# **The Information and Communication Technology Act of 2006:** Bangladesh's Zombie Cyber Security Law

**November 2024**

## A. ABOUT THE AUTHORS

The **Centre for Governance Studies (CGS)** is an independent, non-profit think-tank and research organization established in Bangladesh. CGS supports the country in adapting to the rapidly evolving domestic and global landscape, aiming to improve governance, address security needs, and foster conditions that promote resource use for poverty alleviation, human resource development, and political and social stability. CGS collaborates extensively with national and international networks, partnering with government agencies, foreign organizations, businesses, and foundations to address key security and governance challenges.

**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 Index evaluating countries' justice systems.

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Over the years, she has represented accused persons as well as victims. She has successfully defended individuals accused of terror crimes in India including the Marxist ideologue Kobad Ghandy and a former student from Kashmir, Mohd. Rafeeq Shah, and is presently representing human rights activists in trials arising out of the 2020 Delhi Riots. Amongst the other cases to her credit are the Jain Hawala case of 1996, the 2G spectrum case, the Aarushi Talwar murder case, the Shreesanth IPL match fixing case, the Hashimpura massacre case – where she appeared for the families of 44 Muslim men who were shot dead by the Provincial Armed Constabulary of the Uttar Pradesh Police, in one the worst cases of custodial violence in India.

Rebecca Mammen John also successfully defended Priya Ramani – a journalist who had made allegations against her former editor during the #MeToo India movement in October 2018 – in a criminal defamation complaint filed against her. She has been appointed as the Special Public Prosecutor, in the Ankit Saxena murder trial – involving the brutal murder of a young man, for being in a relationship

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# TABLE OF CONTENTS

**EXECUTIVE SUMMARY** 1

**BACKGROUND** 2

A. Political and Legal Context: ICT Act 2
B. Political and Legal Context: DSA 5
C. Political and Legal Context: CSA 10
D. Impact of the CSA on Ongoing ICT Act Cases 13
E. Current Political Context 14

**LEGAL ANALYSIS** 17

A. Applicable Law 17
B. Impact of the CSA on Pending ICT Act Cases: Continuation of Cases under the ICT Act Violates the Principle of Legality 17
C. Section 57 of the ICT Act Violates the Principle of Legality 23

**CONCLUSION** 27

# EXECUTIVE SUMMARY

Since 2006, journalists, human rights defenders, and activists in Bangladesh have increasingly been targeted under a succession of cybersecurity laws: In 2018, the Digital Security Act ("***DSA***") replaced certain provisions of the Information and Communication Technology Act of 2006 ("***ICT Act***") and in 2023 the Cyber Security Act ("***CSA***") replaced the DSA. Each of these laws have been criticized for restricting freedom of expression online. With the recent political transition in Bangladesh, the time is right for a review of these laws, an undertaking the interim government has appeared to embrace. This whitepaper, which focuses on the oldest of these laws, the ICT Act, is the first in a series: a forthcoming report will also provide an in-depth analysis of the DSA and its use against journalists.

During both the transitions (from the ICT Act to the DSA and the DSA to the CSA), cases pending under the previous law continued, despite its repeal. This whitepaper focuses on the current legal status of cases registered under the repealed provisions of the ICT Act, and analyses how the continuation of such cases is inconsistent with Bangladesh's obligations under international human rights treaties to which it is a party.

The continuation of such cases violates the principle of legality, which requires that any conviction must have a legal basis. With the repeal of the DSA by the CSA, there is no legal provision that "saves" pending proceedings under the ICT Act. Bangladesh is also obligated to implement changes in laws (whether arising from amendment or repeal) in a manner that protects the rights of accused persons in ongoing cases. In particular, the government must ensure that "savings clauses" (clauses that allow cases under a repealed law to continue) are applied narrowly. This means that all cases brought under the repealed provisions of the ICT Act, which were saved by the DSA but not saved by the CSA, should be terminated.

And yet proceedings under the ICT Act continue unabated: Indeed, a substantial number of cases filed under the ICT Act are still unresolved.[1] As such, accused persons in these cases continue to face criminal proceedings devoid of legal basis, and risk pretrial detention and more severe imprisonment than is permitted under even the current (still problematic) cyber security law. The recent announcement by the interim government of Bangladesh to withdraw all "speech offence"-related cases under all three cyber security laws is a step in the right direction.[2]

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[1] *See infra* pgs. 8-9.

[2] *"Speech offence cases under cyber laws to be withdrawn, arrestees to be released",* Dhaka Tribune (September 30, 2024), https://www.dhakatribune.com/bangladesh/crime/360234/speech-offence-cases-under-cyber-laws-to-be.

# BACKGROUND

## A. Political and Legal Context: ICT Act

Since 2001, Bangladesh has gone through multiple iterations of cyber security laws.[3] The Information and Communication Technology Act ("***ICT Act***") was enacted in 2006 ostensibly to prevent cybercrimes and regulate digital communications. Sections 54 to 67 of the ICT Act 2006 defined a range of punishable acts with penalties of up to 10 years of imprisonment and varying fines.[4] In particular, Section 57 of the ICT Act allowed for the prosecution of anyone who published or transmitted "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 "causes to deteriorate or creates a 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."

The ICT Act was passed amid serious political upheaval in Bangladesh. In 2004, the then-ruling Bangladesh Nationalist Party (BNP) amended the Constitution[5] to use the nonpartisan caretaker government (CTG) system,[6] which had ensured free and fair elections since 1996, to its benefit for the upcoming 2007 election.[7] The Bangladesh Awami League (Awami League) refused to participate in the election and ultimately a "state of emergency" was declared, paving the way for the army to take over in January

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[3] The first iteration was the Bangladesh Telecommunication Regulation Act of 2001. *See* Tanim Ahmed, *"The media must do more to protest oppressive laws like the CSA"*, Daily Star (September 18, 2023), https://www.thedailystar.net/opinion/views/news/the-media-must-do-more-protest-oppressive-laws-the-csa-3422006.

[4] The Information and Communication Technology Act 2006, https://samsn.ifj.org/wp-content/uploads/2015/07/Bangladesh-ICT-Act-2006.pdf [hereinafter "**ICT Act**"].

[5] 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*", https://www.globalsecurity.org/military/world/bangladesh/pm-ahmed.htm.

[6] 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*", https://www.lawyersnjurists.com/article/caretaker-government-in-bangladesh/.

[7] Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), 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*", https://bti-project.org/en/reports/country-report/BGD.

2007,[8] termed by some as a "soft coup."[9] At the end of 2008, the military-backed civilian government arranged an election, which resulted in a significant majority for the Awami League. The Awami League eventually scrapped the CTG provision in the Constitution in 2011 and retained power in Bangladesh from 2008 until August 2024,[10] when Prime Minister Sheikh Hasina resigned and fled Bangladesh following widespread protests.[11]

The ICT Act was "widely criticized for restricting freedom of expression."[12] In October 2013, key aspects of the ICT Act were amended, resulting in an increase of imprisonment terms for some offenses from 10 to 14 years and modification of certain procedural rules by making many offenses cognizable (meaning that police could make arrests without a warrant) and non-bailable (meaning that courts could impose pretrial detention).[13] This included Section 57, which was made cognizable, non-bailable and now carried a potential prison sentence of 14 years.

As per a news report that cites data from the police headquarters, close to 3,000 people faced charges under the ICT Act between 2012 and July 2017, across 1,417 cases.[14] Human Rights Watch (HRW) similarly reports that the police submitted close to 1,300

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[8] Somini Sengupta, "*Bangladesh Leader Declares State of Emergency*", New York Times (January 11, 2007), https://www.nytimes.com/2007/01/11/world/asia/11cnd-bengla.html.

[9] "*The coup that dare not speak its name*", The Economist (January 18, 2007), https://www.economist.com/asia/2007/01/18/the-coup-that-dare-not-speak-its-name; "*BTI Transformation Index: Bangladesh Country Report 2022*", Bertelsmann Stiftung, https://bti-project.org/en/reports/country-report/BGD.

[10] For the 2014 election, the incumbent Awami League 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 landslide victory for the Awami League. The next general elections, held in December 2023, were widely regarded as not "free and fair." They were preceded by violent repression and the BNP and several opposition parties boycotted the election. *See* Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), 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), https://moderndiplomacy.eu/2022/04/19/bangladeshs-national-election-in-2023-the-path-of-light-remains-closed/; "*Bangladesh: An election in name only*", FIDH (International Federation for Human Rights) (January 5, 2024), https://www.fidh.org/en/region/asia/bangladesh/bangladesh-an-election-in-name-only.

[11] *See infra* pgs. 13-16.

