, 2018, para. 10.

⁴⁸ High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018.

As referenced above, Ahmed filed a complaint on August 7, 2018 with the NHRC regarding Alam’s allegations of torture.⁴⁹ The NHRC gave the Ministry of Home Affairs seven days to respond. However, the Ministry did not provide information before the deadline.⁵⁰ Ahmed made an additional submission to the NHRC on October 21, 2018. According to Alam’s defense team, the NHRC refused to intervene because the allegations pertained to an ongoing case.⁵¹ Ahmed clarified that the complaint did not concern the ongoing case but pertained to allegations of torture while Alam was in police custody.⁵² Two years and six months after the filing of the complaint, the NHRC reportedly responded, relaying that the Ministry of Home Affairs had stated that there was no evidence of torture while Alam was in police remand from August 6, 2018 — even though Alam’s allegations concerned his overnight detention on August 5.⁵³

Nature of Allegations

The FIR against Shahidul Alam was registered under Section 57 of the ICT Act, alleging that he spread “false information which included inciteful and crime-like statements broadcast ... through Facebook live, which hurt the image of the state by causing deterioration in the law and order situation” and hurt “the emotions of tender-hearted students through confusing propaganda that created social unrest and motivated them to destructive deeds.”⁵⁴ Although the FIR does not specifically mention the Al Jazeera interview, it uses a quote that it appears to attribute to the Al Jazeera interview, in which Alam allegedly called for the overthrow of the government.⁵⁵ It further provides a link to the Facebook Live video.⁵⁶

In its bail order dated November 15, 2018, the High Court found that the contents in the FIR did not match the underlying statements made by Alam. Specifically, the Court held that the “contents of the first information report are altogether different and inconsistent with the subject matter of the [Al Jazeera] interview.”⁵⁷

A review of both videos by TrialWatch also shows that Alam did not make any statement calling for the overthrow of the government. In his Facebook Live video post, Alam appeared to have just returned from the site of protests and showed pictures he had taken and provided information he had received about injuries suffered by students. He further commented on the ruling BAL party’s decreasing popularity, stating that the BAL was “clinging” to power. In the Al Jazeera interview, he was asked to provide context for the

⁴⁹ Submission of Ms. Rahnuma Ahmed to the Bangladesh National Human Rights Commission, Re: Memo No. NHRCB/Complaint/104/18-1277(2), October 21, 2018.

⁵⁰ *Id.*

⁵¹ Internal Case Update, April 10, 2022.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

⁵⁵ High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018.

⁵⁶ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

⁵⁷ High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018.

demonstrations and discussed “pent up” anger about the BAL’s actions, including alleged gagging of the media, extrajudicial killings, disappearances, and corruption. He also criticized the crackdown on the protests, describing how he had seen the authorities use tear gas and had also seen “armed goons” affiliated with the BAL attacking unarmed students. As he stated in the interview: the BAL had assumed “fear was enough” to maintain rule but “you cannot tame an entire nation in this manner.”

Repeal of ICT Act and Stay of Case

In October 2018, when Alam was still in custody, Section 57 of the ICT Act was repealed by the DSA.⁵⁸ Per the repeal and savings clause of the DSA, only cases that had reached a certain stage could continue following the repeal of the Section. Specifically, Section 61 of the DSA states as follows:

The proceedings or cases initiated before, or taken cognizance by, the Tribunal under the repealed sections ... shall, if pending at any stage of trial, continue as if the said sections had not been repealed.⁵⁹

The “Tribunal” refers to the Cyber Tribunal, the specialized court set up by Section 68 of the ICT Act to conduct trials of offenses under the Act. At the very least, Section 61 makes clear that with respect to cases that had been brought under Section 57 of the ICT Act, only those that had been initiated before the Tribunal or that the Tribunal had taken cognizance (judicial notice) of could continue.

