



**DISSERTATION**

**ON**

**A Critical Analysis on the Evidence (Amendment) Act, 2022**

**Course Title: Supervised Dissertation**

**Course Code: LAW 406**

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**Date of Submission**

**10.01.2023**

**Word Count: 9675**

## **Consent Form**

The dissertation “**A Critical Analysis on the Evidence (Amendment) Act, 2022**” prepared by **Rabeya Sultana, ID- 2019-1-66-034** submitted to **Dr. Nabaat Tasnima Mahbub, Assistant Professor, Department of Law** for the fulfillment of the requirements of Course 406 (Supervised Dissertation) for LL.B.(Hons.) degree offered by the Department of Law, East West University is approved for submission.

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## **Acknowledgement**

At first, I would like to express my gratitude to the respected Chairperson and Assistant Professor of Department of Law, Dr. Md. Mehedi Hasan for facilitating the research program with such discipline. I would also like to express my gratitude and appreciation to my supervisor, Dr. Nabaat Tasnima Mahbub (Assistant Professor, Department of Law, East West University) with her guidance and advice helped me to complete this Dissertation. And I want to thank all of my faculty members of the law department who guided me to overcome my weaknesses throughout the journey of studying Law. Lastly, thanks to my family members and friends who supported me and encouraged me to pursue my dream.

## **Declaration**

I, Rabeya Sultana, bearing student ID: 2019-1-66-034, declare that the work in this dissertation titled “A Critical Analysis on the Evidence (Amendment) Act, 2022” has been carried out by me. This is my original work and information used for this research has been duly acknowledged. This work has not been published in any journal, newspaper or article.

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## **Abstract**

Advancement of technology has really changed the lifestyle of people. Way of committing crimes have also changed with advance technology. The Evidence Act, 1872 were kept untouched since 1973. Recently an amendment has come which has addressed some of the flawed provisions. To ensure justice some amendment for example admissibility of digital evidence and character evidence are necessary and this amendment has addressed both of them. Now the current dissertation attempts to analyze the amendment, address the loopholes and limitations.

## List of Abbreviations

CD	Compact Disc
DVD	Digital versatile disc
UNCITRAL	United Nations Commission on International Trade Law
HM-DEAA	Harmonized Model for Digital Evidence Admissibility Assessment
ISO	International Organization for Standardization
IEC	International Electrotechnical Commission
QSO	Qanun E Shahadat
PDA <sub>s</sub>	Personal Digital Assistants
PED	Personal Electronic Devices
CCTV	Closed-circuit television
DEFR	Digital Evidence First Responders
DES	Digital Evidence Specialists
UK	United Kingdom



# **Chapter 1**

## **Introduction**

### **1.1. Introductory Statement**

Evidence law was enacted in 1872 and has been operating as principal law regulating evidence in Bangladesh since 1971 through the Laws Continuance Enforcement Orders, 1971. Regarding substantive and procedural regulation of evidence in Bangladesh, evidence is considered as a parent law. In trial stage law of evidence have its most active role to play since based on evidence the court can make inference. There are enormous errors and conflicting provisions which need to be amended and few of them are to be amended but whether they are properly incorporated in the Evidence (Amendment) Act, 2022 or not this research will find out that. Character assassination in rape cases have always been a matter of concern and since every crime has a digital artifact and in Bangladesh there were no provisions or laws which covers digital evidence, the research will critically analyze the effectivity of the provisions which will be amended.

### **1.2. Research Questions**

Research questions of this papers will be of two kinds which includes main and subsidiary questions. The research questions will be i) to what extent the amendments brought by the Evidence (Amendment) Act, 2022 may be effective in achieving its objective? ii) What are the amendments that have been proposed by the Evidence (Amendment) Act, 2022? iii) What are the limitations and loopholes of the Amendment and what should be done to make improvements in the Amendment?

### **1.3. Research Justification**

On the basis of evidence presented in the court, a court determines or renders a judgment. In both civil and criminal procedure evidence law holds severe relevance. But when a law which has such a huge impact on the whole legal procedure of a country has enormous error or a law which is not updated with time, it becomes a challenge to ensure justice. Bangladesh has adopted necessary measures conforming to the changing necessity of laws and lifestyle of people but yet to change few provisions in evidence law which need to be equipped themselves properly in order to be applicable in appropriate cases. Since the enactment of the evidence law, no noteworthy amendment was done. An initiative is taken and a bill has passed regarding the amendment of Evidence law. Through this research the whole amendment will be scrutinized and tenuous points will be find out. Thus, the fundamental goal of this research is to find out that whether the drafted amendment has addressed the necessary provisions or not and if not what will be the recommendation and suggestions.

#### **1.4. Research Methodology**

The research will be conducted by following the qualitative research method. It will be based on various books, journals, articles on relevant provisions of Evidence law. The primary source of this dissertation is the Acts of Parliament and Judicial decisions. The secondary source is books, Commentaries, Journal Articles, Review, Theses, etc.

#### **1.5. Literature Review**

The Evidence Act, 1872 is considered the backbone of justice system because every statute is dependent on it. After some decades necessary provisions of this act is amended. This research is depend on several journal, articles and blogs. One of them is “Evidence (Amendment) Act, 2022: An Expert’s View” by Quazi Mahfujul Hoque Supan, provides a clear opinion on the amended provisions. Another one is “The long road to the repeal of section 155(4): Will questions about a rape survivor’s ‘character’ finally be banned in court? by Taqbir Huda, the author discussed the necessity to repeal section 155(4) of the Evidence Act. Some points are also taken from “ Evidence act amendment: Draft leaves one questionable section alone” by Ashutosh Sarker, this author criticized the drafted amendment for keeping the scope to assassinate the character of a rape victim. And lastly to compare with other countries present scenario relating digital evidence and character assassination essence from three journals are taken, those are “The Admissibility of Electronic Evidence in Court (A.E.E.C.): Fighting against High-Tech Crime—Results of a European Study” by Fredesvinda Insa, “Admissibility of electronic evidence: an Indian perspective” by Vivek Dubey and “DIGITAL EVIDENCE AND THE ADMINISTRATION OF CRIMINAL JUSTICE” by Dr. Gufran Ahmed.

