RIGHTS WATCH

Linguistic right of indigenous peoples in Bangladesh:

Aspiration of language movement and reality

According to the Minority Rights Group International, about 1.6 million people from 27 different indigenous groups sharing 1.8% of the total population, are residing in Bangladesh. It will not be an exaggeration to comment that we as a state have failed to provide their fundamental civil, political, and cultural rights from the very inception of Bangladesh.

ZUBAIR AHOSAN

This year we commemorated the 70th anniversary of our language movement, which established the syncretic character as a nation and outstretched the notion of the right to mother language all over the world. Our ancestors' valiant sacrifice was also recognised by the UN who declared the 21st February as the International Mother Language Day. But what was the aspiration of the mother language movement? Was it initiated for transgressing and overpassing the dignity of other languages and establishing Bangla as superior to every other language? History provides a different narrative of honouring the idea of mother language in every sphere of life. It is a matter of great regret that, instead of enlarging the opportunity of learning and using indigenous peoples' ethnic language, the state often seems to remain lethargic.

Unfortunately, there is no existing government regulation that asserts indigenous linguistic rights in particular. However, we have some constitutional and international legal responsibility to recognise the linguistic rights of minorities. After the fourteenth amendment of our Constitution, it has become a promise to preserve and develop the unique local culture and tradition of the tribes, minor races, ethnic sects, and communities as per Article 23A of the Constitution. Therefore, for protecting the ethnic minority and indigenous groups in Bangladesh, availing the opportunity of practicing, learning, and using their mother language in public life is one of the essential elements to address. The office of the High Commissioner of UN Human Rights (OHCHR) entails some crucial concerns regarding language rights of linguistic minorities such as recognition of those languages, use of minority languages in public life, education, media, administration, judicial fields, ensuring them the equal opportunity to participate in those sectors also.

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Moreover, it proposes distinguished provisions for serving minority languages. Besides, Article 2 of the UDHR and the International Covenant on Economic Social and Cultural Rights (ICESCR) articulate obligations for the state parties guaranteeing the right to language for every person residing in the respective countries. Bangladesh is a signatory party to the ICESCR. Though for a long period, the economic, social, and cultural right was subject to the question of judicial enforceability under article 8(2) of the Constitution, claiming indigenous language right was more pendulous upon the government wish rather than judicial enforceability. In many instances, we have observed that the supreme court has provided liberal verdicts over enforcing ESC rights complying with fundamental rights in part III of the constitution. Additionally, UNGA has recently adopted an optional protocol for enforcing ESC rights that will allow persons to make complaints regarding violations of ESC rights contained in the ICESCR. Now it is considered to have a quasi-judicial effect in international law. Therefore, we need to live with those complex legal boundaries advocating for indigenous peoples' language rights until the government takes an approach to recognise and furnish the mechanism sincerely.

So far, the Bangladesh government has established International Mother Language Institute (IMLI) in 2010, which has documented only four languages of indigenous communities – Chakma, Marma, Achik, and Tripura. But these indigenous communities have a large population, and their language is still alive. Other indigenous languages with small populations are now at a heavy risk of being extinct. To conserve indigenous ethnicity and cultural diversity, it is time to focus on preserving their language and according dignified recognition to each. Besides providing status, we first need to raise the question of equality of opportunity of practicing their language at least in educational sectors and public offices in hill tracts territory where most indigenous communities reside. Secondly, we need to identify the languages at risk of extinction and take measures to preserve those. Finally, sufficient research and study scope on indigenous language and culture need to be facilitated by the universities so that any substantial threat to those languages and cultures can be mapped out and pertinent propositions for development and preservation can be taken efficiently.

Linguistic diversity and the ethical development of a nation are inextricably associated with each other. We need to stay clear of undertaking unjust and prejudicial treatment, especially on language and cultural opportunities to the indigenous peoples in Bangladesh. And legally recognising their language would be one of the most benevolent presents for them to uphold the aspiration of Bangladesh's language movement and national integrity in the upcoming days.