Per the Bangladesh Code of Criminal Procedure and the ICT Act, the stage of cognizance or initiation before the Tribunal commences after the police have concluded their investigation and have submitted the final report of an investigation/a charge sheet before the Tribunal.⁶⁰ Broadly speaking, there are several stages for a criminal case to reach trial under the Criminal Procedure Code of Bangladesh:⁶¹

- (i) Investigation: In the case of cognizable cases, the police register an FIR under Section 154 of the Code and begin investigation. In the case of non-cognizable cases, the police seek permission of a Magistrate under Section 155 of the Code and begin investigation.
- (ii) Filing of charge sheet: If the police find enough evidence during investigation, the charge sheet/final report of investigation is filed before the appropriate Court under Section 173 of the Code.
- (iii) Cognizance of the offense: The Court takes judicial notice of the offense as described in the charge sheet filed under Section 173.

⁵⁸ Ali Riaz, “How Bangladesh’s Digital Security Act Is Creating a Culture of Fear”, Carnegie Endowment for International Peace, December 9, 2021, available at <https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951>; The Digital Security Act 2018, Section 61, available at <https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf>.

⁵⁹ *Id.*

⁶⁰ See Section 69 of the ICT Act and Sections 173 and 190 of the Bangladesh Code of Criminal Procedure.

⁶¹ See generally, the Bangladesh Code of Criminal Procedure, available at http://bdcode.gov.bd/upload/bdcodeactpart/2019-07-30-12-01-42-41_2_The_Code_of_Criminal_Procedure-Sayed-2.pdf.

- (iv) Commencement of proceedings: Proceedings are initiated when the Court issues a summons to the accused person/criminal defendant to appear before the Court under Section 204 of the Code.
- (v) Framing of charges: After hearing preliminary arguments from the prosecution and defense, the Court can either discharge the defendant from the case or “frame charges” against the defendant and proceed to trial.

At the time of the ICT Act’s repeal, Alam’s case was still in the first stage because it was under investigation by the police.⁶² The police had not filed a charge sheet, proceedings had not been initiated before the Cyber Tribunal, and correspondingly the Tribunal had not taken cognizance of the case. As noted above, Section 61 of the DSA only allows cases under Section 57 to proceed if they had been “initiated before, or taken cognizance by, the Tribunal” and/or were “pending at any stage of trial.”

On these grounds, Alam filed a writ petition before the High Court challenging the continuation of the investigation against him, stating that such continuation not only contravened Section 61 of the DSA but also undermined his fundamental rights to equality, protection of law, fair trial and punishment, and freedom of speech guaranteed under Part III of the Bangladesh Constitution.⁶³ The High Court asked for the records of the case, which showed that the case was still before the Magistrate’s Court and not the Cyber Tribunal, further evidence of the fact that proceedings had not been initiated before the Tribunal. (The Magistrate’s Court had jurisdiction over the bail proceedings.)

On March 14, 2019, the High Court made an initial finding that the police did not have jurisdiction to continue to investigate the case due to the repeal of Section 57. The Court issued an interim order staying the investigation of the case for three months and ordered the government to prove that the investigation had lawful authority and was not outside the bounds of the DSA and the Constitution.⁶⁴

Appeals Filed by the Government

The government filed an appeal against the stay order of the High Court before the Appellate Division of the Supreme Court, the highest judicial authority in Bangladesh. In August 2019, the Appellate Division refused the government permission to appeal and instead directed the High Court to hear the writ petition filed by Alam on its merits (since the order in March 2019 was an interim order) and to reach a decision by December 18, 2019.⁶⁵

Despite this order from the Appellate Division, the High Court did not hear the case for two years.⁶⁶ When arguments on the petition began in 2021, the government argued that

⁶² High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018.

⁶³ High Court Division of the Supreme Court of Bangladesh, Order in Writ Petition No. 2480/2019 (Stay Order), March 14, 2019.

⁶⁴ *Id.*

⁶⁵ Appellate Division of the Supreme Court of Bangladesh, Order in Civil Petition for Leave to Appeal No. 1102/2019, August 18, 2019.

⁶⁶ High Court Division of the Supreme Court of Bangladesh, Judgment in Writ Petition No. 2480/2019, December 13, 2021.

Alam's petition should be dismissed on technical grounds without hearing the merits of the case. The basis of this argument was that Alam should have approached the High Court under Section 561A of the Criminal Procedure Code rather than via the Court's writ jurisdiction under Article 102 of the Constitution.

