CITIZENSHIP LAW

UNDERSTANDING Birthright Citizenship

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The ban on the US birthright citizenship (*jus soli*–right of the soil) by the 47th President of the United States Donald Trump is perhaps one of the most discussed topics at this moment across the globe. This means babies born in the US soil are no longer entitled to obtain citizenship automatically by birth. Earlier President Donald Trump termed it as "birth tourism" and banned this century long constitutionally guaranteed right immediately after being sworn. He signed the directive called "Protecting the Meaning and Value of American Citizenship" on 20 January. However, the order would take effect in following 30 days.

Notably, the 14th amendment to the USA Constitution provides legal recognition of citizenship by birth and states "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". The Immigration and Nationality Act of 1952 defined citizens and also recognized birthright citizenship. Subsequently in 1982, in *Plyler v. Doe*, the US Supreme Court reaffirmed birthright citizenship for children of undocumented immigrants.

Interestingly, there are exceptions too. For instance, a child born in the US to a foreign diplomatic officer with diplomatic immunity are not considered as the US citizen because they are not subject to the jurisdiction of the United States. Pertinently, in 2021, the Supreme Court declared that anyone born in American Samoa's unincorporated territories are not automatically guaranteed birthright citizenship, unless Congress enacts legislation. Also, the baby of enemy occupiers – does not have the birthright citizenship.

The new Executive Directive now creates two groups of individuals born in the US who would not be entitled to birthright citizenship automatically. First, those whose mother was unlawfully present in the US and whose father was not a US citizen or lawful permanent resident at the time of the child's birth; and second, those whose mother was in the US on a lawful but temporary visa e.g., as a student or tourist and whose father was not a US citizen or lawful permanent resident at the time of the birth. The order relies on legal interpretation that the phrase "subject to the jurisdiction" of the US would not be applicable for the undocumented immigrants.

This new presidential directive eliminating birthright citizenship if sustained will affect immigrants and short-term visa holders. Even if the Trump administration is unable to completely ban birthright citizenship of the children of certain immigrants for court's intervention, they could try to restrict short-term visas for pregnant travellers.

Although *Plyler v. Doe* (1982) promulgated that according to the 14th Amendment, there was "no plausible distinction" between immigrants who entered lawfully and those who entered unlawfully as both were subject to the civil and criminal laws of the State they resided in.

The US District Judge John C. Coughenour issued a ruling on 23 January in response to suit from a coalition of states — Washington, Arizona, Illinois and Oregon, temporarily restraining Trump's order nationwide for next 14 days. The court called the order as blatantly unconstitutional. President Trump's administration is set to challenge the restraining order.

Donald Trump claimed that the US is the only state offering birthright citizenship. Although more than 30 countries have the same system of acquiring citizenship including Argentina, Brazil, Canada, Mexico, Uruguay, Venezuela etc. On the contrary, more than 20 countries have reversed or rolled back their policies like the UK, Ireland etc. There were an estimated 11 million immigrants in the U.S. illegally in January 2022, a figure that some analysts now place at 13 to 14 millions. Their US-born children are considered by the government to have the US citizenship.

This new presidential directive eliminating birthright citizenship if sustained will affect immigrants and short-term visa holders. Even if the Trump administration is unable to completely ban birthright citizenship of the children of certain immigrants for court's intervention, officials have reportedly been exploring other ways to tackle the 'birth tourism'. For instance, they could try to restrict short-term visas for pregnant travellers.

Interesting to note, Bangladesh does not recognise birthright citizenship under its citizenship laws. Section 4 of the Citizenship Act of 1951 stipulates that a person shall not be a citizen by birth if their father possesses immunity as an envoy of a sovereign power and is not a citizen of Bangladesh or their father is an enemy alien, and the birth occurs in a place then under occupation by the enemy.

Enemy aliens are people who do not recognise or refuse to recognise the sovereignty, territorial integrity and independence of Bangladesh and whose country of citizenship is, or was, at war with Bangladesh since the declaration of independence. However, citizenship of Bangladesh can be acquired by birth if the identity or nationality of the parents is unknown except children of enemy aliens born in Bangladesh, people residing illegally or refugees in Bangladesh. This is why, the stranded *Bihari* children did not get citizenship of Bangladesh until 2008 when the High Court Division decision in *Md. Sadaqat Khan (Fakku) and Others v. Chief Election Commissioner, Bangladesh Election Commission*.

