Creating a Legal Basis for Intellectual Property Through Human Rights: Imperatives, Impediments, and Irreconcilable Tensions

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1.0 ABSTRACT

The dawn of the 21st century has witnessed the rapid rise of the knowledge economy, through an expanding use of a large array of intellectual property rights in many contexts and dimensions.[1] The introduction of an interdisciplinary and cross-cutting discourse which seeks to study the complex and intricate relationship between intellectual property law and human rights law has therefore captured the imagination of several intellectual property experts, human rights advocates, policymakers, and nongovernmental organizations (NGOs). [2] While the legal relationship between these two bodies of law is still in a nascent stage, it is critical to pontificate upon the precise boundaries and implications of this deepening relationship in order to create a robust institutional and theoretical foundation that can guide and inform future policymaking, especially in the context of human rights.[3]

Although these two rich areas of law initially progressed in virtual isolation from each other, contemporary policy dialogue focuses on the study of their relationship in solving potentially difficult problems in science, technology, and culture.[4] In fact, their relationship also provides an academic basis for understanding patterns of governance, on the basis of the typology of a particular regime.[5] For instance, the study of this relationship between intellectual property law and human rights helps us acquire a more nuanced understanding of possible reasons why the

[1] Duncan Matthews, *Intellectual Property, Human Rights and Development: The Role of NGOs and Social Movements*. Edward Edgar Publishing Ltd, United Kingdom (2011).
[2] Molly Land, "Human Rights Frames in I.P Contests." *Balancing Health and Wealth: Global Law and the Battle over Intellectual Property and Access to Medicines in Latin America*. Rochelle Dreyfuss and César Rodríguez-Garavito, eds. OUP Oxford (2014).
[3] Rosemary Coombe, *Cultural Rights and Intellectual Property Debate*, Carnegie Council for Ethics in International Affairs (2005).
[4] Id.
[5] Ruth L. Gana, *The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*, 18 JOURNAL ON LAW AND POLICY 2, 1996, 315-354.

degree of intellectual property protection is remarkably low in developing countries in which governments typically impose fetters on the enjoyment of fundamental rights and freedoms, making them the preserve of the rich and powerful.[6] It may also explain why socialist countries and centrally planned economies generally tend to grant limited protection to intellectual goods, on account of the cultural and ideological restraints that are imposed on individual freedom.[7] Similarly, it also becomes possible to explain why capitalist economies provide a considerably high degree of protection to intellectual goods, irrespective of internal market structures and segmentation of rights.[8]

It is the endeavor of the authors, therefore, to explain the creation of a legal basis for shaping intellectual property discourse through the eyes of human rights law. In addition to exploring the legal and societal ramifications of this relationship, the authors shall also analyze the connections and divergences between these two sets of rights as part of the larger objective of this paper.

In terms of argument structure, the first segment of this paper succinctly discusses the recognition of intellectual property rights as human rights. This segment, in addition to narrating the circumstances that led to the recognition of intellectual property rights as human rights through a historical narrative, briefly examines the arguments both in favor of and against this development. The remaining five segments in this paper are specifically devoted to the far-reaching effects of this interdisciplinary study on five key areas in modern policy. In order to allow for a thematic introduction, these key areas are healthcare access (second segment), participation

[6] Id.
[7] William Alford, "Perspective on China: Pressuring the Pirate," *Los Angeles Times* (1992).
[8] John R. Commons, *Legal Foundations of Capitalism*. MacMillan Publishers (1932).

in cultural life (third segment), gene patenting (fourth segment), the right to education (fifth segment), and the rights of indigenous peoples (sixth and final segment).

2.0 INTRODUCING THE INTER-DISCIPLINARY NARRATIVE: EXAMINING THE ROLE OF INTELLECTUAL PROPERTY IN INSTRUMENTS OF HUMAN RIGHTS

In this segment, the authors have endeavored to trace the historical narrative surrounding the interdisciplinary understanding of intellectual property and human rights, in various instruments of law and policy, in order to set the tone for the broader thematic and research objective of this paper: the creation of a legal basis for intellectual property through the lens of human rights.

The origin of the alliance between intellectual property rights and human rights can be traced back to the French Patent Law of 1791, which stated that "every novel idea whose realization or development can become useful to society belongs primarily to him who conceived it, and it would be a violation of the rights of man in their very essence if an industrial invention were not regarded as the property of its creator."[9] In fact, the law emphatically stated that the rights of all inventors were "the most unassailable, the most sacred, the most legitimate, and the most personal of the property rights."[10] Thus, this law accorded recognition to the natural law conception of intellectual property rights by effectively stating that these rights existed in "the very nature of things."[11] Viewed through this lens, intellectual property laws were not designed for *conferring* rights upon authors and inventors; they were merely designed for *confirming* these rights. By

[9] Supra, note 5.
[10] Id.
[11] Id.

viewing the entitlement to enjoy the fruits of one's intellectual labor as the "most personal of rights,"[12] this law clearly leaned towards an essentialist conception of human rights.[13]

In fact, this rich inter-relationship also finds support in the writings of the famous French jurist and philosopher Adolphe Theirs, who opines: "The right to one's self, to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word his soul and body, [is] an incontestable right, one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away." More than this, the obligation to labor was "a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family."[14]

In the landmark 1897 Supreme Court case *Allgeyer v. Louisiana,*[15] the Court opined that liberty not only posits freedom from unlawful confinement but also includes:

> …the freedom of a citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose, to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes abovementioned…[H]is enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment.

