

Law relating to Intellectual Property and Human Right

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Abstract

Intellectual Property Rights and Human Rights often come in conflict. Human Rights have gained primacy in the world today. Developing countries through international treaties and conventions are obliged to protect human rights in their countries. At the same time trade and innovation is also of priority for a countries development. Hence, there is a need to understand and bring clarity to the debate between the two namely; trade especially, the intellectual property rights and human rights. Intellectual Property Interests mentioned in UDHR and ICESCR cannot be attributed to be the IPR provisions. There is a need to see intellectual property through human rights.¹ There is a need to give heed to the voices of the developing countries.

KEYWORDS: Intellectual Property, Human Right

INTRODUCTION

Human Rights have developed centuries ago and gained more importance after many colonies got independence through hard struggle. Intellectual Property Rights could be said to have taken birth in the 19th Century. These two subjects were never so treated together. However, in the recent years we experience bridging gap between these two fields of study. It has become increasingly evident that these two disciplines affect each other. Helfer notes that, "Human rights and Intellectual property rights that were once strangers are now becoming increasingly intimate bedfellows. For decades the two subjects developed in virtual isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property laws on the one hand and human rights law on the other²." Human Rights standards have been established through declarations, conventions and treaties have treated human rights as fundamental and inalienable rights and defined as, 'the rights that one has simply as a human being'³ while intellectual property rights are contractual rights and are rights that are conferred in return for certain benefit.

Intellectual property right and Human Rights regimes will often come in close contact and will try to supersede each other. The problems between TRIPs and Human Rights do not only relate to access to medicines, they also extend to Traditional Knowledge and Transfer of Technology. Traditional Knowledge in traditional communities is often used to give medicines, which, now a days is commercialized by big pharmaceutical companies without paying any royalty or even acknowledging the source. Developing countries are now raising concerns to protect traditional knowledge owned by the traditional communities in their countries. Furthermore, one of the main purposes of TRIPs is to facilitate transfer of technology to foster development in developing and least developing countries⁴. However, these multinational companies are not willing to do so. Developing countries have strongly voiced their concerns against the effects of

intellectual property system on health, traditional knowledge and transfer of technology. There is a need to clarify the relationship of the two regimes. The main issue at hand is: Whether Human Rights and Intellectual Property rights could mutually co-exist? If yes, how could we best possibly achieve that⁵?

The Twenty-first century has seen a rapid growth of two regimes: the intellectual property right regime and the human right regime. On one hand, growth of multinational corporations has led to a stronger and stricter intellectual property right regime. On the other hand, human rights have gained primacy in public as well as political debates. Developing countries have argued that intellectual property right and human rights often come into conflict, particularly when implementing their international obligations under TRIPs. Nevertheless, developing countries are forced to provide better intellectual property protection. There is a need to give heed to the voices of developing countries⁶.

Objectives of the research work

The objective of the paper is to examine the question - whether the TRIPs Agreement violates the human rights. To find out the incidence of recent changes in IPR laws reflect India's compliance with the obligation under the TRIPs Agreement. The study tries to find out whether Human Rights and Intellectual Property rights could mutually co-exist? If yes, how could we best possibly achieve that? And at last to suggest several measures necessary for Protection of interest of Indian citizens and Intellectual property rights.

Research Methodology

There is a need to strike a balance between international obligations and national interests. Thus while ensuring TRIPs compliance, Whether India has made full use of flexibilities given under the TRIPs Agreement provides and at the same time initiate certain measures to adequately safeguard national interest. What are the major likely implications of intellectual property rights protection on human rights of people. For this, the research methodology adopted for the study is doctrinal in nature. The sources for the same shall essentially be secondary. For the present study the researcher shall rely upon library resources, journals and articles from magazines and news papers, web journals and legal databases. Critical, comparative and analytical methods are employed with regard to the analysis of the role of the WTO in international Perspective.

HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE

The importance of a healthy life has generally been acknowledged at the domestic and international levels. The right to health as a human right has been included in a number of international instruments⁷. The Universal Declaration of Human Rights (UDHR) was adopted unanimously by the General Assembly on December 10, 1948. As a General Assembly action, the UDHR is inspirational or advisory in nature. It does not legally bind member states of the U.N. to implement it. Over time, however, the UDHR has gradually assumed the status of customary international law. It is considered to be the single most authoritative source of human rights norms. Nevertheless, some provisions, particularly those dealing with basic civil and political rights, have gained more recognition than the provisions dealing with economic, social and cultural rights. Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community has consistently treated civil and political rights as more significant than economic, social and cultural rights.

