



RAJSHAHI UNIVERSITY LAW JOURNAL

Vol. XI

June 2023

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Laws relating to Prosecution Service in Bangladesh: A Critical Analysis

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FACULTY OF LAW
UNIVERSITY OF RAJSHAHI

Rajshahi University Law Journal, 2023

Volume XI

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ISSN 1991-8976

Rajshahi University Law Journal
Faculty of Law
University of Rajshahi

Volume XI, 2023



Published by
Dean
Faculty of Law
University of Rajshahi
Rajshahi-6205
Bangladesh
© Reserved by the Publisher

Printed at
Uttoran Offset Printing Press, Rajshahi
Mobile: 01712-101249

Subscription Rates
For Individuals: TK 250.00 USD 30 (without postage)
For Organization: TK 300.00 USD 50 (without postage)

[Published in December 2023]

Rajshahi University Law Journal (RULJ), 2023

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Rajshahi University Law Journal

ISSN 1991-8976

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Manuscripts submitted for publication must be in three copies, double-spaced typescript or electronic print-out on A4 size (8.5"×11") white sheets with margins of 1" on all sides and pages consecutively numbered. The manuscript should have a title-page with the title of the article and the author's name, designation and contact address. The author's name or anything that may identify the author should not appear anywhere in the text paper. An abstract in English must be provided within 200-300 words at the beginning of the article. Submissions should be addressed to the Editor in Chief, Rajshahi University Law Journal, Faculty of Law, University of Rajshahi, Rajshahi 6205, Bangladesh.

Unravelling Defamation: From British India to Present-Day Bangladesh and the Need for Decriminalisation

Md. Yamin Rahman*
Riasat Azmi**

Abstract: *Defamation laws, Bangladesh stands out for incorporating them within its cyber legislation. The historical underpinnings of this retention can be traced back to the complex dynamics between the colonizer and the colonized during the codification of laws in British India. Remarkably, criminal defamation continues to persist in several Commonwealth nations, Bangladesh included. To grasp the nature of cyber defamation within the country, it becomes imperative to unravel the historical continuum that has perpetuated criminal defamation. This article embarks on a historical exploration, delving into the origins of enduring defamation laws from their inception in British India to their present-day presence in Bangladesh. Then it identifies the anachronistic characters of the defamation laws and proposes for the decriminalisation of defamation.*

Keywords: Defamation, Freedom of Expression, Freedom of Press, Colonial Laws

1. Introduction

The post-colonial independent Bangladesh, despite its journey from extreme poverty and adversity, has become a developing country but reintroduced criminal defamation in the 21st century, deviating from evolving international norms. This study reveals that Bangladesh's laws governing criminal and cyber defamation retain a colonial spirit, falling short of international standards. Such colonial-era laws frequently hindered freedom of speech and press, creating complications in the Indian Subcontinent and the spirit of colonial mindset is still haunting today's legislation. These laws contribute to two specific issues: a. The exacerbation of divisions among Indian Subcontinent's diverse population through biopolitical control. b. The perpetuation of differences and disputes related to religion and caste, supported by Indianized English laws, particularly deterrent penal laws. The Indian Constituent Assembly grappled with these

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challenges, ensuring that the guarantee of freedom of speech would not impact existing libel, slander, defamation, sedition, and similar laws.¹

The recent challenge to the legitimacy of criminal defamation in India has backfired. In the case of *Subramanian Swamy vs. The Union of India*², the Supreme Court upheld sections 499 and 500 of the Indian Penal Code, posing a threat to freedom of speech and expression in South Asian countries. In contrast, international organizations, including the United Nations Human Rights Committee (UNHRC), have consistently called for the abolition of criminal defamation, urging state parties to consider decriminalization.³

Unfortunately, Bangladesh continues to retain archaic colonial defamation and sedition laws. Criminal defamation remains in effect under Chapter XXI of the Penal Code 1860, alongside sedition⁴ and outraging religious feelings⁵ as more severe forms of defamation. The inclusion of criminal defamation in cyber laws occurred in two phases: first under section 57 of the Information Communication Technologies (ICT) Act 2006 and second under sections 25 and 29 of the Digital Security Act (DSA) 2018. While section 57 is currently ineffective, sections 21, 25, 28, 29, and 32 of the DSA continue to contain elements of criminal defamation under various dimensions.

2. Objectives and Methodology of the Study

This study follows a structured approach, first delving into international standards on freedom of speech (Chapter 3). It then analyses the four forms of defamation – general defamation, sedition, outraging religious feelings, and cyber defamation – within the context

¹ Statement by Shri Damodar Swarup Seth, Statement Regarding Article 13 of the Draft Constitution, The Constituent Assembly of India (1 December 1948); See Udit Bhatia (ed.), *The Indian Constituent Assembly: Deliberations on Democracy*, Routledge, 2018

² *Subramanian Swamy vs. The Union of India* AIR 2016 SC 2718.

³ UN Human Rights Committee (HRC), 'General Comment No.34, Article 19, Freedoms of Opinion and Expression', <https://www.refworld.org> last accessed on 13 October 2022.

