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INTELLECTUAL PROPERTY: A HUMAN RIGHTS PERSPECTIVE

ABSTRACT

Human Rights and the Intellectual Property Rights are the two domains that have evolved independently and believed to be in consonance with each other as there were no attempts in relating them together. The former is a result of continuous struggle of the human civilization while the latter is a result of agreements between the states. But due to globalisation and human rights activists, two notions developed regarding the relationship between the two domains. One of the notions is that the Human rights and IPR give due regard to each other and are even similar in many ways. The other notion being that both of these are in fundamental conflict with each other.

Through this research paper, I have tried to mark the provisions and arguments that satisfy both side of the arguments. As regards to the former notion, I have tried to draw similarities between the statutes for the protection of human rights i.e. UDHR, ICCPR, ICESCR and the basic principles of the Intellectual Property Rights. For the later part where the two domains are in conflict with each other, I have cited the provisions of regulatory international instruments of WIPO and WTO. Furthermore I have included the notion of conflict between right to health and patents & Right to education and copyright which is apparent in case of developing countries. In the last part, I have highlighted the solutions in form of suggestions keeping in mind that they balance the rights of the Intellectual Property of the holder and the larger interest of the society.

1. INTRODUCTION

The two arenas of Intellectual property rights and Human rights were not at all related to each other. Growing in isolation with each other, neither of them infringed on each other's domain or in other sense it was believed that neither of them would be in a position to be in conflict with each other especially in the economic, cultural and social rights. Over the period of time two views have originated with regard to relationship between the two fields. One of them is that both of them can exist together or even the IPR can qualify to being a human right and the other view is that both the subjects being in fundamental conflict with each other. On the one hand is the rights offered to the holders of Intellectual property and on the other hand the rights accrued to every human beings. On the one hand is the protection given to the Intellectual property holders and on the other lies the use of that property for the development and welfare of human society.

Human rights are the rights granted to every person mere by the fact of their existence. Intellectual property are the rights provided to individuals or groups of individuals over the intellectual property i.e. creation of human mind. This is an intangible right over a tangible work and gives the owner the right to prevent others from using their works.

The development of Intellectual Property has divided the countries in factions which value these rights according to their own status and position with respect to other countries. The developed countries like USA highly value the private rights of individuals and thereby sets high standards for protection of intellectual property to gain maximum tariffs resulting from the registration of these intellectual properties. On the other hand, developing or under developed countries have a tendency to work for the greater good and public welfare and thereby undermines the private rights of individuals when subject to public welfare. he fact that states have been practitioners of pragmatism when it has come to intellectual property rights does not, of course, necessarily subvert the normative thesis that intellectual property rights ought to be or are fundamental human rights.[1]

If we consider out the nature of Intellectual Property Rights with reference to the Human Rights then it can be said that

- Intellectual Property Rights are non-fundamental Human Rights,
- These rights are open to State interference to fulfil Human Rights obligations.

[1] Peter Drahos, Intellectual Property and Human Rights, 1999

It means that the IPR being non fundamental rights, are subject to economic and welfare concerns and is not a subject of strict scrutiny standards.

2. HISTORICAL DEVELOPMENT

Human rights have evolved through the years dating back to 'Cyrus Cylinder' in 539 BC, thereafter the 'Magna Carta' of 1215 which made the king subject to law and then the petition of rights in 1628 and has thereafter subject to development with the changing needs of the society and has been impacting almost every field of law since then.

The origin of IP law can be traced back to the Venetian Law of 1474 which made the first systematic attempt to protect inventions by a form of patent, which granted an exclusive right to an individual for the first time. It was followed by the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886.