[12] "*No Place for Criticism: Bangladesh Crackdown on Social Media Commentary*", Human Rights Watch (May 9, 2018), https://www.hrw.org/report/2018/05/10/no-place-criticism/bangladesh-crackdown-social-media-commentary [hereinafter "**HRW, No Place for Criticism**"].

[13] *"Briefing Paper on the amendments to the Bangladesh Information Communication Technology Act 2006"*, International Commission of Jurists (November 2013), https://www.icj.org/wp-content/uploads/2013/11/ICT-Brief-Final-Draft-20-November-2013.pdf.

[14] *"Number of ICT cases on the rise again",* Dhaka Tribune, August 10, 2018), *https://www.dhakatribune.com/bangladesh/laws-rights/152723/number-of-ict-cases-on-the-rise-again*.

charge sheets to the Cyber Tribunal established under the ICT Act between 2013 and 2018.[15] Most of these cases were filed under Section 57.

The police data reflects that 1,492 people were arrested. HRW adds that "scores of people [were]… detained for months at a time before being released pending trial, some simply for political criticism."[16] People were arrested for merely "liking" or "sharing" social media posts deemed critical of the then-Prime Minister Sheikh Hasina or the Awami League Government.[17] Those targeted under the ICT Act included journalists (both for their professional writings and personal social media posts), editors of news organizations, members of the opposition and ordinary citizens.[18]

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."[19] Section 57 of the ICT Act was also challenged before the High Court, on the ground that it violated rights protected under the Bangladesh Constitution.[20]

In response to domestic and international pressure, the Bangladeshi government decided to repeal some of the provisions of the Act.[21] 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 that would "establish[] balance between freedom of expression and public morality [and] interest."[22] The petitions challenging

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[15] HRW, No Place for Criticism.

[16] *"Bangladesh: Protect Freedom of Expression"*, Human Rights Watch (May 9, 2018), https://www.hrw.org/news/2018/05/10/bangladesh-protect-freedom-expression.

[17] HRW, No Place for Criticism.

[18] *Id.*

[19] *Bangladesh: Protect Freedom of Expression"*, Human Rights Watch (May 9, 2018), https://www.hrw.org/news/2018/05/09/bangladesh-protect-freedom-expression; *see also "Bangladesh: Release Photojournalist Shahidul Alam and Stop Violations to Free Expression"*, ARTICLE19 (August 7, 2018), https://www.article19.org/resources/bangladesh-release-photojournalist-shahidul-alam-and-stop-violations-to-free-expression.

[20] HRW, No Place for Criticism.

[21] The DSA repealed five provisions from the "Offences and Penalties" part of the ICT Act, namely, Sections 54, 55, 56, 57 and 66 of the ICT Act. *See* Sajidul Haque, "*Bangladesh Passes Digital Security Act Ignoring Concerns It Will Muffle Media*", BDNEWS24 (September 19, 2018), https://bdnews24.com/bangladesh/bangladesh-passes-digital-security-act-ignoring-concerns-it-will-muffle-media.

[22] 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.

Section 57 on constitutional grounds also stalled as a result of the impending repeal of the law.[23]

As the government prepared to repeal Section 57 in 2018, civil society organizations "warn[ed] that any new law should protect rights, [instead of being] used to crack down on critics."[24]

## B. Political and Legal Context: DSA

Like the ICT Act, the Digital Security Act of 2018 ("***DSA***") was introduced amidst political upheaval in Bangladesh. In July 2018, a spontaneous movement of students demanding road safety shook the country, which reflected the people's growing frustration with the Awami League government.[25] A general election was scheduled for December that year. The Digital Security Act was introduced in October 2018, ostensibly to rectify the vagueness of Section 57 of the ICT Act.[26] However, since its adoption the DSA—much like the ICT Act—was subject to significant criticism for its vagueness and the corresponding risk of abuse.[27]

The DSA repealed five provisions of the ICT Act, including Section 57.[28] However, in effect, it maintained the substance of repealed provisions, effectively splitting what had been covered by Section 57 of the ICT Act into different offenses under the DSA and imposing similarly severe penalties.[29] For instance, Section 25 of the DSA, like Section 57 of the ICT Act, criminalized the transmission or publication of offensive, false, or

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[23] HRW, No Place for Criticism.

[24] *Id*. *See also* Faisal Mahmud, *"Bangladesh Enacts New Law That Could Silence Dissenters",* The Diplomat (October 10, 2018), https://thediplomat.com/2018/10/bangladesh-enacts-new-law-that-could-silence-dissenters/.

[25] Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951; Arafatul Islam, "*Why Bangladesh protests are not just about road safety*", DW (August 8, 2018), https://www.dw.com/en/why-bangladesh-student-protests-are-not-just-about-road-safety/a-45007297.

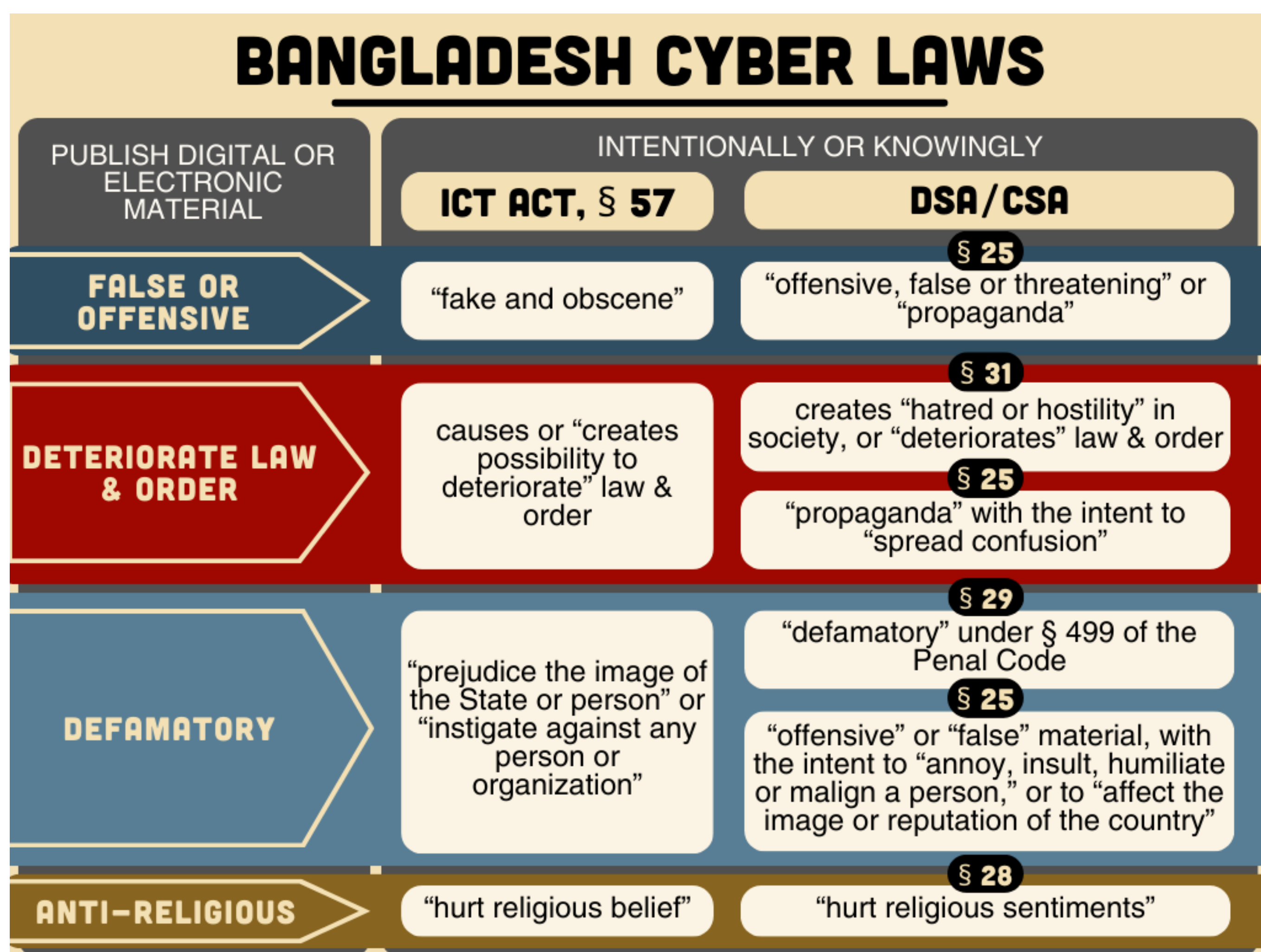
[26] "*Factbox: Bangladesh's broad media laws*", Reuters (December 12, 2018), https://www.reuters.com/article/bangladesh-election-media-idINKBN1OC09I.

[27] Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951.

