"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 ANALYSIS

THE DIGITAL SECURITY ACT, 2018

How far does it protect our privacy?

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THE Digital Security Act, 2018 ("DSA"), which came into force on October 8, 2018, was enacted to ensure digital security and to identify, block, prevent, trial digital crimes, etc. While the stakeholders raised some concerns regarding various provisions of this newly enacted law, the high-profile government spokesmen assured that the drafting of this law was necessary to, *inter alia*, protect the citizens' data and privacy. Looking at the relevant provisions of the law, even though one may identify some scattered provisions in the DSA which may be used to protect some aspects of information privacy, an intentionally designed personal data protection law is something very different from what we have in the DSA.

Without the enactment of a personal data protection law, the true spirit of digital Bangladesh will remain a long distant dream; surely, Section 26 of the DSA is not the proper and desired answer in this regard.

It is a matter of fact that under the existing Bangladeshi laws, there is no reference as to what will constitute 'personal data'. To the best of our knowledge, only the Passport of Bangladesh, in page no. 3, contains few information under the heading of 'personal data' and these include only - name, parents' name, spouse's name and permanent address. Even though, in page no. 2, few other information i.e. date of birth, gender, place of birth, national identification number, etc. are included, which are obviously personal information and are usually included in the personal data protection law as in force in other countries, there is scope of interpretation whether these information of page no. 2 will be included within the definition of 'personal data' when page no. 3 has explicitly included few things as 'personal data'.

In this given context, Section 26 of the DSA has attempted to define 'personal information'; however the section used 'identification information' and has included a long list of information as such information. Explanation to the section provides that 'identification information' means any external, biological, physical information or any other information which alone or jointly can detect an individual or system, whose name, photograph, address, date of birth, parent's name, signature, national identity card, birth and death registration number, finger print, passport number, bank account number, driving license, e-Tax Identification Number, electronic or digital signature, user name, debit or credit card number, voice print, retina image, Iris image, DNA profile, security questions or any other identity which are easily available for the advancement of technology.

The issue of grave concern is that this Section 26 has made it an offence to collect and use 'identification information' and it is provided that if anyone, without having the legal authority, collects, sells, possesses, supplies or uses such information, he will commit an offence for which he will be responsible for imprisonment up to five years or fine up to five hundred thousand taka or both for the first time offence; and for the subsequent similar offence he will be responsible for imprisonment up to seven years or fine up to ten hundred thousand taka or both.

There are some limitations in the definition 'identification information'. A standard definition of 'personal data' will provide with a clear outline on which information would be considered as 'personal data' – laws of many countries and regional laws include both identified (i.e. name, ID number, Passport, etc.) and identifiable (IP address, website browsing history, etc.) information, electronic and manual form of information, as personal data. Personal data are also categorised into sensitive and non-sensitive data to ensure appropriate protection mechanisms. Thus, though the explanation to the Section 26 has included some examples of personal data, it cannot be considered as a proper definition.

Section 26 has not defined 'persons with or having legal authority' or 'process or instances to get legal authority', etc. If we consider the provisions of some other personal data protection law, there are some serious problems with this provision. The law has not defined 'use' and 'collection' for the purpose of Section 26. No distinction is made between 'identification information' collected and used for social, family or recreational purpose; and such information collected or used for commercial purpose. Moreover, there is no distinction made between such information in general and such information which are sensitive in nature. There is no scope for future Rule making under Section 60 of the DSA in this regard. Without this, such acts of collection and use of 'identification information' is made cognizable, i.e. anyone can be arrested even without warrant and non-bailable offence under Section 53.

The reality is that under the existing personal data protection laws, the data subject enjoys the sovereignty before and during the collection, use and processing of his personal information. Simultaneously, even with legal authority, anyone cannot simply collect and use such data unless he obtains the consent of the data subject, who can anytime withdraw his consent and the data processor is bound to cease further activities with such data of the data subject. Moreover, even with such consent, data collected for one purpose cannot be used for another purpose.

Moreover, data protection laws give a guideline on the legal basis of the data processing – under which conditions/circumstances anyone can collect, use and process personal data of an individual. Additionally, to 'data controller' and 'data processor' have to comply with some duties, responsibilities and obligations to protect the personal information collected. However, the DSA has no provision on the legal basis of data processing, obligations of 'data controller' and 'data processor' and compliance issues.

In this age of internet of things, almost every single device and appliances are smart in nature and are connected to the internet where personal information, being the fuel, are used to get the services and access to various sites. We simply cannot carelessly overlook the protection of our personal data. Without the enactment of a personal data protection law, the true spirit of digital Bangladesh will remain a long distant dream. Surely, Section 26 of the DSA is not the proper and desired answer in this regard.

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COURT CORRIDOR

India awaits a judgment on mental disability

A very recent writ petition, *Gaurav Kumar Bansal* v *Union of India and others*, raised some pertinent issues about patients suffering from mental illness being kept in chains in asylums. The petitioner Gaurav Kumar Bansal alleged that some of the patients suffering from mental illness, who are lodged in Faith-Based Mental Asylum situated near Mohalla Kabulpur, Badayun District, Uttar Pradesh, are kept under chains. Certain photographs were also placed on record along with the petition.