Human rights and intellectual property rights, both have evolved independently without caring for each other. The first foundational document regarding Human rights, the Universal Declaration of Human Rights, 1948 protects author's "moral and material interests" in their "scientific, literary or artistic productions" as part of its catalogue of fundamental liberties.[2] The International covenant on Civil and Political rights, 1966 also provides any person 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 and to enjoy the benefits of scientific progress and its applications.[3]

When the development of IPR started, it was merely of territorial nature meaning thereby that the intellectual property laws of one country could not be applied to the other. These laws were only applicable in the territory of the sovereign. When the phase of international cooperation came, the development of these laws took place by the way of bilateral agreement indicating that the territorial nature of the IPR got defeated in this period.

The intellectual property had taken a backseat while the human rights continued to evolve along with other laws. But no reference was made to Human Rights when IPR were discussed. The first documents which brought in the existence of Intellectual property rights and codified them like

[2] Article 27 of UDHR, 1948
[3] Article 15(1)(b) and 15(1)(c) of ICCPR

Berne conventions or Paris Convention have made no reference to any human rights. The main reason that these two fields were unaware of each other was that it was never thought that they will work as aid or threat to each other.

After independence, India adopted the Stockholm protocol in 1967 whose aim was to provide "developing countries greater access to copyright materials". This was the period when the price of medicines were much higher because indigenous medicines were not available to people in general and they had to depend upon the import of medicines from foreign countries.

3. IPR as Human rights:

The Intellectual Property Rights and the Human Rights are two separate fields of law but at the same time they co-exist and also overlap in many ways. The United Declaration of Human Rights (UDHR) declares the Intellectual Property Rights at international level. Article 27 of the UDHR clearly states that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share the scientific advancement made and advantages regarding it." and The second part of Article 27 provides that "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." Article 15 of the International Covenant on Economic, Social and Cultural Rights further supports Article 27 (UDHR) by stating that the States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(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.

Clause 2 states the steps that should be taken to present Covenant and achieve total realization of their rights including those rights necessary for conservation, development and diffusion of culture and science. Clause 3 states that the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. Clause 4 of the Article 15 states that the States Parties to the present Covenant recognizes the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields. These points illustrate the complex and overlapping relationship between the two rights and how they co-exist in most intrinsic way possible. The rights vested under Article 27

includes all those rights related to science and culture with righteousness of common humanity. It goes beyond just the right of getting benefitted by right and talks about the right to share the scientific advancement and the advantages created by it. These regulations provide how progress can take place from scientific progress and its application respectively.

In the words of Lawrence Helfer, "*where intellectual property laws help to achieve human rights outcomes; governments should embrace it. Where it hinders those outcomes, its rules should be modified but the focus remains on the minimum level of human well-being that states must provide, using either appropriate intellectual property rules or other means*."[4]

The Human Rights advocates in the early 1990s made an observation regarding the undervalued rights of the indigenous people and their knowledge which includes their expression, ways, culture and techniques. This became a major concern regarding the rights of the indigenous people and to protect their rights, land and resources two agencies, namely the World Intellectual Property Organization (WIPO) and the United Nations Economic Scientific and Cultural Organization (UNESCO) came forward. (UNESCO)Convention for protection of Intangible Cultural Heritage was created along with UN Declaration regarding rights of Indigenous people. Intangible Cultural Heritage here means all those norms, values and expressions passed on from generation to generation. These include intangible (like prayers, songs, dance etc.) and tangible objects (like the idols for worship), both. These two classifications are connected to each other in such a way that separation would result in absurdity. It will be very safe to say that the values and culture of the indigenous people lies more in their practice and how they look at it or connect with it. The United Nations Declaration on the Rights of Indigenous People states policies regarding Right to Cultural Identity by multiple articles like Right to self-determination (Article 3), Right to maintain and strengthen their distinct political, legal, economic social and cultural institutions (Article 5), the right not to be subjected to forced assimilation or destruction of their culture [Article 8 (1)], the right to practice and revitalize their cultural traditions and customs including the right to maintain, protect and develop the past, present and future manifestations of their culture [Article 11(1)]. Moreover, the Declaration mentions the obligation to provide redress with respect to indigenous "cultural, intellectual, religious and spiritual property" taken without free, prior and informed consent [Article 11 (2)]. This provision must be read in conjunction with Article 31 and 33. These

