



Human rights and intellectual property rights- A new perception

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Abstract: The rights to health and food which are some of the rights whose realisation can be affected in developing countries that adopt or strengthen intellectual property rights frameworks based on the commitments they take under the TRIPS Agreement or other intellectual property rights treaties. There are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other. Existing intellectual property rights are not adequately structured to fulfil this agenda and a human rights based approach to intellectual contributions must imperatively look beyond existing intellectual property rights. This paper explains some ways in which an intellectual property rights approach to human rights could be made more relevant in today's world.

Key words: human rights, Economic, Social and cultural rights, intellectual property rights

Introduction

The relationship between human rights and contributions to knowledge has been at the centre of important debates over the past several years. The International Covenant on Economic, Social and Cultural Rights (Covenant) is in many ways the most crucial legal instrument through which the relationship between the two fields can be examined. Firstly, it recognises, for instance, the rights to health and food which are some of the rights whose realisation can be affected in developing countries that adopt or strengthen intellectual property rights frameworks based on the commitments they take under the TRIPS Agreement or other intellectual property rights treaties.

Secondly, it recognises at Article 15(1)c the need to reward individuals and groups that make specific intellectual

contributions that benefit society. It must be noted at the outset that the rewards which are recognised under the Covenant are not related to existing intellectual property rights regimes. There may be cases where the realisation of this right may be effected through existing intellectual property rights but on the whole, there is no necessary correspondence between the rights recognised in the Covenant at Article 15 and existing intellectual property rights. This is important as it indicates that the Covenant provides a basis for the recognition of all intellectual contributions and not only the ones that fit within the existing intellectual property rights paradigm. In other words, Article 15(1)c is broad enough to accommodate the claims of traditional knowledge holders for instance.

The Committee on Economic, Social and Cultural Rights which



oversees the implementation of the Covenant decided to examine in more detail the relationship between contributions to knowledge and human rights several years ago. The Committee started by focusing on the impacts of existing intellectual property rights on the realisation of human rights. This culminated in the adoption of a Statement issued in 2001.

Subsequently, the Committee undertook the preparation of a politically and legally more significant document in the form of a General Comment. Its adoption is expected at the next session of the Committee in November 2004. This General Comment which would in practice replace the 2001 Statement will constitute an authoritative interpretation of Article 15(1)c of the Covenant. Unlike the 2001 Statement, the proposed General Comment focuses mostly on the rights of individual contributors to knowledge and gives little space to questions concerning the impacts of intellectual property rights on human rights.

This brief commentary examines some of the general issues relevant in the analysis of the draft General Comment. It critically analyses some of the main conceptual issues that underlie the draft and suggests that it should be comprehensively redrafted.

Human Rights, Contributions to Knowledge and Intellectual Property Rights

There are at least two ways in which links between human rights, contributions to knowledge and existing intellectual property rights can be analysed. Firstly, existing intellectual property rights can have impacts on the realisation of human rights recognised in

the Covenant such as the right to food or the right to health. These can be positive or negative impacts depending on the specific legal regime which is introduced. In the context of the introduction and strengthening of intellectual property rights standards brought about through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in developing countries, intellectual property rights raise a number of concern with regard to their impacts on the realisation of human rights in general and the right to health and to food in particular.

Secondly, the Covenant includes an Article 15 a number of rights which are related to culture and science.

Article 15(1) is particularly important and reads as follows:

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.

Intellectual Contributions in a Human Rights Context

The starting point of an enquiry into the place of individual or collective intellectual contributions in a human rights context is Article 15 which generally talks about science and culture. In general, Article 15 seeks to ensure that states provide an environment within which the development of science and culture is undertaken for the greater good of society while recognising the



need to provide specific incentives for this to happen.

Article 15(1) is more specifically concerned with the balance between the individual and collective rights of all individuals to take part in culture and enjoy the fruits of scientific development, and the rights of individuals and groups making specific contributions to the development of science or culture. Overall, Article 15(1) is to be seen as a provision which focuses on society's interest in culture and the development of science and also provides for the recognition of the rights of specific individual or collective contributions to the development of science, arts or culture. Article 15 in general is a provision which devotes significant attention to culture and science.

A number of more specific issues arise in the context of Article 15(1). Firstly, it does not indicate how the balance between incentives and enjoyment has to be achieved. Secondly, sub-section (c) which deals with the reward for individual contributions do not indicate with any specificity the type of contributions which are covered here. This has led a number of people to conclude that Article 15(1) refers to existing intellectual property rights.