The human rights articulated in the UDHR are also held to exist independently of recognition or implementation in the customs or legal systems of particular countries. Human rights are held to comprise important norms that create *prima facie* obligations, particularly on the part of governments, to take positive measures to protect and uphold these rights.⁸

A human rights approach to intellectual property takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and makes it far more explicit and exacting. Existing human treaties such as the two UN covenants include a number of fundamental rights which would generally be seen as natural rights by most people around the world such as right to life, the right to food or the right to health⁹. Since the adoption of the UDHR in 1948, intellectual production has been considered a fundamental human right of all people¹⁰.

The International Covenant on Economic, Social and Cultural Rights (the ICESCR) is the major international human rights instrument addressing these issues. Article 12 of ICESCR recognises everyone's right to the enjoyment of the highest attainable standard of physical and mental health. Article 15 specifies that States Parties, that is the countries that have ratified or acceded to this instrument, "recognize the right of everyone" both "to enjoy the benefits of scientific progress and its applications"¹¹ and "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."¹² To achieve these goals, the Covenant mandates that States Parties undertake a series of steps. These include "those necessary for the conservation, the development and the diffusion of science and culture."¹³ More specifically, States Parties "undertake to respect the freedom indispensable for scientific research and creative activity."¹⁴

Further, States Parties make the commitment to "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields."¹⁵

The core provision to the Right to Health is provided under Article 12 of the ICESCR which provides: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health¹⁶." In this context, the article provides that the state parties should take appropriate steps in order to realize this right including, "the prevention, treatment and control of epidemic, endemic, occupational and other diseases"¹⁷ and "the creation of conditions which would assure to all medical service and medical attention in the event of sickness."¹⁸ Access to medicines forms a part of right to health which is internationally recognized and states are obliged to protect the same. "Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party" "... health facilities, goods and services must be affordable for all."¹⁹ "The Committee encourages the State party to provide greater access to generic medicine making use of the flexibility clauses permitted in the World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPs Agreement)."²⁰

Furthermore, medical care is also included under Article 25(1) of the Universal Declaration of Human Rights (UDHR)²¹. It is therefore; very clear that Right to life is not a mere animal existence but a right to live with dignity and includes the right to good

health²². The Right to health can be fully realized when medical care is accessible to all at affordable cost. Thus, access to medicines is a right derived directly from International human rights law.

To be consistent with the norms in the ICESCR, a human rights approach requires that the type and level of protection afforded under any intellectual property regime directly facilitate and promote scientific progress and its applications, and do so in a manner that will broadly benefit members of society on an individual, corporate, and international level. It also implies a right of access to the benefits of science, again on both an individual and collective level.

Article 15 of the ICESCR builds on the text of a parallel article in the Universal Declaration of Human Rights. Article 27 tries to balance the right of every person in a society to enjoy all kinds intellectual property produced in this world such as copyright, patent and rights in design, with the right of the author or inventor of such property to claim the benefit of his ownership to a reasonable extent²³.

The sub commission of the UN Commission on Human Rights in a resolution in their 52nd session in August 2000 noted that IPRs in the TRIPs agreement constitute contravention of international Human rights Law²⁴. It is also noted that actual and potential conflicts exist between the implementation of TRIPs Agreement and the realization of economic, social and cultural rights²⁵. The resolution further requests all Governments to integrate into their national and local legislations and policies, provisions in accordance with International human rights obligation and principle that protect the social function of the intellectual property²⁶.

WTO, TRIPS AND HUMAN RIGHTS

The World Trade Organization (WTO) is an international organization that aims to promote trade and economic development through the reduction of tariffs and trade barriers.²⁷ The main objective of the WTO was to facilitate the smooth transaction of international trade²⁸. There are 28 agreement²⁹. TRIPs is one of them which includes the IPRs³⁰. There is controversy arise about the TRIPs and public health. From the starting of the WTO, developing countries were opposing the inclusion of the IPRs under the WTO. Under WTO, developed countries have included the IPRs under the TRIPs agreement. Developing countries were forced to amend their laws in accordance with the TRIPs. Being a member of the WTO, India was also forced to amend its IPRs laws. WTO Agreements do not refer to human rights instruments. While WTO Agreements allow for exceptions to the rules if this is necessary to protect the *ordre public* and morality³¹, they do not link these concepts to human rights or human rights instruments.³²