[28] Section 61 of the DSA states "[u]pon the commencement of this Act, the sections 54, 55, 56, 57 and 66 of the [ICT Act], hereinafter referred to in this section as repealed sections, shall be repealed.", Digital Security Act, 2018, https://www.cirt.gov.bd/wp-content/uploads/2020/02/Digital-Security-Act-2020.pdf [hereinafter "**DSA**"].

[29] Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951.

threatening information (including with an intention to affect the image or reputation of the country, or to spread confusion) and carried a potential three-year prison sentence, with the possibility of five years in prison for repeat offenders; Section 29 of the DSA criminalized online defamation, mirroring language in Section 57 and carrying a potential prison sentence of up to three years—five years for repeat offenders; Section 28 of the DSA criminalized transmission or publication of information that intentionally "hurt[] religious sentiments and values," like Section 57, and prescribed a maximum prison term of five years—ten years for repeat offenders; and Section 31 of the DSA criminalized the transmission or publication of information that "deteriorates … law and order," pulling language word-for-word from Section 57 and carrying a potential seven-year prison sentence—ten years for repeat offenders.[30] The absorption of the vague provisions of the ICT Act into the DSA (and later, the CSA) is reflected in this chart:




[30] DSA, Sections 25, 28, 29, 31; ICT Act, Section 57.

Many civil society organizations and human rights activists deemed the DSA "even broader and even more alarming" than the ICT Act.[31] Likewise, the Editors' Council, the body comprising Bangladesh's leading newspaper editors, called for an overhaul of the law on the basis that it would enable prosecutions of journalists, producing a "chilling effect."[32]

In June 2022, the Office of the United Nations High Commissioner for Human Rights ("***OHCHR***") published a Technical Note addressed to the Bangladeshi government based on its review of the DSA.[33] In this note, the OHCHR underscored three major concerns regarding the DSA: first, it expressed alarm over the DSA's vague and expansive provisions, which led to the "criminaliz[ation of] various legitimate forms of expression[,]with overly harsh sentences";[34] second, it noted that the powers vested in the police and the Bangladesh Telecommunications and Regulatory Commission under the DSA were excessively broad, risking abuse;[35] and last, it criticized the fact that many DSA offenses were non-bailable, raising concerns about due process and fair treatment.[36]

OHCHR specifically called for the repeal of Sections 21 and 28—which criminalized, respectively, the online transmission or publication of "propaganda or campaign against the liberation war of Bangladesh, spirit of liberation war, father of the nation, national anthem or national flag," and, as mentioned above, the transmission or publication of information that hurt religious values—and recommended the amendment of eight other sections,[37] including Section 25, the provision concerning offensive, false or threatening information, Section 29, the provision concerning online defamation, and Section 31, the provision concerning information undermining law and order.[38]

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[31] "*Factbox: Bangladesh's broad media laws*", Reuters (December 12, 2018), https://www.reuters.com/article/bangladesh-election-media-idINKBN1OC09I.

[32] Faisal Mahmud, "*Bangladesh Editors Protest 'Chilling' Digital Security Act*", Al Jazeera (October 16, 2018), https://www.aljazeera.com/news/2018/10/16/bangladesh-editors-protest-chilling-digital-security-act.

[33] "*OHCHR Technical Note to the Government of Bangladesh on review of the Digital Security Act*", OHCHR (June 2022), https://www.ohchr.org/sites/default/files/documents/countries/bangladesh/OHCHR-Technical-Note-on-review-of-the-Digital-Security-Act-June-2022.pdf.

[34] *See id.*, pgs. 1-5.

[35] For example, OHCHR stated that the Bangladesh Telecommunications and Regulatory Commission "can be requested by the law … to remove or block 'any data-information published or propagated in digital media that hampers the solidarity, financial activities, security, defence, religious values or public discipline of the country or any part thereof or incites racial hostility and hatred' [and noted that these] formulations allow restrictions that go considerably beyond what is considered permissible under article 19 of the ICCPR." *See id.*, pgs. 5-7.

[36] *See id.*, pg. 7. Sections 25 and 29 were made bailable but cognizable, meaning that police could still conduct arrests without a warrant.

[37] Specifically, Sections 8, 25, 27, 29, 31, 32, 43, and 53 of the DSA. *See id.*

[38] *See id.*, pgs. 1-7.

Subsequently, in March 2023, the UN High Commissioner for Human Rights called on the Bangladeshi government to "suspend immediately its application of the [DSA]," expressing concern that the law was being used to "arrest, harass and intimidate journalists and human rights defenders, and to muzzle critical voices online."[39] The High Commissioner urged the government to undertake a comprehensive reform of provisions in the DSA "to bring them in line with the requirements of international human rights law," referencing the recommendations made in the June 2022 OHCHR Technical Note.[40]

Indeed, the DSA had often served as a basis for the authorities to press criminal charges against government critics.[41] According to a report from the Centre for Governance Studies ("***CGS***"), of the 1,534 individuals charged under the DSA between October 2018 and September 2023 whose professions were known, close to 30 percent were journalists and more than 30 percent were politicians.[42] Out of the 859 cases where CGS was able to identify the filer of the complaint, 22 percent of cases were filed by law enforcement agencies and almost 40 percent were filed by individuals affiliated with political parties, with the vast majority of these individuals affiliated with the ruling Awami League.[43] And with respect to the total number of DSA cases, in September 2023 the then-Minister for Law, Justice, and Parliamentary Affairs, Anisul Huq, stated that over 7,000 cases had been filed under the DSA and that of these cases, approximately 6,000, accounting for 86 percent, were still "awaiting disposal."[44]

Importantly, the savings clause of the DSA, Section 61, permitted cases under the repealed sections of the ICT Act, including Section 57, to continue if they had reached a

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[39] "*Bangladesh: Türk urges immediate suspension of Digital Security Act as media crackdown continues*", OHCHR (March 31, 2023), https://www.ohchr.org/en/press-releases/2023/03/bangladesh-turk-urges-immediate-suspension-digital-security-act-media.

[40] *Id.*

[41] *See, e.g.*, Ali Riaz, "*How Bangladesh's Digital Security Act Is Creating a Culture of Fear*", Carnegie Endowment for International Peace (December 9, 2021), https://carnegieendowment.org/2021/12/09/how-bangladesh-s-digital-security-act-is-creating-culture-of-fear-pub-85951; Zillur Rahman, "*The new CSA: A draconian law made more 'efficient'*", The Daily Star (August 24, 2023), https://www.thedailystar.net/opinion/views/news/the-new-csa-draconian-law-made-more-efficient-3401151; Bilal Hussain, "*Advocates Question Whether Reforms Will Offer Bangladesh Media Greater Protection*", VOA News (August 18, 2023), https://www.voanews.com/a/advocates-question-whether-reforms-will-offer-bangladesh-media-greater-protection/7231154.html.

[42] "*The Ordeal: Five Years of the Digital Security Act, 2018-2023*", Centre for Governance Studies (April 2024), https://cgs-bd.com/cms/media/documents/e7678484-19ac-4716-8224-be3f706bfa66.pdf.

[43] *See, id.,* pg. 18

[44] "*86pc DSA cases pending disposal: law minister*", The Daily Star (September 10, 2023), https://www.thedailystar.net/news/bangladesh/news/86pc-dsa-cases-pending-disposal-law-minister-3415241.

certain stage.[45] On this basis, cases against writers, journalists and human rights defenders that were registered under Section 57 of the ICT Act continued, despite the provision having been repealed.[46] One such case—being monitored by TrialWatch—is against photojournalist Shahidul Alam, who continues to face charges under Section 57 of the ICT Act despite the repeal of the provision six years ago.[47] The police have not completed their investigation in the case as of the writing of this report (which should have been a basis for terminating the case, since it had not yet reached the stage protected by the savings clause), yet the proceedings linger on,[48] requiring Alam to make court appearances on an almost monthly basis. This is typical of cases under the ICT Act—in the more than 30 ICT Act cases reported by Human Rights Watch in May 2018, only 2 had been completed at the time of writing.[49] As per the data from the police headquarter cited above, out of the 1417 cases registered under the ICT Act from 2012 to June 2017, only 179 cases were dismissed/concluded.[50]

Given the disposal rate of 10%, it can be presumed that the vast majority of cases filed under the ICT Act were pending at the time of its repeal. As per recent figures announced by the interim government, there are a total of 1,340 ongoing cases related to "speech offences" (cases filed for expressing opinions online) under the three cyber security laws combined—279 of these are pending under the ICT Act.[51]

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[45] Section 61 of the DSA states that "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."

[46] Freemuse, Drik and PEN International, *"Joint Submission to the mid-term Universal Periodic Review of Bangladesh by Freemuse, Drink, and PEN International"*, (December 4, 2020), 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), https://www.civicus.org/index.php/media-resources/news/5517-bangladesh-stop-harassment-of-human-rights-defenders.

