

KEY HUMAN RIGHTS AT THREAT UNDER THE INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

Human rights and intellectual property rights are two distinct fields that have co-evolved separately. Their relationship needs to be re-examined for a number of reasons. Firstly, the impact of intellectual property rights on the realization of human rights such as the right to health, food etc, have become much more visible following the adoption of the TRIPS Agreement. Secondly, the increasing importance of intellectual property rights has led to the need for clarifying the scope of human rights provisions, protecting individual contributions to knowledge. Thirdly, a number of new challenges need to be addressed concerning contributions to knowledge, which cannot effectively be protected under existing intellectual property rights regimes. Intellectual property rights also have direct and indirect impact on the realization of human rights. Finally, human rights treaties recognize certain rights pertaining to science and technology. The present paper focuses on how intellectual property rights affect human rights adversely, and the need to create awareness among the masses.

Keywords: Agriculture products, food, patenting of food, pharmaceuticals, Right to Health.

“Due to the spectacular advances of molecular genetics, more and more of what we are ‘by nature’ is coming within the reach of biotechnological intervention. From the perspective of experimental science, this technological control of human nature is but another manifestation of our tendency to extend continuously the range of what we can control within our natural environment. From a life-world perspective, however, our attitude changes as soon as this extension of our technological control crosses the line between ‘outer’ and ‘inner’ nature.”

– Jürgen Habermas(2003). Die Zukunft der menschlichen Natur

INTRODUCTION

India has a rich tradition of protecting and promoting the basic rights of human beings. Having been a great civilization with glorious history and culture of its own, India is well known for the protection and promotion of human rights. Starting from the inception of sanatana dharma in ancient times down up to the establishment of the Constitution in the middle of the twentieth century, one can trace the golden line of human rights jurisprudence occupying the prime position in the Indian Jurisprudence and the legal system. In view of the growing importance of the human rights jurisprudence in the 20th century, there has been a new shift in

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the global thinking upon issues pertaining to human rights. But because of rapid development in the field of science and technology, a new kind of property too has cropped into existence. The unique and fragile natures of these rights have been violative of the human rights. Intellectual property rights and human rights remained strangers for a long time. What was the reason for this isolation of human rights and intellectual property rights? WTO's WIPO regime of Intellectual property rights seeks to balance the moral and economic rights of creators and inventors with the wider interests and needs of the society.

DEFINITIONS

Human Right has been defined under Section 2(d) of the Human Rights Act, 1993. Human Right means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in International Covenants and which are enforceable by courts in India.

Thus, the Act gives a very narrow definition of 'human rights' and does not even include all the fundamental rights guaranteed by the Constitution. It simply includes the fundamental rights relating to the life, liberty, equalities and dignity guaranteed in the constitution or embodied in International covenants on human rights. As regards the words "embodied in the International covenants and enforceable by the courts in India", these certainly widen the scope of "Human Rights" enforceable by courts in India.¹

INTELLECTUAL PROPERTY RIGHTS

As per World Intellectual Property Organisation [WIPO] definition, intellectual property refers to creation of the mind ,inventions, literary and artistic works, symbols, names, images and designs used in commerce.²

Intellectual property is all about human creativity. Intellectual property rights are considered as reward for creative and skilful work in execution of ideas. In fact, it is more than a reward for conceiving and executing ideas, in the sense intellectual property rights are a recognition given to novel intellectual work.³

NEED FOR HUMAN RIGHTS

Human rights are essential for all-round development of the personality of the individuals in the society, be necessarily protected and be made available to all the individuals. These must be preserved, cherished and defended if peace and prosperity are to be achieved. Human rights are the very essence of a meaningful life, and to maintain human dignity is the ultimate purpose of government. There are several States where fundamental standards of human behaviour are not observed. It has been realized that the functions of all the laws whether they are the rules of municipal law or that of international law should be to protect them in the interest of the humanity.