It is pivotal to note here that the Court views equality of faculty usage as an expansive concept, hinting at possible ways and means to substantively ensure that all human beings are provided the privilege of freely using them irrespective of their backgrounds.

[12] Id.
[13] Id.
[14] Id.
[15] Allgeyer v. Louisiana 165 U.S. 578 (1897).

Decades later, when a war-weary world began constructing a new international legal order, founded upon the four freedoms enunciated by President Roosevelt to Congress prior to American engagement in the war,[16] it consciously worked towards deepening and broadening the reach of human rights instruments. Thus it was able to transform the rhetoric of human rights ideology into concrete, substantive guarantees.[17]

Recognizing the need to promote a uniform international legal order, this jurisprudential shift was marked by the introduction of statutory protection to the works of authors, through the most widely accepted international human rights instrument, the Universal Declaration of Human Rights (hereafter "UDHR"). For instance, Article 27 (2) of the UDHR, a pivotal source of customary international law on human rights, states*:* "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."[18]

It is worthwhile to mention here that critics of this provision believe that intellectual property needs no special protection beyond that afforded generally by property rights contained in Article 17 of the UDHR. The provision of special protection for intellectual property, they argue, reflects the elitist perspective of the framers of the UDHR.[19]

[16] Michael L. Doane, *Protection in an Age of Advancing Technology*, 9 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 1994, 465-497.
[17] Id. *See also*: Garrett Hardin, *The Tragedy of the Commons*, *Science*, New Series (1968).
[18] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, art. 27, U.N. Doc. A/810 (1948).
[19] *See*: Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress and Access to the Benefits of Science*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 4, 2007.

However, several arguments can be made in favor of including the right of protecting and controlling the use of one's intellectual property in the UDHR, whose legal ramifications are further fortified by the existence of the UDHR as a customary source of international law.

First, the UDHR was designed to protect the intrinsic worth of the individual.[20] Giving individuals the right to protect the products of their intellect definitely reinforces their intrinsic worth, at least at the level of principle.[21] While it is certainly accepted that the modern-day knowledge economy thrives on the culture of sharing as a means of empowerment and great average utility, a non-market-specific argument would, in the opinion of the authors, allow such a reading of products of one's own intellect.[22]

Second, real property, it can be argued, is not as inextricably linked to one's intellect or wellbeing as intellectual property.[23]

Third, the concept of liberty was dominant in the socio-economic milieu of the post-World War II era, and, as mentioned earlier, the freedom of an individual to be free in the exercise of his faculties lies at the heart of liberty.[24] While critics of the incentives theory[25] of intellectual property may principally oppose such a policy stand, one must admit that the core of the diffusion of intellectual property rights through human rights instruments, somewhere admits of the indirect causal link between the sanctity of a strict I.P regime and the *ability* to exercise one's faculties, notwithstanding structural constraints such as the market. One of the

[20] Supra, note 5.
[21] Id.
[22] Id. *See also*: Wendy J. Gordon, *A Property Right In Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE LAW JOURNAL, 1993, 1533-1609.
[23] *See generally*: Andre Gunder Frank, *Capitalism and Underdevelopment in Latin America*, New York University Press, 1967.
[24] Supra, note 5.
[25] Id.

principal reasons why the UDHR is widely regarded as one of the most influential documents of the 20th century is because it unequivocally placed economic, social, and cultural rights on the same footing as civil and political rights.[26]

This fact is also evidenced by international judicial pronouncements, which, more often than not, undertake a joint reading of the UDHR and ICESCR, both as pivotal sources of customary law and *jus cogens* obligations.[27]

The growing importance of intellectual property is reflected by the fact that the intellectual property provision in the UDHR was also incorporated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), even though the provision on real property, embodied in Article 17 of the UDHR, was not included in the ICESCR.[28] While the UDHR is a more influential human rights instrument in terms of its focus area, the ICESCR seeks to strike a balance between the rights of authors and inventors and the rights of the society at large.[29]

Article 15 of the ICESCR imposes a duty on States Parties to recognize the right of everyone to enjoy the benefits of scientific progress and its applications.[30] Moreover, it also categorically asks States Parties to safeguard the moral and material interests of creators of scientific, literary, and artistic works.[31] In pursuance of this goal, it urges States Parties to take

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[26] Peter K. Yu, *International Rights Approaches to Intellectual Property: Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS LAW REVIEW 1039, 2007.
[27] Id.
[28] Supra, note 20.
[29] Id.
[30] Article 15.1. (b), *International Covenant on Economic, Social and Cultural Rights*, henceforth ICESCR, adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966).

