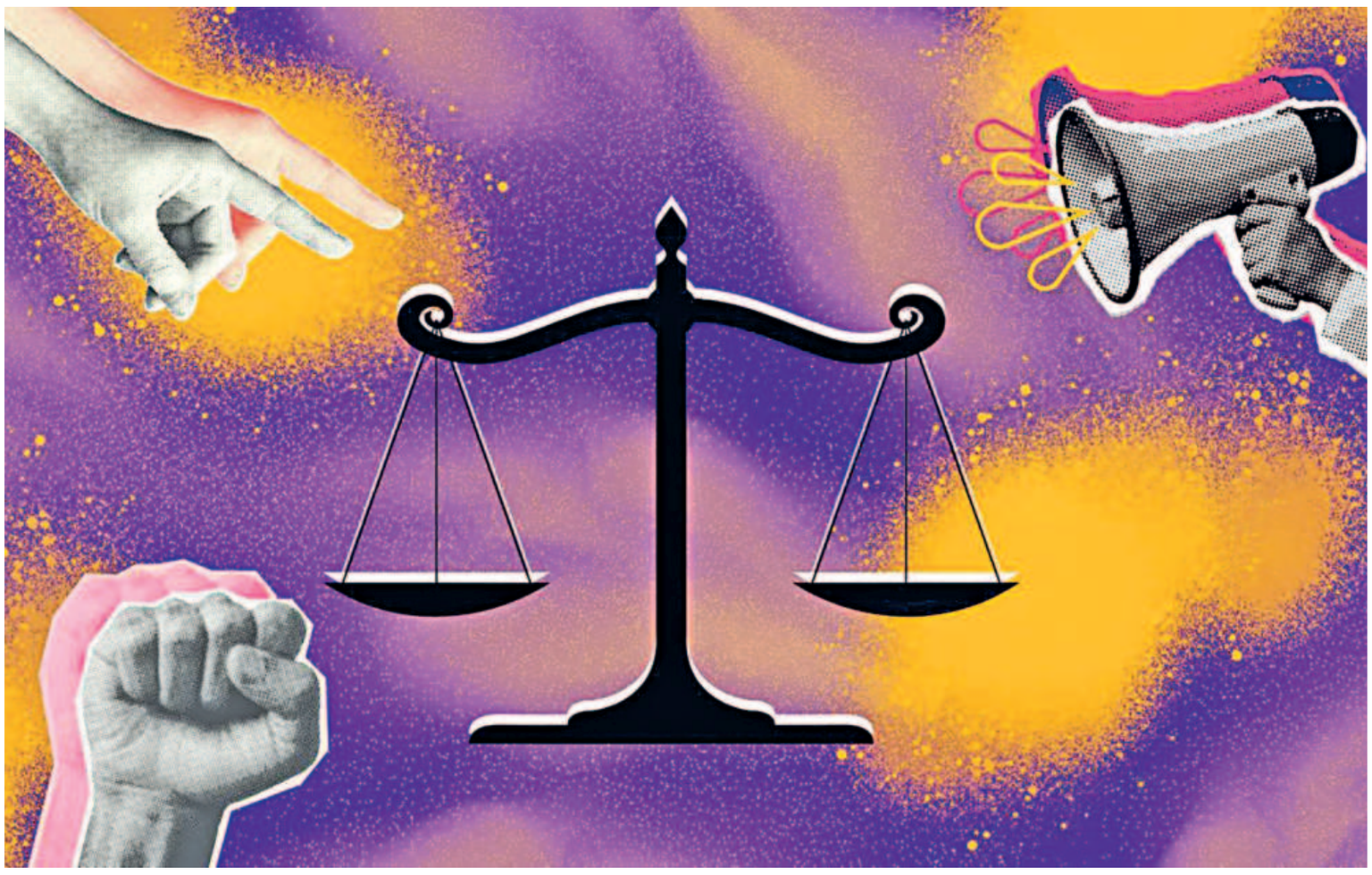
LAW AND EQUALITY

# EQUALITY'S BLURRED LINES

# Unravelling Bangladesh's Constitutional Conundrum



**To truly uphold Bangladesh's constitutional promise of equality, the judiciary must adopt a coherent approach and rigorously differentiate between these two principles, ensuring robust safeguards against arbitrary power and drive substantive equality.**

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The principles of 'equality before law' and 'equal protection of law', cornerstones of modern constitutionalism meant to ensure fairness and justice for all citizens, are entangled in a web of conceptual and judicial inconsistency. In Bangladesh, these principles are enshrined in Article 27 of the Constitution. Yet, the judicial interpretation and practical application of these distinct, though related, concepts have been fraught with confusion, highlighting a broader conceptual deficiency within the legal fraternity. This ambiguity has taken on renewed urgency in the wake of the July-August 2024 mass-uprising, where protests against inequality and state repression underscored the dire consequences of failing to uphold constitutional guarantees. Now, the question remains: can Bangladesh uphold its constitutional promise of equality, or will these fundamental rights continue to be obscured by legal ambiguity?