#### **1.6. Dissertation Outline**

Chapter 1 of the dissertation describes the significance of evidence law in the context of Bangladesh, the introductory statement, research questions, research justification and research methodology. Chapter 2 focuses on the history of Evidence law, theoretical basis of the amended laws of Evidence, importance and development of evidence law in Bangladesh. Chapter 3 provides an analysis of the amended provisions including their limitations. In Chapter 4 of the dissertation, the focus will be on Comparison and compatibility of the proposed amendments in the light of International and other domestic standards. Chapter 5 of the dissertation will comprise overall findings and recommendations.

## Chapter 2

### Law of Evidence in Bangladesh: History, Theory & Importance

#### 2.1. Introduction

Before getting into the history, theory and its development, what is evidence and from where this word has come from should be known. The word 'Evidence' is derived from the Latin word 'evidentia', which means to discover clearly or recover something clearly. Definition of Evidence is given in the Evidence Act, 1872 but legal experts have also given definition. Prof. Taylor defined "the word Evidence which includes all legal means exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation." Evidence is needed to prove the facts in issue or the relevant facts. Since Evidence Law plays an essential role in legal system before analyzing its amendment, its history, theoretical basis and importance will be discussed in this chapter.

#### 2.2. History of Law of Evidence

Evidence law is an important branch of procedural law (Adjective Law) of the country. Conventional laws can be divided into two categories; namely- (1) Substantive law and procedural law. Independent substantive law is the law of human rights and responsibilities. And procedural law is how the independent property law will be applicable in the case. Some rules and regulations have to be observed in the conduct of this trial. The collective name of these rules is 'Evidence Act'. In 1871, during the British period, Sir James Stephen drafted this law. It was introduced in our country in 1872 AD and till now it is in operation in Bangladesh with partial modification. At the beginning of British rule there was no statutory law called evidence law. Trials were conducted according to the Muslim Evidence Act in the village Courts and the principles of the British Evidence Act were followed in the major cities. Finally, the Act No. 10 of 1835 AD introduced and some improvements were made to the law. After this, after the passing of the Eleven Amendment Act, several improvements were made to the Evidence Act by introducing Act No. 2 of 1855 AD. But still there are many loopholes in the law. By introducing the present Act in 1872, some the loopholes were removed.<sup>1</sup>

Bangladesh was a province of Pakistan (East Pakistan) formed in the Indian subcontinent in 1947 before becoming an independent state in 1971. Before that, India was a British colony for about 200 years. The Evidence Act of the Mughal period was abolished as part of the gradual introduction of British law in India to replace the Mughal legal system. Kolkata, Bombay, India (now Mumbai) and Madras (now Chennai) Presidencies started using the rules of English Evidence Act, but no law was passed for the areas outside these areas and the rural areas at that time. As a result, different laws were in force in different areas in British India at that time. Later the British government started working towards a comprehensive law for the entire region. Different laws are passed at different times. The 5th Report of the Third Law Commission constituted in 1861,

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<sup>1</sup> Md. Altaf Hossain, The Evidence Act (6<sup>th</sup> edition, 2009).

submitted in August 1868, was on the Law of Evidence. In 1868 Sir Henry Maine drafted an Evidence Bill. When it was presented to the Legislative Council, it was referred to a Select Committee. However, it was rejected as not suitable for the region. Sir Fitzjames Stephen then drafted a new bill. In 1871 it was presented to the Legislative Council. It was passed as The Indian Evidence Act, 1872 on 15 March 1872 for the whole of British India and came into force from 1 September 1872. The Act came into force in Pakistan from 15 August 1947 and later in Bangladesh from 26 March 1971. The Act is known as The Evidence Act, 1872 (Act No. I of 1872) in Bangladesh. Later, by The Law of Evidence Amendment Act, 1956, a new section was added in section 74 on the issue of forgery of copies of common records. The amendment, however, came into effect on 15 August 1947. Evidence law continues to develop in Bangladesh through parliament and courts.<sup>2</sup>

The Preamble to the Evidence Act acknowledges that the Act of 1872 was intended to consolidate, define and amend the existing law at that time. However, the Evidence Act of 1872 cannot be called an Exhaustive Code. It can be seen that apart from the Act of 1872, there are provisions related to evidence in various other places. For example, Order No. 26 of the Code of Civil Procedure empowers the Civil Court to take evidence or inquire into facts through local inquiry<sup>3</sup>. On the other hand, a look at the Anti-Corruption Act<sup>4</sup> will show that several exceptions have been made to the provision of presuming the accused innocent before the guilt is proved beyond a reasonable doubt. Chapter 41 of the Code of Criminal Procedure<sup>5</sup> contains several rules of evidence. See again, Bankers Books Evidence Act 1891; Commercial Documents Evidence Act 1939; Acts like the Limitation Act 1908<sup>6</sup> make many provisions relating to evidence. Section 2 of the Evidence Act of 1872 can also be seen in this regard. The existence of evidentiary provisions of any other law, rule or policy other than the 1972 Act is hereby acknowledged.<sup>7</sup>

Moreover, with the passage of time, according to the needs of the age, the application of evidence law in the court and the development of special principles related to evidence continues. Examples include increasing the onus of proof on the husband in cases of wife murder<sup>8</sup>, and reliance on expert opinion in signature/tips evidence. Currently, due to the increase in violence against women, the court ruling has stipulated that if the wife dies while living with the husband, the husband must explain the cause, otherwise the husband is responsible for the death of the wife. As a result he has to prove that he did not kill his wife<sup>9</sup>. Again, due to the progress of science, expert opinion is now being given more importance in proving the questionable signature tips of documents through comparison in court.<sup>10</sup>

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<sup>2</sup> M. Jashim Ali Chowdhury, সাক্ষ্য আইন: সহজ পাঠ (2<sup>nd</sup> Edition, 2017) 4.

