LAW REVIEW

Revisiting the Draft Personal Data Protection Act 2023

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In digital age, personal data fuels the online ecosystem while also raising privacy concerns. To address this issue, Bangladesh aims to strengthen its data privacy framework by adopting the draft Personal Data Protection Act, 2023 (PDPA). The General Data Protection Regulation (GDPR) of the European Union (EU) serves as a global benchmark for data protection, influencing privacy laws worldwide through its robust framework and the European Commission's adequacy status. However, the current draft of the PDPA falls short of the GDPR's rigorous standards for the following reasons.

The first concern is regarding the grace period. Section 1(2) of the latest draft of the PDPA, states that the bill will take effect on a date specified by the government in the official gazette. International best practices recommend a minimum two-year grace period for preparation. For instance, the EU GDPR was adopted on 14 April 2016 and took effect on 25 May 2018, providing over two years for compliance preparation.

The draft Act also inadequately emphasises 'personal data' over 'data'. Indeed, the primary focus of a robust data protection law is 'personal data,' as it seeks to protect individuals' privacy and prevent the misuse of their personal information. To effectively protect 'personal data,' it must be explicitly defined. However, the draft PDPA's definition of personal data in section 2(o) is ambiguous, covering legal persons along with natural persons and lacking any reference to the identification of the natural persons it seeks to protect from data breach. Conversely, the GDPR in Article 4(1) precisely defines 'personal data' as any information that can identify a natural person, directly or indirectly. To align with global best practices, it is necessary that the proposed bill puts more emphasis on 'personal' data over 'data' as a whole.

Furthermore, the draft PDPA lacks a clear articulation of the key data protection principles established by the OECD Privacy Guidelines of 1980, which were later adopted by dominant data protection regulations, such as the GDPR. To align with global standards, the PDPA should explicitly incorporate GDPR-aligned principles, including lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability.

The next concern is regarding an independent data protection board. The provisions for establishing an independent data protection authority are essential for the unbiased enforcement of privacy laws and the protection of citizens' rights. While Section 35 of the draft PDPA details the composition and operations of the Data Protection Board, it lacks explicit guarantees of the agency's independence. Without clear safeguards for autonomy, there is a risk of conflict of interest that could undermine its impartiality as a regulatory body.

Moreover, the draft PDPA conflates 'anonymised' and 'pseudonymised' data, although they are distinct. Pseudonymised data can still identify individuals through additional information and remains subject to data protection laws, while anonymised data cannot be traced back and is not subject to these laws. Hence, the PDPA should clarify that these terms are not interchangeable.

Yet another area of concern is the data localisation principles that the draft bill embodies. Sections 50 and 51 of the draft PDPA restrict the transfer of government-classified data outside Bangladesh, except in specific circumstances like international trade or under international agreements. While data localisation policies can be motivated by privacy and security concerns, they often fail to effectively protect data privacy and can negatively impact economic activities, as demonstrated by the Information Technology and Innovation Foundation (ITIF).

Section 28 of the draft PDPA mandates data-fiduciary (*upatta jimmadar*)to notify the Data Protection Board within 72 hours of a data breach, similar to the GDPR. However, it lacks provisions for notifying affected individuals in high-risk cases that could impact data subjects' fundamental rights. The draft should be amended to include such provisions, ensuring transparency, accountability, and alignment with the international best practices.

Notably, the draft bill also falls short on protecting rights of foreign data subjects. Section 17 of the draft PDPA grants foreign data subjects in Bangladesh the same data protection rights but lacks details on enforcement and exceptions. The PDPA should clearly outline enforcement processes, criteria for foreign data subjects, and potential limitations to enhance clarity and transparency.

The draft PDPA excessively relies on rule-making powers, which may lead to broad, potentially misused interpretations. Without mandatory publication requirements, there's risk of executive overreach. Before Parliamentary approval, the PDPA's rule-making provisions should be limited, well-defined, and transparent. The bill also lacks any specific provision on 'data protection by design and by default,' which integrate privacy measures from the outset, ensuring automatic protection of personal data. While Article 25 of the GDPR mandates this, the current PDPA should also include similar provisions.

Yet another area of concern is the many exemptions that the bill provides for. Section 33 of the draft PDPA grants exemptions to government agencies for specific data processing activities, including crime prevention or investigation, health data, research, and journalism. Section 34, however, permits additional exemptions via the official Gazette, raising concerns about transparency and potentially weakening data protection enforcement.

