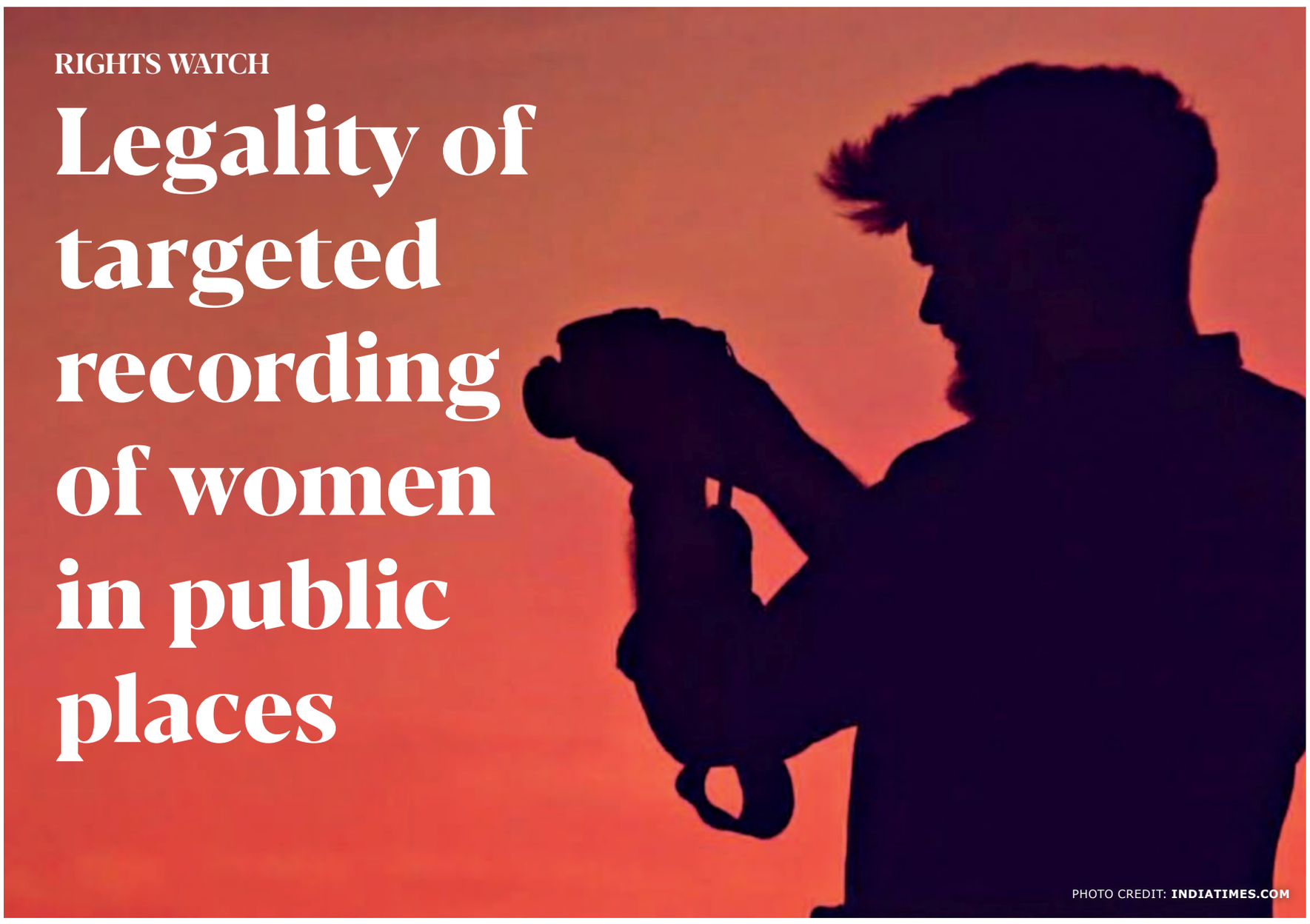
RIGHTS WATCH

Legality of targeted recording of women in public places



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Article 17 of the International Covenant on Civil and Political Rights says that no one shall be subjected to arbitrary or unlawful interference with his/her privacy.

RAFID AZAD SAUMIK

With the rapid advancement in technology all over the world, it has become much easier and efficient to capture photos and record videos. However, this seemingly amazing phenomenon has its drawbacks as well. This 'blessing of modern science' has made it easier for people to capture or record videos of women as means to blackmail, extort, harass, annoy or fulfill their vile sexual gratifications. This type of harassment is on the rise not just in our country but all over the world.

