"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

REVIEW OF A CONSTITUTIONAL AMENDMENT
what does legally matter?

CONSTITUTIONAL ANALYSIS

KAWSER AHMED

THIS essay seeks to discuss briefly two fundamental issues concerned with judicial review of constitutional amendment in Bangladesh, such as – on what grounds a constitutional amendment could be held repugnant and how the court would justify exercise of its judicial power to hold a constitutional amendment repugnant. In other words, what legal criteria the court should rely on for deciding validity of a constitutional amendment, and how the court would account for its jurisdiction in deciding validity of a constitutional amendment.

In view of the background legacy of Bangladesh legal system, it appears that a constitutional amendment could be adjudged repugnant at least on three grounds namely, lack of legislative competence, lack of procedural compliance and lack of substantive compatibility. Invariably, lack of legislative competence refers to a situation when any legislative body or authority brings in a constitutional amendment despite having no power to do so. Examples will include promulgation of ordinance by the president seeking to amend the Constitution. Similarly, passing an amendment bill by a simple majority of its members of parliament will typify lack of procedural compliance. And lack of substantive compatibility will occur if any constitutional amendment stands at so much odds with the existing constitutional provisions or introduces so much changes that even harmonious interpretation cannot rub down their mutual incongruences.

As a matter of fact, the aforementioned grounds came into discussion before the court in a number of cases concerning validity of constitutional amendments. For example, the grounds on which the Supreme Court has annulled the 5th constitutional amendment [Italian Marble Works Ltd v Bangladesh (2010) 62 DLR 70] and the 7th constitutional amendment [Siddique Ahmed v Bangladesh (2011) 63 DLR 565] include lack of legislative competence and lack of procedural compliance. Again, the matter in issue in the cases concerning validity of the 8th constitutional amendment [Anwar Hossain Chowdhury & Others v Bangladesh (1989) BLD (SPL) 1] or the 13th constitutional amendment [Abdul Mannan Khan v Bangladesh (2012) 64 DLR (AD) 169] was mainly substantive compatibility.

Undeniably, among the above-mentioned grounds, determining substantive compatibility of a constitutional amendment vis-à-vis the Constitution is the most difficult task because in the last resort a constitutional amendment is also a part of the Constitution. Therefore, determining validity of a constitutional amendment vis-à-vis the Constitution necessitates a special and convincing tool. The Supreme Court resolved this issue in the 8th Amendment Case by laying down a test for determining substantive compatibility of a constitutional amendment vis-à-vis the Constitution – which is famously known as 'the basic feature doctrine' or 'the basic structure doctrine'. In many respects, the 8th Amendment Case could be designated as the most important case in the history of the legal system of Bangladesh. One such reason is that it marked the beginning of judicial review of constitutional amendment in Bangladesh.

Besides, the Supreme Court, in the 8th Amendment Case, explained the legal basis of its jurisdiction to review validity of a constitutional amendment. In particular, Justice Badrul Haider Chowdhury argued that the authority to decide constitutionality of any laws including a constitutional amendment was vested in the Supreme Court in virtue of article 7 of the Constitution. The aforesaid argument was later followed in the cases in which the Supreme Court declared a number of constitutional amendments repugnant (see Kawser Ahmed, 'Misreading or Leapfrogging? SC's Power to Review Constitutional Amendment', The Daily Star, 22 August 2017, p. 12).

Evidently, the majority of judges in the 8th Amendment Case heavily drew on jurisprudence from Indian jurisdiction in shaping their ideation of the basic feature doctrine. Unfortunately, the judges seemed to have overlooked the fact that the Constitution of Bangladesh did contain tangible hints on the basis of which an indigenous doctrine could have been viably developed so as to accommodate judicial review of constitutional amendment on the grounds of lack of substantive compatibility.

Any theory of judicial review of constitutional amendment in Bangladesh context must take account of article 26 of the Constitution if it wants to claim itself as complete.

For instance, the original article 26of the Constitution unqualifiedly provided that laws which were inconsistent with the fundamental rights would become void and no laws would be made inconsistent with the fundamental rights. By the second constitutional amendment, a new clause was inserted into article 26 providing that the earlier two clauses [26(1) and 26(2)] of the same provision would not apply to any constitutional amendment. The aforesaid amendment endorses the fact that the legislators viewed constitutional amendments as more on a par with 'other laws', and for the same reason, excepted them from judicial review if they were inconsistent with the fundamental rights. To put it differently, article 26(3) implies that constitutional amendments are susceptible to judicial review and could be held repugnant for being inconsistent with any provisions of the Constitution other than the fundamental rights. Hence, it appears that any theory of judicial review of constitutional amendment in Bangladesh context must take account of article 26 of the Constitution if it wants to claim itself as complete.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

GLOBAL LAW UPDATES

Investigation into Israeli forces

NEARLY 60 Palestinians were killed at mass border protests on Monday, 21 May because of Israeli firing into Hamas-ruled Gaza. Following this, the UN has voted to send an international war crimes probe to Gaza. The resolution condemned "the disproportionate and indiscriminate use of force by the Israeli occupying forces against Palestinian civilians". The council voted through the resolution with 29 in favour while two opposed and 14 states abstained. The "independent, international commission of inquiry" mandated by the council will be asked to produce a final report next March.