[47] "*Photojournalist in Bangladesh Facing 14 Years for Charges Under a Law That No Longer Exists*", Clooney Foundation for Justice (January 30, 2023), https://cfj.org/news/photojournalist-in-bangladesh-facing-14-years-for-charges-under-a-law-that-no-longer-exists. *See also* Saad Hammadi, "*We don't want more people in jail for their posts on the internet*", The Daily Star (August 11, 2023), https://www.thedailystar.net/opinion/views/news/we-dont-want-more-people-jail-their-posts-the-internet-3391196.

[48] *See* TrialWatch Fairness Report, *Bangladesh* v. *Shahidul Alam,* Clooney Foundation for Justice (January 2023), https://cfj.org/wp-content/uploads/2023/07/Shahidul-Alam-Fairness-Report_January-2023.pdf.

[49] HRW, No Place for Criticism.

[50] *"Number of ICT cases on the rise again",* Dhaka Tribune, August 10, 2018), *https://www.dhakatribune.com/bangladesh/laws-rights/152723/number-of-ict-cases-on-the-rise-again.*

[51] *"Speech offence cases under cyber laws to be withdrawn, arrestees to be released",* Dhaka Tribune (September 30, 2024), https://www.dhakatribune.com/bangladesh/crime/360234/speech-offence-cases-under-cyber-laws-to-be.

## C. Political and Legal Context: CSA

In response to the widespread criticism of the DSA by national and international actors and mounting pressure to repeal the law, the then Government of Bangladesh introduced the Cyber Security Act of 2023 ("***CSA***"). The government described the new law as a "modernized" version of the DSA without provisions that could be "misused" by anyone.[52] However, from the outset, the government faced criticism about restrictions on public involvement in the legislative process.[53] For example, the public comment period for the draft of the law was limited to two weeks.[54]

According to the Bangladeshi human rights organization Nagorik, the given time frame for public comment was "unrealistic" for civil society to make meaningful contributions to the drafting process.[55] Other human rights groups as well as civil society organizations and opposition lawmakers also expressed concern, stating that "the call for feedback on the CSA draft was a mere tick box exercise"[56] and that the government was "in a hurry [to pass the CSA] without getting recommendations from the stakeholders."[57] They further emphasized the disconcerting similarities between the CSA and the DSA, noting that "the proposed law's content—particularly its provisions regarding cybercrime and the composition and operation of organizations involved in cybersecurity—is essentially identical to that of the [DSA]," as discussed in more detail below.[58]

On September 13, 2023, the Parliament of Bangladesh passed the CSA.[59] This development unfolded just over a month after the government's first public announcement, on August 7, 2023, that it intended to repeal the DSA and replace it with

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[52] Faisal Mahmud, "*Bangladesh to tone down 'draconian' digital security law*", Al Jazeera (August 7, 2023), https://www.aljazeera.com/news/2023/8/7/bangladesh-to-tone-down-draconian-digital-security-law.

[53] Nusmila Lohani, "*DSA has a new name: CSA*", TBS News (September 15, 2023), https://www.tbsnews.net/features/panorama/dsa-has-new-name-csa-700830.

[54] Nowzin Khan, "*From DSA to CSA: The same two bottles of agony*", The Daily Star (August 26, 2023), https://www.thedailystar.net/opinion/views/news/dsa-csa-the-same-two-bottles-agony-3403566.

[55] Nusmila Lohani, "*DSA has a new name: CSA*", TBS News (September 15, 2023), https://www.tbsnews.net/features/panorama/dsa-has-new-name-csa-700830.

[56] *Id.*; "*Bangladesh: Government must remove draconian provisions from the Draft Cyber Security Act*", Amnesty International (August 31, 2023), https://www.amnesty.org/en/latest/news/2023/08/bangladesh-government-must-remove-draconian-provisions-from-the-draft-cyber-security-act.

[57] Ali Asif Shawon, "*Why was there such a rush to pass the Cyber Security Bill?*", Dhaka Tribune (September 16, 2023), https://www.dhakatribune.com/bangladesh/325432/why-was-there-such-a-rush-to-pass-the-csa-bill.

[58] *Id.*; Nowzin Khan, "*From DSA to CSA: The same two bottles of agony*", The Daily Star (August 26, 2023), https://www.thedailystar.net/opinion/views/news/dsa-csa-the-same-two-bottles-agony-3403566.

[59] Ali Asif Shawon, "*Why was there such a rush to pass the Cyber Security Bill?*", Dhaka Tribune (September 16, 2023), https://www.dhakatribune.com/bangladesh/325432/why-was-there-such-a-rush-to-pass-the-csa-bill.

the CSA.[60] Notably, both the DSA and CSA were passed shortly before general elections were held—the DSA was passed in October 2018 and elections were held in December 2018, while the CSA was passed in September 2023 and elections were held in January 2024. Critics thus raised concerns that the erstwhile government averted criticism of the ICT Act and then subsequently the DSA, by introducing new laws with superficial changes as an 'eye-wash' to garner support ahead of elections.[61]

As assessed by human rights NGOs,[62] the primary change in the CSA was that it reduced penalties for certain offenses.[63] With respect to Section 21 of the DSA, for example, which carried a potential ten-year sentence for the dissemination of "propaganda" against Bangladesh's Liberation War, the first president of the country, the national anthem, or the national flag, the CSA reduced the penalty to seven years.[64] Similarly, the potential prison sentence for the publication or transmission of "offensive, false, or threatening" information under Section 25 was reduced from three years in the DSA to two years in the CSA, the potential prison sentence for undermining law and order under Section 31 of the DSA was reduced from seven to five years and, crucially, Section 29, the online

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[60] Faisal Mahmud, "*Bangladesh to tone down 'draconian' digital security law*", Al Jazeera (August 7, 2023), https://www.aljazeera.com/news/2023/8/7/bangladesh-to-tone-down-draconian-digital-security-law.

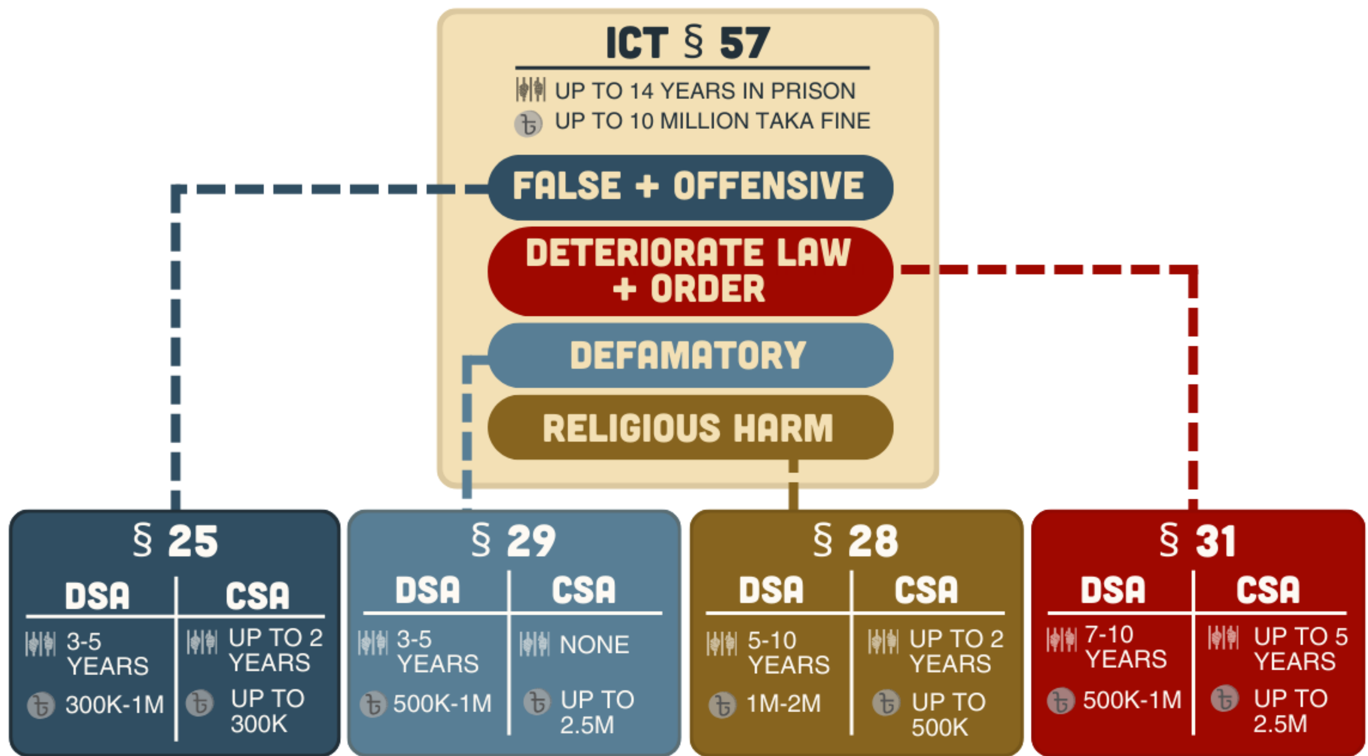
[61] *See "Govt replacing DSA with CSA to fool people, says BNP"*, NewAge (August 8, 2023), https://www.newagebd.net/article/208873/govt-replacing-dsa-with-csa-to-fool-people-says-bnp; *"Cyber Security Act: Same product, different package?"*, TBS (August 8, 2023), https://www.tbsnews.net/bangladesh/cyber-security-act-same-product-different-package-679274.