<sup>3</sup> Code of Civil Procedure, 1908, Order 26 Rule 12

<sup>4</sup> Anti-Corruption Act, 2004

<sup>5</sup> Code of Criminal Procedure, 1898

<sup>6</sup> Limitation Act 1908, S 19,20

<sup>7</sup> Ibid; page 5

<sup>8</sup> State Of Rajasthan vs Thakur Singh, Criminal Appeal No. 357 of 2005

<sup>9</sup> Ganeshlal vs State Of Maharashtra, 1992 SCR (2) 502, 1992 SCC (3) 106

<sup>10</sup> Ibid; page 6

### **2.3. Theoretical foundations of the Evidence Act, 1872**

Evidence law is specifically established based on various abstract sources. A key element of the statutory basis of the law of evidence is that evidence of the facts most relevant to the facts in question must be adduced. The basic principles of law of evidence have been established on the following points. Some of them are given below-

- (1) All the facts which are necessary to prove the fact in question, is the law of evidence must be relevant and acceptable accordingly.
- (2) All facts other than written facts shall be proved by oral evidence. And if any object is involved in the incident, it must be presented before the court.
- (3) Written content by the original document i.e. by the person on whom it is written or in particular cases by facsimile thereof or by oral testimony of its contents can be proved.
- (4) Hearsay evidence shall not be admissible except under the condition laid down in the act.
- (5) Courts can only make inferences about facts under Evidence Act. Although in some cases court is bound to make presumption.
- (6) If any person by his declaration, act or omission intentionally causes any other person to believe anything to be true or does any act on that belief, the first person in any suit or proceeding between the two persons or their representatives cannot deny the authenticity of the object.
- (7) No specific number of witnesses is required to prove any event.
- (8) A mute may testify by sign or by writing.
- (9) First: Examination-in-chief of the witness, followed by cross-examination and finally re-examination.<sup>11</sup>

Apart from these above-mentioned points there are many principles which were kept in mind while making the Evidence Act.

### **2.4. Importance of Law of Evidence**

The purpose of the Evidence Act is to speed up and extend the judicial process as well as ensure justice. Evidence Act like all other laws in the country is a statutory instrument, on the basis of which the proceedings are conducted and the evidence is admitted to secure the judgment. During the conduct of the trial, this law binds the court in a special bond by restricting all the parties to the case.

When a case is filed in the court with a criminal complaint against the accused, the court does not give verdict by looking at the type of crime described in the complaint, the crime defined under any law, the provision of punishment, etc. He has to proceed to trial under the provisions of the Code of Criminal Procedure. The honorable judge takes the evidence of both the plaintiff and the defendant at one stage of the proceedings, hears the cross-examination of both sides, and then renders a judgment after considering all the factors.

A juridical matter has been proved in the judgment only when the sure belief in the mind of the judge about the subject matter has been disproved and only when the juridical matter has

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<sup>11</sup> Md. Altaf Hossain, The Evidence Act (6th edition, 2009) 12.

been proved. It has not been proved false. If there was no specificity in the taking of judicial testimony, litigants would have been subjected to unnecessary harassment and irreparable harm due to inconsistent or incoherent statements or statements of witnesses. On the other hand, it becomes very difficult, time-consuming and difficult for the judge to discover the real truth and establish proper justice.

### **Conclusion**

Evidence law indeed a vast law on which the whole legal system is dependent because in every step to regulate a case, evidence law is needed. Since it plays a vital role in ensuring justice, gradually this law is developing. Because it has become a necessity to keep up with the norms of this growing society and advance technology.

## Chapter Three

### Analysis on the Amendment and its limitations

#### 3.1 Introduction

In Bangladesh the law of evidence has been used as it is since the act was established in 1872. In significant areas of the law, the British and other countries has already amended the provisions which were outdated, faulty and questionable to harmonize with the changing society. But Bangladesh has not been able to bring any significant change in this act. Still there are enormous flaws in the act and the provisions and elements it relies on whose credibility are non-existent such as experts<sup>12</sup>. In forensic law, there is no progress in Bangladesh. Although for ensuring justice it has been used as a sword in Bangladesh which needs a remarkable change. But the wait is over and a bill has been introduced before the parliament on August 31, 2022 after few legislative procedure it has been incorporated in the Act. This chapter will analyze the newly amended provision of the Act and discuss the limitations of the amended provision.

#### 3.2 Analysis of the Amendment

In total 21 changes were introduced in the Evidence Law by this amendment. Categorically some changes are as follows:

**3.2.1 Digital Records:** Digital record includes any information prepared, generated, sent, received or stored in computer memory or any electronic devices and any other electronic device which is defined in the Digital Security Act, 2018, iris, finger and palm impression, digital footprints, certificate, signature etc.<sup>13</sup> The very first amendment was in section 3 which contains the definition clauses of the Act and it introduced digital records as documents. In the definition of evidence, the word ‘digital’ is added. Beside this in section 17, 34,35,36,39 the word digital evidence has been added. New definitions are also introduced in section 3 i.e., digital signature, digital signature certificate, and certifying authority<sup>14</sup>. Moreover, the word evidence was substituted with the word ‘digital evidence’ through the amendment. This amendment has addressed a new section, which talks about the relevancy of oral admission on digital content, it says unless the genuineness is in question oral admission is irrelevant<sup>15</sup>. The definition of digital evidence itself is not appropriate since the technology has become so advanced that new laptops have no compartment to insert a CD, DVD etc. The definition of digital evidence should have been vaster and more inclusive.<sup>16</sup>

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<sup>12</sup>Md. Mahamudul Islam Shakil, "Need for amending evidence law,1872", 27 December, 2019 < <https://thefinancialexpress.com.bd/views/need-for-amending-evidence-law-1872-1577458405>> [Accessed 28 October, 2022]

<sup>13</sup> Abuzar Gifari, "The Evidence (Amendment) Bill:2022", 1 October,2022< <https://www.thedailystar.net/law-our-rights/law-analysis/news/the-evidence-amendment-bill-2022-appraisal-3132281>> [Accessed 28 October, 2022]

<sup>14</sup> Evidence (Amendment) Act, 2022, section 3

<sup>15</sup> Ibid, section 22A

<sup>16</sup> Quazi Mahfujul Hoque Supan, "Evidence (Amendment) Act, 2022: An Expert's View", December 20, 2022<<https://www.dhakalawreview.org/blog/2022/12/evidence-amendment-act-2022-an-experts-view-6169>>[Assessed on 9 January, 2023]