Intellectual Property Rights (IPR) adopted in 1994, through the agreement on Trade Related Intellectual Property Rights (TRIPs), is one of the most contentious international agreements countries have signed until today. Strengthening of IPR regime has become a subject of intense scrutiny and debates in most of the countries in the world. The agreement is one of the treaties administered by the WTO and therefore, meant to generally provide enhanced opportunities for international trade³³. TRIPs nominally provide for minimum standard of protection³⁴ of IPR and constitute a significant challenge to a number of developing countries which have to make significant changes to their legislation to be in compliance³⁵. Since its adoption TRIPs has globalized intellectual property rights. Strong protection of intellectual property has many serious implications on developing countries, especially, with regard to human rights protection.

For instance, that health cannot be excluded from patentability, as TRIPs oblige countries to provide patents in all fields of technology³⁶. Medicinal patents have direct impacts on accessibility and affordability³⁷.

Right to health is one of the economic, social and cultural human right that requires affirmative governmental action to create better conditions for people rather than just governmental restraint vis a vis citizens³⁸. The interdependence of health and patent has substantial conceptual and practical implications³⁹.

Now there is talk that the TRIPs in fact, violate the human rights of people. The United Nations has taken a strong position. The August 2000, Resolution of the UN Sub-Commission for Protecting Human Rights states that "actual or potential conflicts exist between the implementation of the TRIPs Agreement and the realisation of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, 'bio-piracy' and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health..."⁴⁰ With that it's official!

There is broad consensus that TRIPs in its present form is unacceptable because it violates the fundamental rights of people. Principally, it goes against all the rights and opportunities that have been granted to local communities in the Convention on Biological Diversity (CBD) and it strikes at their ability to engage in sustainable development in a self reliant way⁴¹.

D. TRIPs and India Laws

As TRIPs became a part of the WTO regime the member countries became bound to provide intellectual property protection as per TRIPs provision and were forced to amend their laws in tune with TRIPs. WTO's dispute settlement mechanism made sure that those countries which failed to amend their laws forced to do so⁴². For example, on a complaint by the US, the WTO appellate body held that India's patent law violated (i) Article 70.8(a) of TRIPs by failing to provide a means for the filing of patent applications for pharmaceuticals and agricultural chemical products, and (ii) Article 70.9 of TRIPs by not providing exclusive marketing rights (EMRs) to pharmaceutical and agricultural products. As a result, India amended its Patent act in 1999⁴³. The binding nature of the TRIPs Agreement is likely to have immense impact once all the member countries become bound to implement an across-the-board product patent regime.

India amended its Patents Acts and introduced Pharmaceutical product patents. Passing the Act India had met the deadline of January 1, 2005 to comply with WTO requirements, set out in TRIPs. The amendment provision shut the door on frivolous inventions and opened the door to genuine ones. There is nothing vague in the impugned provision⁴⁴. However; the new amendment will have repercussions on access to medicines to many who cannot afford them. The Amendment Act along with Product patents for pharmaceutical inventions, inserted new definitions to the terms, 'New Invention', Inventive Step, and Pharmaceutical Substances. These definitions are ambiguous with numerous technical loopholes, which will in fact facilitate ever greening of patents.⁴⁵ The most controversial provision under the new Amendment Act is Section 3 (d). It provides that "the mere discovery of a new form of a known substance which does not result in the

enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. For the purposes of this clause, salts, esters, ethers, polymorphous, metabolites, pure form, complexes, combinations and other derivatives of a known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy⁴⁶. The controversial third amendment to the Indian Patents Act, 1970, providing protection for product patents as per the WTO obligations, is being introduced at the cost of human health and domestic industry. The Patents (Amendment) Act, 2005 has provided for product patent in all fields of technology, including drugs, pharmaceuticals and chemicals. It has also triggered fears that product patents in pharmaceuticals will spur drug prices, which will adversely affect the public health and most of the drugs would be out of the reach of common man.