RATIONALE OF INTELLECTUAL PROPERTY RIGHTS PROTECTION

Human Rights instruments consider IPRs as Human Rights, but no direct reference to IPRs is made. Rationale of intellectual property rights protection is to provide statutory expression to the moral and economic rights of creators in their creations and such rights of public in access to those creations. To promote creativity and dissemination and application of its results and to encourage fair trading which would contribute to the economic and social development are some of the basic requirements . Society benefits greatly from technological innovations, but this should not curtail basic human rights.

Table 1: Characteristics of Human Rights and Intellectual Property Rights

Human Rights	IPRs
Inherent, inalienable, Universal. Immaterial interest, Unlimited term, Non assignable, exploitable	Statutory Rights, Territorial, Material interest, Limited term, Assignable, exploitable.

HUMAN RIGHTS

Human Rights are inherent in the sense that these are the very birth right of all human beings and people enjoy these simply by virtue of human existence and as such, these do not have to be granted by any superior or sovereign authority. Inalienability stems from the sense that people cannot agree to give these up or have these taken away from them. Human rights are also universal. Human rights are called by different names such as birth rights, basic rights, minimum rights, natural rights, inalienable rights and fundamental rights. In the broader context, both human rights and fundamental rights connote the same thing. But in the Indian context, particularly with respect to the Indian Constitution, fundamental rights are only those rights which are included in the Part III of the Constitution but not other human rights which are not included. In the international context, fundamental rights include all basic rights (human rights) which are necessary to lead a normal life.

IPRs

IPR are statutory rights granted by state which are temporary, can be traded and whose enjoyment can be curtailed. These are territorial in application and rights do not exist on physical object resulting from the idea, but instead to the intellectual creation as such. Rights granted are essentially negative.⁵

HUMAN RIGHTS INSTRUMENTS WITH REFERENCE TO IPRs

There are large number of international covenants that are signed by nation- states accepting the protection of human rights, the major ones being Universal Declaration of Human Rights, the International covenants on Economic, Social and Cultural Rights, Protection of Plant Variety and Farmers Rights Act, Biological Diversity Act, etc. These covenants and treaties are formulated to protect human rights as well as to try to strike a balance between the Human Rights and IPRs.

The gist of some of these international covenants is as follow:

1. Universal Declaration of Human Rights. Art 27(1) and (2)

(1) Everyone has the right to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.⁶

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁷

Through above articles, it can be inferred that the Declaration seeks to protect the moral and material interest of any person of which he is the creator. At the same time it also seeks to protect the interest of the creator. At the same time it seeks the free enjoyment of the result of such creation.⁸

2. International covenant on Economic, social and Cultural Rights (ICESCR) Article 15

1. The States Parties to the present covenant recognise the right of everyone:

(a) To take part in Cultural life,

(b) To enjoy the benefits of scientific progress and its application;

(c) 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.

It is seen how Art 15 (1) (c) binds every state, which is a party to the convention to recognise the right of every individuals to the protection of his interest in the material of his creation. It may be scientific, literary or artistic production. In other words the provision seeks the protection of human rights in the intellectual property in the light of Art 25 of the UDHR.

3. Convention on Biological Diversity (CBD) Art. 8(J)

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁹

Art. 8(j) of the convention on Biological Diversity provides for respecting, protecting and rewarding the knowledge, innovations and practices of local community. Traditional knowledge has to be shared with people, and if benefits arise from commercial use of traditional knowledge, those too have to be shared with the people responsible for creating, refining and using.

4. Protection of Plant Varieties and Farmer's Rights Act, 2001

Indian Plant Varieties Protection and Farmer's Rights Act, 2001 provide for protection of the intellectual property rights and human rights of indigenous people. Objectives of Indian Plant Varieties Protection and Farmer's Rights Act, 2001 are "to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants". It makes provisions for benefit-sharing and compensation for traditional, rural and tribal communities.