[4] Laurence R. Helfer, Toward a Human Rights Framework for Intellectual Property, 40 U.C. DAVIS L. REV. 1018 (2007)

rights mentioned above states right to protect, control and develop the cultural endowment and traditional knowledge and their intellectual property. Thus, the convention provides rights for development and determination of identity or their customs according to their beliefs and practices without the intervention of the state. It is also recognized by the International Law Association that the "States are supposed to acknowledge, admire and safeguard the identity of indigenous people in every sphere including their cultural heritage so that it can be preserved and passed to the future generations. Thus, it can be concluded that cultural expressions in what-so-ever form, comes under the ambit of intellectual property and this can be pointed under the Article 27 of the UDHR connecting Intellectual Property to Human Rights and also uniting Right to Intellectual Property with Right to Cultural Identity.

4. IPR as conflict:

The main reason of the as to why the two fields were being related was the globalisation due to which they started overlapping to a greater extent. It was the human rights Committee that first took notice of the development of IPR in reference to human rights and the two reasons that emerged as a conflict between the two were:

- The emphasis on the neglected rights of the indigenous people.
- The overlapping of the human rights and the TRIPS Agreement.

Both these reasons indicated that the IP laws did not give any regard to the human rights and proved to be deficient with the Human rights perspective. The intellectual property rights, by broadening its scope of protection, imposed limitations on the accessibility and realisation of Human Rights.

We live in a world in which the creation, diffusion and manipulation of information has come to define an ever increasing array of economic, political and cultural activities. The attendant expansion of the intellectual property system to new, previously unaffected territories has become a paramount concern on theoretical and empirical levels alike. In particular, the intellectual property system has significant consequences that affect the enjoyment of various human rights.[5]

[5] Mirela V Hristova; "Are Intellectual Property Rights Human Rights?", 93 J. PAT. & TRADEMARK OFF. SOC'Y (2012)

The UN in the 1990s started to look closely at the rights related to the indigenous communities especially right to recognition of and control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture.[6] But under the IPR, this traditional knowledge was not treated as a personal right because it was considered to be in the public domain the reasons being that either they did not meet the established criteria for any type of protection under IPR laws or the communities did not apply for the owners of those things. Since these traditional knowledge was without any owner and believed to be in public domain, the private players and enterprises utilize this knowledge to develop new kinds of products which they further protect under the IP laws and then restrain other people from using it. These private players refrain the indigenous communities from their righteous share from the profits incurred by them. This is where the intellectual property rights come in conflict with the Human rights. However, the UN commissioned to create a Draft Declaration on the Rights of Indigenous Peoples, and Principles and Guidelines for the Protection of the Heritage of Indigenous People.

The other point of conflict occurred with the adoption of Agreement on Trade related aspects of Intellectual property rights which was adopted as a part of World Trade organization in 1994. This agreement provided for minimum standards of protection for all members, including many least developed states where previous commitment to patents, copyrights, and trademarks was nonexistent. What was unique with this agreement that it was backed up with sanctions for its non compliance which was unlikely with other agreements.

The UN human rights gathered its attention on the TRIPS in the year 2000 and adopted a resolution on the Promotion and Protection of Human Rights on Intellectual Property Rights and Human Rights. [7] This resolution stresses about actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights. These conflicts were:

- The transfer of technology to developing countries
- The consequences for the right to food of plant breeders' rights and patenting of genetically modified organisms
- Bio-piracy

[6] Erica-Irene Daes, Intellectual Property and Indigenous Peoples, 95 AM. SOC'Y INT'L L. PROC. 143, 147 (2001).
[7] Resolution 7 of 2000

- Control of indigenous communities' natural resources and culture
- The impact on the right to health from restrictions on access to patented pharmaceuticals

4.1.Right to health and patents:

The recognition of right to health as an integral part of human life and it's recognition as a fundamental right under article 21 of the Indian constitution has been established in the case of Consumer education and resource centre vs Union of India.[8] From a human rights perspective, access to medicines is intrinsically linked with the principles of equality and non-discrimination, transparency, participation, and accountability. States are obliged to develop national health legislation and policies and to strengthen their national health systems. For this purpose, key issues related to access to medicines must be taken into account such as: sustainable financing, availability and affordability of essential medicines; price and quality control; dosage and efficacy of medicines; procurement practices and procedures, supply chains etc.[9]

According to the World Health Organization (WHO), essential drugs are drugs that "satisfy the priority health care needs of the population" and "are intended to be available within the context of functioning health systems at all times in adequate amounts … and at a price the individual and the community can afford."[10]

Right to health means having equal and adequate access to medicines and accessibility means affordability as well as availability. For a country like India, where 270 million people live under below poverty line and its healthcare and access quality ranking 145 out of 195 counties; providing access is a necessary yet a cumbersome task. A study reveals that only 10 percent of the people suffering from HIV/AIDS in developing countries have access to antiretroviral therapy.

Drug companies often abuse the patent monopoly and fix exorbitant prices for the patented medicines. The introduction of product patent thus reduces accessibility and affordability of drugs. The net result of the TRIPS accord has been high cost of medicines and the consequent denial of access to medicines to the poor across the globe. Further, it has also led to a situation where medicines required to treat diseases that predominantly occur among the poor are not researched

[8] Consumer education and resource centre vs Union of India, AIR 1955 SC 922 (India)
[9] https://www.ohchr.org/EN/Issues/Development/Pages/AccessToMedicines.aspx
[10] See World Health Organization, "Essential medicines." Available at http://www.who.int/topics/essential_medicines/en/.

at all. Instead drugs that are being researched are drugs used for "lifestyle" diseases like impotence, baldness, obesity, etc.

India took a step in to resolve the issues of expensive medicines by introducing section 3(d) of India's Patent Act to prevent the extension of patent protection through minor product modifications, unless a 'significant enhancement of efficacy' can be demonstrated. In the case of Novartis AG vs Union of India which challenged the constitutionality of this section and seeking patenting of *Imatinib Mesylate,* which did not have any enhanced efficacy, their petition was rejected. The significance lies that it was no longer acceptable to the global public that hundreds of millions of people are denied access to life-saving drugs because of monopoly pricing. And the case shows that governments in developing countries with some economic and political clout, such as India's, are prepared to fight the big pharmaceutical companies.

In the midst of growing demands for stronger patent laws, the right to health can be utilized to reclaim some policy space for developing countries to design their national patent laws in a manner that facilitates access to medicines. Domestic courts have a major role to play in this regard: when they are adjudicating disputes involving patents on pharmaceutical products, they can recognize the tension between patent rights and the right to health and resolve this tension by distinguishing between the instrumental nature of patent rights and the fundamental nature of the right to health.[11] In addition, General Comment No. 14 states that health care services must be economically accessible to everyone, suggesting that the prices of essential drugs should not be so expensive as to be unaffordable for poor patients.[12] This makes access to essential medicines an integral component of the right to health.[13] Furthermore, states are obliged to take steps "to control the marketing of medical equipment and medicines by third parties."[14] It has been suggested that this implies that "states should intervene where marketing of drugs by pharmaceutical companies is detrimental to the right to health."[15]

[11] Emmanuel Kolawole Oke, Incorporating a right to health perspective into the resolution of patent law disputes, December 2013
[12] Committee on Economic, Social and Cultural rights, para. 12(b).
[13] UN Human Rights Council, Access to Medicines in the Context of the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/HRC/RES/23/14 (2013). Available at http://www.refworld.org/docid/51cd52304.html.
[14] Committee on Economic, Social and Cultural rights, para 35
[15] S. P. Marks, "Access to essential medicines as a component of the right to health," in Clapham and Robinson (see note 9), p. 90.