The recent recommendation by the Constitution Reform Commission to amend Article 27 and expand 'equal protection of law' to include 'equal protection and benefit' has added to the existing confusion and complexity. While well-intentioned, the inclusion of 'benefit' is superfluous, as entitlement to the law's benefits is already implicit in the rule of law—a principle deeply intertwined with equality. As Lord Bingham articulated in The Rule of Law, its essence is that everyone is bound by and entitled to the benefit of law. Explicitly adding 'benefit' risks creating further ambiguity and obscuring the distinct functions of the two limbs of equality.

To fully grasp the implications of 'equality before law' and 'equal protection of law', their historical and conceptual roots must be examined. 'Equality before law' finds early articulation in the Magna Carta, a landmark medieval document sealed in 1215 between King John of England and his barons. King John, known for his arbitrary rule, heavy taxation, and disregard for his subjects' rights, faced rebellion. The Magna Carta established that even the monarch was subject to the law, declaring that all citizens, regardless of status, should be ruled fairly and equally. This idea was further developed by AV Dicey, who defined it as the equal subjection of all individuals to ordinary laws administered by ordinary courts, preventing arbitrary power. Over time, its interpretation has focused on the impartial application of laws, ensuring procedural fairness and guaranteeing that all individuals, regardless of status, are subject to the same legal treatment.

Conversely, 'equal protection of the law' originates from the Fourteenth Amendment to the US Constitution. Initially focused on preventing racial discrimination, its interpretation has broadened to address various forms of discriminatory treatment. Unlike 'equality before law', which focuses on uniform application of law to prevent arbitrary enforcement, 'equal protection of the law' mandates that legislation is non-discriminatory and requires the state to take positive steps against discrimination. While the former embodies a negative approach, and the latter takes a positive approach, their primary aims remain fundamentally distinct: 'equality before law' primarily targets judiciary and executive actions in applying the law, whereas 'equal protection of the law' targets the legislature in enacting laws.

However, the Supreme Court of Bangladesh has significantly blurred the conceptual boundaries between these two principles through a series of judicial missteps. Firstly, the Court consistently employed interchangeable definitions, conflating the two principles. The concept of 'treating similarly situated individuals alike', central to 'equal protection', was misapplied to 'equality before law', which focuses on preventing arbitrary legal distinctions. In Sontosh Kumar Saha, this conflation peaked with the assertion that 'equal protection of law means all persons are equal in all cases', ignoring the principle's allowance for differential treatment to achieve genuine equality. Secondly, the Court failed to establish a clear framework distinguishing the purposes and applications of each principle, leading to overlapping and contradictory interpretations. Thirdly, the Court's overemphasis on the 'similarly situated' criterion, relevant to 'equal protection', neglected 'equality before law', prioritising substantive equality over non-arbitrary legal application. Finally, later cases like Bangladesh v Md Azizur Rahman and Md Nur Hossain v Bangladesh reinforced this conflation by reiterating flawed interpretations, cementing a judicial precedent that erases the distinction between these two facets of equality.

Bangladesh's equality interpretation must align with international standards, reflecting principles it has agreed to uphold. Article 26 of the International Covenant on Civil and Political Rights, to which Bangladesh is party, enshrines 'equality before the law' and 'equal protection of the law'. Nowak clarifies these principles, stating that 'equality before the law' emphasises the enforcement of existing laws, requiring impartial application by judges and administrators, rather than absolute identical treatment. It mandates equal treatment for objectively equal situations and unequal treatment for unequal ones. This principle primarily focuses on the judiciary and executive, ensuring non-arbitrary application, distinct from 'equal protection of the law', which primarily addresses the legislature's duty to enact non-discriminatory laws. This distinction, endorsed in cases like Kavanagh v Ireland and O'Neill and Quinn v Ireland, remains ignored in Bangladesh.