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INTELLECTUAL PROPERTY RIGHTS

Global South and the WIPO treaty on genetic resources and traditional knowledge

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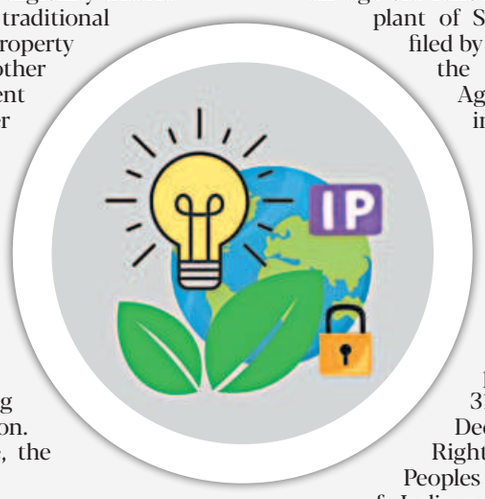
A long-awaited intellectual property treaty relating to 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge' was adopted on 24 May 2024at a diplomatic conference by WIPO (World Intellectual Property Organisation). The adoption of that historic international treaty can be regarded a significant win for the countries of the Global South in several respects.

This treaty is drafted with two objectives in mind: (i) to enhance the efficacy, transparency, and quality of the patent system, and (ii) to prevent the evergreening of patents related to genetic resources and traditional knowledge associated with genetic resources. This treaty obliges its member states to ensure that for patent protection of a new invention based on genetic resources the inventor must disclose the country of origin of genetic resources or the source of the genetic resources in their patent application. Besides, where the invention is based on traditional knowledge of the indigenous or local the treaty mandates to disclose the Indigenous Peoples or local communities who provided such knowledge, or the source of such knowledge associated with genetic resources.

In the existing international conventions, such as TRIPS (Trade-Related Aspects of Intellectual Property Rights) or Paris Convention, traditional knowledge is not protected due to its lack of eligibility criteria of protection by traditional Intellectual Property tools. On the other hand, the patent regime under TRIPS does not impose any obligation to disclose sources or origin of Genetic Resources or Traditional Knowledge at the time of filing patent application. In consequence, the multinational companies (MNC) or inventors had acquired patent for their inventions based on genetic resources or traditional knowledge associated with generic resources of indigenous or local communities without disclosing this information and get exclusive rights over their inventions, whether a product or process, and exclude the local or indigenous people from using such patented inventions. The *Indian Neem Case* controversy is a pragmatic example of biopiracy where an application for a patent of "Neem", an age-old renowned medicinal plant of South Asia, was filed by W.R. Grace and the Department of Agriculture, USA in the European Patent Office.



Contrary to that, different human rights instruments recognised the rights of the indigenous people. Article 31 of the UN Declaration on the Rights of Indigenous Peoples asserts the right of Indigenous peoples to protect and maintain their cultural heritage, traditional knowledge and traditional cultural expressions, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, etc.

Thus, it appears that a dilemma was created between these two international conventions, which can be removed by the adoption of the new WIPO treaty. Since this treaty has included provisions for sanctions and remedies, it is expected that Biopiracy will be reduced after the adoption of this treaty. Further, the WIPO Treaty obliges its contracting member states to implement adequate, effective, and proportional legal, administrative, and/or policy measures to address any failure to submit the disclosure information required by this Treaty. Moreover, the state needs to provide an opportunity to rectify a failure to disclose the information required in Article 3 before implementing sanctions or directing remedies, except where there has been fraudulent conduct or intent.

Another impressive aspect of the WIPO treaty is that the treaty suggested that member states may establish databases for genetic resources and traditional knowledge, in consultation with Indigenous Peoples, local communities, and other stakeholders considering their national circumstances. This will be helpful for the inventors as well as for the traditional knowledge owner. Notably, India already maintains a digital database for their traditional knowledge (known as 'Traditional Knowledge Digital Library') to prevent exploitation and to protect traditional knowledge of India.