⁴ Section 124, (A), *The Penal Code* 1860

⁵ Section 295, (A), *Ibid*

of colonial development (Chapter 4). The study further highlights the draconian characteristics of these laws, tracing their historical origins and assessing their compatibility with international standards (Chapter 5). Ultimately, it recommends the decriminalisation of defamation (Chapter 6).

This research employs a doctrinal study approach to examine legal texts and doctrines. It utilizes content analysis to extract qualitative data from books, legal documents, statutes, and case law, aiming to identify trends, themes, and patterns of the evolution of defamation laws within the legal field.

3. International Law Standards in Criminal Defamation, Online Contents, and Bangladeshi Laws

Bangladesh, a signatory to numerous international treaties, is obligated to uphold global human rights standards pertaining to freedom of expression. However, the terms of criminal defamation within the Penal Code 1860 and the DSA have fallen short of meeting these commitments.

The Universal Declaration of Human Rights (UDHR)⁶ serves as the cornerstone of international legislation on freedom of expression. Article 19 of the UDHR places the responsibility on the State to protect freedom of expression as a recognized right. This obligation is further solidified through Article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁷, which Bangladesh ratified in 2000, legally binding it to adhere to the established standards.

While the UDHR may not impose legal obligations on State parties, many of its provisions have gained the status of customary international law since its adoption.⁸ Additionally, Article 19 of the

⁶ UN General Assembly, 'Universal Declaration of Human Rights' [1948] 217 A (III)

⁷ UN General Assembly, 'International Covenant on Civil and Political Rights' [1966] United Nations, Treaty Series, Vol. 999, p. 171

⁸ United States Court of Appeals and Second Circuit, '630 F2d 876 *Filartiga v. Pena-Irala*' (1979) F2d 876; Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (2011); European Union, 'EU Human Rights Guidelines

ICCPR enshrines the absolute right to hold opinions, distinct from freedom of expression. This right remains inviolable, even when freedom of expression is subject to limitations. The ICCPR extends protection for the right to hold opinions in Article 19(1) and broadly defines the right to freedom of expression. It obligates the State to facilitate the exchange of information and ideas through any accessible public media, even when such content may be considered offensive.⁹

However, the broad application of this right is not without limits. Article 19(3) of the ICCPR places specific restrictions, requiring precision in legal regulations, the pursuit of legitimate aims (such as protecting the rights or reputations of others, national security, public order, public health, or morals), and necessity and proportionality in a democratic society.¹⁰

The jurisprudence of the Human Rights Committee, within the context of Article 19 of the ICCPR, underscores the vital role this provision plays in safeguarding journalistic freedom. The Committee consistently defends journalists from state intervention in their freedom of expression, even in cases of criminal defamation.¹¹ Furthermore, the right of the public to receive journalistic information is complementary to the right to impart information, as established in the Gauthier case.¹² The Human Rights Committee insists that any restriction imposed by the State must be necessary and proportionate, even when it is authorized by statute.

Instances like *Bodrozic v Serbia and Montenegro*¹³ and *de Morais v*

on Freedom of Expression Online and Offline' Foreign Affairs Council Meeting, Brussels, 12 May 2014

⁹ *Handyside vs. United Kingdom*, 5493/72, Council of Europe: European Court of Human Rights, 4 November 1976, available at <https://www.refworld.org>, last accessed 30 October 2023.

¹⁰ UN General Assembly (n 7), Article 19(1)

¹¹ *RakhimMavlonov and ShansiySa'di v Uzbekistan* [2009] CCPR/C/95/D/1334/2004; M O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34,' Human Rights Law Review, Vol. 12, 2012, pp. 627, 19

¹² *Robert W Gauthier vs. Canada* [1999] CCPR/C/65/D/633/1995.

¹³ [2006] CCPR/C/85/D/1180/2003.

*Angola*¹⁴ have seen the Human Rights Committee emphasize the significance of unrestrained expression in public debates and critique the severity of sanctions imposed by states on journalists.¹⁵

However, in Bangladesh, state actions have obstructed journalistic endeavors, with numerous journalists facing charges under the Digital Security Act before June 2020.¹⁶ This contradicts the stance of the Human Rights Committee. The UN Special Rapporteur on Freedom of Expression and Opinion has introduced a three-part test for imposing limitations on freedom of expression, covering expressions that may be subject to criminal prosecution under international law, those that could lead to civil suits, and expressions raising concerns about tolerance, civility, and respect for others.¹⁷

The Special Rapporteur has identified several vague terms that do not conform to international standards for regulating freedom of expression, including "incitement to religious unrest," "defamation of religion," "inciting to violation," "instigating hatred and disrespect against the ruling regime," "inciting subversion of state power," and "offenses that damage public tranquility."¹⁸

4. The Concept of Criminal Defamation in Bangladeshi Laws

4.1. General Defamation under the Penal Code

In English Law, defamation is generally considered a crime when committed in writing, with spoken words leading to civil actions only. However, Lord T.B. Macaulay, who codified the Penal Code 1860, held

¹⁴ [2005] CCPR/C/83/D/1128/2002.

