

THE YEAR BOOK OF LEGAL STUDIES

Vol. 27-28
2005-2006



Editorial Committee :

Patron:

Prof. C. Robin M.A., LL.M.,
Director of Legal Studies,

Editor:

Prof. Dr. J.Jayamani M.L., Ph.D.,
Principal
Dr. Ambedkar Govt. Law College,
Chennai

Associate Editors:

Thiru. S. Narayanaperumal
B.Sc., M.L.

Thiru. J. Vincent Comraj
M.A., M.L., PGDFM.

Tmt. N. Koyalvizhi M.L.

**DIRECTORATE OF LEGAL STUDIES,
CHENNAI - 600 035.**

Contents

1. Dishonour of Cheques	1
- Justice N. Paul Vasanthakumar	
2. Empowerment through Legal Literacy	14
- Justice M. Jaichandran	
3. Basic Structure and Working of the Indian Constitution	18
- Justice V. Dhanapalan	
4. Theories of Governance of Cyberspace - A survey	39
- T.K. Viswanathan	
5. Treaty-making Power under the Indian Constitution	62
- Dr. K.N. Chandrasekharan Pillai	
6. Federal Solution in Union State Relations	65
- Prof. N. Manohar	
7. Right to Information and Role of the Press	72
- A Critical Study	
- Dr. A. Raghunatha Reddy	
8. The Impact of Intellectual Property Rights with Special Reference to Health	79
- Dr. T.S.N. Sastry	
9. Detention without Trial - An Outline	86
- T. Johnson	
10. Judiciary and Conflict Resolution: With Special Reference to Environmental Conflict Management	99
- Dr. A. David Ambrose	
11. Right to Silence under the Criminal Justice System in India ..	111
- Dr. D. Sankar	
12. Sustaining Bio Technology - Need for Re-engineering	117
- S. Shanthakumar	
13. Protection of Surface and Ground Water and Legal Response - An Evaluation	134
- B. Venugopal	
14. Trade in Legal Services - An Indian Perspective	139
- S.M. Balakrishnan	
15. Right to Privacy and Investigative Journalism	146
- G. Rajasekar	

The Impact of Intellectual Property Rights on Human Rights with Special Reference to Health

Dr.T.S.N.Sastry*

Introduction

"Health as a social goal, the realization of which requires the action of many social and economic sectors in addition to health Sector."

-Alma-Atta Declaration¹

Intellectual Property loosely can be defined as the creation of human mind,² which includes creation on inventive works, including distinctive signs or marks. In a generic sense, they are regarded as legal rights accorded in international treaties incorporated into municipal law by national legislation to regulate the economic relations of nation-states. Hence it is often opined that they have no human rights dimensions and the long-term benefits of IPR's could conflict with the short-term public policy objectives of nation-states.³ However, if they are examined through the prism of human rights, they have a compatible relationship with human rights, and, a responsibility is fixed on the states to maintain a balance between public interests and private rights.⁴ But at the same time, a critical examination of proximity between

* Professor & Dean (Academic Planning) & Head Dept. of IPR, Tamil Nadu Dr.Ambedkar Law University, Chennai 600 028, email: tsnsastry(a)gmail.com

1. Declaration of Alma-Atta adopted at the International Conference on Primary Health Care, Alma-Atta, USSR, 6-12, 1978, organized by WHO.

2. For the definition see <http://www.wto.org>.

3. Jayashree Watal: IPR in the WTO & Developing countries, 2001, p.1-3.

4. Art. 7 of the IPR Agreement specifies that, the protection and enforcement of IPR's should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Also see the discussion of the Committee on the Economic, Social and Cultural Rights; ECOSOC, Documents E/C.12/2000/12/29.11.2000, p.2.

human rights and the IPR would lead to a potential conflict between the two on a number of substantial issues, such as how to regulate the balance between public and private interests in bridging the gap between civil and common law systems? Is there any real harmonious relationship exist between the two? Will IPR's extend protection to all the Economic, Social and Cultural rights as guaranteed in the Covenant? Whether IPR's have a tenable mechanism to protect the human rights of the minorities, developing, under developed, and less developed people's rights? Are there any subservient public interests of developing states to private interests of few individuals? Do various dimensions of cultural property exist? Whether basic rights such as right to food, right to health, right to development etc., be protected? Wouldn't it affect the pricing system, and, basic accessibility to life sustained drugs? Should greater emphasis be given to protecting interests of inventors and authors or to promote public access to new knowledge? So forth and so on come into existence. Apart from the issues raised above and also taking into consideration of the fears allied by various quarters,⁵ this paper makes a modest attempt to examine the relationship between IPR and human rights in brief, and, also analyse to what extent the TRIP'S Agreement extends protection in maintaining the balance between public interests and private rights with respect to Right to Health.