5. TRIPS

TRIPS regime provide adequate freedom to the national governments to introduce limitation and exceptions on the enjoyment of the patent rights to safeguard the public interest considering the social-economic and industrial development of the nation. Exercising this freedom many developing countries in the world has exempted areas affecting the basic needs of the people like food and medicine from the area of patenting.¹⁰

MINIMIZING INTELLECTUAL PROPERTY RIGHT'S NEGATIVE IMPACT ON HUMAN RIGHTS

The concept of intellectual property rights and patenting of food, agriculture products, and pharmaceuticals is not totally acceptable in socialist or communist countries and even countries, which follow mixed political systems like India. Patent system prioritizes private property over community property or public property which is against the principles of socialism and communism. In particular, necessities like food articles (agriculture products or substance or articles which are used to produce food products) and pharmaceuticals were kept away from patent monopoly. However, the present trends in the patent system warrant granting of patents on necessities. Intellectual property laws are violating the human rights i.e. 'right to food' and 'right to health' of the citizens by patenting of seeds, plants, food grains (some notable cases like Yellow bean patenting, Basmati rice patenting) and other biological substances. This entails increase in the price of the food items. Thus, Intellectual Property Rights Regime violates the right to food – a human right of every individual. By patenting of medicinal drugs and treatment processes, human right to life is violated. Patenting causes hike in prices of every commodity and makes it inaccessible to the marginalized population thereby impinging upon their human rights.

Detrimental impact on realizing the right to health

Health is a fundamental human right indispensable for the exercise of other human rights. As defined in the preamble of the WHO Constitution, health is a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity and that governments have a responsibility for the health of their people, which can be fulfilled only through the provisions of adequate health and social measures. Access to pharmaceuticals is a human right and the right to health includes access to appropriate

health care. Patenting of pharma products plays a significant role in the growth of drug industry. With the onset of the TRIPS agreement and its implementation across the world, the patented pharma products have a great impact on the society and economy of the nation. The post-TRIPS era has given rise to a new horizon to the pharma sector in areas of research activities, investments, infrastructure, technology etc. Nations across the world has incorporated several provisions to regulate the pharma products due to the increase in demand for such products in the international and domestic markets. Several life saving drugs that are applied to treat various diseases such as Malaria, HIV/ AIDS, are required to save human lives. But the present intellectual property system reduces the availability of pharmaceuticals in a variety of ways. By increasing development costs, intellectual property protection may spur higher research and development of new drugs and technologies appropriate to smaller markets. Patents restrict access to essential medicines against HIV/AIDS especially in the poorer regions due to the high prices they engender. The price of medicine is an important factor in determining access.¹¹

Detrimental impact on realising the right to food

Right to food as a human right may become affected through policy and legal restrictions and limitations imposed by the very nature of IP. Intellectual property regimes have threatened food security in several ways. The extension of very broad patents for specific plant varieties and biotechnology patenting is affecting food security. Intellectual property protections also hampers farmer's traditional practice of saving harvested crop for subsequent sowing.¹²

Impact on the Rights of Indigenous people and Traditional knowledge

Traditional Knowledge is essentially culturally oriented or culturally based, and it is integrated to the cultural identity of the social group in which it operates and is preserved. The definition of traditional knowledge used by the World Intellectual Property Office (WIPO) includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, design, stories and art work. Traditional knowledge relating to biological resources, agricultural practice, medicine, etc, is commonly referred as any useful information that is passed on by the members of the community from generation to generation. Protection of Indigenous people's right over their genetic resources and traditional knowledge is both dependent upon and crucial to the realization of other human rights to food, health, human dignity, culture, land, territories, resources. Traditional knowledge and indigenous resources have been with human beings for time immemorial, but they have not been protected yet. Now bio-piracy is the main reason for violation of human rights. Bio-piracy is the misappropriation of knowledge and/or biological material from traditional communities. It occurs when a company or person is granted an IPR on seeds, and genes or traditional knowledge are taken from a community. Bio-piracy and patenting of indigenous knowledge is a double theft because it allows theft of creativity and innovation and the exclusive rights is established by patents on stolen knowledge. Even it will steal economic options of everyday survival on the basis of our indigenous biodiversity and knowledge of indigenous people.¹³ From an Intellectual Property perspective, traditional knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous community which created it did not endorse private ownership rules.