- 3.2.2 Expert opinion relating digital evidence and others:** A significant amendment is seen in section 45 of the act. Elements like physical or forensic evidence or digital record, footprint or palm impression or iris impression or typewriting or usage of trade or technical terms or identity of person or animal have been included on which expert opinion can be taken. Some limitations are also given regarding expert opinion on physical or forensics by incorporating section 45A. It states a witness not testify as an expert without the leave of the court unless a copy of his report is served to both of the parties and the reports of the experts shall address to the court not to any of the parties. Newly added section 47A says in case of forming opinion by the court on digital signature, opinion of the certifying authority is relevant fact. Use of expert evidence on digital evidence or other evidence are given more importance now a days to scrutinize the evidence and to ensure proper justice scrutinizing such evidence is a must.
- 3.2.3 Proof as to digital signature and verification of digital signature:** Along with the certifying authority's opinion to ensure that nobody can defraud the court with digital signature section 67A has been added which states digital signature of the subscriber must be proved. In order to verify the digital signature purported to have been affixed by a particular person, the person has to produce a digital signature certificate.
- 3.2.4 Admissibility of Digital Evidence:** New provisions are introduced which contains the conditions are to be fulfilled in the due process of admissibility of digital evidences in the court.<sup>17</sup> For in growing need of society and dependency on digital gadgets it has become a necessity to make digital evidence admissible. Crimes which are done in digital platform such as cybercrimes or those crimes done with the help of digital gadgets are easier to prove by digital evidence. Before this amendment many cases left unsolved because of the inadmissibility of digital evidence Before this amendment in some cases digital evidences were made admissible under other laws i.e. Section 16 of the Druto Bichar Tribunal Ain, 2002, some of the cases are Mrs. Khaleda Akter VS State<sup>18</sup>, Biswajit murder case<sup>19</sup>, The State Vs. Yeasin Khan Palash<sup>20</sup> etc.
- 3.2.5 Presumption as to documents:** In chapter 5 of the act, some provisions are incorporated through this amendment. It includes presumption as to agreements in digital forms, digital record and digital signatures, digital signature certificates, digital communication, physical or forensic evidence, and digital records five years old.<sup>21</sup>
- 3.2.6 Raising questions over the character of a witness or accused:** Section 146 which addresses the provision of lawful questions which can be asked in the cross examination. A restriction has been imposed in section 146(3) through adding a proviso clause that a rape victim shall not be questioned which is likely to raise question on the character and previous sexual behavior of the victim. However the court shall have the discretion to permit to ask such questions. Since this law has been incorporated, rape victims are asked questions on their character in trial to prove that the victim is of a bad character. By proving

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<sup>17</sup> Evidence (Amendment) Act, 2022, section 65A-65B;

<sup>18</sup> 37 DLR (1985) 275

<sup>19</sup> 70 DLR (2018) HCD 26

<sup>20</sup> 29 BLD (HCD) (2007) 469

<sup>21</sup> Evidence (Amendment) Act, 2022, section 81A, 85A, 85B, 85C, 88A,89A, 90A



bad character being raped used to be justified by the advocate of respondent. It took decades to decades for the law makers to understand that character has nothing to do with getting raped. No one deserve to be raped, even though the person is a prostitute. Thousands of rape victims feared to go through the trial stage as a result they end up not fighting for justice. But this amendment has added a controversial proviso clause in section 146(3) that “Provided that in a prosecution for an offence of rape or attempt to rape, no question under clause (3) which gives the advocate the authority to ask such question to shake the credibility of the witness can be asked in the cross-examination as to general immoral character or previous sexual behavior of the victim; Provided further that such question can only be asked with the permission of the Court, if it appears to the Court necessary for the ends of justice.

Beside this, section 155(4) of the act is abolished under which a scope of character assassination was there which could be done in a rape case. The philosophy behind the most criticized section, according to a report generally of immoral character basically indicated that on some specific occasion any immoral act has been done by the victim or she has a record of going to number of men to commit immoral acts or she has a prostitute’s hat.

Even though the judge does not give permission to ask question to a rape victim about her character under section 146(3) of the act under section 11 of the act questions about character can still be asked, section 11 states “facts not otherwise relevant are relevant if they conflict with any fact in issue or relevant fact”. In India character evidence is brought under section 11 of the Indian Evidence Act.<sup>22</sup>

### **3.3 Limitations of the Amended Provisions**

A major change has been brought in the evidence law by amending the most objectionable provisions. Among them three provisions are mentionable i.e. i) obsoleting section 155(4); ii) added a proviso in section 146(3) which has set a restriction in questioning a rape victim and iii) included digital evidence as evidence and made it admissible to the court<sup>23</sup>.

Section 155(4) states when a man is prosecuted for rape, it may be shown to the court that the procecatrix is of immoral character. To prove unchastity of a rape complainant, defense lawyer used to use it to strengthen their case by proving the witness or procecatrix unreliable. In broader sense by default it used to create a negative presumption on the procecatrix. The nature of this section is discriminatory and unjust. It would make more sense if section 54 of this act is compared with it. The character of an accused is irrelevant unless his good character certificate is presented to the court whereas provision like section 155(4) alleging a victim who is seeking justice for rape,

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<sup>22</sup> Quazi Mahfujul Hoque Supan, “Evidence (Amendment) Act, 2022: An Expert’s View”, December 20, 2022<<https://www.dhakalawreview.org/blog/2022/12/evidence-amendment-act-2022-an-experts-view-6169>>[Assessed on 9 January, 2023]

<sup>23</sup> Dr. Shahjahan Mondol, The Evidence Act: Amending Nine Sections”, 7 May 2022< <https://www.daily-sun.com/post/619240/The-Evidence-Act:-Amending-Nine-Sections>> [Accessed 30 October, 2022]

putting a reserve effect by presuming generally of negative character<sup>24</sup>. Abolishing section 155(4) is indeed a mention worthy step to meet with the necessity of this growing society. But its execution will meet the vision of the law makers or not is uncertain since curtailing scope of tarnishing a rape victims' character by amending the most criticized provision may not be enough in the existence of section 146(3) which gives a wide scope to raise questions on the character as well as Indian court is seen to bring character evidence under section 11 of the act, our amended laws are similar to Indian Evidence Act, since court of Bangladesh is very much influenced by Indian Courts, courts in Bangladesh will be effected by this definitely.