To conclude, the adoption of the WIPO Treaty is a win for the Global South countries, including Bangladesh, being the hub of mega biodiversity and traditional knowledge. To ensure protection of the traditional knowledge of the local communities and indigenous people, Bangladesh can sign the treaty and amend its legal framework on patent so that the third parties cannot achieve patent protection over its resources and exercise monopolistic rights over the traditional knowledge of the local and indigenous communities.

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RIGHTS WATCH

Rights of photographers in Bangladesh

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Freedom of Panorama (FoP) refers to the legal provision allowing individuals to capture and share images of publicly visible works, such as buildings, sculptures, monuments, and so on, without infringing copyright. The term originated from the German term *panorama freiheit*. The laws or case-laws dealing with FoP limit an owner's ability to take legal action against people who create and share images of public artworks or buildings. This is an exception to the usual rule that only the copyright owner can allow others to create and share works based on the original.

FoP facilitates the free sharing and dissemination of knowledge, a core principle of Wikimedia projects like Wikipedia and Wikimedia Commons. Contributors face restrictions in uploading photographs of public landmarks, sculptures, or artworks due to copyright constraints, particularly in jurisdictions with limited or no FoP. This hampers the ability to provide visual representations that enhance the quality and accessibility of articles, especially for educational and cultural content. Moreover, the absence of FoP can result in legal uncertainties for Wiki medians, as they might inadvertently infringe on copyright laws while attempting to document and share culturally significant works. This not only limits the growth of freely accessible repositories but also discourages global collaboration.

In Bangladesh, the Copyright Act 2000 in section 72(1)(t) incorporated the notion of FoP. The section actually mentioned several acts that do not constitute copyright infringement

and fall under fair use. The section stated that "the making or publishing of painting, drawing, engraving or photograph of a sculpture or other artistic work falling under section 2(36)(c), if such work is permanently situated in a public place or any premises to which the public has access". Section 2(36) defines the term artistic works as "(a) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph whether or not any such work possesses artistic quality; (b) a work of architecture; and (c) any other work of artistic craftsmanship".

Interestingly, the new Copyright Act 2023 has no such provision, which raises a question whether Bangladesh has FoP right now. After analysing the existing jurisprudence developed around the world, this piece argues that Bangladesh has the FoP right now despite the non-incorporation of the FoP clause.

In the UK, this right is explicitly enshrined in section 62 of the Copyright, Designs and Patents Act 1988, permitting photographs of permanent works displayed in public spaces for commercial and non-commercial purposes. Conversely, the US lacks a specific 'Freedom of Panorama' statute; however, works in public spaces are generally considered to fall within the domain of fair use under copyright law, especially for non-commercial purposes, though restrictions apply to copyrighted architectural designs completed after 1990 under the Architectural Works Copyright Protection Act. Apart from the practices in the UK and US, in the European Union, the scope of freedom varies by country: Germany provides broad rights, allowing both personal and commercial use, whereas France limits this freedom to non-commercial contexts. Many other nations, such as India, grant this freedom broadly, ensuring cultural works are accessible for educational and public benefit, while some restrict its application to prevent potential misuse.

At the very first instance, it seems that Bangladesh follows the US model since no specific clause related to FoP is present in the 2023 Act. Like USA, the existence of FoP is argued to be within the purview of 'fair use'. The author argues that Bangladesh has entered the US fair use model by non-incorporating specific acts as fair, rather the use of fairness will be determined by case-to-case basis. In this regard, the US four factor test can also be developed. Four factor test implies the purpose, nature, amount, and effect of the use of the copyrighted work will be determined in every case. For instance, when a photographer uploads a photo by prejudicing the potential market or value of the work photographed, that will not be amounted to 'fair use'.

It is contended that Bangladesh may follow the US four factor test while permitting FoP as within the purview of 'fair use'. If the use of the work does not pass the test, it is not allowed. If it passes the test, FoP is counted within the 'fair use' provision even though no clear provision allows it.

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