The first thing to understand regarding this is whether taking photos of others in public places should be criminalised. This is a legal question which has divided even the scholars. Some scholars argue that people have no rational right to privacy in public places. Others argue that just because someone is in the public sphere does not mean he/she has given up all rights of privacy. In fact, article 17 of the International Covenant on Civil and Political Rights says that no one shall be subjected to arbitrary or unlawful interference with his/her privacy. Many countries have tried to make laws prohibiting taking photos or recording videos without consent, specially of women. For example, in India, under section 354C of its Penal Code, it is an offence to take photos of or even watch a woman in circumstances where she would usually have the expectation of not being observed. Moreover, section 354D of the Indian Penal Code prohibits stalking of any kind, whether done in person or online. Even in Germany, section 201a of the German Criminal Code prohibits the transmission of any photo to any third party which is of such nature as to significantly damage the reputation of the person depicted.

However, it is unfortunate that the laws of Bangladesh on the matter are quite vague. The Constitution of Bangladesh does not deal with privacy in the public sphere. However, right to privacy may fall within the ambit of right to life and liberty under article 32 of the Constitution. In the landmark case of *Puttaswamy* v *Union of India* (2017) 10 SCC 1, it was held that right to privacy is an integral part of article 21 of the Indian Constitution, which is similar to article 32 of the Constitution of Bangladesh. In this case, Justice Chandrachud famously said, 'privacy was not surrendered entirely when an individual is in the public sphere'.

As for statutory laws in Bangladesh is concerned, firstly, section 509 of the Penal Code, 1860 comes into play, which deals with outraging a woman's modesty. However, as this entire phenomenon is very novel and unique, there has not been sufficient judicial development regarding this. Most pertinent to the issue in hand is section 26 of the Digital Security Act, 2018 that prohibits unauthorised collection, use, etc. of identity information of anyone. Moreover, this section along with section 29 of the same Act deals with the problem of spreading such photos or videos online with mal-intention. While transmitting these photos or videos sometimes they are even distorted and converted into pornography to further annoy, harass, or extort the victims. In case of such scenarios, section 4 of the Pornography Regulation Act, 2012 and section 29 of the Digital Security Act, 2018 are relevant to mention. Even though there are certain statutory provisions regarding this issue, no law addresses this problem specifically. As a result, we see that victims of this type of sexual assault are confused about their rights and do not usually seek legal assistance after facing such incident.

It is of great importance to mention here that in *BNWLA* v *Bangladesh* (2009) 21 BLD 415 the High Court Division of the Supreme Court of Bangladesh gave directives in the form of an eleven-point guideline to protect the women and children from sexual harassment filling the legislative vacuum in the nature of law. In these directives, the Court suggested a detailed definition of sexual harassment that included all other existing definitions of non-contact sexually connoting offences. It also incorporated the modern means of erotic insults against the women that are prevalent in our present age of information technology.

However, as we know any such law that specifically addressed all such issues is yet to be enacted in Bangladesh. It is high time that clear penal provisions regarding taking photos or recording women without consent were made and this problem is resolved conclusively.

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LAW REVIEW

The Evidence Act, 1872: "digital" amendment already obsolete?

S.M. MAHBUBULLAH

The much-anticipated amendment of the Evidence Act, 1872 was put into effect on 20 November 2022. The amendment brought digital and electronic records into the fold. It also made forensic evidence admissible under sections 3(3), 45, 45A, 73B, and 89A. The controversial provision of "character evidence" was also done away with. These changes are welcome. However, the real question is whether the amendment is really as "up-to-date" or as effective as the legislature might believe it is. Let us evaluate how impactful this amendment will be, in the wake of 2023.

The first thing to mention is that digital content had already been used in the trial as evidence in certain circumstances, even before this amendment. For example, in *State* v *Qamrul Islam & Others* (2017), it was held that video footage is to be considered as a "document", under the meaning of section 2 of the 1872 Act. A similar court ruling in *Biswajit Murder Case* (2018) declared video footage, and still photographs as admissible evidence. Moreover, in *Rifat Murder Case* (2020), CCTV footage was used in the trial as substantial evidence that helped in identifying and convicting the accused.

Considering these facts, the inclusion of a specialist section, as opposed to a generalised one, leaves much to be desired. The definition clause of "digital evidence" in section 3 of the Act specifically picks certain existing technologies as the namesake. If we consider the exponential innovation of technology in recent years, it is very likely that the way we perceive, and store information will advance, making much of the current technology obsolete. That could create the need for further amending of the law in the very near future.