While hearing the writ petition, the Supreme Court of India has observed that the act of keeping mentally disabled persons in chains in mental asylums violates such persons' dignity as human beings because a person, only by dint of being mentally disabled, does not cease to be a human being as such. This landmark observation was made by the bench comprised of Justice AK Sikri and Justice S Abdul Nazeer. The Judges observed that the issues that were raised in the petition were of serious concern and they were in need of taking into account with an immediate attention.

The bench requested Solicitor General of India Tushar Mehta to appear on behalf of Union of India and to respond to the issues raised by the petitioner. "This is not only inhuman and violative of rights of such persons under Article 21 of the Constitution of India, as even a person suffering from mental disability is still a human being and his dignity cannot be violated," the court said.

In its order, the court also added that alongside being violative of the constitutionally guaranteed rights, keeping such patients under chains is also against the spirit of Section 95 of the Mental Healthcare Act, 2017. The Section prohibits treatments like electro-convulsive therapy without the use of muscle relaxants and anaesthesia, electro-convulsive therapy for minors, sterilisation of men or women, when such sterilisation is intended as a treatment for mental illness.

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RIGHTS WATCH

Overdue state party report of Bangladesh on the UNCAT

QUAZI OMAR FOYSAL

TILL now the Government of Bangladesh has not submitted its initial state report to the Committee against Torture despite the fact that Bangladesh acceded to the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984 ('the UNCAT') twenty years ago. Under Article 19 of the UNCAT, each state party is under obligation to submit its initial report to the Committee Against Torture ('the Committee') within one year from the date of ratification or accession. According to recent information available on the OHCHR website, it appears that the Committee has finally decided to consider Bangladesh's observance of the UNCAT in its 67th Session even without its initial state party report of Bangladesh.

Bangladesh's oversight to submit its twenty-year due State report to the 67th session of the Committee may be seen as a visible spot in its radiant international image.

Bangladesh has multifold obligations under both domestic and international law to ensure protection against torture. These include, in addition to the UNCAT, the Constitution of Bangladesh [Article 35(5)], International Covenant on Civil and Political Rights (Article 7), Rome Statute of the International Criminal Court [(Article 7(1)(f) and 8(2)(a)(ii) & (c)(i)], the Four Geneva Conventions on the Protection of Victims of Armed Conflicts (Common Article 3 and the grave breaches provisions). Moreover, 'protection against torture' has been upheld as Jus Cogens on a number of occasions. Conceiving these responsibilities, Bangladesh has enacted the Torture and Custodial Death (Prevention) Act in 2013. In view of the foregoing, the Government's oversight regarding submission of its state party report to the Committee deserves some criticism.

At this juncture, it is worth mentioning that despite the Government's omission to submit its report on the UNCAT, the National Human Rights Commission ('the NHRC') of Bangladesh submitted an alternative report to the Committee on compliance by Bangladesh with the UNCAT. The said report made a critical assessment of the legal regime in force designed to address protection against torture in Bangladesh. In addition to providing a general overview of international legal framework concerning Bangladesh's obligation and commitment to prevention and punishment of torture, it specifically delineates the ambit of Bangladesh's legal obligation under the UNCAT. In a broader context, the report includes a comprehensive analysis of the domestic legal regime purporting to give effect to the provisions of the UNCAT with focus on topical issues like the legal concept of torture, measures to prevent torture, immunity from prosecution for torture, criminal jurisdiction over torture, principle of non-refoulement, extradition and torture, general and thematic issues relating to torture scenario in Bangladesh, training and education to prevent torture, forms of punishment amounting to torture, compensation to the torture victims, confessions and torture, etc. The report includes specific recommendations to fortify legal protection against torture.

However, one may notice that the aforesaid report is not available on the OHCHR website which means that the Committee at that time did not take it into consideration most probably for the reasons that either no review session was scheduled for Bangladesh or no state party report was submitted. Presumably, this is the reason why the NHRC later published the report in 2015 under the title, 'JAMAKON Report to the UN Committee against Torture.'

The fact that the report is already five-year old does not diminish its relevance entirely. In the absence of any other report of equivalent quality, the NHRC should press the Committee for taking this report into consideration during the review process. Alternatively, should time permit, the NHRC may decide to update and resubmit the report after incorporating a few features like the issue of torture victims in the judgments of the International Crimes Tribunal of Bangladesh or torture under the Rome Statute, etc.

Currently, Bangladesh is adorning the seat of the Human Rights Council for the third time. Recently, it has been selected for the post of elected to Board of Directors of ICC Trust Fund for Victims. Additionally, it is leading to many human rights causes including that of Rohingyas. Of late, it has drawn special attention of the world community with its elevation to the Middle-Income Country. In this context, Bangladesh's oversight to submit its twenty-year due State report to the 67th session of the Committee may be seen as a visible spot in its radiant international image.

