"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

Concerns over the proposed personal data protection bill

Md. Toriqul Islam

It has come to light through print and electronic media that the Government of Bangladesh has recently prepared a draft bill on the matter of personal data protection. Some very pertinent issues regarding the bill are set out below.

Section 2 of the proposed bill includes definitions of several key terms, including data, anonymised data, personal data, the data subject, data controller, data processor, processing, etc., but many of the definitions are not comprehensive and exhaustive. For example, under the proposed bill, anonymised data refers to 'any data that has undergone the process of anonymisation', but there is no explanation regarding the anonymisation process. Again, there should have been clues about the personal data that can be used to identify a person. Generally, personal data means and includes some identification indicators, such as the name, ID number, location data, or any specific physical, physiological, genetic or mental condition, etc. The definition of personal data as laid down in the said bill does not include any of these identification indicators, and this turns the definition clause into a problematic one.

An effective data protection law does not intend to stop the processing of personal data rather allows processing within the legal bounds. A carefully designed data protection regime promotes business, eases trans-border data transfers, encourages research and innovations, pays due attention to public interests, and protects the privacy rights of individuals.

Moreover, the proposed bill did not define many other important terms, generally used in data protection laws, including but not limited to - international transfer/cross border processing, profiling, pseudonymisation, consent, data breach, health data, biometric data, establishment, etc.

Since data processing activities are becoming increasingly complex in the digital age, there must be entities to be in place to act as watchdogs for the protection of the rights of the individuals. Therefore, most international, regional, and national data protection frameworks, specially the Convention 108 of the Council of Europe 1981, the General Data Protection Regulation (GDPR), and 90% of countries having data protection laws have opted to establish an independent supervisory authority.

Whereas under section 28, the proposed bill incorporates provisions for the establishment of a data protection office (DPO) under the direct control and administration of the Digital Security Agency constituted under the Digital Security Act, 2018 (DSA). The DPO will be equipped with officers and other employees as required and headed by the Director-General of the Digital Security Agency established by section 5 of the DSA. Experts in the field opine that the DPO under the proposed bill should be independent of the Digital Security Agency. One should bear in mind that privacy is not an option but one of the most valued rights for the growth of democracy in the digital age.

Under section 43 of the proposed bill, there are provisions for the transfer of personal data outside Bangladesh, subject to the notification of the government published in the Official Gazette. This will be a lengthy process. The cross-border data transfer can be made more simplistic by incorporating specific provisions like transfers subject to appropriate safeguards, binding corporate rules, derogations/exemptions, or international cooperation mechanisms. Despite that section 43(3) specifies seven circumstances of cross-border data transfer without government's intervention such as consent, performance of a contract, vital interests of the data subject, public interest, etc., these provisions lack at least two other important provisions such as transfers subject to appropriate safeguards and international cooperation for the protection of personal data.

Data breach notification is being incorporated as one of the most exhaustive provisions in modern data protection instruments. Under section 29 of the proposed personal data protection bill, the controller will share the data breach with the Director-General and the processor will notify the controller without undue delay. But there is no specific timeframe for the notice of data breach, and eventually, the said provision could hardly protect the irreparable data losses of the individuals. Moreover, there is no notification requirement to the victim concerned. In that case, the data controller and all other responsible persons should notify about the data breach without undue delay, but no later than 72 hours. Furthermore, if the data breach appears likely to cause a high risk to the rights and freedoms of the individuals, the controller should inform the concerned persons without further delay.

The combined reading of sections 60 and 65 of the proposed bill reveals that no legal action can be taken against the Director-General, authorised officer, an employee of the DOP in respect of any act or omission done or omitted by any of them in good faith in such capacity. Similarly, under section 57 of the said bill, a company along with other responsible persons may get exemption from being punished for the commission of an offence under the bill if they can prove that the offence was committed without their knowledge, or they had exercised all due diligence to prevent the commission of such offence. Let us not forget that too much blanket powers of exemptions as evidenced in the bill will certainly destroy its purposes while making the law meaningless.