As mandated by Article 65 of the TRIPs Agreement, India has recently adopted the Patents (Amendment) Act, 2005⁴⁷ (assented by the President on 4th April 2005), by further amending the Patents Act, 1970. The amended Act has provided for product patent in all fields of technology, including drugs, pharmaceuticals and chemicals. The Act has also dropped Chapter IVA on Exclusive Marketing Rights (EMRs) and mailbox applications, introduced as transitory measure in 1999 by amending the Patents Act, 1970, to comply with the TRIPs obligations under Article 70 (8) and (9). It has triggered fears that the introduction of product patents in pharmaceuticals will spur the drug prices, which will adversely affect the public health and most of the drugs would be out of the reach of common man. As such it is clear that by signing the WTO TRIPs agreement without reservation (without a democratic debate or even parliamentary discussion) the Indian government has bartered away the constitutional right of the people, particularly the right to health under article 21⁴⁸.

The WTO agreement TRIPs and Indian patent Law have virtually taken a heavy toll on our right to life and development⁴⁹. The WTO, the TRIPs and the Indian Patent Laws have virtually flouted the sovereignty of the Indian Parliament, abridged in an unconstitutional way the fundamental rights as contained in article 14, 19 and 21 of the constitution and destroyed the basic structure of the constitution by curtaining sovereignty and distorting the concept of Indian socialism⁵⁰.

The obligation of the State to create and sustain conditions congenial to good health is cast by the directives contained in Articles 39 (e), (f), 42 and 47 and 48A in part IV of the Constitution of India. The Supreme Court of India has also regarded the right to health as an important facet to the right to life protected under Article 21 of the Constitution⁵¹. Under the Indian Constitution, both the State and Central Government can legislate on health-related issues since health is included in entries 23, 26 and 29 of the Concurrent List of the Seventh Schedule. Furthermore, Article 242 of the Constitution gives power to Twelfth Schedule which include item 6, 'Public Health, Sanitation Conservancy and Solid Waste Management'.

We have the technology to treat health as a human right and we should. Our global society cannot continue treating health as just another commodity in the world economy. Policies regarding intellectual property, innovation and public health should be evaluated according to their contribution to the protection, fulfillment and realization of a universal right to health. As observed by Justice V.R. Krishna Iyer, "The GATT treaties, including

the TRIPs with which we are directly concerned here, gave biting teeth to conquest by patent, hiding the bleeding operation with dubious promises of latest technology and benefits of benign global competition for the third world⁵².

The TRIPs and the amended patent law of India have a very deleterious effect on right to life and social justice which are the basic features of our constitution and are enshrined in article 21 of the constitution of India⁵³. Dear life in good health and free from diseases is the foremost human right and is a constitutional fundamental. The humbler the Indian human, the higher the state has duty to protect the person⁵⁴.

The Government of India all round involvement in the WTO is a clear violation of the fundamental rights, Directives principles and preamble of the constitution of India. Signing a document which contains provisions contrary to the basic structure and principles enshrined in the constitution is not authorized by the constitutional provisions dealing with the exercise of the executive power of the constitution⁵⁵. And further the WTO has failed to deliver what it promised. The developed countries have been mostly benefited at the cost of the developing countries and under developing countries.

Strong intellectual property rights are said to bring more foreign investment while such ambiguous laws leave more room for the patent holders to manipulate in the market. Thus, it leaves major burden on the common man without proper access to medicines which is a violations of the basic right to health enshrined under Article 21 of the constitution.⁵⁶

In state of Punjab vs. M. S .Chawla⁵⁷, the Supreme Court held “it is now settled law that the right to health is integral to the right to life. Government has a constitutional obligation to provide health facilities”. The question whether the government of India by signing the WTO TRIPs agreement has been obvious of the constitutional obligation to provide health facilities does not need an answer. As the maxim goes “Res ipsa Loquitur” i.e. the things speak itself⁵⁸.

From an Indian point of view, it is equally important that the national patent law also reflect a social commitment. The Patent Act of 1970 was highly instrumental in keeping the drug prices under control and promoting the Indian pharmaceutical industry, which in recent years has emerged as a strong contender to the western pharmaceutical industry. More importantly, Article 21 of our Constitution casts a total and absolute obligation on the State to preserve life⁵⁹. The Supreme Court has time and again categorically emphasized that Article 21 also includes within its ambit the right to health⁶⁰. Article 47 in the directive principles of the Constitution also stresses on the improvement of public health and the Government has an obligation to regulate the prices of drugs and medicines so that they are made available to the citizens at affordable prices⁶¹. Thus, before a further amendment is carried out to the patent law, the Indian policy-makers need to realize the importance of the recent international developments and our constitutional obligation to "right to health"⁶².