Intellectual property rights as currently materialised in most legal systems around the world are based on the premise that there must be a balance between the rights granted to the property rights holder and society's interest in having access to novel developments in the arts, science and technology. This is related but much narrower than the scope of Article 15(1). While intellectual property rights

frameworks introduce rights for individual contributors, they only balance it with what can be generally seen as recognition of the broader public interest of society in generally benefiting from artistic or technological advances. Intellectual property rights frameworks do not recognise everyone's right to enjoy the 'benefits of scientific progress and its applications' as an individual and/or collective right. While readers of Article 15(1)c may also be tempted to make an association with categories of rights recognised in intellectual property rights frameworks, nothing indicates that Article 15(1)c talks only about existing categories of intellectual property rights. In fact, Article 15(1)c recognises intellectual contributions in general without making any special reference to one or the other category of existing intellectual property rights. In this context, it is noteworthy that the draft General Comment takes a position which is largely based on existing intellectual property rights regimes by referring to everyone's right to benefit from the progress of science as an element to be 'given due consideration' in striking the balance with the interests of authors. However, it is unclear whether it refers to this balance in terms of a right of equivalent standing.

One of the important aspects of the proposed General Comment is the understanding that the Committee has of the terms 'any scientific, literary or artistic production' at Article 15(1)c. The Committee interprets 'scientific production' as including scientific inventions. This implies that Article 15(1)c is meant to include not only authors who get protection through copyright but also 'inventors' who are protected under existing intellectual



property rights by patent rights. This interpretation is debatable but the more important point is whether considering 'inventors' as 'authors' implies that Article 15(1)c must only be analysed with regard to existing categories of intellectual property rights. Firstly, it is instructive that the draft General Comment specifically indicates that certain types of intellectual property rights such as trademarks which bear no personal link to a creator are excluded from the protection under Article 15(1)c.¹¹ Secondly, debates preceding the adoption of Article 15(1)c provide interesting pointers. On the one side, some countries which are today the greatest defenders of intellectual property rights were completely opposed to associating intellectual property rights and human rights as a matter of principle.¹² On the other side, while debates indicate the emergence of different positions on this point, most state representatives seem to have conceived the issue mostly from the point of view of authors or written work.¹³ This indicates that the inclusion of inventors under Article 15(1)c was not an obvious interpretation at the time of the adoption of the Covenant. This also confirms that there is no congruence between the rights recognised at Article 15(1)c and rights recognised in intellectual property rights frameworks. There are no doubt overlaps in certain situations but the content of Article 15(1)c is not circumscribed by existing intellectual property rights frameworks.

Overall, a human rights perspective to intellectual contributions will be meaningful if it completely dissociates itself from existing intellectual property rights regimes and examines all intellectual contributions by

individuals and groups as falling within the scope of Article 15(1)c.

Impacts of Intellectual Property Rights on the Realisation of Human Rights

As noted in the previous section, Article 15(1)c should not be read as referring to existing intellectual property rights but should be seen as being much broader in scope. Existing intellectual property rights are nevertheless of immediate relevance in this field because of the impact they can have on the realisation of human rights.

This is at least as important as questions concerning the rewards granted to authors and inventors and should constitute one of the core aspects of a general comment addressing all the main challenges in this area. The draft General Comment does not completely ignore questions related to the impacts of intellectual property rights on the realisation of human rights and seeks, for instance, to confirm that there is a need to strike an adequate balance between the protection of intellectual property rights and human rights to food, health and education.

This raises important questions. Firstly, the Committee does not explain what the concept of 'obligations of comparable priority' means.¹⁷ Secondly, Section 42(a) may be understood as providing that there should be a balance between the human rights claims of authors/inventors and the social function of intellectual property rights. In other words, the balance is not a question of the relative importance of the human rights to health, food and education on the one hand and intellectual property



rights on the other hand. The balance is only the same basic 'social' balance which intellectual property rights regimes seek to achieve. This is of considerable importance because it downgrades fundamental human rights such as the rights to food and health to elements which are taken into account in a balance which is not first and foremost centred on human rights claims.

Additional Links between Human Rights and Intellectual Contributions

The draft General Comment will be unbalanced as long as it seeks to deal with Article 15(1)c on its own. It is in fact odd that the Committee should consider this approach while recognising within the Draft in several places that even in the field of intellectual property rights, the balance between the rights of the author/inventor and the interests of society at large are recognised. In any case, Article 15(1) goes much further since it puts all the rights on the same level and can in fact probably be read as putting everyone's right to benefit from the development of science as being more important than the interests and rights of authors/inventors.