[62] "*Digital Security Act 2018 and the draft Cyber Security Act 2023: A Comparative Analysis*", Transparency International Bangladesh (August 30, 2023), https://www.ti-bangladesh.org/articles/position-paper/6752; "*Bangladesh: Open letter to the government: Feedback on proposed 'Cyber Security Act'*", Amnesty International (August 22, 2023), https://www.amnesty.org/en/documents/asa13/7125/2023/en.

[63] *Id.*; *See also* Nusmila Lohani, "*DSA has a new name: CSA*", TBS News (September 15, 2023), https://www.tbsnews.net/features/panorama/dsa-has-new-name-csa-700830.

[64] *"Repackaging Repression: The Cyber Security Act and the continuing lawfare against dissent in Bangladesh"*, Amnesty International (August 18, 2024), https://www.amnesty.org/en/documents/asa13/8332/2024/en/.

defamation provision, eliminated imprisonment as a penalty, providing for a fine instead.[65] A mapping of the penalties under the three cybersecurity laws is below:




Furthermore, under the CSA most offenses, barring a few,[66] became bailable (meaning that accused persons are entitled to bail as a right and pretrial detention is not an option)[67] and non-cognizable (meaning that police officers must obtain a warrant to arrest individuals)[68].

Although penalties were reduced and offenses made bailable and non-cognizable, the problematic offenses themselves were largely left in place, as seen above, leading numerous civil society organizations to deem the "CSA… essentially a renamed version

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[65] *Id.*

[66] Sections 17, 19, 27, and 33 of the CSA, which proscribe unlawful access to critical information infrastructure, damage to computers and computer systems, cyberterrorism, and hacking respectively are cognizable and non-bailable.

[67] "*Parliament passes Cyber Security Bill 2023*", Dhaka Tribune (September 13, 2023), https://www.dhakatribune.com/bangladesh/325228/parliament-passes-cyber-security-bill-2023.

[68] Under Section 42 of the CSA, police officers can still arrest individuals without a warrant where there are "reasons to believe that an offence under this Act has been or is being committed, or is likely to be committed in any place, or any evidence is likely to be lost, destroyed, deleted or altered or made unavailable in any way."

of the DSA, with only a few alterations in the form of reduced severity of punishments."[69] As Amnesty International has reported, "the CSA repackages almost all repressive features of the DSA (and Section 57 of the ICT Act that preceded it)."[70] Given that Sections such as 21 (the criminalization of online "propaganda" against the government), 25 (the criminalization of online offensive, threatening, or false information), 28 (the criminalization of online information that harms religious values), 29 (online defamation), and 31 (the criminalization of online information that undermines law and order) remained intact, even Former Law Minister Huq acknowledged that "[the DSA] cannot be called invalid, as there are many provisions of the old law in the new one."[71]

The replacement of the DSA with the CSA thus mirrored some aspects of the process by which the DSA itself repealed select provisions of the ICT Act. As discussed above, while the DSA repealed Section 57, all of the proscriptions in Section 57 were incorporated into the DSA across four separate sections.

Considering that Section 57 had accounted for 65 percent of all cases filed under the ICT Act and that subsequently this trend continued, with the number of cases filed under the related four DSA sections exceeding 1,500,[72] there is significant concern about the CSA merely absorbing the problematic sections of the DSA, just like the DSA absorbed those same sections of the ICT Act.[73]

## D. Impact of the CSA on Ongoing ICT Act Cases

Until 2023, the continuation of ICT Act cases under the repealed provisions was justified by the savings clause of the DSA.[74] Section 61 of the DSA allowed for "proceedings or

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[69] "*Digital Security Act 2018 and the draft Cyber Security Act 2023: A Comparative Analysis*", Transparency International Bangladesh (August 30, 2023), https://www.ti-bangladesh.org/articles/position-paper/6752.

[70] *"Repackaging Repression: The Cyber Security Act and the continuing lawfare against dissent in Bangladesh"*, Amnesty International (August 18, 2024), https://www.amnesty.org/en/documents/asa13/8332/2024/en/.

[71] "*No jail terms in defamation cases, old cases to continue*", Dhaka Tribune (August 7, 2023), https://www.dhakatribune.com/bangladesh/321828/minister-no-jail-terms-in-defamation-cases-under.

[72] Zillur Rahman, "*The new CSA: A draconian law made more 'efficient'*", The Daily Star (August 24, 2023), https://www.thedailystar.net/opinion/views/news/the-new-csa-draconian-law-made-more-efficient-3401151.

[73] Nowzin Khan, "*From DSA to CSA: The same two bottles of agony*", The Daily Star (August 26, 2023), https://www.thedailystar.net/opinion/views/news/dsa-csa-the-same-two-bottles-agony-3403566; *"Cyber Security Act: Same product, different package?"*, TBS News (August 8, 2023), https://www.tbsnews.net/bangladesh/cyber-security-act-same-product-different-package-679274.

[74] In some cases, the continuation of proceedings under the ICT Act is not even justified by the savings clause of the DSA, since the clause saved only those cases that have reached a particular stage. The continuation of ICT Act cases that had not reached that stage, as in the case of Shahidul Alam, appears to be contrary to the DSA itself. *See* TrialWatch Fairness Report, *Bangladesh* v. *Shahidul Alam,* Clooney

cases initiated before, or taken cognizance by, the Tribunal under the repealed sections" of the ICT Act to continue if they were "pending at any stage of trial."[75]

The CSA, however, repealed the DSA. It contains its own savings clause; which is limited to cases filed under the DSA and does not reference cases filed under the ICT Act. Section 59 of CSA provides: "pending cases under the said Act [DSA] in the relevant Tribunal and appeals against the order, judgment or punishment passed in similar cases in the relevant Appellate Tribunal, shall be conducted and disposed of as if the said Act [DSA] had not been repealed."[76]

As explained in the legal analysis below, in the absence of a clause in the CSA "saving" ongoing cases under the repealed provisions of the ICT Act, there is no legal basis for them to continue.

## E. Current Political Context

In June 2024, nationwide student protests erupted in Bangladesh after the High Court reinstated a quota system for government jobs, seen by the students as discriminatory and favoring supporters of the Awami League.[77] These protests ultimately culminated in the resignation of Prime Minister Sheikh Hasina on August 5, 2024.

The protests were met with a brutal crackdown, with the police and security forces reportedly firing on protestors and using indiscriminate force, leading to the deaths of more than 1,500 people[78] and thousands injured.[79] On July 18, 2024, the Government imposed a nationwide shut down of broadband and mobile Internet, preventing access to

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Foundation for Justice (January 2023), https://cfj.org/wp-content/uploads/2023/07/Shahidul-Alam-Fairness-Report_January-2023.pdf.

[75] DSA, Section 61.

[76] Section 59(2), Cyber Security Act, 2023. Unofficial translation.

[77] The High Court reinstated a quota system reserving 30% of government jobs for descendants of veterans of Bangladesh's war of independence, an important constituency for the Awami League. This quota system was abolished in October 2018 after massive protests, but this decision was challenged, resulting in the High Court decision that sparked the protests. *See* "*Preliminary Analysis of Recent Protests and Unrest in Bangladesh*, Office of the United Nations High Commissioner for Human Rights (OHCHR) (August 16, 2024), https://www.ohchr.org/sites/default/files/2024-08/OHCHR-Preliminary-Analysis-of-Recent-Protests-and-Unrest-in-Bangladesh-16082024_2.pdf [hereinafter "**OHCHR Bangladesh Report**"], pg. 4.

[78] *"Total death toll in mass upsurge 1581, says health sub-committee",* The Financial Express (September 29, 2024), https://today.thefinancialexpress.com.bd/last-page/total-death-toll-in-mass-upsurge-1581-says-health-sub-committee-1727543244.