IPR and Human Rights: Potential Links

At the outset, Art. 15 of the ICESCR⁶ and similar provision under Art.27 of the Universal Declaration of Human Rights impose an obligation on the states to design the intellectual property system to strike a balance between public interests to access new knowledge as easily as possible to protect the interests of such investors. This balance is familiar to intellectual property law and has been protected by the states traditionally in a limited way.⁷

Though there exist a compatibility between human rights and traditional IPR systems, the focal point is where to strike a balance

5. For a detailed discussion, see the summary Record of the 77th Meeting of the Committee on Economic, Social and Cultural Rights, ECOSOC Document E/C.12/2000/Sr.77 dated 13.12.2001, p.1-7.

6. Art. 15(1) States: "The States parties to the present Convention recognize the rights of every one (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author".

7. The human rights approach to IP was first explicitly manifested in the French Revolution. It is evident, from the 1789 Declaration on the Rights of Man and Citizen which included: "Property" as a part of the mantural rights of Man. The word property here refers to all property which includes intellectual property too.

between them to be borne in mind. They are, first, public interests in the Covenant either after the human rights TRIPS Agreement finally, the effects of it will

As stated, obligation and obligation and users of economic and balance in the health. Actual such measures to promote socio-economic measures the states are able order to protect animal or certain but well as make the computer against the parties may by rights to restrain the technology developed and insom least death and equi

8. Report on TRIPS

9. Art. 27

10. Art. 27

11. Art. 27

12. Ibid.

13. Ibid.

them. There are certain preconditions which should always be kept in mind before applying human rights approach to IP system. First, whatever the balance is struck between private and public interest in IP, it should not work to the detriment to other rights. Secondly, IPR being legal rights, they can be revoked after their expiry or for violation of legal conditions, where as human rights are inalienable and not granted by a state. Thirdly, the Agreement has to be read with a human rights approach and the Agreement must be assessed empirically to determine the impact of it on human rights.⁸

As stated already, the objectives of the Agreement impose an obligation on the State parties to maintain a balance between rights and obligations of IPR holders, and, between the interests of producers and users of technological knowledge, with an objective to promote economic and social welfare. The Agreement tries to achieve this balance in various ways and means especially with respect to right to health. According to Art.8, member States are empowered "..... to adopt measures necessary to protect public health and nutrition, and, to promote the public interest in sectors of vital importance to their economic and technological development." However, these measures should be consistent with TRIPS Agreement, and, member States are also empowered to exclude inventions from patentability in order to protect public order or morality, including to protect human, animal or plant life or health etc.⁹ Member states may also exclude certain living matter from patentability, such as plant and animals, as well as methods for the treatment of humans or animals.¹⁰ Further, under compulsory licensing system, members have a right to take action against unfair or anti-competitive practices.¹¹ Further more, States may adopt appropriate measures to prevent every abuse of IPR'S by holders to prevent or resort to practices that unreasonably restrict trade or adversely affect the international transfer of technology.¹² It encourages international cooperation, especially the developed states are obliged to provide incentives to their enterprises and institutions to promote and encourage transfer of technology to the developing countries.¹³ Members are empowered to enforce fair and equitable measures which should not be unnecessarily

⁸ Report of the UN High Commission of Human Rights on the Impact of the Agreement on TRIPS on Human Rights, see E/C/N.4/sub.2/2001/13, dt. 27 June 2001, p.5-7.

⁹ Art. 27(2) of the Agreement.

¹⁰ Art. 27(3) of the Agreement.

¹¹ Art. 41 of the Agreement.

¹² See also Art. 40 Section (8).

¹³ See Art. 66(2) and Art. 67.

complicated, or costly or entail unreasonable time limits or unwarranted delays.¹⁴ Well, as stated in Art. 7, the Agreement aims to balance the rights of ICESCR under Art. 15 with respect to public health and nutrition technology transfer at least in theory. The above brief approach clearly specifies that the IPR Agreement has envisaged a vision of human rights approach to a certain extent if not fully.

TRIPS and Right to Health

In accordance with Art. 12 of the ICESCR, states have an obligation to protect and fulfill the right of everyone to the highest attainable standards of physical and mental health. In general, right to health includes the promotion of research, access to affordable treatments, including special categories of diseases like HIV/AIDS; carrying into international obligations and regulating the acts which constitute violations of the rights.¹⁵ States have a duty to take steps necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases. At the same time, international organs like WHO, WTO too have obligations to cooperate with the States to build in their expertise with reference to right to health.

This being the position of States under the ICESCR to protect and promote the right to health, to what extent then is the protection and enforcement of IPR within the obligations of the States in fostering these rights? The forms of IPR protection, most relevant to right to health is patents, trade marks. Patents and Trade marks are particularly important in medical research, because the industry often charge very high costs of testing, development and approval of drugs. Further, pharmaceuticals are relatively easy to reverse-engineer and thus are open to easily copy in the absence of IP protection. Hence intellectual protection, promotion of research to invent new drugs should serve the purpose of enjoyment of right to health. But this does not mean that IPR's promote respect for the right to health in its entirety.