The evolving interpretation of equality within Bangladesh's constitutional landscape highlights the persistent difficulty in maintaining distinct meanings for 'equality before law' and 'equal protection of law'. The repeated invocation of 'like should be treated alike' to define both concepts has led to the erosion of their individual normative purposes. This trend is, however, not unique to Bangladesh. Even the Indian Supreme Court, eg, in Srinivasa Theatre v Government of Tamil Nadu, acknowledged their commonality, despite distinct meanings. Similarly, the US Supreme Court's experiences, including with Dred Scott and Plessy, illustrates struggles with equal protection, notably the 'separate but equal' doctrine. Only in Brown v Board of Education did the Court conclusively hold segregation unconstitutional, affirming that separate educational facilities are inherently unequal.

To truly uphold Bangladesh's constitutional promise of equality, the judiciary must adopt a coherent approach and rigorously differentiate between these two principles, ensuring robust safeguards against arbitrary power and drive substantive equality. This precision will enhance access to justice, strengthen the rule of law, and transform the cries of the masses into a reality of justice for all.

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LAW VISION

# The impacts of patent laws on plant and food security

**As biotech giants continue to consolidate control over plant genetics, concerns are mounting about food security and farmers' independence. Without stricter regulations for farmers' safety, the unchecked patenting of seeds could inflate food prices and hinder efforts to create climate-resilient crops. If monopolistic patenting continues, the future of food may rest in the hands of a few powerful corporations and that too at a high cost to farmers, consumers, and global food security.**

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The future of food security is increasingly threatened by the aggressive patenting strategies of major biotech corporations, according to the experts in agriculture and legal research. Farmers are being restricted, and giant companies are exploiting patent laws to monopolise seed markets and to control the development of genetically modified organisms (GMOs) and new genomic techniques (NGTs). Patent laws under intellectual property laws are now being used as powerful tools to dominate agricultural markets.

Patents were designed to encourage innovation. Originally intended to protect the owner's rights in technical innovations, patents are now being used to claim ownership over seeds, plants, and even their offsprings. This growing trend is severely impacting farmers, breeders, and the overall food system. Companies are leveraging these legal protections to restrict access to essential genetic material, effectively limiting competition and endangering biodiversity.

Globally, biotech firms are attempting to expand their control through broad patent claims that cover genetic traits shared by multiple plant varieties. This misuse of the patent system creates legal uncertainty for breeders and farmers and restricts their ability to innovate. As a result, farmers and small-scale agricultural enterprises are finding it increasingly difficult to navigate the complex web of overlapping patents without risking costly legal battles.

In Bangladesh, the Plant Varieties Protection Act, 2019 was introduced to safeguard the rights of farmers and breeders while promoting innovation. This law aims to ensure that plant varieties created through traditional breeding methods remain accessible to farmers, plant breeders and researchers. Farmers in Bangladesh face challenges in securing protection for their plant varieties due to lack of awareness and limited resources. They consider the registration process burdensome. Moreover, treating farmers and commercial breeders equally in this regard may disadvantage farmers further.

Section 23(2) of the Act permits farmers to reproduce and sell seeds except for commercial purposes. However, it is submitted that this restriction on commercial sales creates risks for food security. Limiting farmers' ability to trade seeds on a larger scale may reduce seed diversity, hinder innovation, and weaken farmers' resilience in addressing climate change and crop failure challenges.

The growing patent dominance is also posing serious risks to traditional farming practices. Farmers may inadvertently cultivate crops containing patented traits and face legal action as a result. Small breeders, unable to afford the costs of licensing fees or legal advice, risk being pushed out of the industry altogether. This monopolisation threatens agricultural resilience at a time when climate change demands innovative, adaptable crops.

As biotech giants continue to consolidate control over plant genetics, concerns are mounting about food security and farmers' independence. Without stricter regulations for farmers' safety, the unchecked patenting of seeds could inflate food prices and hinder efforts to create climate-resilient crops. If monopolistic patenting continues, the future of food may rest in the hands of a few powerful corporations and that too at a high cost to farmers, consumers, and global food security.

Thus, it is urged that policymakers take immediate steps to enforce the Plant Variety Protection Act, 2019 to ensure strict safety evaluations, transparent labeling, and enhanced traceability throughout the supply chain. In conclusion, stronger enforcement of law is essential to prevent monopolistic practices in the nation's agriculture sector.

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