[79] Harindrini Corea and Nazia Erum, "*What is happening at the quota-reform protests in Bangladesh",* Amnesty International (July 29, 2024), https://www.amnesty.org/en/latest/news/2024/07/what-is-happening-at-the-quota-reform-protests-in-bangladesh/.

websites, social media and web-based mobile phone communications for several days.[80] A curfew was imposed and the army was reportedly given "shoot at sight" orders.[81] More than 2,500 people were arrested according to Amnesty International,[82] with many subject to "incommunicado detention" and reporting mistreatment and even torture.[83] Although the Supreme Court rolled back the proposed quota, the protests, which by then were joined by people from all walks of life, continued, demanding Prime Minister Sheikh Hasina's resignation.[84] In a "rapid and dramatic series of developments," Prime Minister Sheikh Hasina resigned and fled Bangladesh on August 5, 2024.[85] The President dissolved the Parliament the next day[86] and on August 8, 2024, a civilian interim government with Nobel Laureate Professor Muhammad Yunus at its helm was appointed to oversee a transition to fresh elections.[87] The interim government has promised to uphold "democracy, justice, human rights, and freedom of speech."[88]

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[80] OHCHR Bangladesh Report; Harindrini Corea and Nazia Erum, "*What is happening at the quota-reform protests in Bangladesh",* Amnesty International (July 29, 2024), https://www.amnesty.org/en/latest/news/2024/07/what-is-happening-at-the-quota-reform-protests-in-bangladesh/.

[81] "*Bangladesh top court scraps most quotas that caused deadly unrest"*, Al Jazeera (July 21, 2024), https://www.aljazeera.com/news/2024/7/21/bangladesh-court-scraps-most-job-quotas-that-caused-deadly-unrest-reports.

[82] Harindrini Corea and Nazia Erum, "*What is happening at the quota-reform protests in Bangladesh",* Amnesty International (July 29, 2024), https://www.amnesty.org/en/latest/news/2024/07/what-is-happening-at-the-quota-reform-protests-in-bangladesh/.

[83] OHCHR Bangladesh Report, pg. 7.

[84] "*Bangladesh top court scraps most quotas that caused deadly unrest"*, Al Jazeera (July 21, 2024), https://www.aljazeera.com/news/2024/7/21/bangladesh-court-scraps-most-job-quotas-that-caused-deadly-unrest-reports.

[85] OHCHR Bangladesh Report, pg. 3.

[86] *Redwan Ahmed,* "*Bangladesh parliament dissolved a day after resignation of prime minister",* The Guardian (August 6, 2024), https://www.theguardian.com/world/article/2024/aug/06/bangladesh-student-protesters-to-meet-with-army-chief-after-pm-resigns.

[87] Ruma Paul, *"Nobel laureate Yunus takes charge of Bangladesh, hopes to heal strife-torn country"*, Reuters (August 8, 2024), https://www.reuters.com/world/asia-pacific/bangladesh-awaits-installation-interim-government-after-weeks-strife-2024-08-08/.

[88] *"Election after vital reforms: Chief Adviser to Bangladesh interim government"*, Asia News Network (August 19, 2024), https://asianews.network/election-after-vital-reforms-chief-adviser-to-bangladesh-interim-government/.

International and national organizations, such as Amnesty International,[89] the American Bar Association,[90] the Editors Council,[91] industry bodies,[92] and journalists[93] have called upon the interim government to repeal the CSA and withdraw cases under the CSA and DSA. Amnesty International has in particular called on the government to "immediately release all those who remain detained under the ICT Act, DSA, CSA" and drop charges against them.[94]

The interim government has announced that these laws are under review[95] and that the CSA, or portions of it, are likely to be repealed.[96] Further, the interim government is reportedly categorising all pending cases under the three cyber laws as related to either "speech offences" (where filed for online speech) or "computer offences" (involving computer hacking or digital fraud etc.) and plans to withdraw speech offence related cases.[97] The interim government has not announced when such cases will be withdrawn.

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[89] *"Bangladesh: Interim Government must restore freedom of expression in Bangladesh and repeal Cyber Security Act*", Amnesty International (August 8, 2024), https://www.amnesty.org/en/latest/news/2024/08/bangladesh-interim-government-must-restore-freedom-of-expression-in-bangladesh-and-repeal-cyber-security-act/.

[90] *"Bangladesh: Flawed Cybercrime Regime Requires Repeal or Reform"*, American Bar Association Center for Human Rights (September, 2024), https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/bangladesh-flawed-cybercrime-regime.pdf.

[91] *"Scrap cases under CSA, DSA against journalists: demands Editors Council",* The Daily Star (August 13, 2024), https://www.thedailystar.net/news/bangladesh/news/scrap-cases-under-csa-dsa-against-journalists-3675766.

[92] *BASIS urges interim govt to repeal CSA",* NewAge (August 10, 2024), https://www.newagebd.net/post/country/242148/basis-urges-interim-govt-to-repeal-csa.

[93] Redwan Ahmed and Kaamil Ahmed, *"Bangladeshi journalists hopeful of press freedom as Hasina era ends",* The Guardian (August 9, 2024), https://www.theguardian.com/global-development/article/2024/aug/09/bangladeshi-journalists-hopeful-for-return-to-press-freedom-as-hasina-era-ends.

[94] *"Bangladesh: Interim Government must restore freedom of expression in Bangladesh and repeal Cyber Security Act*", Amnesty International (August 8, 2024), https://www.amnesty.org/en/latest/news/2024/08/bangladesh-interim-government-must-restore-freedom-of-expression-in-bangladesh-and-repeal-cyber-security-act/.

[95] "*Asked not to arrest in cybercase: Nahid Islam",* DW (September 27, 2024), https://www.dw.com/bn/সাইবার-মামলায়-গ্রেপ্তার-না-করতে-বলা-হয়েছে-নাহিদ-ইসলাম/a-70348612.

[96] "*Cyber Security Act is being repealed: Asif Nazrul"*, Prothomalo (October 3, 2024), https://www.prothomalo.com/bangladesh/edlki78nav.

[97] *"Speech offence cases under cyber laws to be withdrawn, arrestees to be released",* Dhaka Tribune (September 30, 2024), https://www.dhakatribune.com/bangladesh/crime/360234/speech-offence-cases-under-cyber-laws-to-be.

# LEGAL ANALYSIS

## A. Applicable Law

This 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, which the HRC has deemed relevant for interpreting the provisions of the ICCPR.[98] The report also references relevant principles of international law and English common law. Lastly, this report relies upon judgments of the Supreme Court of India, given that 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.

## B. Impact of the CSA on Pending ICT Act Cases: Continuation of Cases under the ICT Act Violates the Principle of Legality

The principle of legality as enshrined in Article 15 of the International Covenant on Civil and Political Rights ("**ICCPR**") and Article 7 of the European Convention on Human Rights ("***ECHR***") guarantees that "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"[99] and the penalty imposed must not exceed the limits fixed by laws in force at that time.[100]

The European Court of Human Rights has explained that the principle of legality not only prohibits the retroactive application of 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.[101] Articles 15 and 7 thus require the existence of a legal basis in order to convict

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[98] For example, when interpreting the provisions of the ICCPR through its General Comments, the HRC has relied on decisions made by the European Court of Human Rights. *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.

[99] ICCPR, Article 15(1).

[100] 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.

[101] 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.

someone of a crime, or impose a sentence.[102] This principle is also reflected in the Constitution of Bangladesh[103] and the Constitution of India.[104]

As noted above, Section 59 of the CSA contains a savings clause providing that cases initiated under the DSA should continue to be processed in accordance with the DSA. Importantly, this savings clause does not mention the ICT Act or cases instituted under that Act. Thus, after enactment of the CSA, there is no legal basis for cases under the ICT Act to proceed. As such, the continuation of these cases would violate both domestic law and international human rights standards.

## Repeal of the DSA repealed the savings clause pertinent to pending ICT Act Cases

It is a settled principle of common law that repeal of a law implies "abrogation or obliteration of one statute by another, from the statute book as completely as if it had never been passed"; when an Act is repealed, "it must be considered (except as to transactions past and closed) as if it had never existed."[105]

In line with this principle, the Indian Supreme Court has noted that the repeal of a criminal statute not only "destroy[s] the effectiveness of the repealed [A]ct in future, but also operate[s] to destroy all… 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."[106] These findings were made in the context of the repeal of a criminal law: namely, the Prevention of Terrorism Act, 2002 by the Prevention of Terrorism (Repeal) Act, 2004.[107]

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[102] *"Guide on Article 7 of the European Convention on Human Rights"*, European Court of Human Rights (December 31, 2020), para. 23, https://www.refworld.org/jurisprudence/caselawcomp/echr/2020/en/123523.

[103] *The Constitution of the People's Republic of Bangladesh* (1972), http://bdlaws.minlaw.gov.bd/act-details-367.html. Article 31 of the Bangladesh Constitution states that no action detrimental to the life or liberty of a person shall be taken except in accordance with law. Article 35 of the Bangladesh Constitution 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.

