"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW OPINION

The legal challenges of intellectual property protection for data

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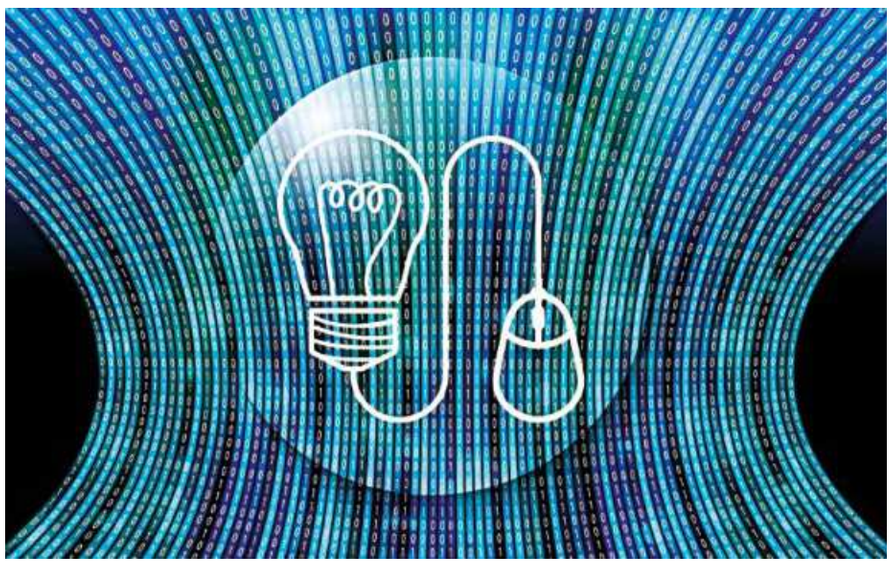
DATA is the primary building block of the digital economy. Data is, therefore, logically termed as 'new oil' and 'infrastructure' of digital economy. In digital economy, Artificial Intelligence (AI) and Machine Learning (ML) tools overwhelmingly rely on the volumes of data which are fed to create new inventions or works. Similarly, data driven global giants such as Google, Amazon and Facebook require great volume of data to keep their business up to date and concomitantly, they remain in control of huge amount of data produced by the users. Reasonably, there are number of ethical and legal conundrums involved in dealing with data issues which range from privacy, personal security, personal data protection to ownership, processing and control over the data. Till date, the legal provisions, for example EU General Data Protection Regulation, (GDPR) 2016, have mainly addressed these issues, precisely giving emphasis on protection of natural person's data and processing thereof. Thus, intellectual property protection over data with creative and economic values has remained largely unattended. However, given the creative nature, economic and other values attached to data, it remains a critical question as to whether data can be protected as intellectual property. If so, who owns the data? Broadly, what are the legal challenges of intellectual property protection for data?

In EU, Database, as opposed to raw data, is protected under either copyright law or *sui-generis* system. In the former case, it must be original expressions whereas in the latter case, there must be substantial investment in obtaining, verifying and presenting the contents of the database. As far as the IP protection of data is concerned, there remain legal and practical challenges. Relevantly, three forms of intellectual property, namely, copyright, patent and trade secret may attract the attention in dealing with data. As copyright protects the original expressions and not the ideas, therefore, readily available and non-rivalrous data with little creative or original expressions is not protectable. Thus, figure and data presented in the copyrighted works is free from legal protection unless originally expressed. Patent protection for data could be of little help. It inherently lacks novelty and non-obviousness. Readily available data may be equated with products of the nature and as such is non-patentable or falls within the exclusion clause of patentability. Trade secret seems to be nearly appropriate for IP protection of data. However, such protection is only applicable for corporations, if they generate or compile and keep it secret from the competitors and values attached to because of the secrecy. Critically, it is always susceptible to be known



by competitors in due course without resorting to any unlawful means. Beyond the IP paradigm, such data of company or corporation may also be protected through the agreements with employees and any other third parties in case of joint ventures.

The existing IP system does not sufficiently provide legal mechanisms to protect data. Moreover, data *per se* is kept open without IP monopoly because of the public policy or public interests. However, global big corporations are pressing the issues to protect the data since their business models are overtly data driven. The concerns exist that the corporate ownership of data might hinder the public policy issues, innovations or knowledge generation and most significantly access to the knowledge. Again, question remains that how far people's data is safe with the corporations? The world has experienced the misuse of data by Cambridge Analytica and many other corporations. Further, the traditional concept of 'consumer' is now shifting towards new concept of 'prosumer' where users not only use but also contribute to the development of novel dataset of the corporations, for instance, through the 'keywords' search in google search engine. This value addition, in one way, demands the openness of data for all. In another way, if at all, any proprietary rights are recognised, then, the prosumers should have a due place, in any form, on the scheme of legal regime.