Israel condemned the resolution, while the United States decried it as an example of a biased focus on Israel by the council. Both lamented that the resolution didn't mention about the Hamas rulers of Gaza, whom Israel blames for the violence.

Zeid al-Hussein, the current United Nations High Commissioner for Human Rights, slammed Israel's reaction to protests along the border as "wholly disproportionate".

In a vigorous speech, he slammed the "appalling" recent events in Gaza and called for the occupation of Palestine by Israel to end. He said that 1.9 million people living in Gaza had been denied human rights by Israeli authorities and described those living in the Palestinian enclave as "caged in a toxic slum from birth to death; deprived of dignity; dehumanised by the Israeli authorities to such a point it appears officials do not even consider that these men and women have a right, as well as every reason, to protest".

He compared the Palestinians' use of Molotov cocktails, slingshots and burning kites against the "horrifying and criminal violence" with which they were met. "The stark contrast in casualties on both sides is suggestive of a wholly disproportionate response. Killings resulting from the unlawful use of force by an occupying power may also constitute 'wilful killings' – a grave breach of the Fourth Geneva Convention," he told the UN council.

The vote for the said investigation came days after Israeli forces shot and killed 59 Palestinians and injured more than 2,700 during mass protests along the Gaza border on the day the US officially opened its embassy in Jerusalem.

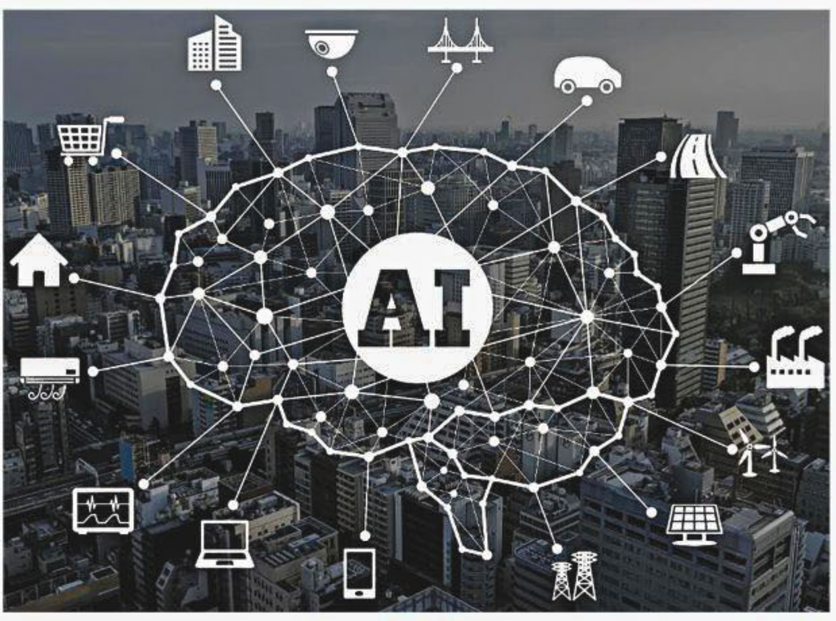
COMPILED BY LAW DESK (SOURCE: INDEPENDENT.CO.UK).

LAW VISION

Can Artificial Intelligence claim IP-ownership?

ABU SADAT MD. SAYEM ALI PATHAN

TODAY we use many services or products even without noticing that these are Artificial Intelligence (AI) generated, as for example, auto pilot system in airplanes, spam filters in emails, plagiarism checker softwares, etc. AI-driven world is becoming relevant because it can generate data and write news, paint pictures, assess marketing policy and what not.



However, the question of ownership over a product generated by AI comes when it can produce something which falls within the definition of Intellectual Property (IP). Still AI has got no legal status irrespective of its "intelligence" feature under the IP law. In order to find out the scope of AI to claim IP law protection, the primary question is whether AI has intelligence to create something which could be addressed as "creation of mind".

AI, as it is now, is not a single man's work. At least eight types of contributors have developed AI system. These contributors are often regarded as stakeholders. These stakeholders are: the software programmers, data suppliers, the trainers/feedback suppliers, the new employers of other players, the operators of the systems, the users, the Government, the investor(s). But can every one claim his or her ownership on the AI-generated products? The claim of such ownership under the principles of copyright and patent law deserves discussion.

An AI can produce something which will satisfy all the three criteria of copyright, namely: creativity though a minimum amount, fixation, and originality. But none of the legal systems over the world does permit an AI to get copyright over its work and the same is true for patent.

The IP is a creation of mind. Necessarily, the word "mind" used here means a mind of human being. Except human being, no one can claim the protection or ownership under IP law irrespective of its intelligence. Even a non-human having, a so-called, mind has no capacity to claim ownership under IP law.