¹⁵ UNHRC, 'Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland' available at <https://www.refworld.org>, last accessed 30 Nov 2023; UNHRC, 'UN Human Rights Committee: Concluding Observations, Italy' available at <https://www.refworld.org>, last accessed 30 Nov 2023.

¹⁶ SampadakParishad Condemns Arrest of Journalists under Digital Security Act' *The Daily Star*, 30 June 2020, available at <https://shorturl.at/ahMOQ>, last accessed 3 December 2020.

¹⁷ UNHRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Addendum, Communications to and from Governments 2011 [A/HRC/17/27]; UN General Assembly, Promotion and protection of the right to freedom of opinion and expression 2011 [A/66/290].

¹⁸ *Ibid.*

a different view. He argued that "written defamation may be contained in a letter intended for a single eye, while spoken defamation may be heard by an assembly of many thousands."¹⁹ The legislative framers of the Penal Code opted to make defamation an offense without considering its potential to incite unlawful violence, thus rejecting the distinction seen in English Law.²⁰

Bangladesh, having inherited its Penal Code from the British Empire via the Pakistan regime, has retained its essence.²¹ Interestingly, defamation in Bangladesh allows for both criminal and civil remedies to be pursued simultaneously for the same incident. The definition of defamation, as outlined in Section 499 of the Penal Code, reads:

"Whoever by words either spoken or intended to be read, or by signs or visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."²²

Section 500 of the same Code prescribes the punishment for defamation, stating: "Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with a fine, or with both."²³ The Penal Code goes further by extending liability and punishment to not only the individual making the defamatory statement but also to the printer, publisher, engraver²⁴, and even the seller²⁵ of such defamatory content.

In *A.K.M. Enamul Haque vs Md. Mizanur Rahman and others* (1992), the Court noted that while the words spoken were clearly arrogant, rude, and disrespectful, they did not imply an imputation concerning any specific person. Defamation typically entails an accusation or an allegation of fact, not just a term of abuse. To establish defamation, the Court emphasized that "the offending words spoken must contain an

¹⁹ Thomas Babington Macaulay, *The Complete Works of Thomas Babington Macaulay* (Ebook Edn, Delphi Classics 2016), Note R: On the Chapter of Defamation, para 6.

²⁰ *Ibid*, para 4.

²¹ *Bangladesh (Adaptation of Existing Laws) Order*, 1972.

²² Section 499, *The Penal Code 1860*.

²³ Section 500, *Ibid*.

²⁴ Section 501, *Ibid*.

²⁵ Section 502, *Ibid*.

imputation concerning a person with the intent to harm or with knowledge or reason to believe that such imputation will harm that person's reputation."²⁶

In addition to the mentioned legal provisions, an aggrieved individual has the option to file a compensation suit in the Civil Court. Bangladesh has established principles for the civil remedy of defamation, allowing compensation suits to be filed in appropriate cases. The determination of civil liability can follow the rules of English Common Law or be guided by principles of equity, justice, and good conscience.²⁷ A compensation suit can be filed under Section 19 of the Civil Procedure Code (CPC), 1898.²⁸

Even if a civil suit is filed for compensation as a civil wrong, it does not infringe on the right to file a criminal case, as the prescribed provisions for defamation in the Penal Code does not bar the aggrieved person the right to seek two remedies simultaneously. The right to this remedy is not a substitute for one another.²⁹ However, Section 198 of the Code of Criminal Procedure (CrPC) 1898 provides that:

No Court shall take cognisance of an offence falling under...Chapter XXI of the Penal Code...except upon a complaint made by some person aggrieved by such offence...³⁰

There are four explanations and ten exceptions to the said section 499 of the Penal Code. The Act classifies these defences under two broad headings of 'imputation of truth' and 'expressing an opinion in good faith' for the public good. Case laws show that defamation cases are generally filed against newspaper authorities commonly by the political leaders, public servants and rarely result in a conviction. However, the provision of criminal defamation, the practice and stack

²⁶ 1994 BLD 201 (High Court Division).

²⁷ 'Final Report on Whether Specific Provisions of Civil Remedy Can Be Formulated Regarding Defamation' (Law Commission Bangladesh) 81, para 22.

²⁸ *The Code of Civil Procedure*, 1908, s 19.

²⁹ 'Final Report on Whether Specific Provisions of Civil Remedy Can Be Formulated Regarding Defamation' (n 27), para 19.

³⁰ *The Code of Criminal Procedure*, 1898.

of pending caseschills media freedom because the process of litigation itself carries a penalty.³¹ For instance, in *Serajuddin and Ors. vs Md. Fakruzzaman and Ors.* (1995)³², the Upazila Magistrate of Laksham framed a charge against the petitioners under section 501 of the Penal Code. It was during the Martial Law regime of Hussain Muhammad Ershad. The complaint says that on 05-10-1989, 12-10-1989, and 19-10-1989, the weekly *Biborton* published a news heading "Who is more powerful – The President or the Minister." The prosecution alleged that by publishing the said news, Honourable President Hussain Muhammad Ershad and affairsof Bangladesh Telegraph and Telephone Board, including the complainant, were defamed andlowered in the estimation of the public by publishing a false and manufactured story. However, the High Court quashed the proceedings under the exception of expressing any opinion in good faith.