Section 561A of the Criminal Procedure Code outlines the High Court's special powers to give effect to orders passed under the Code, prevent the abuse of process of any Court, and secure the ends of justice in criminal cases. Article 102 of the Constitution empowers the High Court to pass any orders to enforce the fundamental rights guaranteed under the Constitution. Additionally, the High Court can pass certain extraordinary writs/remedies under Article 102 to ensure subordinate courts and government authorities act within the bounds of the law, provided the aggrieved person has no alternative equally effective remedy.⁶⁷

The High Court entertained the government's technical challenge even though the Appellate Division had explicitly directed the High Court to hear the case only on its merits.⁶⁸ On December 13, 2021, it ruled that the writ petition filed by Alam was not maintainable because the appropriate remedy was to file a petition under Section 561A of the Criminal Procedure Code.⁶⁹ As a result, the interim order dated March 14, 2019 was vacated, allowing the case against Alam to continue.

Current Legal Proceedings

Alam filed a petition challenging the High Court's decision dismissing his petition to quash the case before the Appellate Division of the Supreme Court and sought a stay of the High Court's judgment in the interim.⁷⁰ On November 28, 2022, the Appellate Division dismissed his petition. Although TrialWatch has yet to obtain the written decision, trial monitoring notes reflect that the State and Court commented on the merits of the case: specifically, that the Court stated that there was no chance of annulment of the investigation and that the police would file the charge sheet in due course.

⁶⁷ These writs are: the writ of *prohibition* (restraining an authority from doing what it is not permitted to do), *mandamus* (compelling an authority to do what it is required to do), *certiorari* (declaring an act or proceeding of a court/authority is without lawful authority and legal impact), *habeas corpus* (directing that a person in custody be produced before the court to ensure legality of custody) and *quo warranto* (requiring a person holding public office to show under what authority the office is held).

⁶⁸ High Court Division of the Supreme Court of Bangladesh, Judgment in Writ Petition No. 2480/2019, December 13, 2021.

⁶⁹ *Id.*

⁷⁰ Internal Case Update, April 10, 2022.

ANALYSIS



A. APPLICABLE LAW

This preliminary report draws upon the International Covenant on Civil and Political Rights (ICCPR) to which Bangladesh acceded in 2000, jurisprudence from the United Nations Human Rights Committee (HRC), tasked with monitoring implementation of the ICCPR, and jurisprudence from the European Court of Human Rights (ECtHR), which the HRC has deemed relevant for interpreting the provisions of the ICCPR.⁷¹ The report also references relevant provisions in the Constitution and the Criminal Procedure Code of Bangladesh. Lastly, this report draws upon the jurisprudence of the Supreme Court of India, given that the provisions in the Constitution of Bangladesh are analogous to provisions in the Indian Constitution and the legal systems in the two countries are likewise similar. Both countries followed the same Criminal Procedure Code from 1898 until 1973—while Bangladesh continues to follow this law, India adopted a new Criminal Procedure Code in 1973, which is substantially similar to the 1898 code.

B. VIOLATIONS IN LEGAL PROCEEDINGS TO DATE

Principle of Legality

No Crime and No Punishment Without Law

Article 15 of the ICCPR and Article 7 of the ECHR guarantee the principle of legality in criminal proceedings. To meet this requirement, as specified in Article 15, “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed,”⁷² and the penalty imposed must not exceed the limits fixed by laws in force at that time.⁷³ As the European Court of Human Rights has explained, the principle of legality not only prohibits the retroactive “application of the criminal law to an accused’s disadvantage” but also “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*),” which it must do clearly and precisely.⁷⁴

⁷¹ For example, when interpreting the provisions of the ICCPR through its General Comments, the HRC has relied on decisions made by the ECtHR. *See, e.g.*, UN Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, fns. 15, 18, 28, 52, 61, 65, 73-75, 99, 118, 122, 132; UN Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/GC/36, September 3, 2019, fns. 5, 6, 32, 64, 86, 88, 92, 104, 126-129, 136, 164, 215, 217.

⁷² ICCPR, Article 15(1).

⁷³ UN Human Rights Committee, *Nicholas v. Australia*, Communication No. 1080/2002, March 19, 2004, para. 7.5; European Court of Human Rights, *Del Río Prada v. Spain* [GC], Application No. 42750/09, October 21, 2013, para. 80; European Court of Human Rights, *Coëme and Others v. Belgium*, Applications Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, October 18, 2000, para. 145.