[31] Id.

measures that are "necessary for the conservation, the development, and the diffusion of science and culture." [32] States Parties must "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields."[33] In addition, States Parties are required to "undertake to respect the freedom indispensable for scientific research and creative activity."[34] The aforementioned rights impose three types of interlocking duties on states: the obligations to *protect*, *respect*, and *fulfill*.[35]

The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights comprehensively delineate the scope of these duties.[36] The obligation to respect posits that states must not impinge upon the enjoyment of certain specific rights; the obligation to protect entails prevention of the encroachment of these specific rights by third parties. Finally, the obligation to fulfill postulates that the onus is on states to take, inter alia, appropriate legislative, financial, and administrative measures for the full realization of these rights.[37]

While the recognition of intellectual property rights as inalienable human rights is a positive development, it is also pertinent to note that authors and inventors often grossly misuse their intellectual property rights and subsequently justify their actions by referring to the esteemed status that has been granted to these rights by human rights instruments. It is dismaying to note that such arguments erroneously "entrench some dangerous ideas about

[32] Id.
[33] Article 15.4, ICESCR.
[34] Article 15.3, ICESCR.
[35] Supra, note 20.
[36] Id.
[37] Id.

property: in particular, that property rights as human rights ought to be inviolable and ought to receive extremely solicitous attention from the international community."[38]

Intellectual property rights, like all other human rights, cannot and must not be used for depriving those in the lowliest brackets of society access to intellectual goods that can transform their lives in powerful ways. Further discussion on this follows.

3.0 NORMATIVE UNDERPINNINGS OF GREATER HEALTHCARE ACCESS: EXPLAINING A HUMAN RIGHTS APPROACH TO PARALLEL TRADE

Even though the exorbitant pricing of essential drugs has been hotly contested in the last two decades, these contestations were surprisingly not initially viewed in human rights terms.[39] The United Nations High Commission on Human Rights[40] and the Joint United Nations Programme on HIV/AIDS [41] conducted the United Nations Second Annual Consultation on HIV/AIDS and Human Rights[42] in 1996, which culminated in the release of exhaustive guidelines stipulating that States Parties "should enact legislation to provide for the regulation of HIV-related goods, services, and information, so as to ensure widespread availability of safe and effective medication at an affordable price."[43]

[38] Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS LAW REVIEW 1021, 2007, 1031-32.
[39] Supra, note 3.
[40] Id.
[41] Id.
[42] Id.
[43] Id.

However, it is somewhat disappointing and astonishing to note that the aforesaid guidelines did not focus on regulating intellectual property for controlling the prices of these medicines.[44] The more poignant examples of the use of human rights norms against the misuse of intellectual property rights for exorbitantly priced drugs can be found in South Africa and Brazil.

In South Africa, human rights norms are an integral part of national constitutional law.[45] The existence of a constitutional right allowed Treatment Action Campaign (TAC), the organization that spearheaded the movement against the sale of drugs at exceptionally high prices in South Africa, to claim that charging high prices for important drugs was a human rights violation under the South African constitution.[46] By framing its arguments in human rights terms, TAC was able to attract considerable attention to its campaign against the abusive use of patents by pharmaceuticals for sustaining their practice of selling drugs at unaffordable prices.[47] With the active cooperation of like-minded organizations, such as the Law and Treatment Access Unit of the AIDS Law Project, TAC was able to amply demonstrate the transformative potential of human rights law in restructuring public and legal discourse. [48]

In the case of Brazil, access to health care is a right embodied in Article 196 of the Brazilian Constitution of 1988. The argument for providing affordable medicines in Brazil is also grounded in the country's system of healthcare (Sistema Único de Saúde or SUS), which creates a robust framework for providing public healthcare in ways that would make it accessible to the last man in the line.[49]

[44] Supra, note 24.
[45] Supra, note 3.
[46] Id.
[47] Id.
[48] Id.
[49] Id.

Furthermore, Law 9.313 gives concrete expression to this constitutional guarantee by statutorizing the government's obligation to provide HIV/AIDS patients access to medicines indispensable for their treatment.[50] This human rights foundation has been a major galvanizing force in the expansion of access to medicines and healthcare services.[51] In addition, the Movimento Sanitária, a democratization and human rights movement that helped overthrow the country's military dictatorship, has been a pioneer in advocacy initiatives for universal access to healthcare.[52]

In the United States, Ralph Nader and James Love of the Consumer Project on Technology (now known as Knowledge Ecology International) led the movement for control of the prices of essential drugs.[53] Subsequently, their focus shifted to ensuring international equity on account of the deleterious effects of the TRIPS Agreement.[54]

The pressing need for testing the efficacy of intellectual property law against the anvil of human rights law is best epitomized by the example of Argentina and Chile, where the absence of a strong right to health, coupled with the inability of organizations to construct a strong human rights narrative, has resulted in the monopolization of debates on patent protection by powerful pharmaceutical companies.[55]

Similarly, at the international level, even though organizations like Third World Network, Health Action International, Essential Action, and Doctors Without Borders have worked relentlessly to create a legal regime for guaranteeing access to essential medicines, their inability to effectively invoke human rights norms has significantly stultified their efforts to usher in the

[50] Id.
[51] Id.
[52] Id.
[53] Id.
[54] Id.
[55] Id.

kind of deeper structural changes that are a sine qua non for guaranteeing sustainable access to healthcare.[56]

To be sure, the failure of organizations to use human rights norms in such contestations results not just from a lack of recognition of the enormous potential that these norms and narratives can play in reshaping contemporary discourse, but also a principled belief that the use of such norms would not be apposite and useful.