The limitations of a General Comment focusing only on one subsection of Article 15(1) are readily apparent. What is less immediately visible and more significant is the fact that the draft General Comment misses out an opportunity to adopt a more comprehensive view of what constitutes intellectual contributions and an opportunity to use the possibly unfortunate inclusion of Article 15(1)c in the Covenant to use it to the benefit of those who are most disadvantaged within the existing legal framework and do not get recognition for their intellectual

contributions through the existing intellectual property rights system.

Article 15(1)c should not be deemed to refer only to existing intellectual property rights but to the intellectual contributions made by different individuals or communities to knowledge. This is neither new nor controversial. In the past ten years, significant developments have taken place around the introduction of so-called sui generis forms of intellectual property rights to ensure that actors who cannot be rewarded under existing intellectual property rights are provided some form of legal protection. Two main issues have been considered.

Firstly, in the context of Article 27(3)b of the TRIPS Agreement, the question of plant variety protection has given rise to proposals for the protection of farmers' rights besides the rights granted to patent holders and commercial plant breeders.²¹ While an international definition of farmers' rights remains elusive at the international level, several developing countries have already attempted to operationalise the concept of farmers' rights in their legislation.²³ Secondly, in recent years, there has been an increasing focus on the development of legal forms of protection for traditional knowledge. At the international level, debates have not proceeded beyond the stage where traditional knowledge is considered as an issue which must be addressed. At the national level, however, some countries have already legislated on some aspects of traditional knowledge.²⁵

The inclusion of farmers and traditional knowledge holders in the scope of Article 15(1)c constitutes one of



the few ways in which Article 15(1)c can be made relevant to today's challenges. As long as intellectual contributions are equated with existing intellectual property rights, Article 15(1)c can only serve to justify the existence of existing intellectual property rights and to limit debates concerning the impacts of intellectual property rights on the realisation of human rights. Generally, human rights bodies need not concern themselves with existing intellectual property rights. For instance, with regard to scientific production patent holders are today more than adequately rewarded by existing intellectual property rights regimes which are rapidly being extended to most if not all countries. This is not the case for informal innovators such as farmers and traditional knowledge holders who are not rewarded in existing legal frameworks. In keeping with the recognition that the implementation of human rights must be judged according to its impacts on the weakest and most disadvantaged sections of society, Article 15(1)c should be construed as providing one of the few avenues through which a comprehensive perspective on intellectual contributions can be taken.

Conclusion

Human rights perspective to intellectual contributions will be meaningful if it completely dissociates itself from existing intellectual property rights regimes and examines all intellectual contributions by individuals and groups as falling within the scope of Article 15(1)c. It is important to ensure that the present General Comment be reworked to adopt a more balanced and broader approach. The two main tasks, in this regard should be to consider in much more detail the question of the

impacts of existing intellectual property rights on the realisation of human rights which does not refer to intellectual contributions as being linked to existing intellectual property rights but takes into account the fact that intellectual contributions by individuals and groups take a variety of forms. This exercise should be undertaken in view of the fact that the implementation of human rights must be judged according to the benefits it brings to the most disadvantaged and marginalised individuals. Existing intellectual property rights are not adequately structured to fulfil this agenda and human rights based approach to intellectual contributions must imperatively look beyond existing intellectual property rights.

References

- 1 Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, November 2001, Annex XIII, Committee on Economic, Social and Cultural Rights Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, UN Doc. E/2002/22-E/C.12/2001/17 [hereafter 2001 Statement].
2. UN Doc. E/2002/22-E/C.12/2001/17.
- 3 Resolution 2000/7, Intellectual Property Rights and Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 17 August 2000, UN Doc. E/CN.4/Sub.2/2000/7. [§2]
- 4 Declaration on the TRIPS Agreement and Public Health, Ministerial Conference – Fourth Session, WTO Doc. WT/MIN(01)/DEC/2 (2001).
5. See, e.g., United Nations, Third Committee Summary Record of



Meetings, UN Doc. A/C.3/ SR.150 (1948). [GAOR 3rd Sess, part 1, Third Committee, Summary record of meetings, 21.9- 8.12.1948. 621. US:

6. statements of the Dominican Republic, UN Doc. A/C.3/SR.799 (1957)[Dom Rep. supporting amendment: obviously focusing on copyright] and India, UN Doc. A/C.3/SR.798 (1957

7. See, e.g., Steven Cherenky, 'A Penny for their Thoughts: Employee-Inventors, reinvention Assignment Agreements, Property, and Personhood', 81 Cal. L. Rev. 597 (1993).

8. International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001.

9. India, Protection of Plant Varieties and Farmers' Rights Act, 2001, Act 53 of 2001.

10. World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Report, Sixth Session, Doc. WIPO/GRTKF/IC/6/14 (2004).