In *Shahadat Chowdhury vs Md. Ataur Rahman* (1996)³³, The accused-petitioner Shahadat Chowdhury, the Editor of the weekly *Bichitra*, published news on the corruption of a public official. The petitioner showed thatthe Bureau of Anti-Corruption held an enquiry. A report was submitted by it, butthat corrupt official kept the same in hibernation. The Court quashedthe proceedings because of the failure of the petitioner to claim the alleged report to beentirely baseless.

There are several other case laws of similar issues thatcan be mentioned. To name a few: *Kamar Uddin Chowdhury vs State and Ors.* (2018)³⁴, *Shafiqur Rahman and Ors. vs The State* (2012)³⁵, *Bangladesh Krishi Bank vs State and Ors.* (2001)³⁶, *Afzal Hossain vs S.M. Selim Idris* (1995)³⁷. In addition to all these provisions mentioned above, writing,

³¹ 'Defamation' *The Daily Star*, 13 November 2018, available at <https://www.thedailystar.net/>, last accessed 24 September 2020.

³² LEX/BDHC/0307/1995 Bdlex (High Court Division).

³³ *Ibid*

³⁴ LEX/BDHC/0042/2018 Bdlex (High Court Division).

³⁵ *Shafiqur Rahman and Ors vs The State* (2012) LEX/BDHC/0304/2012 Bdlex (High Cour Division).

³⁶ LEX/BDHC/0290/2001 Bdlex (High Court Division).

³⁷ 1995 BLD 362 (High Court Division).

printing, publishing, distributing, or selling any report or magazine containing any harmful or harmful or obscene subject was a punishable offence under Sections 16 and 17 of the Special Powers Act, 1974. However, as per the journalists' demands, these two sections have been repealed by the Special Powers (Amendment) Act 1991.³⁸ Since then, the provisions in the Penal Code were the only criminal rules regarding defamation.

4.2. Sedition and Outraging Religious Feelings

Sedition is a rigorous variant of libel published or attempting to publish with an intent to bring hatred, contempt, or exciting disaffection towards the government.³⁹ It is immaterial whether the seditious publication caused any mutiny or rebellion or any sort of disturbance. If the accused intended to excite rebellion or disturbance, the act doubtlessly falls within the ambit of sedition.⁴⁰ The punishment for sedition is life imprisonment or any shorter term, to which fine maybe added, or imprisonment which may extend to three years, to which fine may be added, or with fine.⁴¹

The legislative history of sedition is fascinating. The draft prepared by the Indian Law Commissioners in 1837 contained a provision on the topic, and it proposed to include it in the Indian Penal Code (IPC). It was omitted from the IPC as enacted in 1860 for some unaccountable reason. In 1870, section 124A was inserted by the IPC (Amendment) Act.⁴²

There is another type of criminal libel titled 'Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs' under section 295A of the Penal Code. The section states that any person by publishing or verbally or by any other

³⁸ 'Final Report on Whether Specific Provisions of Civil Remedy Can Be Formulated Regarding Defamation' (n 27), Para 13.

³⁹ Section 124 (A), *The Penal Code*.

⁴⁰ Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *The Indian Penal Code*, 19th edn, The Bombay Law Reporter Office, 1948, P. 99

⁴¹ *The Penal Code*, s 124A.

⁴² KN Chandrasekharan Pillai and Aquil Shabistan, *Essays on the Indian Penal Code*, Indian Law Institute, 2005, P. 281

representation, insults any religion or religious beliefs shall be punished with imprisonment of a maximum of two years or with fine or with both.⁴³

This provision was also added later in the Penal Code in 1927. There are peculiar caselaws that have created ambiguity in society and harassed many accused persons in a vicious circle of malicious prosecution. One such case law is *Shamsuddin Ahmed vs The State* (2000), where the prosecution brought the allegation for writing a story in the Daily Jana Kantha that he claimed to have hurt his religious belief as a Muslim. After meticulously checking the publication, the High Court Division held:

"It was written against the narrow interpretation or distorted meaning given or spread out in our country, specially, by less educated and half-educated fanatic religious Mollas and Islamic Fotowabaj. Reading of the entire caption and publication establishes that its inner or real meaning is not at all intended to hit the feeling of any Muslim or to distort the meaning of the said Sura of the Holy Quran."⁴⁴

There are a handful number of similar case laws where the courts find no merit on the accusation, hence quashed. But, they did have a significant impact on society. To name a few: *Md. Sahabuddin Chisty and Ors. vs Moulana Md. Nurul Huda Mondal and Ors.* (2005)⁴⁵, *Dr. Taslima Nasrin vs Md. Nurul Alam and Another* (1995)⁴⁶, *Dr. Ahmed Sharif vs State and Another* (1994)⁴⁷. However, interestingly, in *International Book Agency Ltd. vs. The State* (2001), the Court upheld the government order of impugning a magazine to save the religious feelings. The Court highlighted that:

"It does not matter whether a class of citizens can read and understand the offensive material; if there is an

⁴³ Section 295 (A), *The Penal Code*, 1860

⁴⁴ *Shamsuddin Ahmed and Others vs The State and another* LEX/BDHC/0150/2000 Bdlex (HCD).