- * IPR's being commercial rights, their main aim is towards economic incentives than the objects of promoting respect for human rights. This means, the IPR's promote research towards "Profitable" diseases than normal diseases, especially that of malaria and tuberculosis etc., where in the research is highly neglected.¹⁶

14. Art. 41(2).

15. General Comment No. 14 (E/C.12/2000/4; date 11 May, 2000).

16. For details see WHO/EDM/2001-2 "Globalization, TRIPS and Access to Pharmaceuticals" WHO Policy Perspectives on Medicine: WHO Medicines Strategy; 2003, No. 3, March 2001, p.5.

Conclusion

The States have to promote needs of the ICESCR, corresponding design of the right

- * Since IPR's enrich economically the patent holders, they are increasingly becoming corporate assets. This in turn, lead to competition in the market. Consequently, patenting activity became high in pharmaceutical industry, and many patents cover "me-too" drugs that are just different enough to be considered novel for the purpose of patent protection.
- * Since economic activity is the main consideration it may clog certain drugs. This will certainly impair the pricing of drugs and it may impair the protection to right to health.
- * Since IPR's promote commercial interest, they may affect the traditional medical systems such as siddha, Ayurvedha etc., from the domain of human rights. They affect the traditional knowledge of people and the indigenous medical system that is guaranteed under Art.25 of the ICESCR which promote the enjoyment and utilization of natural wealth and resources. For example, if neem tree seeds from India are patented, it would automatically violate the human rights of the people and the state which extends intellectual protection would contravene its covenant obligations.
- * The high pricing in the drugs in view of the mounting research costs. The low priority and banned drugs may be dumped by the corporate houses of the developed world into the developing world. This would certainly lead to differential pricing and affecting the purchasing capacity of the consumers in different countries. Though parallel importation is permissible under the TRIPS Agreement, it would lead to economic confrontation between states parties.
- * Art. 7 of the Agreement though appears to promote the right to health in theory, and to strike a balance between economic interests and human rights, it fails to provide any guidance on the ways and means to achieve the balance.

Conclusion

The above brief analysis clearly specifies that on the one hand, States have an obligation to implement the intellectual property system to promote economic and social development taking into account the needs of the polity to balance the rights and responsibilities. Art. 15 of the ICESCR, on the other hand, expects that the states have a corresponding duty to balance the public and private interests in the design of IP System. Under Art. 12 states need to take steps to promote the right to health. In such a scenario, as rightly pointed out by the

WHO, the states parties have onerous tasks to "carefully monitor the implementation of the TRIPS agreement in order to formulate comprehensive proposals for the future review of the TRIPS Agreement..."¹⁷ The requirement under TRIPS Agreement for the grant of patents, novelty, inventive steps and industrial applicability are open to interpretation under national legislation. Each country has an obligation to take into consideration the local conditions before according intellectual property. Further, according to Arts.8 and 40 of the TRIPS Agreement which permit member states to protect against anti competitive practices, as rightly pointed out by the UN High Commission on human rights. Hence, States should consider the elaboration of competitive laws that prevent abuses of IPR that lead to violation of right to health.

In the promotion of Right to health, States should always bear in mind, the WHO's call that "when establishing standards of patentability for pharmaceuticals, countries should consider the implications for health of these standards." Developed countries have an onerous task to promote technology transfer and the supply of affordable drugs to developing countries. Further, in order to achieve the objectives of TRIPS Agreement, the WTO should establish close contacts with other agencies of the UN specially while reviewing the agreement on drafting future treaties promoting trade to input the balancing mechanism to promote human rights philosophy than leaving it to states. Another way of balancing of the interests under human rights is by looking at the *travaux preparatoires*.¹⁸ This exercise will certainly specify all the bodies and the states parties to find out the ways and means to regulate the ill-effects of intellectual property systems in the promotion of human rights. Further more, the TRIPS Agreement does not prohibit the members from allowing parallel importation of patented pharmaceuticals. Accordingly, member states (especially developing states) should implement the provision in national legislation as safeguards to protect access to essential drugs as a component of right to health.

Right to health being an important human right, is an interdependent right. It also casts a duty on all the actors to promote the highest "attainable standards in the enjoyment of health".¹⁹ Right

17. Ibid p.6

18. According to international law of treaties, *travaux preparatoires* means preparatory work; preliminary drafts, minutes of conferences, and the like, relating to the conclusion of a treaty.

19. For a detailed discussion see Centre for Development and Human Rights: Right to Development, A primer; 2004, p.103-05.

to health being
the ideology of
States (especially
to attain the
the beneficiaries
or gimmicks

to health being inseparable from other rights, and especially promote the ideology that centres round the concept of Right to Development, States (especially Industrialized Countries), have onerous responsibility to attain the balance between IP System and human rights and pass on the benefits to the people of the universe without any stealing tactics or gimmicks by the patent holders.