Till date, AI or ML generated contents are not protected under the existing IP regime. However, 'data ownership' would be a crucial factor in both the input and output processing of data, if AI and ML generated contents are to be protected in future. Since IP protection of data inherently is not possible, at least not under current legal framework, a policy solution as data producer's right- a new special property right for the data producers, has been suggested in EU by the legal scholars and experts. However, the proposal is also subject to criticisms from both theoretical and practical perspectives.

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In Bangladesh, ICT division is considering data related draft Polices, Laws, Rules and Regulations such as Internet of Things (IoT) Strategic Paper, 2019, National Strategy for Artificial Intelligence in Bangladesh, 2019-2024, National Core Data Inoperability Standard (NCDIS), 2019, and National Core Data Definition Standard, (NCDDS), 2019 for adoption and some of them are already adopted. Bangladesh is also considering enacting new Patents and Designs law, Copyright Law, Personal Data Protection Law. While adopting the relevant Polices, Laws, Rules and Regulations, Bangladesh should duly address the legal challenges of intellectual property protection for data as well.

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PEOPLE'S VOICE

THE SIGNIFICANCE OF LEGAL KNOWLEDGE

LAW encompasses every sphere of life and society. So, knowledge of law is indispensable for every citizens of a country. Common perception of the mass people about law and legal system is that, judges and lawyers form the core of justice system. When law is violated or law is misapplied or abused or laws are not consistent with the constitution of the country, it is the task of the administration of justice to bring the violator or wrongdoer to book or declare the law unconstitutional. But the judges and the lawyers are not the only actors in the administration of justice. Administration of justice of a country addresses the concerns of each and every person living in that particular country.

General principle of law in Bangladesh is *Ignorantia juris non excusat*, i.e. ignorance of the law is no excuse. More specifically, a person who is unaware of a law may not escape liability for violating that law merely because he or she was unaware of its content. Article 21 of the Constitution of Bangladesh says that, it is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property. At the same time, to enjoy the protection of the law, and to be treated in accordance with law has been guaranteed as fundamental right. Preamble to the constitution enumerates that the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens. So, for the purpose of enjoying the rights as guaranteed in the constitution and at the same time for performing public duties and maintaining discipline you must know the laws.

However, the primary, secondary and higher secondary level of education in Bangladesh contains no mandatory legal education. Chapter 15 of the National Education Policy, 2010 talks about development of legal education. This is all about law students of universities and law colleges. It does not have any strategic plan for inclusion of legal education in primary, secondary and higher secondary level. Moreover, right to education is enshrined in international instruments such as UDHR and ICCPR.

In Bangladesh, many crimes are committed without knowledge of consequences. Recurrent road accidents are happening in Bangladesh because in most of the cases, drivers or commuters are found to be ignorant about road safety laws. All government and non-government instructions are governed by laws of the country. If people are made aware of the law, they will surely be aware of their rights in these institutions. Ignorance in most cases makes people deprived of rights that he or she is entitled to. For establishing rule of law and creating a conscious civil society, legal education deserves importance.

The 2010 Policy further affirms that to realise a society which is free from exploitation, the significance of legal education cannot be ignored. Primary knowledge about laws and legal system of Bangladesh will be a strong tool to ensure the fundamental rights. Recently, in a discussion held at The Daily Star, young lawyers recommended that people be made

more aware of legal remedies available at local and district levels, so that every matter is not brought to the higher courts. They further suggested making people aware of sectoral laws and policies -- including those dealing with medical and educational services, banking sector, road safety, consumers' rights and food safety.

To insert primary legal education in the national curriculum, the incumbent government can form a committee comprising of legal experts from judges, university teachers and lawyers. This committee, after proper scrutiny, will formulate guidelines for inclusion of primary legal education in the national curriculum in an easily comprehensible manner. There may be two separate books for secondary and higher secondary level respectively. Introducing legal education at school-level will be a significant step for making people conscious and empowered.