⁴⁵ LEX/BDHC/0210/2005 BdLex (HCD).

⁴⁶ LEX/BDHC/0070/1995 Bdlex (HCD).

⁴⁷ LEX/BDHC/0005/1994 Bdlex (HCD).

apprehension that on seeing the publication containing the writings resembling Arabic on the soles of feet Muslims, irrespective of being readers or not of the magazine, become enraged on seeing the publication, the Government is required to take steps, under section 99A of the Code."⁴⁸

4.3. Cyber Defamation

The Information and Communication Technology (ICT) Act 2006 marked the beginning of criminal defamation, sedition, and hurting religious beliefs within cyber space's ambit. The highly controversial section 57 of the ICT Act criminalised any deliberate publication or transmission of fake and obscene materials that deteriorate law and order, prejudice the image of the State or person or cause hurt to any religious belief.⁴⁹

The punishment under section 57 was excessively harsh. It was a minimum of 7 to a maximum of 14 years imprisonment with a fine which may extend to taka ten crores.⁵⁰ This provision faced high levels of controversy from various human rights activists and researchers, termed a repressive law.

According to the Cyber Security Tribunal prosecutor, at least 740 cases were filed under the ICT Act throughout the country till July 2017, and 60% of them are under Section 57.⁵¹ Section 57 of the ICT Act was subsequently repealed, but it did not mark any change in the cyberspace apprehension of criminal defamation. It was replaced with the even more repressive Digital Security Act (DSA) 2018, legislation that only strengthened the State's grasp on limiting the citizens' freedom of expression. The DSA introduced non-bailable penalties for at least 14 offences. For starters, the most controversial one, Section 32,

⁴⁸ *International Book Agency Ltd vs The State* (2001) LEX/BDHC/0259/2001 Bdlex (HCD).

⁴⁹ *The Information and Communication Technology Act*, 2006.

⁵⁰ Section 57 (2), *Ibid*.

⁵¹ Tribune Desk, 'Section 57 Cases Will Continue' *Dhaka Tribune*, 29 January 2018, available at <https://www.dhakatribune.com/bangladesh/law-rights/2018/01/29/section-57-cases-will-continue>, accessed on 3 December 2020.

correlates with the Official Secrets Act, 1923,⁵² in the digital medium. This time, each of the offences got more severe punishment on the commitment on the second time or recurrently by the same person. In this section, the punishment for committing a second time or recurrently is life imprisonment or with a maximum fine of 1 crore taka or both.⁵³ It is usually the public figures, political and administrative leaders, businesspersons, and those close to them, who use these laws. The whole thing is a standing temptation for those who wish to control and a terrible threat to freedom of speech.

Therefore, it is visible from the abovementioned provisions that although the world has seen the advent of new mediums of communication through various technological inventions, the legislature of Bangladesh is still carrying on the colonial legacy of deterrent penal laws. How these provisions do not meet the global standards shall be discussed in the subsequent chapter?

5. Anachronistic Characteristics of Criminal Defamation in the Penal Code and Cyber Laws

5.1 Based on Colonial Stereotype of Criminalisation

The Penal Code's approach to defamation differs from English Common Law. Notably, the utilitarian influence on English law in the 19th century, particularly through figures like Jeremy Bentham, John Stuart Mill, and John Austin, shaped the introduction of criminal defamation and related offenses in the British Empire's codification process in India. Thomas B. Macaulay, who chaired the First Law Commission of British India in 1834 and was responsible for drafting the Penal Code 1860, saw India's population as diverse, primarily divided along religious and caste lines. He believed that many innocent practices of one group might horrify another, justifying the criminalization of defamation to prevent mutual harm.⁵⁴

Macaulay's commentary reflects the British Monarchy's policy, emphasizing uniformity when possible, diversity when necessary, and

⁵² Act No XIX of 1923

⁵³ Section 32 (2), *Ibid.*

⁵⁴ Macaulay (n 19), Note R: *On the Chapter of Defamation*, para 10

certainty in all cases.⁵⁵ The Law Commission aimed to adapt governing principles to accommodate the varied habits, character, and institutions of the diverse Indian population.⁵⁶ During the colonial period, the focus was on deterrence theory as a means of punishment⁵⁷, and criminalization spread rapidly due to the lack of a democratic environment and political conditions that necessitated legal reform.