Although a proviso is added in section 146(3) which states that it shall be the courts discretion to permit such questions to be raised on a rape victim. Section 146(3) allows the lawyer to raise those question which may injure the character of the witness in order to verify his credibility.<sup>25</sup> Nevertheless this still gives the defense lawyer scope to assassinate the character of any victim or any witness to undermine them by using character evidence.<sup>26</sup>

Digital records are made admissible in the court but since there is lack of skilled person or technician who can properly collect, preserve, examine the digital evidence and present it in the court is challenging.<sup>27</sup> Moreover a procedural law to regulate such evidence is yet to be incorporated thus it would take a while to properly apply the provision of digital evidence or records. It is a question of fact that how welcoming the courts would be to take digital evidence due to unexperienced technicians and the decision based on these evidence will do justice or not. In the present act the area of expert opinion is quite narrow which will be much wide if the laws are incorporated properly.

### **3.4 Conclusion**

For this rapidly changing society it is a must to update laws which is are in use to ensure justice and evidence law is the father of both civil and criminal law since all the decisions are based on evidence which the evidence law regulates. But updating a law may create many loopholes and limitations if not properly incorporated and implemented. However, less loopholes results in less injustice and analyzing the loopholes makes it easy to fill the gaps.

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<sup>24</sup> Taqbir Huda, "The long road to the repeal of section 155(4): Will questions about a rape survivor's 'character' finally be banned in court?", 5 July 2021 < <https://www.thedailystar.net/opinion/justice-practice/news/the-long-road-the-repeal-section-1554-will-questions-about-rape-survivors-character-finally-be-2123791>> [Accessed 2 November 2022]

<sup>25</sup> Ashutosh Sarker, "Evidence act amendment: Draft leaves one questionable section alone", 21 February 2022 <https://www.thedailystar.net/news/bangladesh/news/evidence-act-amendment-draft-leaves-one-questionable-section-alone-2966861> [Accessed 04 November, 2022]

<sup>26</sup> *ibid*

<sup>27</sup> Ahsan Uddin Bhuiyan, "Evidence (amended) act 2022:A promise to true e-judiciary", 3 August 2022 < <https://www.observerbd.com/details.php?id=377588>> [Accessed 5 November,2022]

## Chapter Four

### Comparison and Compatibility of the Amendments in the Light of International and Other Domestic Standards

#### 4.1 Introduction

To keep up with the time and progressive society, countries have amended necessary provisions of the Evidence Act. Technological advancement and victimization of rape victim in court are two of them. Now the entire world is dependent on technology, some cases are kept unsolved due to the lack of provision relating admissibility of digital evidence and many rape victims are living with the trauma for the rest of their life which they face in the court in cross-examination of a trial to prove their chastity. No country could make rules that would further promote injustice and inequalities in the society, internationally some standards are provided to make the procedure uniform. This chapter discusses international standard of evidence law and compare the present scenario in other countries with the amended provisions of Evidence Act, 1872 in Bangladesh.

#### 4.2. International Standard of Evidence Law

To begin with digital evidence, there is no international treaties in this regard but some legislative advices are given at UN level through the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.<sup>28</sup> Antwi-Boasiako and Venter (2017) have created Harmonized Model for Digital Evidence Admissibility Assessment (HM-DEAA) to ensure the admissibility of digital evidence in national courts where it has put forward how these evidences can be taken in consideration, its assessment and determination.<sup>29</sup>

The International Criminal Court has been facing issues relating to digital evidence very often since usage of digital gadgets have become very common. To make the admissibility of digital evidence easy ICC has made a list of categories of evidential concern i.e., i) authenticity; ii) hearsay; iii) chain of custody and iv) preservation of evidence<sup>30</sup>. The International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) has provided a guideline. Identification, collection, acquisition, and preservation of prospective digital evidence are the steps covered by ISO/IEC 27037, which offers rules for these actions. With the aim of facilitating investigations involving digital devices and digital evidence in a systematic and impartial manner while maintaining its integrity and authenticity, this standard ensures that responsible individuals manage potential digital evidence in realistic ways that are accepted worldwide.<sup>31</sup>

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<sup>28</sup> Alex B. Makulilo, The admissibility and authentication of digital evidence in Zanzibar under the new Evidence Act, 2018, Digital Evidence and Electronic Signature Law Review, [Accessed 17 November, 2022]

<sup>29</sup> Digital evidence admissibility, UNODC, 2019 <<https://www.unodc.org/e4j/en/cybercrime/module-6/key-issues/digitalevidenceadmissibility.html#:~:text=Digital%20evidence%20is%20admissible%20if,Justice%2C%202004a%3B%20European%20Network%20of>> [Accessed 17 November, 2022]

<sup>30</sup> International Criminal Court e-Court Protocol at ¶ 1, ICC-01/04-01/10-87-Anx 30-03-2011, available at <http://icc-cpi.int/iccdocs/doc/doc1049623.pdf>

<sup>31</sup> Da-Yu Kao , Guan-Jie Wu & Ying-Hsuan Chiu, A Novel Process Framework for Digital Forensics Tools: Based on ISO/IEC 27037:2012[ Assessed on 23 December]

This guideline states who handles digital evidence must be able to identify the evidence and know how to manage the risk which may arise while handling such evidence. For that some specific procedure must be followed by the Digital Evidence First Responder to conserve the integrity and reliability of such evidence, those are-

- Reducing exploitation of digital gadget and digital data.
- Record all the steps and modification which will be done to the digital evidence so that the experts can give their opinion in the matter of reliability of such digital evidence.
- Following the rules set down by the government of the country.
- Digital Evidence First Responder must refrain to work beyond its competence.

Some sub processes are to be followed i.e. identification, collection, acquisition and preservation.<sup>32</sup>

Brief details is given below:

**Identification:** Searching, detecting and documenting digital evidence is a part of identification process. Each device that might contain digital evidence should be identified. Further, DEFR should conduct a systematic search to gather every small details including camouflaged devices, virtual components e.g. cloud computing. Additionally, any instable device should be prioritized while collecting evidence. Meanwhile, such collection and subsequent process should minimize possible damage to the digital evidence.

**Collection:** After completing the identification process, the devices are to be transferred to laboratory for thorough analysis. The collection and transfer process must be documented. DEFR should also secure any tangible material with a view to helping the digital data that has been collected.

**Acquisition:** DEFR should rely on the most suitable method and process of acquiring data considering the price, time, and situation. In that case any inevitable changes from the original copy should be documented. The choice of method must be justified by DEFR in absence of verification process.<sup>33</sup> The created copy must be verified or it must be documented as well as justified and vindictive. However, DEFR might acquire only the relevant part of digital evidence when the source is too big to handle.