There are several reasons for this perception, which the authors have briefly discussed below:

First, human rights norms, the argument goes, are morally persuasive and are able to set the right tone with their sweeping generalizations and broad assertions, but do not provide concrete solutions, applicable to practical realities, that are consistent with the twin imperatives of incentivizing pharmaceutical innovation through robust protection and the need to promote wider access.

Second, there is an increasing concern that the human rights approach could prove to be counter-intuitive, because the same arguments that are made to demand fairer intellectual property norms can also be used by those whose creations enjoy intellectual property protection, in light of the fact that international human rights law unequivocally recognizes the right to enjoy the fruits of one's intellectual labor, as demonstrated in section 2.[57]

Third, human rights experts are typically not sufficiently well versed in intellectual property law to be able to come up with persuasive responses to the market-based rationale that is put forth by organizations for justifying the high prices of drugs, so mere rhetorical flourishes are

[56] Id.
[57] Id.

not sufficient to sustain the intensity of their campaign.[58] As a result, arguments against the sale of expensive drugs increasingly rely on the Access to Knowledge (a2k) framework, which, it is believed, has the potential of providing more sustainable solutions to this complex problem.[59]

However, it is submitted that the appropriate response to these concerns would not be to refrain from invoking human rights norms, lest they backfire, but to devise strategies for using those norms in ways that are practically relevant and that can withstand scrutiny. To this end, human rights advocates can take at least three specific steps to address these fears. First, they must work towards acquiring a more nuanced understanding of the market forces that shape the decisions of pharmaceutical companies so that they can use that knowledge to ground their arguments on market-based rationale. Second, they must seek to shed light on the fundamental goals and broad aspirations that underpin the human rights system to thwart attempts to misuse the system in ways that help the powerful advance their interests. Finally, they must integrate human rights norms into a broader, multi-pronged strategy for accomplishing their goals, which would help them provide meaningful ideas and ensure that they do not get accused of predicating their campaign upon smoke and mirrors.

In addition to this, a human rights approach offers a credible alternative to the suggested recourse to parallel trade problems across the globe. Parallel trade, as critics posit, is a serious threat to the sanctity of the intellectual property regime. Although it can possibly and credibly be argued that internal market structures of global pharmaceutical companies take care of the cheap/accessible healthcare problem by allowing for price discrimination, it is a well-settled position that exploitative business policies ultimately do not proportionately allow for cheaper medicines. On the other hand, however, if one were to consider countries such as Germany,

[58] Id.
[59] Id.

where domestic law allows for parallel trade subject the re-imported medicines being equal to or more than 10% cheaper than the original drug, the results intended haven't quite been achieved. If one were to consider the case of the thrombolytic ISCOVER,[60] which is sold at a re-imported retail price of €236.4 as against the original price of €240.1, only a price reduction of 1.5% can be observed, thereby defeating the very essence of the relaxation given to re-importers. In fact, even if one sees the sale price for the calcium supplement NORVASC[61] or the hepatitis vaccine TWINRIX,[62] or even the neuroleptic ZYPREXA,[63] the intended figure of a 10% deduction in price has not been reached.

Therefore, while re-importers are allowed to carry on their trade with re-packaged goods, the intended reduction in price is nonetheless not achieved. In such a situation, therefore, it would not be surprising if international pharmacy corporations with operations in Germany shifted their research centres to markets such as those of the United States of America, which afford a more justifiable regime through enhanced protection. Naturally, therefore, both sides to the parallel trade discussion have their own merits, which thus warrant a different discourse altogether. In the opinion of the authors, this should be the human rights approach.

[60] Medicinal drug.
[61] Supra, note 59.
[62] Id.
[63] Id.

4.0 EXPLORING THE RIGHT TO PARTICIPATE IN CULTURAL LIFE: ARGUMENTS FOR GREATER ACCESS

The right to participate in cultural life, which lies at the heart of most human rights instruments, encompasses two related but distinct concepts:

A. The right to protect one's own distinctive culture; and
B. The right to share and transform cultural goods and thereby contribute to cultural advancement.[64]

The growing importance of cultural participation is best explained by Yvonne Donders through the following assertion: "Culture now represents, in accordance with the anthropological approach, a way of life of individuals and communities."[65] Even as the advancement of science and technology has paved the way for greater access to cultural goods, restrictions imposed by intellectual property law on such access, which are often founded on facile notions, have imposed an undue burden on the exercise of this right.