⁷⁴ European Court of Human Rights, *Kokkinakis v. Greece*, Application No. 14307/88, May 25, 1993, para. 52; European Court of Human Rights, *Coëme and Others v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, October 18, 2000, para. 145.

The principle of legality is also captured in Article 31 and Article 35 of the Bangladesh Constitution. Article 31 states that no action detrimental to the life or liberty of a person shall be taken except in accordance with law. Article 35 states that a person can only be convicted for an act that constituted an offense at the time of its commission and that no person can be subjected to a penalty greater than that provided for by the law in force at the time of commission of the offense. The guarantee in Article 35 is also provided in Article 20(1) of the Indian Constitution; similar to Article 31 of the Bangladesh Constitution, Article 21 of the Indian Constitution states that no person can be deprived of his life or liberty except according to procedure established by law.

In this case, the provision under which Shahidul Alam was charged stands repealed. As per the repeal and savings clause of the DSA, cases under Section 57 of the ICT Act can continue only if at the time of repeal proceedings had already been initiated before the Cyber Tribunal or the Tribunal had already taken cognizance of the offense. As discussed in the case history, this stage had yet to be reached in Alam's case, since the allegations were still under investigation.⁷⁵ Therefore, the continuation of the case against him without any legal basis violates the principle of legality.

In this vein, the Indian Supreme Court has noted that the repeal of a criminal statute not only

destroy[s] the effectiveness of the repealed Act in future, but also operate[s] to destroy all existing inchoate rights and pending proceedings. This is because the effect of repealing a statute is to obliterate it completely from the record, except to the extent of savings.⁷⁶

The Court explained that savings clauses only operate to “wind-up” matters related to the repealed act, as the “[n]atural consequence of repeal, as noticed above, is complete obliteration including [of] pending proceedings.”⁷⁷

This precedent is a helpful analogy for Alam's case. Since Alam's case was at the nascent stage of investigation at the time of the repeal of Section 57, his case should not have been continued on the pretext of “winding-up” matters under the provision — indeed, that is the main thrust of the savings clause in the DSA. Instead, the case should have been terminated with the repeal of Section 57. The government's pursuit of Alam's prosecution

⁷⁵ A review of Indian case law can be instructive in understanding the stage of “cognizance” and “initiation of proceedings” because the Indian Criminal Procedure Code, 1973 is substantially similar to the Bangladesh Criminal Procedure Code, 1898, and prior to 1973 both countries followed the Criminal Procedure Code, 1898. The Supreme Court of India has clarified that the stage of cognizance arises after the police complete investigation and present the charge sheet before the relevant criminal court. The criminal court has to determine whether to take cognizance/judicial notice of offense in the charge sheet, after which it can “initiate proceedings” by issuing summons to the criminal defendant to answer the case against him/her. See Supreme Court of India, *R.R. Chari v. State of U.P.* [(1951) SCR 312] para. 7; Supreme Court of India, *Chief Enforcement Officer v. Videocon International Ltd.* [(2008) 2 SCC 492] paras. 20-23; Supreme Court of India, *Nupur Talwar v. CBI* [(2012) 2 SCC 188] paras. 6-7.

⁷⁶ Supreme Court of India, *Mahmadhusen Abdulrahim Kalota Shaikh (2) v. Union of India* [(2009) 2 SCC 1] para. 36.

⁷⁷ *Id.* at para. 37.

under a repealed law – and the Appellate Division’s reported endorsement of the resumption of the criminal investigation – contravenes the principle of legality.

Strict Construction of Criminal Laws and Procedures in Favor of the Accused

As discussed above, it is clear that under the savings clause of the DSA Alam’s case should not have qualified as a proceeding that could continue given Section 57’s repeal. Nonetheless, even if there were ambiguity in the savings clause, the High Court flouted international and regional standards that require that criminal laws and procedures be interpreted in the defendant’s favor.