Thus it could be concluded that there is much evident conflict between IPR and human rights. IPR are being used contrary to the goals and obligations of the developing countries. As seen a strong IP protection can have serious implications on access to medicines. In fact, there is need to review TRIPs and its provisions must be read and implemented in the light of its aims and objectives. More to add the member countries should also take the full advantage of the flexibilities given under TRIPs, make full use of compulsory licensing procedures and make disclosure of knowledge and processes in the

invention or technology mandatory. Last but not the least, the Judiciary in the developing countries should play pivotal role in elaborating the scope of human rights. Indian Judiciary regarded highly in the world must set an example by expanding the scope of human rights within intellectual property rights. The judiciary should adopt a harmonious approach and is the only institution that can effectively do so.

CONCLUSION AND RECOMMENDATIONS

Intellectual Property Rights and Human Rights often come in conflict. There is a need to give heed to the voices of the developing countries. Human Rights have gained primacy in the world today. Developing countries through international treaties and conventions are obliged to protect human rights in their countries. At the same time trade and innovation is also of priority for a countries development. Hence, there is a need to understand and bring clarity to the debate between the two namely; trade especially, the intellectual property rights and human rights. Intellectual Property Interests mentioned in UDHR and ICESCR cannot be attributed to be the IPR provisions. There is a need to see intellectual property through human rights.⁶³

We can say that WTO Agreements do not refer to human rights instruments. While WTO Agreements allow for exceptions to the rules if this is necessary to protect the *ordre public* and morality, they do not link these concepts to human rights or human rights instruments.⁶⁴ Compulsory licensing provisions are incorporated to ensure that fundamental rights of the public to food and medicine are not discriminated against due to the profit motive

The Government of India needed to amend only Section 5 of 1970s Patent Act to provide for product Patents. Instead there are more than 70 amendments-the government of India has bent backward and has not thought it fit to use the flexibility afforded by TRIPs agree and Doha Declaration⁶⁵.

The effective and efficient instances of compulsory licences are imperative to curb the abuse of patent rights by the patentee⁶⁶.

We should take the maximum or the fullest advantage of the provisions of article 7 and 8 to hold our head high and keep at bay any foreign invasion on our sovereignty and fundamental rights of our people⁶⁷. Public health laws, national drug policy and the patent system are inter-related.⁶⁸ Developing countries such as India should focus on developing intellectual property right frameworks where this may serve the need of their citizens⁶⁹. Article 7 and 8 explicitly provide for sufficient scope for safeguarding the national interest and the role of the domestic industry by providing balancing of rights and obligations conducive to social and economic welfare⁷⁰. Even the preamble of the TRIPs Agreement recognizes “the underlying public policy objectives of the national systems for the protection of intellectual property, including developmental and technological objectives”. This stipulation has direct relationship with our public policy objectives in the constitutional obligation of right to life including right to health as guaranteed through the fundamental rights in the Indian Constitution⁷¹.

We should always remember that the greatest accomplishment of humans has not been our science, but our development of human rights and democracy. There is direct link between some fundamental rights such as right to food, health whose fulfillment is inextricably interwoven to the Intellectual property right concept. This implies that TRIPs agreement cannot be read independently from domestic and international human right instrument⁷².

The approach should be taken especially by the judiciary. Indian judiciary as mentioned above has been actively involved in expanding the scope of human rights. It can protect the human rights of individuals through its interpretation of the new Patents Amendment Act, 2005. It should interpret the controversial provisions such as section 3(d) in such a way that they leave behind the meaning that the law is meant is to advance technology through inventions but at the same time safeguard human rights. Not only the judiciary but also the adjudicating authorities at WIPO should also approach a human rights test to the TRIPs provisions and should read them in harmony with human rights⁷³.

The national laws have to be consistent with national aspirations and the good of the community. One view is that the entire world should be considered as one family; political or national boundaries should be considered irrelevant when human rights are involved. Nobody should feel that he is exploited⁷⁴.

And finally, the Human Rights concerns that have been raised with respect to TRIPs, should be taken on board. The TRIPs should be modified so that it does not violate the rights of ordinary citizens.⁷⁵

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