[104] *The Constitution of India* (1950), https://www.indiacode.nic.in/bitstream/123456789/15240/1/constitution_of_india.pdf. The guarantee in Article 35 of the Bangladesh Constitution 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.

[105] Per Tindal, C.J., in *Kay* v. *Goodwin* [(1830) 6 Bing 576, 582] and Lord Tenterdon in *Surtees* v. *Ellison* [(1829) 9 B & C 750, 752] cited with approval in Supreme Court of India, *State of Orissa* v. *M.A. Tulloch & Co*. [ (1964) 4 SCR 561], para 19.

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

[107] *Id.* at para. 13.

The Court elaborated that "continuation of proceedings in respect of any offence under an Act, after the repeal of such Act, is… a result of a deeming fiction… created by the savings clause."[108] 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."[109]

Applying this principle, Section 61 of the DSA (the savings clause that saved ICT Act cases) operated to wind-up certain cases under the ICT Act, and the continuation of these cases was only possible as a result of the "deeming fiction" of this savings clause. With the repeal of the DSA by the CSA, Section 61—the savings clause—also stands repealed. Resultantly, cases under the ICT Act cannot continue, unless they stand saved by the CSA.

## The CSA does not save prosecutions under the ICT Act

The CSA has a specific savings clause that saves only cases pending under the DSA and is silent on cases pending under the ICT Act. In such a scenario, the provision on "effect of repeal" in the General Clauses Act, 1897, a colonial-era law on statutory interpretation followed by both Bangladesh and India, may be relevant.

Section 6 of the General Clauses Act, saves pending proceedings under a repealed law, provided the repealing act does not have a "contrary intention."[110] Section 6 is reproduced below:

> Effect of repeal — 6. Where this Act, or any Act of Parliament or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, *unless a different intention appears,*[111] the repeal shall not—
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> …..

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[108] *Id.* at para. 37.

[109] *Id.*

[110] Section 6 of the General Clauses Act was modeled after Section 38(2) of the Interpretation Act of 1889 in England. As noted above, the general rule in common law is that repeal of a law destroys any pending proceedings under the repealed law. To dispense with the necessity of inserting a savings clause in every law, Section 38(2) was inserted in the Interpretation Act of 1889 in England, providing that "a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it and any investigation, legal proceeding or remedy may be instituted, continued or enforced in respect of any right, liability and penalty under the repealed Act as if the Repealing Act had not been passed." *See* Supreme Court of India, *State of Punjab v. Mohar Singh* [(1955) 1 SCR 893].

[111] Emphasis added.

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

The Indian Supreme Court has clarified that if a law is repealed "without making any provision for savings, the provisions contained in [S]ection 6 of the General Clauses Act, 1897 will apply. *But where the repealing Act itself contains specific provisions in regard to savings, the express or special provision in the repealing Act will apply*."[112] The Court has explained that when there is a specific savings clause "then a different intention is indicated"[113] and "where a repeal is followed by a fresh legislation on the subject, the Court has to look to the provisions of the new Act to see whether they indicate a different intention."[114]

The savings clause of the CSA does not refer to ICT Act cases—a clear indication of not intending to save them. The 'different intention' of the CSA is also evident in the fact that the CSA has reduced penalties two times over as compared to the ICT Act—the DSA first reduced penalties when it repealed select provisions of the ICT Act, and the CSA further reduced penalties prescribed in the DSA. As such, the General Clauses Act does not justify the continuation of cases filed under the ICT Act.

## Doctrine of strict and favorable construction must be applied in case of any ambiguity

The rights guaranteed under Article 15 of the ICCPR and Article 7 of the ECHR embody, more generally, the principle that criminal law and procedures should not be construed to a criminal defendant's disadvantage.[115] As stated by the European Court, the principle of

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[112] Supreme Court of India, *Mahmadhusen Abdulrahim Kalota Shaikh (2) v. Union of India* [(2009) 2 SCC 1], para. 34(f) (emphasis added).

[113] Supreme Court of India, *Qudrat Ullah v. Municipal Board* [(1974) 1 SCC 202], para.18.

[114] *Id*.

[115] 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

legality extends to “the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.”[116]

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 favor of the person being investigated, prosecuted or convicted.”[117]

This principle of international law is also reflected in Indian law. The Indian Supreme Court has 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 favor of the accused.”[118]

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 favor the interpretation which leans towards protecting the rights of the accused, given the ubiquitous 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.”[119]

Based on the above principle, Section 59 of the CSA (the savings clause) must be interpreted strictly—to only permit cases mentioned in the Section to continue. Further, any doubt in interpreting the clause and its effect on cases under the ICT Act should be resolved in favor of accused persons facing prosecutions under the ICT Act.

However, as noted above, ICT Act cases are still being pursued. In September 2023, a few days after the passage of the CSA, Adilur Rahman Khan, founder and Secretary of civil society organization Odikhar (and currently an advisor to the Interim Government), along with A.S.M. Nasiruddin Khan, Director of Odhikar, were sentenced to two years imprisonment under Section 57 in connection with “a fact-finding report they compiled 10

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(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.

[116] 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.

[117] *Rome Statute of the International Criminal Court* (1998), Article 22(2). *See also* International Criminal Court, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15 (December 9, 2019), para. 23.

[118] 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.

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

years ago on extrajudicial killings."[120] They were charged under Section 57 of the ICT Act exactly 10 years prior, and thereafter subject to pre-trial detention for 62 and 25 days respectively.[121] They were re-arrested upon their conviction, and released on bail on orders of the High Court in October 2023 pending appeal.[122] This case demonstrates that Section 57 cases can be resurrected at any time and the specter of the law looms over the persons against whom cases are still pending.

In fact, authorities under the Awami League government construed the savings clause in the DSA to save ICT Act cases pending at the investigation stage, contrary to the provision itself.[123] Resultantly, ICT Act cases where the police have not yet completed their investigation still continue to be open, permitting the resurrection of these cases at any point depending on the will of the police and authorities. This includes Section 57 cases that were registered during the road safety protests in the lead up to the 2018 elections[124]—epitomized by the case against Shahidul Alam who continues to face an investigation under the ICT Act for merely posting a Facebook Live video and giving an interview to Al Jazeera about the protests.[125]

Allowing these cases, including some that were not in fact even saved by the DSA, to continue despite the DSA's repeal by the CSA would be an implausible construction of the CSA's savings clause, to the accused's' detriment. Under international law, the interim

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[120] *"Bangladesh court jails prominent rights activists for two years"*, Al Jazeera (September 14, 2023), https://www.aljazeera.com/news/2023/9/14/bangladesh-court-jails-prominent-rights-activists-for-two-years.

[121] "*Bangladesh: Upcoming verdict in the case of Adilur Khan and ASM Nariruddin Elam",* International Federation for Human Rights, (August 29, 2023), https://www.fidh.org/en/issues/human-rights-defenders/bangladesh-upcoming-verdict-in-the-case-of-adilur-khan-and-asm.

[122] *"Top Bangladesh Rights Activists Released on Bail,* VOA, (October 16, 2023), https://www.voanews.com/a/top-bangladesh-rights-activists-released-on-bail-/7313942.html.

[123] According to the savings clause of the DSA, cases under the repealed provisions 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. 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. Therefore, cases where the investigation was pending were not saved by the DSA. *See* TrialWatch Fairness Report, *Bangladesh* v. *Shahidul Alam,* Clooney Foundation for Justice (January 2023), https://cfj.org/wp-content/uploads/2023/07/Shahidul-Alam-Fairness-Report_January-2023.pdf.

[124] *"Journalists, activists in Bangladesh arrested under ICT Act for posting on social media"*, AccessNow (August 10, 2023), https://www.accessnow.org/press-release/bangladesh-ict-act/; *"IFJ Press Freedom Report 2018-2019: Bangladesh*", International Commission of Jurists (2019), https://www.ifj.org/fileadmin/user_upload/IFJ_SAPFR_-_BANGLADESH.pdf.

[125] "*Photojournalist in Bangladesh Facing 14 Years for Charges Under a Law That No Longer Exists*", Clooney Foundation for Justice (January 30, 2023), https://cfj.org/news/photojournalist-in-bangladesh-facing-14-years-for-charges-under-a-law-that-no-longer-exists.

government should do the reverse: All pending ICT Act cases under Section 57 should be terminated or withdrawn.

## C. Section 57 of the ICT Act Violates the Principle of Legality

The principle of legality also requires more broadly that laws be clearly and precisely defined. The UN Human Rights Committee has noted "the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time."[126] Regional human rights courts have likewise emphasized that "domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable"[127] and that there must be "a clear definition of the criminalized conduct, establishing its elements."[128]

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" which is "fake and obscene" or is deemed likely to "deprave and corrupt persons," "deteriorate law and order," "prejudice the image of the State or person," or cause "hurt," "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.