It is good to see that under section 46, the proposed data protection bill incorporates the provisions of compensation for the victim from the data controller, data processor or data collector for their failure to comply with the provision of this law. There is neither any provision for filing civil litigation nor any fixed administrative fine under the proposed bill. Due to the lack of specific provisions for civil litigation, fixed administrative fines, etc., the proposed bill may turn into a powerless tool. Considering the profound importance of privacy, the data protection laws of many countries such as Singapore, Switzerland, USA, UAE, Portugal, South Africa, Malta, Macau, Chile, Lesotho, Cape Verde, Bahrain and Uzbekistan have incorporated provisions for filing civil suits against data breach incidents.

Last but not least, an effective data protection law does not intend to stop the processing of personal data rather allows processing within the legal bounds. A carefully designed data protection regime promotes business, eases trans-border data transfers, encourages research and innovations, pays due attention to public interests, and protects the privacy rights of individuals. Hence, the principal aim of an effective data protection regime is to strike the balance of the competing interests among all stakeholders, namely the State, businesses, and data subjects. Though the primary duty of ensuring privacy lies on the government, all relevant stakeholders such as civil society, the legal community, judiciary and other legal institutions, national human rights institutions, ministries and legislative bodies, industry and technology community, and media should have some roles to make a new law purposeful.

THE AUTHOR IS A DOCTORAL CANDIDATE ON PRIVACY AND DATA PROTECTION LAW AT THE FACULTY OF LAW, UNIVERSITY OF MALAYA, MALAYSIA.

FOR YOUR INFORMATION

In the spirit of peace, recovering better for an equitable and sustainable world

Each year the International Day of Peace is observed around the world on 21 September. The UN General Assembly has declared this as a day devoted to strengthening the ideals of peace, through observing 24 hours of non-violence and cease-fire. Established in 1981 by unanimous United Nations resolution, the Peace Day provides a globally shared date for all humanity to commit to Peace above all differences and to contribute to building a Culture of Peace. 2021 is significant as it is the 20th Anniversary of the UN Resolution on the Programme of Action on a Culture of Peace (A/RES/53/243 B). The theme of this year's International Day of Peace is "Recovering better for an equitable and sustainable world".

In 2021, as we still fight the COVID-19 pandemic, we are inspired to think creatively and collectively about how to help everyone recover better, how to build resilience, and how to transform our world into one that is more equal, more just, equitable, inclusive, sustainable, and healthier.

The pandemic is known for hitting the underprivileged and marginalised groups the hardest. By April 2021, over 687 million COVID-19 vaccine doses have been administered globally, but over 100 countries have not received a single dose. People caught in conflict are specially vulnerable in terms of lack of access to healthcare.

In line with the Secretary-General's appeal for a global ceasefire last March, in February 2021 the Security Council unanimously passed a resolution calling for Member States to support a "sustained humanitarian pause" to local conflicts. The global ceasefire must continue to be honoured, to ensure people caught in conflict have access to lifesaving vaccinations and treatments.

The pandemic has been accompanied by a surge in stigma, discrimination, and hatred, which only cost more lives instead of saving them: the virus attacks all without caring about where we are from or what we believe in. Confronting this common enemy of humankind, we must be reminded that we are not each other's enemy. To be able to recover from the devastation of the pandemic, we must make peace with one another.

And we must make peace with nature. Despite the travel restrictions and economic shutdowns, climate change is not on pause. What we need is a green and sustainable global economy that produces jobs, reduces emissions, and builds resilience to climate impacts.

Above all, we should not forget that on 12 November 1984, the United Nations General Assembly adopted the Declaration on the Right of Peoples to Peace, proclaiming that "the peoples of our planet have a sacred right to peace" and "the maintenance of a peaceful life for peoples is the sacred duty of each State".

On this day, the United Nations invites everyone out there to celebrate peace by standing up against acts of hate online and offline, and by spreading compassion, kindness, and hope in the face of the pandemic, and as we recover.

FROM LAW DESK (SOURCE: INTERNATIONALDAYOFPEACE.ORG).

JUDGMENT REVIEW

Procedural waiver in writ jurisdiction: Should *Tayeeb* case be followed as general standard?