The rights guaranteed under Article 15 of the ICCPR and Article 7 of the ECHR embody, more generally, the principle that the criminal law and procedures should not be construed to a criminal defendant’s disadvantage.⁷⁸ As stated by the European Court, the principle of legality is “not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage ... [as it also extends] to the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.”⁷⁹

Article 22 § 2 of the Rome Statute, the treaty that established the International Criminal Court, to which Bangladesh is party, likewise provides that “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”⁸⁰

This principle of international law is also reflected in Indian law. In *State of Gujarat v. Mansukhbhai Kanjibhai Shah*, the Indian Supreme Court held that

the golden rule of interpretation for any penal legislation is to interpret the same strictly, unless any constitutional considerations are involved, and in cases of ambiguity, the benefit of the same should enure in favour of the accused.⁸¹

In *M. Ravindran v. Directorate of Revenue Intelligence*, the Indian Supreme Court reiterated the importance of adopting the construction that protects the rights of criminal defendants. The Court held that

in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous

⁷⁸ European Court of Human Rights, *Vasiliauskas v. Lithuania* [GC], Application No. 35343/05, October 20, 2015, para. 154; European Court of Human Rights, *Kokkinakis v. Greece*, Application No. 14307/88, May 25, 1993, para. 52; European Court of Human Rights, *Coëme and Others v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, October 18, 2000, para. 145.

⁷⁹ *Id.*

⁸⁰ See also International Criminal Court, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, December 9, 2019, para. 23.

⁸¹ Supreme Court of India, *State of Gujarat v. Mansukhbhai Kanjibhai Shah* [(2020) 20 SCC 360] para. 24. See also Supreme Court of India, *Ishar Das v. State of Punjab* [(1973) 2 SCC 65] para. 9.

power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused.⁸²

Based on the above principle, any doubt in interpreting Section 61 of the DSA and its effect on cases under Section 57 of the ICT Act should have been resolved in favor of Alam. Instead, the provisions have been construed to Alam's severe detriment.

Right to a Fair Trial and Right to Access Courts

Article 14 of the ICCPR and Article 6 of the ECHR guarantee the right to a fair trial and to equality before courts and tribunals. These rights encompass “the right of access to the courts in cases of determination of criminal charges and ... [require that a]ccess to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, *in procedural terms* [emphasis added], of his or her right to claim justice.”⁸³

The judgment of the Bangladesh High Court rejecting Alam's petition on procedural grounds, and the Appellate Division's recent dismissal of Alam's appeal of the High Court ruling, undermine his right to access courts to claim justice.⁸⁴ The High Court dismissed the petition on the technical ground that Alam wrongly approached the Court under its writ jurisdiction under Article 102 of the Constitution and should have filed the petition under Section 561A of the Criminal Procedure Code.⁸⁵ The High Court's approach — excessively formalist in the view of this report — in reaching this finding meant that it elevated procedural restrictions over Alam's right of access to the courts to challenge his prosecution as a breach of the principle of legality. The Appellate Division's apparent endorsement of this formalism likewise elevates procedural restrictions over the right of access to the courts.

Although the right of access to courts may be subject to statutory requirements, courts must avoid excessive formalism when applying procedural rules that would compromise the fairness of proceedings.⁸⁶ The particularly strict application of a procedural rule may sometimes impair the very essence of a criminal defendant's fundamental right to a fair trial,⁸⁷ especially where the defendant's ability to appeal is undermined and/or the stake

⁸² Supreme Court of India, *M. Ravindran v. Directorate of Revenue Intelligence* [(2021) 2 SCC 485] para. 17.9.

⁸³ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 9.

⁸⁴ High Court Division of the Supreme Court of Bangladesh, Judgment in Writ Petition No. 2480/2019, December 13, 2021.

⁸⁵ *Id.*

⁸⁶ European Court of Human Rights, *Walchli v. France*, Application No. 35787/03, October 26, 2007, para. 29; European Court of Human Rights, *Evaggelou v. Greece*, Application No. 44078/07, June 20, 2011, para. 23.