**Preservation:** When it comes to preservation, protection of integrity of the digital evidences is vital for the purpose of investigation. DEFR should ensure that the digital evidence is unchanged otherwise they should be able to demonstrate documentation and justification for such changes. Mainly the police and forensic experts deals with the foregoing activities. To their aid, the ISO 27037 provides guidelines for the following devices and circumstances:

- Digital storage media used in standard computers like hard drives, floppy disks, optical and magneto optical disks, data devices with similar functions,

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<sup>32</sup> Jaromir Veber & Zdenek Smutny, standard ISO 27037:2012 and Collection of Digital Evidence: Experience in the Czech Republic, 2015,page 295,< [\(PDF\) Standard ISO 27037:2012 and Collection of Digital Evidence: Experience in the Czech Republic \(researchgate.net\)](#)> [Assessed on 23 December,2022]

<sup>33</sup> while acquiring data from a running system, when the original contains bad sectors, or when the time for acquiring data is limited

- Mobile phones, Personal Digital Assistants (PDAs), Personal Electronic Devices (PEDs), memory cards,
- Mobile navigation systems,
- Digital still and video cameras (including CCTV),
- Standard computer with network connections,
- Networks based on TCP/IP and other digital protocols, and
- Devices with similar functions as above.

Standard is purposed for:

- Forensic laboratory managers
- DEFR (Digital Evidence First Responders)
- DES (Digital Evidence Specialists)
- Incident response specialists<sup>34</sup>

There is no international standard or guideline is provided to prevent character assassination in rape cases but According to article 3(1) of the EU Charter of Fundamental Rights, Everyone has the right to respect for his or her physical and mental integrity. Even though domestic laws of countries are not bound to abide by this standard but generally it is expected to conform to international standards. Having no specific guideline actually indicates that surprisingly this issue is yet to become a global concern in the eye of highly intellectual society who are likely to research on global problems and give guidelines. Having no guidelines largened the scope to assassinate the character of a rape victim more.

#### **4.2.1 European Countries**

In the case of admissibility of digital evidence in court there is no specific law to regulate its procedure. In fact in their legal codes a specific definition of digital evidence is not provided.<sup>35</sup> The review of statutory provision shows that digital evidence is considered equivalent to traditional evidence. There are three types of equivalence i.e. i) equivalence of digital documents to documents in paper support; ii) equivalence of digital signature to handwriting one and compared to conventional notaries deeds, electronic notaries deed; iii) between electronic mail and postal mail. There is one group that explicitly accept electronic records as equal to paper records and recognize their value as documentary evidence in court. Another group of state compare digital signature to traditional signature, giving both of them equal weight in legal proceedings. Judges are most likely to accept digital evidence because of the development of e-commerce through digital documents and signature and the lower mailing cost of digital documents. Regarding the drawbacks mentioned, legal specialists believe that it is difficult to establish a legal value for this kind of evidence because of widespread ignorance regarding data processing techniques and how prosecutorial law is interpreted in this regard. This issue is brought on by both a lack of appropriate

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<sup>34</sup> Jaromir Veber & Zdenek Smutny, standard ISO 27037:2012 and Collection of Digital Evidence: Experience in the Czech Republic, 2015,page 295,< [\(PDF\) Standard ISO 27037:2012 and Collection of Digital Evidence: Experience in the Czech Republic \(researchgate.net\)](#)> [Assessed on 23 December,2022]

<sup>35</sup> Fredesvinda Insa (2007) The Admissibility of Electronic Evidence in Court (A.E.E.C.): Fighting against High-Tech Crime—Results of a European Study, Journal of Digital Forensic Practice, 1:4, 285-289, DOI: 10.1080/1556728070141804, 286

and organized regulation and a lack of uniform jurisprudence. Jurists openly acknowledge their concerns about the fragility (the nature of highly volatile electronic evidence). This type of evidence is frequently rejected in court because judges and prosecutors do not fully comprehend it. Computer experts has addressed some inconvenience such as lack of legal support and certification model, incomprehensibility shown by judicial agencies and lastly the cost of obtaining and interpreting the digital evidence as well as it is time consuming.<sup>36</sup>

Since there is no specific law regarding the procedure of collecting, preserving digital evidence but through applying general rule or procedure, 48 percent of such rule can also be applied in case of digital evidence. In UK a Police and Criminal Evidence Code<sup>37</sup> regulates collection of computer evidence in a specific way. In Belgian law there are rules regarding gathering of evidence which also applies on digital evidence. In a survey European jurists have given different opinions regarding the need of separate procedure of regulating digital evidence. In Austria and Romania they follow special steps to collect digital evidence. Generally internal police procedure rule is followed by UK and Romania.<sup>38</sup>

Legal experts concur that there are common norms in Europe that govern how evidence is secured in various criminal and commercial matters. By analogy, they can be used with electronic evidence, but not in other jurisdictions. They claim that because there is no mechanism established for the preservation of electronic evidence, each nation must carry out this activity in accordance with an analogous interpretation of the standards established for traditional evidence.<sup>39</sup>

In the case of character certificates, there are variations in European countries. In Scotland, Finland and Sweden judges rely on the judge's discretion, the door to ask disturbing and extraneous question about personal things are open. On the contrary, in Austria victims are not bound to answer any questions relating their previous sexual conduct. Moreover Croatia has also barred to use evidence relating the previous sexual history of the victim.<sup>40</sup>

#### **4.2.2 India**

Indian Evidence Act has made digital evidence admissible under section 65B. Section 65A and 65B consist of special procedure for adducing digital records in evidence. But unfortunately there is no practical use of the special provisions. The lower judiciary of India is vastly unskilled and technologically unsound, the trial judges are unable to understand the technology what the IT Act included. The judicial system of India is still outdated and underfunded as a result they have a tendency to treat electronic records as documentary evidence since it is the easier way to use it as evidence. Thus Trial judges in India will continue to be ignorant about electronic evidence and the methods for verifying its authenticity as long as the judicial system is not changed.<sup>41</sup>