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LAW ANALYSIS

Analysing the draft Bangladesh Maritime Zones Act

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THE term 'areas beyond national jurisdiction' (ABNJ) refers to maritime zone where no littoral state has any obligation for management. Put more simply, approximately two thirds of the high sea of world's ocean fit within this term. Because of their unique biophysical features, management and enforcement needs, such areas in ocean need legislative emphasis.

The 1972 Stockholm Conference on Human Environment first specifically addressed the significance of marine environment conservation and protection. However, it did not provide any rules or standards for protection of marine environment. The 1992 Rio Conference on Environment and Development, urged States to act in all possible ways to address the degradation of marine environment. The provisions of the 1982 UNCLOS consolidate the rights of coastal states over maritime zones adjacent to their territories. Article 56 enables the coastal states to exploit marine resources within the Exclusive Economic Zone (EEZ), whereas Article 76 allows coastal states to conduct offshore activities ranging from economic exploitation to energy production. Article 194 further enumerates that exploration and exploitation of marine resources should be managed in such manner that would minimise the potential of pollution, accidents or emergencies to the fullest possible extent.

> The draft Maritime Zones Act of 2019 should have some measures associated with strict and continuous monitoring mechanism in fulfilling coastal state's obligation of exercising due diligence mentioned in article 208 of the 1982 UNCLOS.

Under the rubric of 'Biodiversity of Areas beyond National Jurisdiction', section 128 of the draft Bangladesh Maritime Zones Act of 2019 enumerates that government may initiate programs for ensuring conservation as well as sustainable use of marine biodiversity of areas beyond national jurisdiction. The provisions of Clause 4 of section 128 also pick up the discussion on the significance of management of marine protected

areas. A vital takeaway from the provision is that the wordings of this sub-clause emphasise on enhancing the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction; and on facilitating research support to monitor the management system.

In 2008, the *FAO International Guidelines for the Management of Deep-sea Fisheries in the High Sea* advocates coastal states to adopt national policy for better alignment with international law relating to areas beyond national jurisdiction. According to the FAO (Food & Agriculture Organisation) and the UN Environmental Program, a national policy on ABNJ should include number of issues encompassing: sustainable use of marine living resource; prevention of impacts on vulnerable marine ecosystems; incorporation of policy relating to IUU fishing; endorsement of precautionary and ecosystem approach. Furthermore, national policy should also highlight the requisite measures to effectively materialise those issues.

However, regarding the draft Maritime Zones Act, 2019, all is not what it seems. The draft law has had the scope to update and strengthen legal elements that a littoral state like Bangladesh should take into account. Keeping in mind with the fragility of marine environment and uncertainty associated with marine exploration and exploitation activities, the draft Maritime Zones Act of 2019 should have some measures associated with strict and continuous monitoring mechanism in fulfilling coastal state's obligation of exercising due diligence mentioned in article 208 of the 1982 UNCLOS.

The functions of such monitoring mechanism can be carried out through establishing national scientific and technological body for exchanging and integrating maritime information on biodiversity among neighboring littoral states. To identify any infringement of legal provision and to review exploration activities, there is urgent necessity to establish a system of maritime database and information bank. Such maritime dataset is also helpful for state mechanism in multiple ways: to forecast the requirement of international cooperation and coordination required in which maritime sector; to submit report to international institutions to highlight state's compliance of international law obligations and recommendations for future drafting of hard law and soft law. However, in the draft Maritime Zones Act, there is no mention of such 'comprehensive' legislative, administrative or database construction measures to formulate such body.

In latter days, various fast track maritime projects (i.e., construction of sea ports, coal power plants and LNG terminals) are currently underway in the coastal areas adjacent to *Sonadia*, *Mongla*, *Pyra* and *Matarbari*. The offshore gas blocs in the Bay of Bengal are revving up for drilling and explorations. The marine biodiversity of these areas is experiencing fast pedestal of change. The vista of gargantuan development is getting filled to the brim. However, measures in mapping out any elaborate impact on those areas' marine ecosystem still remains as distant foghorn. Serious pollution from land-based activities may spread beyond the limits of the place of origin. It may also affect the maritime areas beyond internal water and territorial sea.

The draft Maritime Zones Act of 2019 lacks any specific provision about how these existing heavy development projects will make a face-off with the marine biodiversity and ecosystems. The Act has surely missed the opportunity to synchronise and address the spirit of marine environment protection with these intensified development projects.

Nonetheless, the success or failure of the law lies with its implementation through the national institutional and administrate apparatus. As of the time of preparing this write up, it would be prudent to opine that whether the law would be a turning point or simply a passing phase remains to be appraised.

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