⁸⁷ European Court of Human Rights, *Labergère v. France*, Application No. 16846/02, December 26, 2006, para. 17. See also European Court of Human Rights, *Maresti v. Croatia*, Application No. 55759/07, September 25, 2009, para. 37.

in the proceedings involves long-term imprisonment, thereby imposing a disproportionate burden on the defendant and upsetting the overall notion of fairness.⁸⁸

Acknowledging that “[t]he right of access to a court by its very nature calls for regulation by the State and may be subject to limitations,” the European Court has emphasized that there must be a fair balance between any restrictive measure adopted by judicial institutions and the right of access to a court; as noted by the Court, “[a] limitation will violate the [European Convention on Human Rights] if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”⁸⁹

In a similar vein, the Indian Supreme Court has emphasized that High Courts should not lay down rigid formulas or inflexible technical guidelines for exercising their jurisdiction under Article 226 of the Indian Constitution, which is analogous to Article 102 of the Bangladesh Constitution, under which Alam applied for relief.⁹⁰ Indeed, the Indian Supreme Court has held that unlawful criminal proceedings can be quashed interchangeably under Article 226 of the Constitution or under Section 482 of the Indian Criminal Procedure Code, 1973. Because Section 482 of the Indian Criminal Procedure Code, 1973 is the functional equivalent of Section 561A of the Bangladesh Criminal Procedure Code, 1898, Indian jurisprudence on the need to not elevate form over substance is particularly relevant.

In *State of Haryana v. Bhajan Lal*, the Indian Supreme Court examined the extraordinary power under Article 226 of the Constitution and also the inherent powers under Section 482 of the Criminal Procedure Code and held that either provision could be exercised by the High Court to prevent abuse of the process of a criminal court or to otherwise secure the ends of justice in criminal cases.⁹¹

In *Pepsi Foods Ltd. v. Special Judicial Magistrate*, the Indian Supreme Court held that the provision under which a petition is filed should not interfere with a court’s ability to hear a case so as to prevent injustice, and that a petition filed under Article 226 of the Indian Constitution can be *treated as one* filed under Section 482 of the Criminal Procedure Code.⁹² The relevant portion is as follows:

Nomenclature under which petition is filed is not quite relevant and that does not *debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory.*

⁸⁸ See *id.* at para. 20.

⁸⁹ See European Court of Human Rights, *Maresti v. Croatia*, Application No. 55759/07, September 25, 2009, para. 37; European Court of Human Rights, *Davran v. Turkey*, Application No. 18342/03, February 3, 2010, para. 37.

⁹⁰ Supreme Court of India, *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335] para.102; Supreme Court of India, *Pepsi Foods Ltd. V. Special Judicial Magistrate* [(1998) 5 SCC 749]. Similar to Article 102 of the Bangladesh Constitution, Article 226 of the Indian Constitution gives High Courts the power to issue writs to subordinate courts/government authorities and also to pass orders to enforce fundamental rights guaranteed under the Constitution.

⁹¹ Supreme Court of India, *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335] para. 102.

⁹² Supreme Court of India, *Pepsi Foods Ltd. V. Special Judicial Magistrate* [(1998) 5 SCC 749] paras. 21-26.

If in a case like the present one the court finds that the appellants could not invoke its jurisdiction under Article 226, the court can certainly treat the petition as one under Article 227 or Section 482 of the Code.⁹³

In view of the above-mentioned principles of international law, and how the Indian Supreme Court has interpreted issues similar to those posed by the present case, the High Court undermined Alam's right to access courts by declining to hear his petition on its merits, as did the Appellate Division by upholding the High Court's ruling. Among other things, the High Court appears to have failed to consider that Alam had been subject to a criminal investigation for close to four years under a repealed legal provision, was facing possible imprisonment of up to 14 years, and that there had been an inordinate delay in determination of his petition. The High Court's refusal to determine the legality and constitutionality of the continuation of the case by applying procedural rules, despite the high stakes for Alam, and the Appellate Division's apparent affirmation of this approach, compromised Alam's right to access the courts, as protected by Article 14 of the ICCPR.