British India, the codification process spread promptly and quickly. One palpable explanation is that the colonial lawmakers "did not face the political conditions that grounded legal reform at home, such as a growing civil society and realm of public opinion."⁵⁸ The Monarchy "emerged as an authority to criminalise and prescribe punishment for any act it pleased"⁵⁹ by inclining the very act into the offence's definition. The absence of a constitutional check paved the way for unprincipled criminalisation.⁶⁰ On the one hand, Macaulay, along with his Law Commission Members, "transacted with the traditional criminal law and reinterpret it in ways more appropriate to the premises of British public paramountcy."⁶¹ On the other, "many of the offences described in the Penal Code were basically crimes under English criminal law but were presented in a manner which gave them the air of indigenous conventions."⁶²

While the British portrayed codification as a modernization initiative for India's legal system, it was primarily a reflection of colonial culture, ideological disparities, and an authoritarian regime that did not rely on public support.⁶³ The colonial power dynamics exacerbated the

⁵⁵ 'East-India Company's Charter, Hansard, 10 July 1833,' available at <https://api.parliament.uk>, last accessed 27 June 2020.

⁵⁶ Kartik Kalyan Raman, 'Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence,' *Modern Asian Studies*, Vol. 28, 1994, P. 739.

⁵⁷ *Supra* note 19

⁵⁹ Muhammad Mahbubur Rahman, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity*, Brill Nijhoff, 2017, P. 106

⁶⁰ *Ibid.*

⁶¹ *Supra* note 63

⁶² *Ibid.*

⁶³ Marc Galanter, 'The Displacement of Traditional Law in Modern India', *Journal of Social Issues*, Vol. 24, 1968, P. 65

differences between Europeans and natives⁶⁴, ultimately leading to the transplanting of English common law to India and sparking Indian nationalism.⁶⁵

The Penal Code underwent numerous amendments⁶⁶, including the inclusion of sedition in 1870 and the subsequent increases in punishment. Outraging religious feelings of any class was added as an offense in 1927, with the press being a primary target of the sedition law in its early years.⁶⁷ Various laws were enacted in response to nationalist movements and mass uprisings, such as the Press Act of India 1910, which prohibited publications that aimed to bring contempt to the monarchy or British India's administration. Dhavan observes that "equipping the imperial state with the power to crush rebellion, silence discontent, prohibit censor and forfeit unpalatable pamphlets and literature, and generally curb social and political protest."⁶⁸

More laws were later enacted, keeping in mind the nationalist movement's situation and taking lessons from the Sepoy Mutiny of 1857 to various other mass uprisings.⁶⁹ Such an Act is the Press Act of India 1910, which outlawed any publications which aimed to 'bring into hatred or contempt his Majesty...or the administration of justice in British India...under the suzerainty of his Majesty.'⁷⁰

While Bangladesh has gained independence, remnants of colonial-era laws, including defamation, sedition, and outraging religious feelings, remain enshrined in the Penal Code 1860. Additionally, Bangladesh

⁶⁴ *Supra* note 58

⁶⁵ David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century,' *Modern Asian Studies*, Vol. 32, 1998, P. 513

⁶⁶ Borhan Uddin Khan and Quazi Mahfujul Hoque Supan, *Encyclopedic Compendium of the Laws of Bangladesh*, Vol. 1. (Bangladesh Legal Aid and Services Trust 2002).

⁶⁷ Section 295 (A), *The Penal Code*, 1860

⁶⁸ Rajeev Dhavan, 'Kill Them for Their Bad Verses: On Criminal Law and Punishment' in Rani D Shankardass (ed), *Punishment and the Prison: Indian and International Perspectives*, Sage Publications, 1999.

⁶⁹ See Jill C Bender, *The 1857 Indian Uprising and the British Empire*, Cambridge University Press, 2016.

⁷⁰ Section 4, *The Press Act of India*, 1910.

has extended criminal defamation provisions to its Cyber Laws, reflecting the enduring influence of colonial-era legal constructs in the present day.

5.2 Freedom of Speech and Defamation

The colonial legacy of the State emerging as a litigant in public interest led to the suppression of individual victim's interests, culminating in a State-centric legal framework.⁷¹ This framework sought to provide legal predictability, categorizing defamation as a criminal offense in the Penal Code, paving the way for later stringent libel-related amendments such as sedition and outraging religious feelings.

The State's role as a litigant in defamation cases is unwarranted, as the primary purpose of the criminal justice system is to safeguard society rather than individual reputations. Reputation is a facet of personal property and should not be wielded as a pretext for stifling freedom of speech under the guise of public interest.

In defamation cases, it is insufficient to merely speak the truth⁷²; the statement must also serve the "public good." However, defamation should not overshadow freedom of speech or be treated as a crime against society. It, by nature, suppresses freedom of speech, casting a shadow over not only individual reputation but also the broader domain of government, State, and religion, evolving into stringent laws like sedition and religious sentiment offenses.

Defamation cannot be neatly categorized as a crime that serves genuine public interest. Instead, it infringes upon freedom of speech, one of the most vital public interests. Many defamation cases, including those involving religious offenses, have roots in personal vendettas or animosity, undermining freedom of speech.

Sadly, the interpretation of constitutional law in many places, including Bangladesh, remains entrenched in colonial paradigms, resulting in the framing of restrictions on freedom of speech and the enactment of deterrent laws. These perspectives emphasize limiting people rather than liberating them from historical constraints. While

⁷¹ See Heike Jung, "The Renaissance of the Victim in Criminal Policy: A Reconstruction of the German Campaign" in Roger G Hood, Lucia Zedner and Andrew Ashworth (eds), *The criminological foundations of penal policy: essays in honour of Roger Hood*, Oxford University Press, 2003.