4.2. Copyright and Right to Education:

Copyright means right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.[16] Right to education in India has been granted as a fundamental right through a series of decisions like JP Unnikrishnan vs State of Andhra Pradesh[17] and Mohini Jain vs State of Karnataka[18]. The critical problem of potential conflicts arises from the fact that the educational materials, in which authors may have a material interest, are critical to the realization of the right to education.

The doctrine of fair usage in India or fair dealing in UK has been envisaged to resolve the conflict between the education of persons and the rights of a copyright holder. It provides right of access of Copyrighted material to a limited extent with specific provisions to be used by people for research and educational purposes. However the terms are still open to interpretation and there is not much clarity in the concepts of terms for fair usage.

The recent case of Delhi University Photocopy case or The Chancellor, Masters & amp; Scholars of the University of Oxford & Ors. vs. Rameshwari Photocopy Services & Ors.[19] where the balance between the fundamental rights of the citizens and protection given to the copyright holders was to be compared. This was a case where on the one hand laid the principles of a country which has guaranteed its citizens the right to free and compulsory education and on the other hand laid the interests of the copyright holders. The court although not in its strict words of judgement reflected that it always keeps the fundamental rights of citizens at the top.

5. SUGGESTIONS:

The resolution of these conflicts needs to be in a way that they balance the needs of the society and the rights of the IPR holder. The resolution should not be such that one of the parties should enrich at the cost of the other. The best possible way of removing these conflicts is the harmonization of the interests of the parties. The need is to ensure that the interest of the IP holder and the public at large are harmonised for the well being of the society. For harmonisation, it is

[16] Kartar Singh Giani v. Ladha Singh & Others AIR 1934 Lah 777 (India)
[17] JP Unnikrishnan vs State of Andhra Pradesh, 1993 AIR 2178 (India)
[18] Mohini Jain vs State of Karnataka , 1992 AIR 1858 (India)
[19] University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors (2016) 160 DRJ (SN) 678 (India)

necessary that the ambiguous provisions are to be identified at first. Specific interpretations needs to be given to those provisions which respect the areas and objectives of both the fields.

If society recognizes copyright as private property akin to physical property, such as a car, a home, or a book, then it becomes easier to view reproduction without consent of the copyright holder as theft. Similarly, if IP rights are treated as human rights or natural entitlements, there is potential to view these rights as more expansive and to view the state's ability to restrict these rights as relatively limited.[20]

For protecting the rights of the indigenous communities, the state should enact legislations that prevent the usage of their traditional knowledge by private players or even of they do the communities should be given the right to enforce damages or compensation for such use. The other way can be by denying the patents in respect of the traditional knowledge which will bring both the private players and indigenous communities at an equal footing.

The conflict between the right thing health and Patent can be resolved by the intervention of the government. It can only be done when the government shows that it is prepared to fight against the big Pharmaceuticals companies. The mechanisms that can be used are price ceiling methods, providing subsidies in drugs, reducing import duties on drugs etc.

6. CONCLUSION:

The two fields of law which had grown isolated to each other had to be interrelated with increasing globalisation. It actually seems unlikely that these two fields one of which advocates for the personal right of public at large and the other the rights and protection of the works of individuals grew unnoticed with each other. One talks about the social rights of persons and the other especially about the economic rights. The two notions that grew due their interrelationships were that both of them are co existent and can complement each other in several ways and the other notion being that they are in fundamental conflict with each other.

In this contemporary era, the value of both the rights are to be taken into account. The best way to resolve their conflict is by harmonization in a way by which the objectives of both the laws are

[20] J. Janewa Osei Tutu, Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus, 20 VAND. J. ENT. & TECH. L. 1 (2017).

upheld meaning thereby that the interest of a IP holder as well the larger interest of the society as well are fulfilled. However even when this harmonization is not possible, the government should give the human rights an upper hand meaning thereby that the interest of the public at large should be placed higher.