Many cultural products have become geographically inaccessible because of publishers, driven by economic goals, often decide not to make their products available in countries in which they would not be able to commercially exploit them to the fullest extent possible.[66] In addition, robust copyright protection often comes in the way of attempts to make popular works of cultural significance available in a diverse array of languages.[67]

[64] Id.
[65] Yvonne Donders, *Cultural Life in the Context of Human Rights*, U.N. Doc. E/C.12/40/13 (2008).
[66] Supra, note 33.
[67] Id.

Similarly, as Brian D. Wassom notes, houses of worship also generally tend to refrain from using musical works, sketches, videos, and dramatic scenes during prayer meetings because they are required to obtain multiple licenses for using these forms of art, giving rise to the fear of entangled legal battles with cantankerous intellectual property owners.[68]

These restrictions not only undermine the ability of individuals to make transformative use of existing goods, which is indispensable for the march of culture, but they also fail to recognize the unexceptionable proposition that the ability of individuals to choose widely from existing cultural goods is critical for them to decide what kind of cultural life they want to lead.[69]

Further, Article 15 of the ICESCR, which seeks to balance the rights of authors with the collective cultural rights of communities, has also come in for considerable criticism because of its inability to delineate specific ways of lessening the tension between these two sets of interests.[70] In its General Comment no. 17, the U.N. Committee on Economic, Social, and Cultural Rights, which was created to oversee the implementation of the aforementioned Covenant, described the relationship between these interests as being "mutually reinforcing and reciprocally limitative."[71] In addition, it reaffirmed that intellectual property is a social product with a social function, and gave several concrete examples to drive home the point that States Parties have an obligation to

[68] Brian D. Wassom, *Unforced Rhythms of Grace: Freeing Houses of Worship from the Specter of Copyright Infringement Liability*, 16 FORDHAM INTELLECTUAL PROPERTY, MEDIA, AND ENTERTAINMENT LAW JOURNAL 61, 2005.

[69] Julie Ringelheim, *Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from the International Human Rights Case Law*, U.N. Doc. E/C.12/40/4 (2008).

[70] Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights* 9 HUMAN RIGHTS QUARTERLY 9, 1987.

[71] General Comment No. 17, "*The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant),*" U.N. Doc. E/C.12/GC/17 (2006).

ensure that authors' exclusive rights are structured in ways that make them compatible with the wider interests of the community.[72]

It is submitted that if full and effective cultural participation is to be promoted in ways that are compatible with values of semiotic democracy, it is imperative that we invoke human rights discourse for advancing this cause. More specifically, a conscious and concerted strategy to bring these two bodies of law in harmony for cultural advancement would involve at least three important steps.

First, the use of compulsory licensing, which has helped bridge the chasm between competing interests in the context of patents, should be promoted in the context of cultural goods, while ensuring that sufficient safeguards are built into the system in order to make creators feel invested in the endeavor.[73]

Second, states must recognize that a vibrant and constantly expanding public domain is critical for advancing values of semiotic democracy, and must carefully evaluate laws and policies that have resulted in the death of the public domain in order to restructure them in a manner consistent with the human right to cultural participation.[74]

Third, as the ICESCR calls upon states to work towards the progressive realization of the rights guaranteed in the Covenant, states must recognize that their constant efforts to expand the scope and reach of intellectual property law directly run counter to this obligation and must refrain from undertaking expansions that are impermissibly retrogressive.[75]

[72] Id.
[73] Id.
[74] Id.
[75] Id.

5.0 GENE PATENTING AND HUMAN RIGHTS: ENDORSING POLICY BALANCE THROUGH IDEATIONAL REFORM

Until the 1980s, it was a well-accepted proposition that human or animal genes could not be patented because their protection fell foul of the fundamental goals that the patents system espoused. However, a decision of the U.S. Supreme Court in the 1980 case *Diamond v. Chakrabarty* opened the floodgates for the patenting of genes. In this case, the Court, while allowing the grant of a patent for a human-made microorganism that was designed to degrade components of crude oils and as a tool for confronting oil spills, noted, "The patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature's handiwork, but his own; accordingly, it is patentable subject matter. . . ."[76]

This decision sent shockwaves through the communities of ethosists, religious leaders, and scientists. In 1980, shortly after this decision, the General Secretaries of the National Council of Churches, the U.S. Catholic Conference, and the Synagogue Council of America appealed to President Carter to intervene and take cognizance of the moral ramifications of the decision.[77]

In 1987, the U.S. Patent Office provided a legal foundation for the grant of patents for "non-naturally occurring nonhuman multicellular living organisms, including animals."[78] As a result, in 1988, a Harvard University biologist received a patent for a mouse that had been

[76] Diamond v. Chakrabarty, 447 U.S. 303 (1980).

[77] Supra, note 20.