In 2018, the Ninth Circuit of USA held in case of Naruto et al v David Slater that animals, other than humans, cannot sue for copyright. From the judgment, it is clear that the US legal system allowed only human to get protection under IP laws. Moreover, the countries who are members of WIPO enact law under which a non-human cannot get the protection of IP law.

Under these circumstances, who is the owner of IP generated by AI? The answer is difficult considering its multiplayer model. To understand whether AI can get the ownership over the products generated thereby requires more analysis of the IP law under "law and economics theory", "the personality theory" and "Locke's theory on labour".

As per law and economics theory, AI cannot claim ownership under IP law, mainly for the reason that an AI system does not have the capacity to receive such incentive that creators and inventors are entitled to as exclusive rights to their intellectual products by preventing others from using their goods without permission or payment.

Hegel, the proponent of personality theory, argues that property rights are a means for developing and realising one's personality. He also argues that "an idea belongs to its creator because the idea is a manifestation of that creator's personality." AI also fails to manifest its personality without its creator who happens to be a human being.

In the opinion of John Locke, the proponent of labour theory, "the labour of his body and the work of his own hands, we may say, are properly his." Under this theory, all the persons who are involved with AI have capacity to be remunerated as per their contributions. Thus, the scope of ownership in favour of AI remains as narrow as possible.

Therefore, it may be said that the AI system has no scope to get ownership over the products which it generates. If so, then who will get the ownership? In a multiplayer model, every stakeholder making an AI to work has the scope to claim the ownership over the contribution he or she makes. But the ownership over the final products generated by AI depends upon the legal framework of the particular State under which jurisdiction it falls.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

LAW LETTER

Road deaths and injuries: The role of tort law

Bangladesh is hardly any stranger to road deaths and injuries but this past month has been particularly poignant since certain road injuries and subsequent deaths in Dhaka have garnered nationwide attention due to their tragic and gruesome nature. On April 3, Rajib Hossain, a university student, had his right hand chopped off after it got stuck between two speeding buses. He later died at Dhaka Medical College Hospital. On April 11, Runi Akter, a university student, was hasting towards a road divider when a speedy bus ran over her, and crushed her legs against the pavement. She is still undergoing treatment at a Kalyanpur hospital. These gruesome incidents are but the latest instances of our already dire road fatality problem. A recent study by the Accident Research Institute at BUET found that 40,000 people have been killed and 60,000 crippled as a result of road crashes in the last five years alone.

The severity of this problem must beg the question as to how the law should respond to road deaths and injuries. While almost all cases have seen the police chasing down the bus driver and lodging a complaint against him, we must come to understand that criminal law offers little respite to victims of road fatalities. When someone loses a part of their body as vital as their hands or legs, imprisoning the offender does nothing to address the innumerable pecuniary and non-pecuniary losses that are bound to flow out of this bodily injury. Take for instance, the case of Runi Akter, who was not only in the final stages of her MBA course but was also working part time at Rangs Properties to help her family make ends meet. Upon graduation, she was hoping to secure a full time, better paid job in the commercial sector to support her family to an even greater extent. Criminal law is unable to address the host of losses now faced by Rumi, as imprisoning the reckless driver will not make Rumi's life any better. It will not address the immense financial costs of her ongoing and future treatment or the immense loss of potential earnings that she could have made as an able bodied MBA graduate.

Tort law on the other hand, which deals with compensating victims, is very much apt in dealing with these cases as it tries to redress the victim in monetary terms insofar as possible. Furthermore tort law allows the court to impose liability on third parties who should be held accountable (but escape criminal liability) such as bus owners and operators who employ unqualified drivers to run unfit buses in the first place and directly incentivise rash driving by paying these drivers by the number of trips they can make, rather than on a weekly or monthly basis and they also have deep enough pockets to pay the necessary compensation. The Bangladesh Beverage Case and Catherine Masud Case are two significant precedents set by the Supreme Court on road deaths and injuries whereby employers were vicariously held liable for the reckless driving of their employees and ordered to pay BDT 1.7 crores and 4.6 crores in damages to the victims respectively.

Runi's university colleagues have already held a demonstration demanding justice for their friend, including demands for compensation. This is significant because it shows how we are slowly moving away from our obsession with criminal law as the exclusive medium of implementing justice. Additionally, State Minister for Labour and Employment Mr. Mujibul Haque said the government has decided to provide BDT 2 lakh as compensation to the family members of Rozina Akhter, another victim of road death and most recently the High Court has asked the two bus companies to pay BDT 1 crore to the family members of Rajib Hossain. While these are welcome steps by the government and judiciary, the amounts are inconsistent and no mention was made of Rumi or any of the other victims. Furthermore, the applicability of the precedent set by Rajib's case to private bus companies/parties is questionable as it was filed under article 102 of the Constitution which generally applies to public authority bodies. What we need right now is a systematic compensation scheme incorporating established tort law principles, which is accessible to all victims of road deaths and injuries, not ad-hoc, erratic sums of compensation offered to selected victims whose death or injury garners a requisite degree of attention.

Taqbir Huda
Legal Researcher, Bangladesh Institute of Law and International Affairs (BILIA)