In conclusion, while the draft PDPA represents a positive step towards establishing a comprehensive data protection regime in Bangladesh, it requires significant improvements to align with global standards. The adjustments outlined in this write-up will strengthen Bangladesh's data protection framework, align it with international standards, and help secure an adequacy decision from the European Commission, thereby enhancing global trade relations.

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LAWS OF WAR

Understanding the Syrian Armed Conflict

MD. SIAM SHAFI

Rebel forces, particularly Hayat Tahrir al-Sham (HTS) and the Syrian National Army (SNA), carried out an offensive that ended the 50 years of the Assad family's authoritarian rule in Syria. An armed coalition, supported by both state and non-state actors, was involved in this offensive.

The International Humanitarian Law (IHL) classifies two types of armed conflicts: International Armed Conflict (IAC) and Non-international Armed Conflict (NIAC). Common Article 2 of the Geneva Conventions defines international armed conflicts as all instances of declared war or any other armed conflict that may occur between two or more high contracting parties (i.e., States), whether or not one party recognises the *state of war*. On the other hand, Article 1 of the Additional Protocol II of the Geneva Conventions defines non-international armed conflict as all instances of armed conflict that may occur between state forces and non-state forces or between such non-state forces in the territory of any high contracting party (i.e., State). We cannot simplistically categorise the Syrian conflict as either IAC or NIAC alone as the Syrian conflict simultaneously demonstrates the traits of both IAC and NIAC.

Many armed forces were involved in the Syrian conflict, including state and non-state actors. The Assad regime received support from Russia and Iran to fight against many rebel factions. HTS is the Sunni Islamist paramilitary organisation that led the recent offensive and overthrew of Assad. The US-backed Syrian Democratic Forces (SDF) is a Kurdish-dominated coalition of ethnic militias whose military aim is to defeat IS, which controls the northeastern part of Syria. The Free Syrian Army (FSA), a loose umbrella group of armed northern Syrian opposition factions, formed the Syrian National Army (SNA), a Turkish-backed coalition, which collaborated with other rebels, including HTS, to overthrow Assad.

The involvement of a foreign state in a non-international armed conflict presents a significant challenge for IHL in classifying these types of armed conflicts. A non-international armed conflict becomes an international armed conflict when foreign intervention is involved. This requires "overall control" on part of the foreign state as stated by the International Criminal Tribunal for the former Yugoslavia Appeal Chamber in the *Prosecutor* v *Dusko Tadic* case. According to the Tadic Appeal Chamber decision, the degree of support, such as military, financial, logistical, political, etc., is required to transform an NIAC into an IAC. The Appeal Chamber further stated that:

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"In order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law."

Therefore, when a foreign state supports a non-state party through military, financial, logistical, political, and other means, we can say that the foreign state has overall control over that non-state armed group, thereby transforming an NIAC into an IAC.

The initial nature of the Syrian conflict was non-international, as it involved the Assad government and certain rebel groups. However, the question remains whether the conflict will remain non-international following the intervention of foreign states that have supported the rebel groups through various means. Iran, Russia, and the Shia Islamist militia Hezbollah backed the Assad regime. Various state parties, including Turkey, Israel, the United States, the Netherlands, and many others, backed the rebel groups. Turkey has played a crucial role as the primary external supporter of the rebel faction since 2011. Turkey has provided arms, military, and political support to rebel factions, the majority of which still operate under the Syrian National Army (SNA) banner. Also, Turkey maintains a military presence in northwest Syria and extends support to certain rebel factions, including the SNA. In addition to providing the groups with the necessary equipment, it seems that Turkey was also actively coordinating and assisting in the planning of their overall military operations. The supply of modern weapons, strategic assistance, and the verifiable increase in military capabilities suggest a further degree of overall coordination. In my opinion, this level of coordination goes beyond the provision of mere material support and transforms the character of the Syrian conflict from NIAC to IAC.

In conclusion, the International Humanitarian Law does not provide any explicit provision for neatly distinguishing a non-international armed conflict (NIAC) from an international armed conflict (IAC). In author's view, factual categorisation classifies situations like the Syrian conflict as international, while a specifically legal categorisation classifies it as non-international.

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