The use of forensic evidence has been a fact in our courts, for a fairly long time. The new section 3(3) includes blood, semen, hair, organs, DNA, fingerprints, eye impression as forensic evidence. This will hopefully remove any doubts and confusion, if there still were any, as to their admissibility in court. However, the specific nature of the provision brings valid criticism, in that it may as well prevent the admissibility of newer types of emerging forensic technologies that are not yet in widespread use but will be available soon; for example, "proteomics" and "molecular profiling", to name a few.

Secondly, the amendment has removed the much controversial "character evidence". Section 146(3) has been amended, making questions about a rape victim's character possible only with the court's permission. Such wide discretion of the judge allows a certain bias of the judge to play a dangerous role. In addition, section 155(4), which allowed for the credit of a witness to be impeached, based on "immoral character", has been completely omitted.

Although the omission is certainly worthy of praise, only time will tell how much effective it really is. Experts suspect that the changes brought in the "character evidence" provisions will not be enough. That is because character evidence can still be produced in court, bypassing section 155(4), through section 11. Under section 11(1), facts not otherwise relevant are relevant if they conflict with any fact-in-issue or relevant fact. The section can easily be interpreted by clever lawyers into allowing any facts regarding a victim's character. Thus, the high threshold placed in section 146(3) can be rendered useless by this loophole. The interesting thing is the exact same situation took place in India after its Evidence Act was amended. Character evidence continued to haunt the process of the courts in this way. There is no reason to believe that Bangladesh will not meet a similar fate.

However, this amendment is not all doom and gloom. Despite its many flaws, the amendment has succeeded in removing any vagueness and confusion that existed in the courts in admitting digital and forensic evidence. This will certainly help in speeding up the court process. But the amendment is unlikely to impact our evidence system in any major, meaningful way. Hopefully, the government notices these flaws, and fix them in due time.

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LAW LETTER

Need for addressing diplomatic immunity

TAHEFA SAMIN AND JUWEL KOBIR

Diplomatic immunity is a well-recognised concept of international law that provides the safe exit and legal protection of diplomats wherever they represent their own country and aims to ensure their freedom and safety.

Granting diplomatic immunity has been a common practice for thousands of years. Even though the limelight is on the euro-centric approach to diplomats' immunity, it is indeed clear that similar practices existed in ancient Greece, the Ottoman empire, and the Chinese empire. With the introduction of the Vienna Convention on Diplomatic Relations (VCDR) of 1961, the custom was finally given a legal framework.

The VCDR grants protection to individuals based on their rank in a diplomatic mission and the necessity for immunity in the performance of their responsibilities. It protects diplomats, their families, and diplomatic property in several ways. The primary objective of the VCDR is to let diplomats carry out their duties without interference from the receiving state.

For example, the receiving state cannot punish diplomats and must protect them and their families and property. However, of all the protections provided by the VCDR, none has raised as much controversy as article 31 has done, according to which, diplomats should not be subject to the local laws and regulations of the host country. Article 37 provides that this immunity also applies to both administrative and technical staff members of diplomatic missions, who also enjoy a degree of immunity. Nonetheless, the Convention makes it clear in the preamble that 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States'.

Diplomatic immunity is a widely accepted principle throughout the international community but is not always respected. This often occurs only when the diplomat has committed an offence that breaches fundamental human rights unrelated to their diplomatic function or has witnessed such a heinous act.

It is indeed true that diplomats are shielded from the host country's judicial, civil, and administrative jurisdiction. However, article 32 empowers the host nation to request that the diplomat's immunity be revoked. If the exemption is granted, the diplomat will be held accountable for his or her offences, like any other citizen. Under article 9, the host nation has the right to declare any member of the diplomatic mission persona non grata. This may be done at any moment, and there is no obligation to explain such a decision. Governments often abuse this authority when there are no specified reasons for declaring a diplomat persona non grata. This shortcoming has prompted nations to engage in reciprocity. In such instances, the host nation would often return the individual or terminate his diplomatic activities.

Diplomatic immunity regulations have evolved throughout the years, with no universally practiced codified law in force. While the VCDR has acknowledged and brought to attention the significance of diplomatic privileges and immunities to a significant extent, there is still room for advancement as it does not permit the receiving state to punish crimes committed by diplomats from the host nation. The receiving state's hands are tied, and in most cases, it cannot take any action that violates fundamental human rights or constitutes grave abuse of power. To secure both human rights and the intent of the law, it is required to make some changes. Therefore, the VCDR should be reformed in a way that limits diplomatic immunity. Diplomats should not enjoy immunity from committing grave offences. It should only apply in specific circumstances to criminal cases.

To sum up, it can be stated that the legislation on diplomatic ties is highly dependent on several external circumstances, such as the political situation in particular nations and the stability of relations between states, yet diplomatic crime is a global problem that must be addressed to ensure offenders face punishment for their crimes.

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