[78] Id.

genetically altered to serve as an animal model for acquiring a better understanding of human cancers.[79]

Other countries, too, have jumped on the bandwagon and have restructured their patent laws in ways that incentivize research in the field of gene therapy. German law, for example, allows human genes to be patented and states: "An element isolated from the human body … including the sequence or partial sequence of a gene, may constitute a patentable invention even if the structure of that element is identical to that of a natural element."[80]

Similarly, Japan, Canada, and Australia allow for the patenting of human genes if they are sufficiently isolated and if the patent application is able to demonstrate how their use is capable of industrial application.[81] Viewed through the lens of human rights, these developments raise several concerns that demand the immediate attention of the international community.

Philosopher Baruch Brody eloquently describes the argument underlying the protests against the granting of patents on genes:

> Even if the main purpose of the patent system is to promote technological advances, there is no reason why it cannot recognize limitations based upon the need to respect legitimate moral constraints. And even if a liberal state must be neutral and not prohibit behavior merely on the basis of moral constraints, there is no reason why it must promote what it considers to be immoral practices by providing them with intellectual property protection. So neither institutional considerations nor considerations of political policy prohibit the protection of human dignity by the Patent Office.[82]

[79] Id.
[80] See: https://www.pharmapatentsblog.com/2013/04/30/dispelling-the-myriad-gene-patent-harmonization-myth/
[81] Id.
[82] Supra, note 20.

The commodification of genes is also indicative of the manner in which governments often yield to the pressure of commercial forces and simply overlook moral considerations. The norms that undergird the present patent system are in sharp conflict with the socio-cultural milieu of most countries and have been structured in such a way as to lower the sanctity and dignity of life. Michael Walzer's concept of "blocked exchanges" may lend credence to this argument. He presents a list of 14 things which cannot be bought and sold and must be viewed in noneconomic terms.

His list includes, inter alia, human beings, political office, love and friendship, military service, freedom of speech, etc.[83] Although he does not include human genes within this list, it would not be unfair to assert that the idea that underpins this concept, i.e. the importance of certain things transcends economic value, applies with equal force to human genes which are the building blocks of a human being. The need to erect barriers to the unfettered patenting of genes is also captured well by E.R. Gold, who explains how commercialization and privatization reduce everything to economic terms, on account of which moral or ethical considerations tend to get crowded out.[84]

The United States, which is widely blamed for according legal recognition to such patents in the first place, has considerably altered its stance on gene patents over the years by circumscribing the ability of scientists to monopolize such inventions.

This finds expression in a 2013 U.S. Supreme Court decision, which makes it clear that "a naturally occurring DNA segment is a product of nature and not patent-eligible merely because it has been isolated." Based on this reasoning, the Court came to the conclusion that CDNA segments

[83] Id.
[76] Id.

are patentable precisely because they are not naturally occurring.[85] Similarly, Article 53(a) of the European Patent Convention emphatically asserts that patents should not be granted for inventions "the publication or exploitation of which would be contrary to 'order public' or morality."

The need to strike a balance between these competing interests is also brought into sharp focus by the 1975 Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind which unequivocally stipulates that all States must take effective measures, including appropriate legislation, to prevent and preclude the utilization of scientific and technological achievements to the detriment of human rights and fundamental freedoms and the dignity of the human person. [86]

Audrey R. Chapman recommends a four-pronged approach for striking a healthy balance between intellectual property rights and human rights norms for scientific advancement:

A. Intellectual property rights must be in consonance with the understanding of human dignity in the myriad international human rights instruments and the norms defined in accordance with those instruments;
B. The main goal animating the creation of intellectual property rights in the sphere of science should be the promotion of scientific progress and access to its benefits;
C. Intellectual property regimes must respect the freedom indispensable for scientific research and creative activity; and
D. Intellectual property regimes must encourage the development of international contacts and cooperation in cultural and scientific realms.[87]

[85] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2118–19 (2013).

[86] Supra, note 20.
[79] Id.

6.0 AN ARGUMENT FOR GREATER *"SHARING"*: ENDING THE POLICY PARALYSIS

As Chief Justice Earl Warren described education in the celebrated case of *Brown v. Board of Education*:

> [It] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[88]

Despite the unequivocal recognition of the unexceptionable proposition that education is the single most important tool for transforming the lives of the deprived and marginalized by domestic and international legal instruments, intellectual property laws, either advertently or inadvertently, make it virtually impossible for those with limited means to get access to cutting-edge educational material within the four corners of the law. Copyright law, by giving wide discretion to publishers to make their material available at any place and amount of their choosing, creates the chilling effect of denying hungry minds from the lowliest brackets of society meaningful access to academic material.[89]

According to R. Preston McAfee, an economics professor at Cal Tech, textbook publishers benefit from the problem of "moral hazards," which essentially means that professors who prescribe these textbooks don't have to bear the cost of purchasing them, so they do not pay any heed to the problems that students may have to face in accessing them.[90]

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[88] Brown v. Board of Education, 347 U.S. 483 (1954).
[89] Eddan Katz, "The Right to Education Threatened by the IP Copyright Regime," presentation at panel, "Tackling the Negative Impacts of Intellectual Property Systems: A Human Rights Approach," 13 March 2008.