⁷² Section 499, *The Penal Code*, First Exception.

the Constitution of Bangladesh does not explicitly prohibit criticism of religion or the State, defamation laws, with their overly broad definitions, enable prosecution under the pretext of religious or State insults.⁷³

Tolerance and rational criticism, which are welcomed worldwide, can be directed towards the government, religion, individuals, or any subject. However, the loose definitions in defamation laws offer little clarity and can lead to the prosecution of virtually any statement as a religious or State insult.

Although India repealed a section similar to Bangladesh's ICT Act Section 57 due to concerns about freedom of speech, Bangladesh reintroduced the provisions of Section 57 under Sections 28, 29, 31, and 32 of the Digital Security Act. These sections have been controversial, with numerous cases seemingly based on political vendettas or other ulterior motives. Many such cases have been deemed questionable⁷⁴, and they often revolve around criticism of political leaders, influential figures, or religious matters in the context of defamation.

5.3 Expanding Nature of Defamation

Defamation law has an expanding nature, and the expansion is towards more deterrent penal sanctions. It is the British Empire who brought the defamation into the realm of public interest and later expanded it to religious feelings and State-centric crime such as sedition. The post-colonial regimes kept it alive and expanded it to cyber laws. As a result, the cyber defamation law has evolved into a mechanism that includes general defamation, sedition, and outraging religious feelings on the broader terms.

⁷³ *Shamsuddin Ahmed and Others vs. The State and another* (n 35). The High Court in this case affirmed that: The Constitution of Bangladesh also allows some liberty and freedom to make free and fair criticism of any religion or faith.

⁷⁴ Shahnaz Parvin, 'Five Major Incidents in Bangladesh Surrounding Fake News' *BBC News Bangla* 14 November 2018, available <https://www.bbc.com/bengali/news-46126648>, accessed 27 June 2020 and ShakhawatLiton, 'Bangladesh: Abuse of Cyber Law Finds No Limit,' *International Press Institute*, 25 July 2018

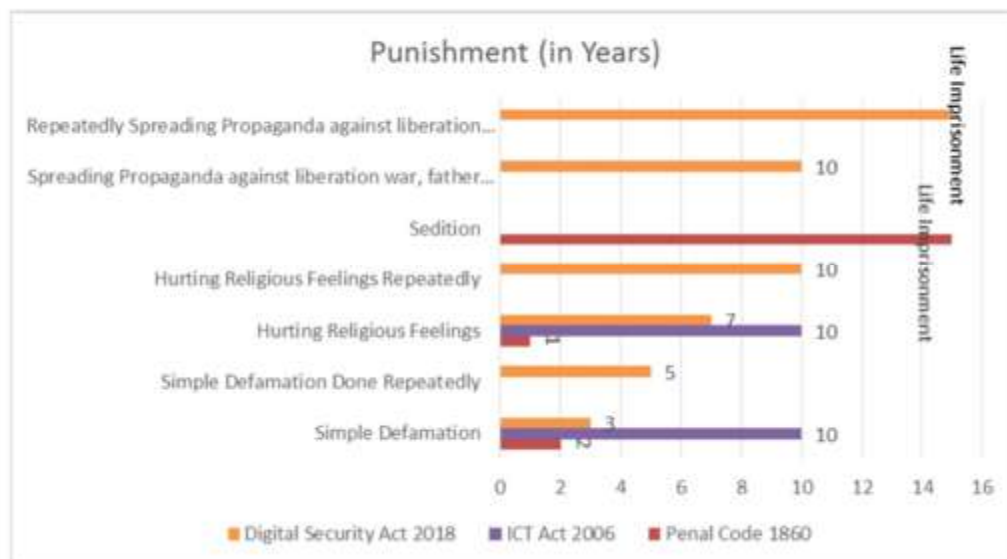


Figure 1: Punishments under Different Acts

5.4 Right to reputation does not mean to initiate criminal prosecution

Although, Article 31 of the Constitution of Bangladesh provides for equal protection of the law and protects the reputation of the individual. However, there is no reason to conclude from the purpose of this section that the reputation should be protected only through criminal prosecution. Personal reputation can also be well preserved through Civil Courts.

In the case of a claim for compensation under civil damages, a plaint has to be submitted specifying the amount of money claimed, and *anad valorem* court fee is required to be paid. The Law Commission of Bangladesh has claimed in support of criminal defamation that if one loses a case in a civil court, he/she will still have to pay a considerable amount of money as court fees. Because of these circumstances, no person afflicted with defamation is at all interested in resorting to civil remedies except the wealthy.⁷⁵

It is not clear why the Law Commission viewed it negatively. Instead, because of the availability of criminal and civil remedies for the same

⁷⁵ 'Final Report on Whether Specific Provisions of Civil Remedy Can Be Formulated Regarding Defamation' (n 33), Para 23.

offence and the absence of fear of losing money in criminal cases, people, particularly the powerful and wealthy ones are naturally more inclined to file criminal cases.