The impact on Farming communities

In the developing country like India, where agriculture plays a significant role in the national economy, the issues relating to plant patent and protection of farmers is very vital and crucial. Future development in this area will be of great significance. But intellectual property rights neglects the needs of the small farmers. There is a vast development of agricultural products and crops and there is a development of agricultural

equipments, pesticides, fertilizers as well as seeds. This causes burden on the farmers due to higher price of pesticide, fertilizers and developed seeds, which farmers are supposed to use. Farming companies rely on exclusive monopolistic rights granted for the development of seeds and plant varieties through modern forms of biotechnology and plant breeding. Such monopoly is in one or the other way affecting the farming communities. A strong regime of IPR is not suitable for non-developed states that are still seeking to increase their base of human capital. Governments of developing countries are afraid that the changes brought by the introduction of IPR in biotechnological invention would contribute to the loss of employment to their farmers.¹⁴

Impact on Environment

A clean environment is integral to all aspects of human development and is a precious public good. Over-consumption, modern industrialization, inventions (patents) and unchecked economic growth in the developed world have led to serious environmental degradation. Inventions like refrigerator will harm the ozone layer and it will contribute to climatic changes. Ultimately it will affect on Human beings. When genetic modification of species are prevailing, there will be negligence on the part of naturally rarely available plants. It will create ecological imbalance by genetic modification of micro-organisms. It will also affect productivity of agricultural land. Every citizen has the right to live in a healthy environment. In a country like India, economic progress is necessary but must not be detrimental to environment. At the core of this dilemma are two human rights: the right to realize basic needs and the right to a healthy environment. The conflict between these rights has to be addressed through 'sustainable development', which is defined as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs.'

Ethical Dilemma

Patenting of life form (micro-organism) raises host of ethical issues. These can be formulated as under:

- Is life a patentable commodity?
- Will patenting of life forms serve the animal and human welfare?
- Is majority of world population living in developing countries and least developed countries going to benefit by patent of biotechnology invention?
- Should invention leading to cruelty on animals, without bringing any advantage to human welfare, be patented?

It is not easy to find answer to the above raised ethical issues. Impact of human reproductive cloning on human health, dignity and human rights is still being examined. In this age of technology and commerce, the human values have been relegated in the underbelly of development. It is only through enlightened global debate and firm political stand that the damage likely to be caused to the interest of developing nations can be mitigated. Since biotechnology inventions involve patents on human genetic materials like DNA and RNA, living beings and their life, their patenting gives rise to monopoly over life or living beings or over living processes. The inventions of biotechnology were viewed as against the moral and ethical considerations of the society, as these inventions involve tinkering with life and as well as monopoly over life. Societal concerns state that life is not patentable and living beings should not become a subject of patent monopoly. However, with the emergence of biotechnology capable of producing non-natural living beings, patenting of living beings or life gained significance in the modern era. In fact, patenting of life was never considered as possible due to the presumption that life is a creation of God and human being could not get exclusive rights over it. Human cloning would violate fundamental, moral or human rights.¹⁵

CONCLUSION

The relationship between intellectual property rights and human rights is complex. There is a strong current of fear among votaries of Human Right that intellectual property rights would deny them access to necessities. It is unfortunate that there is no serious attempt at the international as well as national level to protect the violation of the human rights by intellectual property rights. This ought to be studied further especially the effect of IP rules, regarding patents and copyright, such as the access to affordable medicines, access to adequate food, and access to educational materials. There is an obligation on the part of the government to guarantee the common man access to patented necessities at affordable prices. In order to safeguard the human rights of the largest sections of the society, we must introduce more provisions facilitating the national governments to take proper remedial measures to prevent the abuse of the monopoly on human rights.

There needs to be more stress on the health of the general public and in this regard the government has to take proper measures in order to ensure proper medical treatment and affordability of medicines. The governments ought to launch lot of awareness programmes highlighting socio-economic impact of IPRs on human rights.

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