Right to Freedom of Speech and Expression

Under Article 19 of the ICCPR, "[e]veryone shall have the right to freedom of expression," which encompasses "political discourse, commentary on one's own and on public affairs ... discussion of human rights, [and] journalism."⁹⁴

In interpreting Article 19 of the ICCPR, the UN Human Rights Committee has emphasized the importance of safeguarding political debate and the ability to criticize public officials, stating that the value placed by the Covenant upon uninhibited expression in this domain is particularly high.⁹⁵ The Committee, for example, has asserted that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."⁹⁶ In the Committee's words: "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition."⁹⁷

According to the Committee, any restrictions on protected speech must (i) be provided by law (the principle of legality), (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.⁹⁸ Objectives deemed legitimate under Article 19(3) of the ICCPR include the protection of public morals, public health, public order, national security, and the rights and reputation of individuals.⁹⁹ As stated by the

⁹³ *Id.* at paras. 21-22, 26.

⁹⁴ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

⁹⁵ *Id.* at para. 38.

⁹⁶ *Id.* at para. 13.

⁹⁷ *Id.* at para. 38.

⁹⁸ See UN Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, January 4, 1999, para. 12.2; see also UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.

⁹⁹ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 21.

Committee, “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat ... in particular by establishing a direct and immediate connection between the expression and the threat.”¹⁰⁰

Where a restriction pursues a legitimate objective, it can still “violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”¹⁰¹ The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”¹⁰² States must therefore meet a high threshold before instituting criminal prosecutions based on speech. Notably, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has asserted that under Article 19 only the gravest of speech offenses should ever be criminalized: child pornography, incitement to terrorism, direct and public incitement to commit genocide, and advocacy for national, racial, or religious hatred.¹⁰³

Article 39(2) of the Bangladesh Constitution also protects the right to freedom of speech and expression and the freedom of the press. As stated in the Constitution, “reasonable” restrictions on speech may be imposed by law on the following grounds: security of the State, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, or incitement to an offense.

In accordance with the above standards, the criminal proceedings against Alam violate his right to freedom of expression. The FIR against Alam was registered based on his Facebook Live video post¹⁰⁴ and the interview he gave to Al Jazeera,¹⁰⁵ both of which were reviewed in full by TrialWatch. In these videos, as discussed above, he showed pictures he had taken of student protests about road safety and commented on the socio-political situation, the ruling BAL party’s decreasing popularity, and the government crackdown on the demonstrations.

The speech in question clearly constituted journalism and “criticism and political opposition”¹⁰⁶ and was situated within a broader public dialogue. As established by the UN Human Rights Committee, this form of engagement with current events warrants

¹⁰⁰ *Id.* at para. 35.

¹⁰¹ *Id.* at para. 33.

¹⁰² *Id.* at para. 34.

¹⁰³ UN General Assembly, “Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session”, U.N. Doc. A/66/290, August 10, 2011, para. 40; *see also* UN Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of fundamental freedoms and human rights while countering terrorism”, U.N. Doc. A/HRC/31/65, April 29, 2015, para. 38; Johannesburg Principles on National Security, “Freedom of Expression and Access to Information”, U.N. Doc. E/CN.4/1996/39, October 1, 1995, Principle 7.

¹⁰⁴ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018. *See also* Facebook Post by Alam, available at https://m.facebook.com/story.php?story_fbid=10156666223500152&id=540020151.

¹⁰⁵ High Court Division of the Supreme Court of Bangladesh, Judgment in Criminal Miscellaneous Case No. 43604/2018, November 15, 2018. *See also* YouTube Video “Analysis: What Incited Protests in Bangladesh”, available at <https://www.youtube.com/watch?v=J9j3EgLm62Q>.

¹⁰⁶ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

heightened protection. Consequently, the limitation imposed — the criminal proceedings against Alam — is unlawful unless it complies with the three-part test delineated by the UN Human Rights Committee.

The proceedings against Alam do not pass this test. As a threshold matter, the restriction in question is not “prescribed by law” per the principle of legality because, as described above, the case against Alam was extinguished by the repeal of Section 57 and the narrow DSA savings clause.

Even if the case could have proceeded despite the repeal, Section 57 itself fails to meet the requirements of the principle of legality. Namely, it is impermissibly vague, making it difficult for individuals to understand what acts are prohibited. Section 57 broadly criminalizes the publication of “any material” which is deemed likely to “deprave and corrupt persons,” “deteriorate law and order,” “prejudice the image of the State or person,” “hurt religious belief,” or “instigate against any person or organization.” However, there is no definition of or limiting principles applied to these terms, leaving their meaning uncertain. The resulting ambiguity makes the law susceptible to arbitrary interpretation or application, affording the authorities excessive discretion.