[90] Noam Cohen, "Don't Buy That Textbook, Download It Free," *The New York Times,* 15 September (2008).

Furthermore, the anti-circumvention laws in most countries have also been structured in such a way that professors who use copyrighted educational material, which they are perfectly entitled to do under the exceptions in the copyright regime, may still be held liable in accordance with the anti-circumvention laws.[91] Another profound problem, which is not very well documented, pertains to the lack of access to books to the print-disabled. It is pertinent to note that less than 20 percent of blind students in India have access to academic material in their preferred format, and less than 35 percent have any access at all.[92]

This is a significant barrier to access – a political and legal, not technical or attitudinal, one.[93] At present, only 57 countries have exceptions in their copyright laws for providing access to educational material to the visually impaired.[94] Some experts believe that this problem should not be viewed in human rights terms because, they argue, the reasons for deprivation of access to copyrighted works flow from technical copyright doctrines, making it harder to construct a black-and-white narrative. Human rights norms, they opine, should only be used to tell a clear causal story and identify those responsible for the harm in a direct and concise manner.[95]

However, in her article "Addressing the Book Famine: A Human Rights Issue," Krista L. Cox eloquently refutes this argument. She notes, "Access to knowledge, such as that commonly found in the written word, is fundamental to a number of human rights that include, inter alia, the rights to take part in society, participate in cultural life, enjoy the benefits of scientific progress, exercise freedom of opinion and expression, seek and impart information, education and employment opportunities."[96]

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[83] Molly Land, *Intellectual Property Rights and the Right to Participate in Cultural Life*, 2008.
[92] http://www.unicef.org/sowc2013/perspective_sawhney.html
[85] Id.
[94] Id.
[87] Supra, note 3.
[96] Krista L. Cox, *The Right to Read for Blind or Disabled Persons,* American Bar Association (2012).

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which was signed after intense negotiations in 2013, seeks to put in place robust exceptions and limitations to international copyright law which would make it possible for more than 300 million print-disabled people across the world to have access to books. However, only nine countries have ratified the treaty so far,[97] giving rise to the fear that the promise to make the written word accessible to the blind may end up remaining confined to mere words. Therefore, if the book famine is to be ended, it is imperative that countries adopt a threefold strategy. First, they must restructure their copyright laws in such a way as to make it possible for persons with disabilities to transform copyrighted works into accessible formats without attracting the mischief of the law. Such exceptions must be couched in sufficiently wide language to prevent publishers from citing flimsy grounds for preventing such conversions. Second, the fair use/fair dealing doctrines, found in almost every copyright law, must be interpreted broadly to bring attempts to convert inaccessible works into digitally accessible formats for persons with disabilities within their ambit. A recent decision by the U.S. Court of Appeals for the Second Circuit, bringing such conversions within the ambit of the fair use doctrine, is a positive development. [98] Finally, pursuant to the mandate of the Marrakesh treaty, states must develop appropriate structures for facilitating cross-border transfer of accessible books so as to enable anyone familiar with the Spanish language residing anywhere in the world, for instance, to read any accessible translation of a book made in Spain.

[97] http://policynotes.arl.org/?p=1120.
[98] Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)

7.0 RIGHTS OF INDIGENOUS PEOPLES: CREATING SCOPE FOR DIALOGUE

Modern models of development, which are predicated upon assimilation through invisibilization, fail to take account of the unique culture, ethos, and values of indigenous communities. As a result, indigenous communities lack access to the legal tools that are needed to protect traditional knowledge, art, and medicine.

Traditional knowledge, it must be recognized, is fundamentally different from all other forms of creation for at least two reasons. First, this knowledge passes on from one generation to another, often in very informal ways, making it very difficult to find out who the original creator of the knowledge was. Second, this knowledge is owned and possessed by communities and not individuals; even community leaders are, at best, its most trusted guardians, not its owners.

The upshot is that, as Graham Dutfield notes, traditional knowledge is often conveniently assumed to be in the public domain. This creates the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely.[99]

Therefore, there are no legal restrictions on the transformation and, in some cases, mutilation of this knowledge by scientists, authors, and artists. This problem is further exacerbated by the fact that indigenous communities are hardly ever able to reap the benefits of the financial and societal benefits resulting from the use of their traditional knowledge.[100]

The cultural sensitivities involved in such cases are best illustrated by the example of the Worrora, Wunumbal, and Ngarinyin Aboriginal tribes belonging to the Kimberley region in

[99] Graham Dutfield, *TRIPS Related Aspects of Traditional Knowledge*, 33 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 233, 238 (2001).
[100] *Promotion and Protection of Human Rights: Written Statements Submitted by International Indian Treaty Council*, U.N. ESCOR Comm'n on Human Rights, 59th Sess., Agenda Item 17, U.N. Doc. E/CN4/2003/NGO/127 (2003).

Australia. These tribes have, for centuries, been painting images of the Wandjina – their supreme creator and the maker of the earth – on rock sites, caves, and paper. These tribes possess the exclusive right within the Aboriginal community to depict the Wandjina in any form.