Indeed, Section 57 was used as a tool of harassment, with cases based on a wide array of social media commentary, including sharing political cartoons, reporting on garment worker protests, or making comments deemed critical of Islam.[129] The Special Public Prosecutor handling the Cyber Tribunal cases reportedly admitted that 65-70% of the

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[126] UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), para. 7; *see also* UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), CCPR/C/GC/35, (Dec. 16, 2014), para. 22.

[127] The African Court on Human and Peoples' Rights has also emphasized that "domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable." African Court on Human and Peoples' Rights, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (Nov. 24, 2017), para. 136. The East African Court of Justice has echoed this holding, stating that criminal laws must "be clear, and accessible to citizens so that they are clear on what is prohibited." East African Court of Justice, *Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania*, EACJ Reference No. 2 of 2017 (Mar. 28, 2019), para. 60.

[128] Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52 (May 30, 1999), para. 121. And the Caribbean Court of Justice has indicated that "[a] penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct." Caribbean Court of Justice, *Quincy McEwan et al. v. The Attorney General of Guyana*, [2018] CCJ 30 (AJ), para. 80. *See also* European Court of Human Rights, *Kokkinakis v. Greece*, App. No.14307/88 (May 25,1993), para. 52.

[129] HRW, No Place for Criticism.

cases filed under Section 57 could not be proven in court, stating "[s]ome cases are totally fabricated and are filed to harass people."[130]

Laws similar to Section 57 of the ICT Act have been struck down by courts around the world, on grounds of being unconstitutional restrictions on the right to freedom of expression. In 2015, the Indian Supreme Court struck down a provision similar to Section 57 of the ICT Act, stating that the provision "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."[131] Similar to Section 57's prohibition on transmitting information that is "fake and obscene," or which is likely to "prejudice" the image of a person, or "cause hurt," the provision struck down by the Indian Supreme Court criminalized sending "any information that is grossly offensive" or that is "know[n] to be false" and is sent for the purpose of causing *inter alia* "insult, injury… enmity, hatred or ill will."[132] Neither law defined any of these terms. The Indian Supreme Court held that "a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness."[133]

Similarly, the Constitutional Court of Uganda struck down a section of that country's Computer Misuse Act criminalizing 'offensive communication.'[134] The Constitutional Court found that "Section 25 of the Computer Misuse Act No. 2 of 2011 does not specify what conduct constitutes offensive communication. To that extent it does not afford sufficient guidance for legal debate…. [I]t is vague, overly broad and ambiguous."[135] On this basis, the Court held that the law was null and void.

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[130] *"Two-thirds of cases filed under Sec 57 do not see the light of day",* Dhaka Tribune, (Sept. 22, 2017), https://www.dhakatribune.com/bangladesh/laws-rights/126258/two-thirds-of-cases-filed-under-sec-57-do-not-see.

[131] Supreme Court of India, *Shreya Singhal v. Union of India* [(2015) 5 SCC 1], para. 94.

[132] Section 66-A of the Information Technology Act, 2000 stated: "Any person who sends, by means of a computer resource or a communication device, (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine."

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

[134] TrialWatch also monitored a case under this law, identifying its vagueness and subjectivity at the time. *See* Staff at the American Bar Association Center for Human Rights, TrialWatch Fairness Report, *Uganda v. Stella Nyanzi,* (February 2020), https://www.americanbar.org/content/dam/aba/administrative/human_rights/fairnessreport-uganda-stella-nyanzi.pdf.

[135] Constitutional Court of Uganda, *Karamagi et al. v. Attorney General*, Judgment, Constitutional Petition No. 5 of 2016. Section 25 of the Computer Misuse Act criminalized whoever "willfully and repeatedly

In Kenya, the High Court struck down a law that criminalized "send[ing] a message or other matter that is grossly offensive or of an indecent, obscene or menacing character" or "send[ing] a message that [a person] knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person." The Court noted that "there is no definition in the Act of the words used. Thus, the question arises: what amounts to a message that is 'grossly offensive', 'indecent' 'obscene' or 'menacing character'? …. Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter."[136] On this basis, the Court found that the law was "so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences."[137]

In the United States, the Supreme Court found unconstitutionally vague a law that proscribed 'indecent' and 'patently offensive' material online, explaining that "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." The Court noted in particular the potential subjectivity of community assessments of what would meet these standards.[138]

Courts have also struck down 'fake news' laws that parallel Section 57's proscription of "fake" material. Thus for instance in March 2024, the Constitutional Court of Indonesia struck down provisions criminalizing the dissemination of "false news or information" or "uncertain or exaggerated or incomplete information" that causes or is likely to cause "disruption among the public."[139] Similar to the Kenyan High Court in the 'offensive communication' case, the Constitutional Court of Indonesia relied on the fact that the absence of definition of these terms "caused a disparity of interpretation in court

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use[s] electronic communication to disturb or attempt to disturb the peace, quiet or right of privacy of any person with no purpose of legitimate communication."

[136] High Court of Kenya at Nairobi, *Andare v. Attorney General et al.*, Judgment (Apr. 19. 2016), para 77.

[137] *Id.,* para 78.

[138] United States Supreme Court, *Reno v. ACLU*, 521 U.S. 844 (1997)

[139] Articles 14 and 15 of Law No. 1/1946. Article 14 stated: "(1) Any person who, by way of disseminating false news or information, intentionally cause disruption among the public shall be punishable by a maximum prison sentence of ten years. (2) Any person disseminating news or issuing information that may cause disruption among the public, while such person ought to expect that such news or information is false, is punishable by a maximum prison sentence of three years." Article 15 stated: "Any person disseminating uncertain or exaggerated or incomplete information, while such person understands [or] should at the least expect that such information would or can easily cause disruption among the public, is punishable by a maximum prison sentence of two years."

proceedings," and there would be "multiple interpretations" for whether a "situation of "disruption" was the result of a "news" being disseminated by a person."[140]

Section 57 also targets speech that "causes to deteriorate or creates the possibility of to deteriorate law and order." Such laws that ostensibly protect law and order have also been found to be impermissibly vague. When analyzing the imprisonment of a Pakistani national for allegedly facilitating incendiary speeches, the UN Working Group on Arbitrary Detention found a law in Pakistan, which prohibited the furthering of activity prejudicial to public safety or the maintenance of public order, as "extremely vague and lack[ing] the requisite degree of precision and legal certainty" such that it "le[d] to deprivation of liberty which is unreasonable or unnecessary."[141]

As per the standards explained above, Section 57 itself fails to meet the requirements of the principle of legality. The use of this law to prosecute persons for their online speech therefore violates the right to freedom of expression, and all such cases ought to be withdrawn on this ground alone.

[140] Constitutional Court of the Republic of Indonesia, Decision No. 78/PUU-XXI/2023 (March 6, 2024), para. 3.18.

[141] UN Working Group on Arbitrary Detention, *Hassan Zafar Arif v. Pakistan*, Opinion No. 8/2017, UN Doc. A/HRC/WGAD/2017/8 (June 2, 2017), paras. 8-11, 36, 38.

# CONCLUSION

With the repeal of the DSA by the CSA, there is no legal basis for cases under the ICT Act to continue. Even in the case of ambiguity, the principle of construing criminal laws narrowly and in favor of accused persons should mean that ICT Act cases stand terminated (since the CSA's savings clause failed to preserve them).

A majority of these cases are filed under Section 57 of the ICT Act—a law that violates international human rights norms—and therefore cases under this provision are *per se* contrary to international law.

The continuation of proceedings under the ICT Act leaves all those who have been charged under the law as vulnerable as ever. While the interim government has announced plans to withdraw "speech" cases under the ICT Act, such withdrawal should be undertaken as soon as possible.

## Recommendations

The interim government has a historic opportunity to restore the rule of law in Bangladesh, in line with human rights guarantees. This report reiterates recommendations made by OHCHR to the interim government to "[t]ake steps to restore democratic order and rule of law through an inclusive and participatory process guided by human rights" and "allow media to operate freely and safely without intimidation or reprisals."[142]

Specifically, we call upon the interim government to take the following measures immediately:

- Withdraw all cases pending under the repealed provisions of ICT Act;
- Use objective criteria to categorise cases under the cyber-laws as "speech offence" related and "computer offence" related and make the basis of such categorisation public;
- Immediately and unconditionally release all those detained under the ICT Act, DSA or the CSA where charges are based on their online speech;
- Bring clarity in the implementation of Bangladesh's cybercrime laws and reduce vagueness in laws.

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[142] OHCHR Bangladesh Report, pg. 9-10.