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<sup>36</sup> *ibid*

<sup>37</sup> Police and Criminal Evidence Code, 1984

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> JoAnne Sweeny & John Slack, Sexting as 'Sexual Behavior' Under Rape Shield Laws, 2017; Vol. 11(2), page 252-252 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3059866](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3059866)> [ Assessed on 27 December]

<sup>41</sup> Dubey V. Admissibility of electronic evidence: an Indian perspective. *Forensic Res Criminol Int J.* 2017;4(2):58–63. DOI: 10.15406/frcij.2017.04.00109

Indian courts have continued to apply the provisions of sections 63 and 65 of the Evidence Act, which deal with documents, to electronically stored information by avoiding the special provision on electronic records. Simply expressed, sections 65A and 65B of the Evidence Act have largely been disregarded by the courts. Remarkably, the Supreme Court approved of this situation in the Navjot Sandhu case<sup>42</sup>, which was a highly publicized appeal from a controversial terrorism trial. A Division Bench of Justices P. Venkatarama Reddi and P. P. Naolekar held the original electronically stored records be reproduced when the authenticity and accuracy of a certain call data records are in question by the defence.<sup>43</sup> On the other hand it is seen that a CD containing intercepted phone calls was recently introduced in front of the Supreme Court in Ratan Tata v. Union of India without adhering to any of the rules outlined in section 65B of the Evidence Act.<sup>44</sup> The proper way to make the digital evidence admissible in the court is by adducing the evidence under section 65B with certificate of sub-section 4. In a recent case of Jagdeo Singh vs. The State<sup>45</sup> the honorable High Court held that secondary electronic evidence without a certificate under Section 65B Evidence Act is inadmissible and cannot be used by the court for any purpose whatsoever when dealing with the admissibility of intercepted telephone calls in CDs and CDRs that were not certified under Section 65B Evidence Act.<sup>46</sup> Courts must determine whether the evidence satisfies the three fundamental legal requirements of authenticity, reliability, and integrity. It can be anticipated that the Indian courts will adopt a consistent approach and will implement all feasible safeguards for accepting and appreciating electronic evidence in light of the Supreme Court's decision in the Anvars case<sup>47</sup>, which established the rules for admissibility of electronic evidence.<sup>48</sup>

Section 155(4) of the Indian Evidence Act has been repealed in 2003<sup>49</sup> since the Indian Evidence Act is based on several myths and moral misunderstandings. This section implicitly presupposes that a woman with a history of sexual misconduct is morally repugnant and so untrustworthy. Such a viewpoint is irrational in addition to being patriarchal.<sup>50</sup> Section 146 of the Indian Evidence Act states in case of rape “where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.”<sup>51</sup> The Criminal Law (Amendment) Act 2013 has

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<sup>42</sup> State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru, Appeal (crl.) 373-375 of 2004

<sup>43</sup> Dubey V. Admissibility of electronic evidence: an Indian perspective. Forensic Res Criminol Int J. 2017;4(2):58–63. DOI: 10.15406/frcij.2017.04.00109

<sup>44</sup> Ratan Tata v. Union of India Writ Petition (Civil) 398 of 2010.

<sup>45</sup> Jagdeo Singh vs. The State and Ors. MANU/DE/0376/2015

<sup>46</sup> Dubey V. Admissibility of electronic evidence: an Indian perspective. Forensic Res Criminol Int J. 2017;4(2):58–63. DOI: 10.15406/frcij.2017.04.00109

<sup>47</sup> Anvar vs. Basheer AIR 2015 SC 180, MANU/SC/0834/2014.

<sup>48</sup> Dubey V. Admissibility of electronic evidence: an Indian perspective. Forensic Res Criminol Int J. 2017;4(2):58–63. DOI: 10.15406/frcij.2017.04.00109

<sup>49</sup> Section 155(4) omitted by Act 4 of 2003

<sup>50</sup> Hatti, Poornima and Karthik, M.P. (2001) "Past Sexual History: Exploding the Myth," National Law School of India Review: Vol. 13: Iss. 1, Article 4.<

[https://repository.nls.ac.in/nlsir/vol13/iss1/4?utm\\_source=repository.nls.ac.in%2Fnl%2Fvol13%2Fiss1%2F4&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://repository.nls.ac.in/nlsir/vol13/iss1/4?utm_source=repository.nls.ac.in%2Fnl%2Fvol13%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages)> [Assessed on 23 December]

<sup>51</sup>The Indian Evidence Act, 1860, section 146

added section 53A in the Indian Evidence Act which provides in proving consent in rape case victim's prior sexual experience is not relevant.<sup>52</sup>

#### 4.2.3. Pakistan

Through the amendment of Qanun E Shahadat Order, 1984(QSO) and adoption of Electronic Transaction Ordinance, 2002(ETO) digital evidence is made admissible in Pakistan. Previously these evidences were not treated as primary evidence in court, it needs to be corroborated with other material evidence<sup>53</sup>. Article 46A of QSO states that evidence which has come from a mechanical process are relevant and Article 73 of QSO has given a concise explanation of things which are to be considered as digital evidence and what type of evidence it would be. It states that all electronic documents are to be considered as primary evidence<sup>54</sup>. Through these amendments digital evidence is given status of primary evidence even though it would take a long time to properly implement it. Gradually changes are coming, in a recent case *Mian Khalid Pervaiz v The State*<sup>55</sup>, the SC held that digital evidence can be made admissible by documentary evidence under Article 164, 46A and 78A of QSO, 1984 and the procedures which are provided by the ETO, 2002 to receive and prove digital evidence through documentary evidence is being followed. Previously in a case of 2019, *Shoaib Ahmad vs. State*<sup>56</sup> under Article 164 of the QSO modern device such as CCTV Footage is made admissible and considered as evidence and arrested the accused with the help of it.<sup>57</sup> Even though through new amendments digital evidence is given the status of primary evidence, the admissibility of such evidence is still under the discretion of the court as well as the weight of such evidence seems to be measured or given more weight if it is corroborated with a physical evidence.<sup>58</sup>