In the last few years, many non-indigenous artists have used Wandjina imagery for what Aboriginal people consider to be their petty parochial benefits. In many of these paintings, mouths were added to the traditional Wandjina imagery. This was particularly offensive to the leaders of the Worrora, Wunumbal and Ngarinyin tribes because they firmly believe that the Wandjina are so powerful that their power descends to earth through the line seen as a nose; adding mouths to Wandjina imagery, they argue, is a serious insult to their creators.[101] Adding insult to injury, a woman named Vesna Tenodi published a book containing Wandjina imagery and put forth a theory that Australian indigenous peoples are, in fact, a dying race, as they are suffering from spiritual stagnation.[102]

Naturally, this greatly infuriated the Aboriginal people, as Ms. Tenodi put a question mark on the very essence of their existence. Furthermore, reports have also shown that these developments led to a sharp increase in the number of suicides in the Aboriginal community, as many Aboriginals could simply not come to terms with the myriad ways in which their community was defamed. Valda Blundell has described the ramifications of these developments in the following words:

> Depicting Wandjina is a significant way in which Wandjina-Wunggurr people enact their identity as a distinct Aboriginal society and convey this identity to other Aboriginal societies as well as the non-Aboriginal world. The execution and public display of the Katoomba sculpture has not been authorized by Wandjina-Wunggurr people. Such an unauthorized portrayal of the Wandjina undermines the very foundation of their society in that it constitutes an attack on the specificity and integrity of their identity and the legitimacy of their cultural and religious beliefs. As an unauthorized depiction of

[101] http://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html.
[102] Vesna Tenodi, *Dreamtime Set in Stone: The Truth about Australian Aborigines,* Anan Press (2010).

> Wandjina, it destabilizes the natural balance of their life-world, which is only ensured when their laws and cultural protocols are followed.[103]

In response to the growing pressure for enacting a law for protecting cultural heritage, the Australian government started working on a National Cultural Policy. A discussion paper pertaining to the aforementioned policy explicitly states that the first goal of the policy would be "to ensure that what the government supports – and how this support is provided – reflects the diversity of a 21st-century Australia, and protects and supports indigenous culture."[104]

In the 1990s, the movement to protect the rights of indigenous peoples started gaining momentum in the human rights machinery in the United Nations.[105] This process culminated in the adoption of the Declaration on the Rights of Indigenous Peoples (DRIP), a first-of-its-kind instrument to protect the interests of indigenous communities, by the General Assembly of the United Nations in 2007.

Article 31(1) of this Declaration gives to indigenous communities the right to protect, maintain, and control their traditional knowledge, cultural expression, and medicine, in all its forms and manifestations, and to obtain intellectual property protection for this purpose. To this end, Article 31(2) calls upon States Parties to develop a legal framework in which the need to balance the goal of fostering scientific and technological advancement by drawing upon traditional knowledge is effectively balanced with the need to protect the interests of indigenous communities.

It is submitted that this balance can be struck by adopting an approach based on four fundamental pillars. First, recognizing of the human right of traditional communities of

[103] Submission of Valda Blundell to the Land and Environment Court, April 27, 2011 (Blundell submission).
[104] National Cultural Policy Discussion Paper, Department of the Prime Minister and Cabinet, (2011).
[105] Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS. 143, 2001, at 147.

preserving, transforming, and sharing their culture in ways that they deem fit. Second, recognizing that traditional knowledge has transcendental value for the communities to which it belongs and that its value therefore cannot be reduced to monetary terms in any circumstance. Third, recognizing that even though intellectual property law is indispensable for fostering creativity, scattered patterns of ownership, unique modes of creation and transmission, and the absence of clear historic records that are all associated with traditional knowledge make it virtually impossible for traditional conceptions of intellectual property law to be applied for protecting such knowledge. Fourth, in order to allow such knowledge to be used for scientific advancement, a framework consisting of leaders of traditional communities, scientists and researchers, and organizations working in this field must be created for the purpose of finding concrete ways of using this knowledge in ways that are consistent with its inherent characteristics.

8.0 CONCLUDING REMARKS

In modern discourse about human rights law, intellectual property law is generally viewed as a part of the problem, not the solution. However, it doesn't have to be so. A well-structured intellectual property regime, founded on the cardinal principles of justice and equity, can actually complement the rights that we all possess on account of being human. Such a regime would definitely impose a requirement on all States Parties to rigorously and judiciously analyze the far-reaching implications of specific innovations and to comprehensively examine the pros and cons of granting exclusive rights to large corporations for these innovations.

Succinctly put, such a system would stress the need for governments to attach greater importance to the effects of these innovations on the welfare of those sections who have, since

time immemorial, been deprived equal access to innovations: the poor, the disadvantaged, women, the disabled, indigenous groups, and linguistic minorities. It would require them to put societal welfare on a higher pedestal than the narrow economic interests of large multinational corporations whose only goal is to secure a strategic advantage over their competitors. Such a system would go a long way in facilitating the negotiation of fairer and more inclusive terms of participation across the globe.