In a similar vein, the Indian Supreme Court has held that “a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness.”¹⁰⁷ On this basis, in 2015 the Court struck down a law similar to Section 57 of the ICT Act that criminalized online speech, stating that the law “takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech.”¹⁰⁸ In light of the above, the prosecution of Alam under Section 57 of the ICT Act fails to meet legality standards.

Second, the imposition of restrictions required articulation of a legitimate objective. As discussed above, the UN Human Rights Committee has made clear that the fact that speech is critical of the government is not a legitimate reason to restrict freedom of expression.

But in this case, the FIR appears to be based on precisely that: Alam’s criticism of the ruling party. For example, it cites Alam’s Facebook Live post in which he gave updates after returning from the site of student protests and noted that the BAL appeared to be clinging to power despite popular opinion. It further refers to the Al Jazeera interview, in which Alam explained the socio-political tensions that sparked the demonstrations and denounced the ensuing crackdown (as noted above, the High Court’s bail order explicitly asserted that Alam did not call for overthrow of the government in the Al Jazeera interview, as incorrectly stated in the FIR). Reporting and commenting on political events cannot be the basis for restrictions on freedom of speech.

Moreover, in invoking an ostensibly legitimate objective the government must demonstrate “in specific and individualized fashion the precise nature of the threat ...

¹⁰⁷ Supreme Court of India, *Shreya Singhal v. Union of India* [(2015) 5 SCC 1] para. 59.

¹⁰⁸ *Id.* at para. 94.

[and] a direct and immediate connection between the expression and the threat.”¹⁰⁹ Even assuming that Alam’s prosecution was intended to protect public order and security and not to punish him for his journalism and activism, the authorities not only failed to present “specific and individualized” information about the “precise nature of the threat” but also failed to establish “a direct and immediate connection between the expression and the threat.”

Instead, the FIR relied on the allegation that Alam’s Facebook Live post and the Al Jazeera interview were “spreading false information which included inciteful and crime-like statements” and “causing an anarchic and unstable situation in the country” through “propaganda ... and [encouraging] destructive deeds.”¹¹⁰ Nowhere, however, in the materials reviewed by TrialWatch is the supposed threat of anarchy and instability further explained or supported with evidence, and nowhere is a “direct and immediate connection” between Alam’s speech and this asserted threat established. Without identification of a concrete threat posed by the speech, the proceedings against Alam do not satisfy the international standard requiring that there be a link between a legitimate objective for regulating speech, and the speech itself.

Third, with respect to necessity and proportionality requirements, the institution of criminal prosecution was not the “least intrusive instrument amongst those which might achieve their protective function.” As detailed above, the criminalization of speech is only appropriate where grave crimes have been committed, such as incitement to terrorism or advocacy of national, racial, or religious hatred.

Although the FIR describes the speech made by Alam as “creat[ing] social unrest and motivat[ing] [‘tender-hearted students’] to destructive deeds through incitement and instigation,”¹¹¹ the document fails to explain how Alam’s acts qualified as incitement to violence or hatred. Tellingly, the FIR does not cite any specific instances in which Alam encouraged violence or committed any violence himself. Moreover, the Facebook post and Al Jazeera interview in question, as reviewed by TrialWatch, contain no call to violence. The institution of criminal proceedings with the threat of 14 years of imprisonment was thus neither necessary nor proportionate, violating Alam’s right to freedom of expression.

¹⁰⁹ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

¹¹⁰ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

¹¹¹ First Information Report, Ramna Model Police Station Case No. 12 Corresponding to G.R. Case No. 433 of 2018, August 6, 2018.

CONCLUSION



Alam appears to have been subject to criminal investigation purely for his journalism and activism, with the authorities unfairly construing the savings clause in the DSA to his disadvantage despite the fact that it clearly prohibits the continuation of proceedings against him. Further, Alam has been denied meaningful access to justice over the past four years. If the case is allowed to proceed and Alam is convicted, he faces up to 14 years in prison. Based on international standards, as paralleled by Indian precedent, the investigation against Alam should be quashed or discontinued.