Article 141 of the QSO titled as questions lawful in cross-examination where clause 3 provides that to shake the credibility of a witness any questions which may injure their character can be asked. On the other hand Article 151 which is titled as impeaching credit of the witness<sup>59</sup>, clause 4 stated that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." Which means no amendments is done till now to these provisions to reduce degradation of a rape victim's character in the trial stage. Advocates are given freedom to degrade a woman in rape cases however they want. In practice it is seen that the cases and rulings of rape cases in Pakistan is the epitome of revolting and sickening decisions. The most fitted case is *Zafran Bibi's case*<sup>60</sup>, the victim is found committing adultery and was sentenced to be stoned to death because she could not prove that she physically resisted the rape done by her husband's brother while her husband was in prison and as a result the child in her

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<sup>52</sup> Criminal Law Amendment Act, 2013

<sup>53</sup>Dr. Gufran Ahmed, "DIGITAL EVIDENCE AND THE ADMINISTRATION OF CRIMINAL JUSTICE" Vol. 1 Iss. 1 <[https://www.bsolpk.org/digital-evidence-and-the-administration-of-criminal-justice#\\_ftn1](https://www.bsolpk.org/digital-evidence-and-the-administration-of-criminal-justice#_ftn1)> [assessed on 5 January, 2023]

<sup>54</sup> Qanun E Shahadat Order, 1984, art 73

<sup>55</sup> *Mian Khalid Pervaiz v The State* (2021 SCMR 522)

<sup>56</sup> *Shoaib Ahmad Vs. State* (2019 PCRLJ 57)

<sup>57</sup> Dr. Gufran Ahmed, "DIGITAL EVIDENCE AND THE ADMINISTRATION OF CRIMINAL JUSTICE" Volume 1 Issue 1 <[https://www.bsolpk.org/digital-evidence-and-the-administration-of-criminal-justice#\\_ftn1](https://www.bsolpk.org/digital-evidence-and-the-administration-of-criminal-justice#_ftn1)> [assessed on 5 January, 2023]

<sup>58</sup> *ibid*

<sup>59</sup> Qanun E Shahadat Order, 1984, art 151

<sup>60</sup> PLD 2002 FSC 1



womb was considered as the sign of adultery. Apart from the provision of Qanun E Shahadat there are some other provisions i.e. Zina and Hudood Ordinance, 1979 which made the proceeding way more rigid to prove rape.<sup>61</sup> Where these type of decisions are taken, character assassination in trial stage is not a matter of concern in a country like Pakistan.

### **4.3 Comparison between the Amendments and Other Countries**

In case of digital evidence it is seen from the above mentioned countries no standard form or rules relating digital evidence is formed. In UK the internal police procedure is followed, in India the judges are still ignorant about verifying digital evidence, similarly in Pakistan there is no specific or standard law on how to assess and admit digital evidence as well as the admissibility of digital evidence is still under the discretion of the court.

On the other hand in Bangladesh, no procedural law relating the digital evidence is mentioned in the evidence law as well as in the amended version of evidence law. Since the new provisions have been incorporated recently, it is now in question how the evidences will be collected by the forensic team, since there is lack of trained forensic team. As a result it would be difficult to preserve in proper manner and such evidences will be easily manipulated.

Questioning in trial of rape victims' character or past sexual conduct or to shake the credibility of the victim by proving the victim of an immoral character, these countries gave some landmark judgments. In fact long ago in 2003 India has repealed section 155(4) of the Indian Evidence Act under which section character assassination was possible. Also section 146 has set a bar that no evidence can be adduced or in cross examination no such question can be asked so to prove that the woman is of immoral character. On the other hand in Pakistan the provisions are kept as it was since these laws were incorporated. There is no bar to ask any questions to a woman which may lead to character assassination.

Recent amendment has repealed section 155(4) of the Evidence Act but kept the scope to ask questions to the rape victim about character under section 146(3) upon the courts discretion. In a country like Bangladesh a rape victim is victimized in the court where she goes to seek justice. Advocates of opposite party tear apart the character of a rape victim by questioning on her character. By proving past relationships she is identified as a woman of immoral character.

### **4.4 Conclusion**

Though provisions relating to digital evidence vary from country to country, no country has a suitable or flawless provision. In every statute there is loopholes and flaws which lead to unsolved cases. There are several points of all the countries mentioned above need to work on to ensure fair trial and justice. Some needs severe amendments of controversial provisions and some needs to implement the amended provisions properly.

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<sup>61</sup> Rafia Zakaria, "A country of dead women", (Published May 30, 2014) <<https://www.dawn.com/news/1109538/a-country-of-dead-women>> [ Assessed on 7 January, 2023]

## Chapter Five

### Findings and Recommendations

#### 5.1 Findings

1. The amended provisions could not address the problems of Bangladesh properly. Before this amendment digital evidence were made admissible through other acts , so it is a legitimate expectation that the definitions and provisions which are brought by the amendment would be more inclusive and clear. But the amendment has become more of a copied version of Indian Evidence Act, 1872.
2. Procedural matters relating digital evidence are not incorporated and no law relating this is present.
3. There is no specific international standards relating digital evidence which the countries could use as a guideline, ISO tried to give guidelines but countries are seen to follow their local rules and regulations under which whether the authenticity is properly verified or not is a question of fact.
4. Forensic teams are not properly trained to preserve digital evidence, moreover these teams are not properly utilized.
5. Character assassination is a common concept worldwide. No country is very much bothered about this issue. Some countries tried to prevent character assassination by amending some provision or adding proviso or giving the discretion to court but these are more like to hoax people with heavy provisions because under other provisions character can be still assassinated. If the motive is to prevent it all necessary amendments should be done together. Leaving a scope to character assassination makes the amendment useless.

#### 5.2 Recommendations

1. Provision relating custody, storage, authenticity, and reliability of digital evidence should be made.
2. In every court an expert in digital evidence should be appointed to assist in the analysis of digital evidence, especially to verify the authenticity.
3. To handle the extraction, addition, or deletion, storage, authenticity, and reliability of digital evidence an expert team should be appointed in each district.
4. Forensic teams should get proper training.
5. Multiple forensic teams should be appointed in every district.
6. সাক্ষ্য ও বিচার কার্যক্রমে তথ্য প্রযুক্তির ব্যবহার আইন, ২০১৯(Shakkho O Bichar Karjokrome Tottho Projuktir Bebohar Ain, 2019) this law was drafted but yet to be incorporated. By incorporating this law there will be a clear concept of handling digital evidence, it can be used as a guideline.
7. There are other sections which is left untouched since the execution of the act such as Section 82, 89,166 these sections should be amended.

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