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FOR YOUR INFORMATION

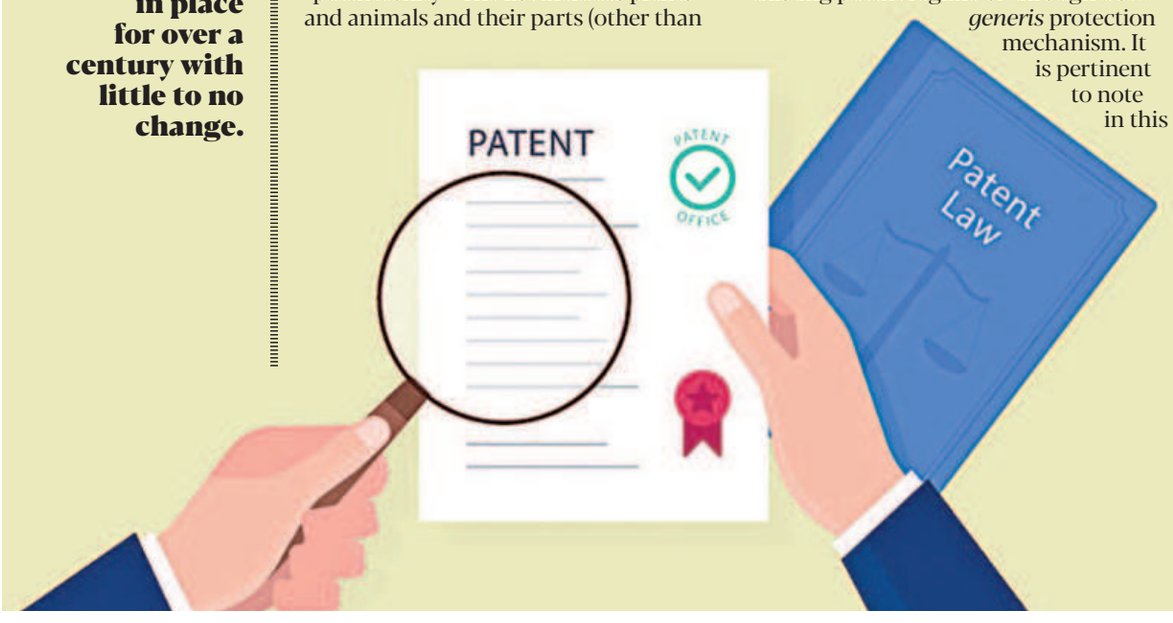
New Patent law passed in the PARLIAMENT

Earlier this month, the new Patent Act was passed in the parliament, replacing the Patents and Designs Act, 1911. The newly enacted law has been in discussion for quite a long time, having been in place for over a century with little to no change.

Particularly in light of the global discourse on patent law in relation to the availability of vaccines for the COVID-19 pandemic, the need for a comprehensive and up-to-date regime on patent law was highlighted by academics and policymakers.

The new Act is cognisant of the international standards of Intellectual Property Rights (IPRs) as established under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and brings about much clarity on the laws on patents. While in the 1911 Act, definitions of "patent" and "invention" were broadly formulated without any carve-out for exceptions or limitations, the new law provides clearer guidance on patentability. Section 5 of the newly passed Act lists down exceptions to "patentability". The list includes plants and animals and their parts (other than microorganisms) and the biological processes and the biological processes necessary for the production of plants or animals and their parts (except inorganic and microbiological processes). Section 5 also excludes traditional knowledge, innovation arising out of traditional knowledge or from a combination of the same.

Article 27(3)(b) of TRIPS Agreement allows member states to exclude from patentability "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes." However, the second part of Article 27(3)(b) states that member states are required to provide protection for plant varieties either under the existing patent regime or through a *sui generis* protection mechanism. It is pertinent to note in this regard that the government enacted the Plant Varieties Protection Act, 2019 for the protection of different classes of plant varieties as well rights of breeders and farmers.



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The Act also lays down provisions on parallel importation (the principle of international exhaustion, i.e. an authorised sale of a patented product by the patentee or his authorised licensee anywhere in the world, exhausts the right to control further disposition). It lays down the term for utility models (10 years).

Section 5 also excludes from patentability any invention whose production within the borders of Bangladesh is required to be prevented in order to maintain public order and morality, as well as any process which is clearly contrary to the course of nature. These exceptions broadly fall within Article 27(2) of the TRIPS Agreement which allows member states to exclude from patentability any invention on grounds of "the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment". The TRIPS provision under article 27(2) which itself sets the standard for exclusion on grounds of public order and morality itself has been subject of longstanding debate which remains unresolved. Therefore, it remains to be seen how the debates unfold as it will understandably impact the interpretation of the exceptions under section 5 of the newly enacted Act. It will be useful to note that the willingness to conform to the TRIPS standard on patentability is evident from the framing of the provisions on patentability.

Section 21 of the Act lays down the rules on compulsory licensing of patents. It allows the government to grant compulsory license to any government authority or other selected entities on the following grounds: (i) when it is necessary for public interest, national security, nutrition, health, national economy or development of any other significant sector; (ii) when a court or executive authority decides that the patentee is using the invention in an anti-competitive manner and granting compulsory license may prevent such anti-competitive conduct (iii) when the patentee misuses the exclusive rights or fails to prevent the misuse by the licensee of the same (iv) the patented invention is not available at the predetermined price or in proper quality in Bangladesh through manufacture or import; and (v) when a subsequent economically significant invention is related to a prior invention and the subsequent patent cannot be worked without violating the prior patent. Section 21(5) provides that no compulsory license shall be issued on grounds of insufficient production or non-working of patent within 4 years from the date of application or 3 years from the date of granting of patent. This requirement is in line with the Paris Convention for the Protection of Industrial Property. Section 21 also provides the patentee an opportunity of being heard.

Section 21 also provides for certain conditions to be included within compulsory license which includes (i) use of the invention for manufacture or import within Bangladesh (ii) termination of the license by the patentee (iii) uninterrupted use of the invention by the patentee, subject to provisions of Section 24. Further guidance is provided on compulsory license for pharmaceutical products or processes, which stipulate that compulsory license shall be primarily used to meet local needs unless license is granted for the purpose of export to countries which do not have sufficient manufacturing capacity.

The Act also lays down provisions on parallel importation (the principle of international exhaustion, i.e. an authorised sale of a patented product by the patentee or his authorised licensee anywhere in the world, exhausts the right to control further disposition). It lays down the term for utility models (10 years). Section 36 reaffirms the applicability of the WTO General Council's decision taken on 30 August 2003 on export of pharmaceutical products under compulsory license until the TRIPS council's amendment decision comes into effect in Bangladesh.

Overall, the new Patent Act adopts the internationally applicable standards, lays down a clear set of criteria for compulsory licensing, and provides guidance on balancing between meeting local needs and exporting to countries without sufficient manufacturing abilities, particularly with regard to pharmaceutical products and processes. Its reliance on international standards of patentability has the potential to lend more certainty and reliability to the patent law framework in general and may remove hindrances from attracting foreign investment.

By Law Desk