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PEOPLE'S VOICE

National response to tobacco control

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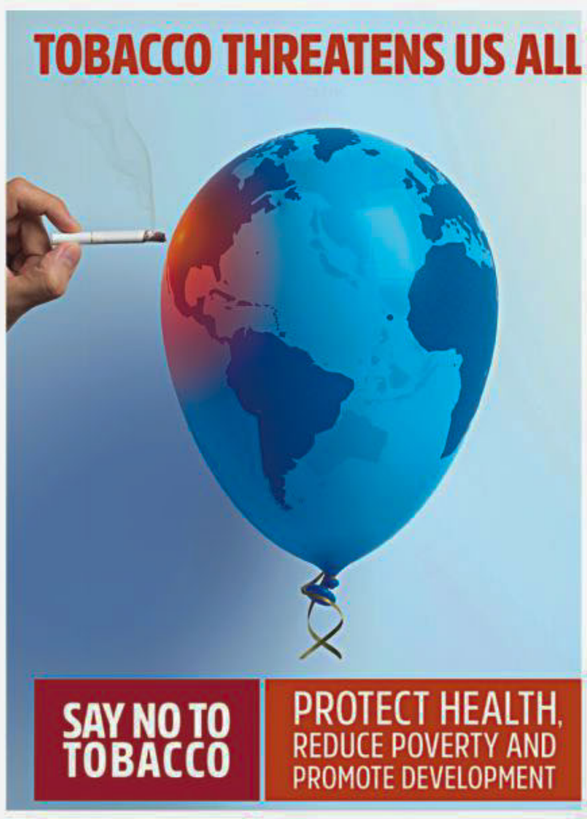
THE WHO Framework Convention on Tobacco Control (FCTC) aimed at protecting the present and future generations from the devastating health, social, environmental and economic consequences of tobacco. One of the Convention's core supply reduction provisions contained in Article 17 mandates the state parties to promote economically viable alternatives for tobacco workers, growers and individual sellers. In relation to the impact of tobacco cultivation on environment, Article 18 stipulates that the parties have to give due regard to the protection of the environment and the health of persons in relation to tobacco cultivation and manufacture within their respective territories. Reading both the provisions together along with the object and purpose of the Convention, it is quite clear that, the WHO FCTC envisions complete elimination of tobacco and thereby generating an alternative for all dependents on tobacco, has becomean imperative.

Under the Convention, Parties are, in general, obliged to adopt and implement effective legislative, executive, administrative and/or other measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke. Most importantly, Article 5.3 stipulates that Parties, while setting and implementing their public health policies with respect to tobacco control, shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law. Thus, it is clear that there must have corresponding provisions in national law to prevent tobacco industry interference in formulating national tobacco control measures.

WHO ranked Bangladesh as the 7th largest tobacco growing and 8th largest tobacco consuming country. In Bangladesh, there is no updated, consistent and comprehensive nation-wide data on tobacco cultivation available in the official sources. On the other hand, the anti-tobacco campaigners and mass media reports are claiming rapid increase in acreage of tobacco cultivation, manufacture and export.

Bangladesh as a Party to the WHO FCTC requires implementing domestic law to give legal effect to the convention. In 2005, Bangladesh enacted the Smoking and Using of Tobacco Products (Control) Act with the objective of controlling tobacco products for public health and implementing the WHO FCTC. Section 12 provided for granting loans on easy terms by the Government to encourage the cultivation of alternative cash crops instead of tobacco; and the Government will run such loan facilities for five years then a comprehensive Policy will be formulated to gradually discourage tobacco farming and installation of tobacco industries. The 2013 Amendment of the said Act omitted the provision relating to loan facilities and provided only for framing a Policy to gradually discourage tobacco cultivation.The Rules framed under the law in 2006 and 2015 have no mention on tobacco cultivation and its environmental hazards. Previously, in Prof. Nurul Islam and Others v Government of Bangladesh and Others (2000), the High Court



Division directed the government to take stepsto stop tobacco production, giving subsidy for alternative crops and creating alternative jobs for tobacco workers. The decision was subsequently upheld by the Appellate Division.

As of now, Bangladesh has not yet framed any Policy to regulate tobacco cultivation. Even there is no specific provision in country's environmental laws to regulate environmental harms by tobacco. Regrettably, there is no provision in the country's tobacco control laws to prevent tobacco industry interference in formulating tobacco control measures. In the absence of such provision, tobacco industry has deepened its efforts to derail, dilute and delay the implementation and enforcement of tobacco control measures in Bangladesh. To many, dilution of the provision relating to tobacco cultivation by 2013 Amendment and subsequent delay in framing the Policy are attributable to tobacco industry interference. Now, it is suggested for Bangladesh to frame a comprehensive Policy, as mandated under the law, in consonance with the Government's goal of making tobacco free Bangladesh by 2040. It is further suggested that, in line with international obligations under the WHO FCTC and related instruments, necessary provisions to incentivise alternative crops and alternative means of livelihoods, taking into account thehealth, social, environmental and economic menaces of tobacco cultivation, have to be inserted in the existing tobacco control laws.

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