It is not fair to consider a law good or bad based on the certainty of winning a case. Instead, the standard rule should be to bear the loss if one loses in a false case or fails to prove the allegation. Therefore, court fees may be reduced rationally, which will help in actual cases' speedy disposal.

5.5 Opposite to the Doctrine of Presumption of Innocence

Public interest has been enumerated in Bangladesh's defamation laws as a part of the burden of proof in such a way that it falls on the shoulder of the defence. Reputation is a metaphysical property, and defamation initiates criminal prosecution because the doctrine of presumption of malice encompasses the defamation law. Jurists keep this doctrine out of criminal jurisprudence because it is not infallible regarding the burden of proof.⁷⁶ The established principle of a criminal trial is innocent until proven guilty that is the doctrine of presumption of innocence. Therefore, the defamation laws are a violation of the general doctrine of presumption of innocence.

5.6 Disproportionality in Severity and Punishment

Reasonability should be based on the doctrine of proportionality. Nevertheless, defamation has been classified as a warrant case in the Penal Code. The Penal Code generally classifies an offence punishable by three years or more as a warrant case. The offences under sections 500, 501, and 502 relating to defamation despite being punishable by two years of imprisonment, the CrPC in its Second Schedule has classified it as a warrant case in column 4.

According to the Law Commission, the then legislators attached great importance to this crime.⁷⁷ We do not understand why the Law Commission of Bangladesh has looked at it positively. This statement of the Law Commission serves as proof of our statement that the

⁷⁶ *Subramanian Swamy vs The Union of India* (n 3).

⁷⁷ 'Final Report on Whether Specific Provisions of Civil Remedy Can Be Formulated Regarding Defamation' (n 27), Para 24.

legislators of those days placed this undue importance on far-reaching repressive thinking, in stark contrast to the doctrine of proportionality.

5.7 Vagueness in *locus standi*

Section 198 of the CrPC distinguishes plaintiffs in defamation cases, allowing both the affected individuals and public prosecutors to file cases. The State's involvement in these cases has implications for freedom of speech.

During the enforcement of Section 57 of the ICT Act 2006, the issue of locus standi was ambiguous as Section 57 operated as a special law. Nonetheless, the CrPC provisions from 1898 were applicable. Section 198 of the CrPC, which mandates that an aggrieved person must file a complaint for offenses in Chapter XIX of the Penal Code, was seemingly not consistently adhered to. In many cases, individuals unrelated to the matter became plaintiffs under Section 57.

With the enactment of the Digital Security Act 2018, Section 57 of the ICT Act was repealed, and Section 50 of the Digital Security Act extended the application of CrPC 1898's Section 198 to cyberlaw cases. However, deviations from Section 198 are evident in cyber defamation cases, where complaints are based on people's comments, especially on social media platforms like Facebook and Twitter, allowing individuals who are not directly aggrieved to become litigants. This departure from the *locus standi* is rarely questioned by the courts, highlighting a breach of legal procedure.

5.8 Concerning provisions of the Digital Security Act, 2018

The Digital Security Act encompasses several concerning provisions. Section 21, addressing propaganda or campaigns against the Liberation War and related ideals, lacks clear definitions for key terms, potentially enabling their misuse to suppress government criticism. Section 25(1)(a) mirrors colonial-era criminal defamation elements but uses overbroad language, leaving undefined terms like "false information" and "offensive," thus jeopardizing freedom of expression. Subsection (b) introduces vague terms such as "spreading confusion" that could be exploited to stifle criticism directed at the government. Section 28, criminalizing the publication of information harming religious

sentiment, falls short of international freedom of expression standards, neglecting to strengthen freedom of religion. Section 29 introduces criminal defamation, mirroring a colonial mindset and disregarding international human rights standards. Section 31 outlines punishments for online content causing discord, using undefined terms like 'communal harmony,' 'law and order,' and 'adversity,' which could be manipulated to hinder journalistic and academic pursuits and penalize government critique. Furthermore, Section 32 prohibits breaches of government secrets, potentially obstructing legitimate journalistic, academic, and research activities.

6. Conclusion

Defamation of an individual by another individual is a civil wrong or tort, pure and simple for which common law remedy is an action for damages. Defamation was also a criminal offence in England. Later, however, the nature of defamation cases in England itself changed. As the successor of common Law, Bangladesh has accepted defamation as a criminal offence and continued the colonial spirit of governance. International Law provisions guides to decriminalise defamation law, but in our emerging democracies, it is still not only an embodied reality but also a repressive provision that pervades cyberlaw. Unquestionably people need the right to defend their reputation against defamatory statements if they consider themselves to have been defamed. Decriminalisation of defamation does not mean the abolition of defamation. It simply means there will be only civil responsibility in defamation cases. Nevertheless, from this study of history, it becomes clear how criminal defamation came to Bangladesh and has survived for generations. In the case of criminal defamation in cyberlaw, the origin of defamation itself must be contemplated. The abolition of criminal defamation is essential for the release of freedom of speech.