Md. Ikra

Enforcement of fundamental rights is itself a fundamental right within the constitutional scheme of Bangladesh, the basis of which is found in Articles 44 and 102(1) of the Constitution. The words used in Article 44 need no further explanation as the words are devoid of ambiguity and posit the rights to be 'guaranteed'. However, the articulation of words in Article 102(1) possesses linguistic uniqueness which is certainly capable of inviting a wide range of interpretation. A textual reading reveals 'an application' must be submitted to set the case in motion, therefore making it a pre-requisite to the judicial enforcement of fundamental rights.

The essence of submitting an application is to draw the Court's attention to a particular case of violation along with other aspects of maintaining a case, such as certainty of contesting parties, aggrieved person's *locus standi*, etc. Apparently, the liberalisation of '*locus standi*' in the famous case *Mohiuddin Farooque* v *Bangladesh* (Writ Petition No. 998 of 1994) could not remove the procedural hurdle in toto in writ jurisdiction of the High Court Division. Traditional legal scholarship would interpret the requirement of submitting 'an application' from an aggrieved person as an absolute procedural requirement. This was the prevailing attitude until the premise met with challenge in *Mohammad Tayeeb* v *Bangladesh* (Civil Appeal No. 593-594 of 2001). In this case, fatwa given by the local community forced the victim to go through another marriage against her will before she could return to her actual husband after an alleged divorce from the latter. The High Court Division initiated a *suo moto* case considering the newspaper report as 'an application' after reading it in the same. Later, it was challenged in the Appellate Division which expounded the case in favour of victim. The Court had to deal with, among others, the question of procedural requirement of submitting an application. It interpreted the requirement in the light of 'knowledge' of the judge which was the ultimate purpose of 'application' moving away from the conventional understanding of an 'application' to be a well-written document disclosing the grievances and accounts of violation of rights. So, in case of grave violation of human rights where the victim cannot pursue the court to set forth the case by reason of any procedural hurdle, including, but not limited to, submitting an application, the judge can exercise *suo moto* jurisdiction if it comes to his knowledge. This premise is also known as epistolary jurisdiction of the Court that connotes the relaxation of procedural rules to meet the justice.

Epistolary jurisdiction was introduced in India as part of judicial activism in *Sunil Batra* v *Delhi Administration* (AIR 149 SC 1982) where the Supreme Court, upon receiving a letter from a prisoner stating the Jail Authority's inhumane treatment to the prisoners, took cognizance of the said letter and treated it as a petition. The *Tayeeb case* seems to be a reiteration of Indian precedent in Bangladesh, though the text of the judgment does not mention the same. One might find it an extreme instance of judicial activism that wins justice for the downtrodden. Dispensing justice for the people not capable to access justice due to their social or economic misfortune by exercising the Court's epistolary jurisdiction is indeed applaudable. But this epistemic or knowledge based 'discretionary' power is coupled with dilemmas, such as when any such event which satisfies a judge to intervene into the matter by initiating a case, it places him in a representative capacity. Furthermore, when the same judge renders rulings or deals with the same that he himself initiated, it then makes him the judge of his own interest. It is important to note that *Tayeeb case* did not establish a general standard of maintainability of a writ petition, rather merely provided waiver of application requirement in exceptional cases. Drawing reference to this case in every matter at hand despite the merit of the case would thus be a wrong application of epistolary jurisdiction bypassing the actual text of the Constitution. However, the Supreme Court of Bangladesh is showing great interest in *suo moto* rulings in recent days by introducing procedural amendment to facilitate *suo moto* rulings based on news report, letters, etc.

In a society where violation of human rights is prevalent, where social structure systematically bars the poor from accessing justice, where transparency and good governance is subjected to political consideration, an inevitable outcome would be victims becoming unable to reach the Court with their grievances. In such cases, Court cannot sit idle. In a grave case of violation or a case involving environmental matter which requires immediate attention, epistolary jurisdiction should be exercised as a timely weapon to address the cause and in such a case it should be seen not as a Court's being overenthusiastic but being active in fulfilling its constitutional obligation.

THE WRITER IS A GRADUATE STUDENT OF LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS.