ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 3
Issue I

August 2021

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES
ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
& NBA Accredited for MCA Programme

Volume 3, Issue I August, 2021 ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

TABLE OF CONTENTS

S. No. Title of the Paper/ Author **Page No.**

1. An Era Comes To An End: Soli- A Great Lawyer And A True Friend
V. Sudhish Pai 1

2. Pre-empting A rise in Human Trafficking: A Deadly Side Effect of the COVID-19 Pandemic
Shivani Chawla 7

3. Efficacy of Victim Impact Statement in Indian Criminal Justice System in the Light of International Experiences
Samriti Verma and Anuj Kumar Tiwari 23

4. Psychological Autopsy
Lovleen Sharma 36

5. Constitutional Courts and Judicial Independence: Conceptualising Judicial Dissent in South Asian Perspective
Neha Tripathi and Anubhav Kumar 44

6. Work From Home and The Need for Right to Disconnect: Aftermath of the COVID-19 Pandemic
Shivya Juneja and Divyanshu Priyadarshi 61

STUDENTS

7. Liability Dimension of The Chamoli Disaster in Uttarakhand Under the Legal Framework
Sarthak Aryan and Jayanta Boruah 73

8. The Role of Nyaya Panchayat in Delivery of Rural Justice in India: A Critical Analysis
Namrata Chakraborty and Himanshu Anand 83

9. Inadequate Environmental Laws and increasing Pollution in Space
Deepansh Tripathi 94

10. An Unvaccinated World: The Intellectual Property Rights Conundrum
Nishita Arora and Hiba Nasir 105

11. Regulating the Unregulated Video-On-Demand Platforms in India
Ravi Singh Chhikara and Abhinav Arora 114

12. Utility Model System: Need of the Hour for Small Innovators
Girish Ahuja and Aparna Singh 130

13. CSR and Ghost Beneficiaries: The New Age Fraud Mechanism
Kushal Tekriwal 145

14. The 'Unpolished' Code Barricading Cross- Border Insolvency In India.
Prateek Khandelwal and Poojal Agarwal 154

15. Evaluation of Multiculturalism and Gender Equality in Family Laws of India from Uniform Civil Code Perspective
Tejash Bhandari 167

16. Protest: Defending the Right to Protest in the Digital Age
Neha Maria Antony 177

17. Is Gambling Safe Haven for Taxation? Understanding the Applicability of GST Laws in the Gambling Industry
Sagnik Sarkar 188

18. Applicability of the POSH Act to the Virtual Workplace: Assessing the New Normal
Gunjan Garg 202

19. Cyber Defense Policy Framework and Response Mechanisms towards the Cyber Threats and Emerging Cyber Warfares
Kshitij Dahiya and Vasu Manchanda 216

CASE COMMENTS

20. To Report or Not To Report: Zooming in the Case of Chief Election Commissioner of India v/s M.R. Vijayabhaskar & Ors.
Prerna Dhingra 228

21. An Approach Towards Balancing Fundamental Rights: Amit Sahni v/s Commissioner of Police
Sarthak Bhardwaj 237

LEGISLATIVE REVIEW

22. The Hindu Marriage Act of Pakistan: A Spearhead of Social Change
Kavish Arora 247

23. Critical Analysis of Civil Liability for Nuclear Damage Act, 2010
Ayush Garg and Mridul Pateriya 256

BOOK REVIEW

24. Rashmi Salpekar and Gauri Gupta, *Moot Problems*
(Vivekananda Institute of Professional Studies, 2021)
Shweta Shukla 269

AN UNVACCINATED WORLD: THE INTELLECTUAL PROPERTY RIGHTS CONUNDRUM

Nishita Arora*
Hiba Nasir**

VIPS Student Law Review
August 2021, Vol. 3, Issue 1, 105-113
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)
© Vivekananda Institute of Professional Studies
https://vslls.vips.edu/vslr/

Abstract

In the aftermath of the COVID-19 pandemic the world has witnessed a globally disrupted economy, demolishing health sectors, food shortages and mass unemployment, with the World Bank Forecast officially declaring a global recession. With a few promising vaccines already in production, the situation necessitates that an egalitarian approach is adopted towards their distribution as well. However, a report by the People's Vaccine Alliance is suggestive of the fact that a few wealthy nations have already hoarded orders for a majority of the most competent vaccines in production. This demonstrates the vast socio-economic inequality between the affected countries in terms of their vaccine affordability power. This has led to a significant time in the IPR regime globally, with the core issue being the choice between safeguarding the public health at large or the private interests of the Pharmaceutical Companies developing these vaccines. In an effort to ensure that the existing socio-economic inequality does not impact the availability of vaccines in under-developed and developing nations, India and South Africa have petitioned the World Trade Organisation requesting a waiver of certain requirements under the TRIPS Agreement pertaining to the awarding or implementation of Intellectual Property rights with regards to COVID-19 vaccines and other medical technologies until a global 'herd immunity' is achieved. This paper argues the need for compulsory licensing of the vaccine, with regard to India and South Africa's petition at the WTO. Firstly, the paper highlights the existing polarity between different nations with

* Student, B.A.LLB., 5th Year, Jamia Millia Islamia, Delhi, India.
** Student, B.A.LLB., 5th Year, Jamia Millia Islamia, Delhi, India.

respect to their vaccine affordability power. Further, it analyses how India can be a potential ally for third world countries in terms of their access to the vaccine if the petition is approved. Finally, the paper also discusses how the existing legal framework, both at the domestic and international levels, validates the solution proposed by the petition.

Introduction

"The Coronavirus united the world in fear but divided it in response"
- Gabriela Bucher, the Executive Director of Oxfam.

The year 2020 has been the most challenging time of the 21st century, with the Covid19 pandemic claiming more than 1.5 million lives at present. The germane measures that several countries began implementing around the month of March, to contain the spread of the virus resulted in almost a third of the world population being under some form of restrictions. The ramifications that ensued included an adversely impacted economy, disrupted enterprises, health sector, food security, and mass unemployment in particular and have led the world into a recession as per the World Bank forecasts.[1] India itself saw more than 10 million cases with approximately 1,45,000 deaths.[2]

Significant efforts are being made to study, diagnose and develop a vaccine for the disease by the Pharmaceutical Industry owing to the urgency of the situation, due to which more than a hundred vaccine candidates have reached clinical trial levels with a few of them reaching Phase III efficacy testing while vaccines developed by Pharma Companies like Pfizer, BioNTech, Sinovac, Gamaleya Research Institute have been approved in their respective countries of origin.[3]

With the vaccines few weeks away, wealthy nations such as USA, Britain, France, etc., have pre-booked the vaccine supply as a result of which countries with 14% of the world population have hoarded orders for 53% of the most competent COVID-19 vaccines as

1 Thin Lei Win, *Poor Countries seen missing out as rich nations hoard Covid19 vaccines*, The Jakarta Post (Dec. 9, 2020, 9:41 AM), https://www.thejakartapost.com/news/2020/12/09/poor-countries-seen-missing-out-as-rich-nations-hoard-covid- 19-vaccines.html.

2 WHO, *Coronavirus Disease (COVID19) Dashboard*, World Health organization (Dec. 19, 2020, 9:41 AM) https://covid19.who.int/table?.

3 RAPS, *Covid 19 Vaccine Tracker*, Regulatory Affairs Professionals Society (Dec. 19, 2020) https://www.raps.org/news-and-articles/news-articles/2020/3/covid-19-vaccine-tracker.

reported by the People's Vaccine Alliance (PVA).[4] The World Health Organization (WHO) in light of this has also issued a warning showing concern over accessibility and availability of the COVID-19 vaccine in the developing and under-developed nations. WHO Chief *Tedros Adhanom Ghebreyesus* shared similar concerns and stated: *"We need to prevent vaccine nationalism. Sharing finite supplies strategically and globally is actually in each country's national interest*".

The response to the pandemic by different countries, in terms of their vaccine affordability power shows the socio-economic inequalities among them and such advance agreements create an atmosphere of apprehension that the foremost approved vaccines would be overpriced and unattainable to a majority of the world population with the wealthy nations being an exception.

As a result of such apprehension, India and South Africa petitioned the World Trade Organisation on October 2, 2020, under the rights granted to WTO member states by virtue of Article IX (3) and (4) of the Marrakesh Agreement,[5] to permit all WTO members to waive certain requirements contained in TRIPS Agreement that deal with the awarding or implementation of Patent Rights, Trade Secrets, Industrial Designs and Copyrights with regards to COVID19 drugs, vaccines, diagnostics and other medical technologies until we have achieved global 'herd-immunity'. The petition entails a pressing request for harmony and unrestricted exchange of technology and expertise at the global level to ensure that rapid responses for dealing with COVID19 can be promptly put into action.[6]

This article analyzes why the proposal by India and South Africa, backed by other low-income countries, should be accepted and how India can contribute significantly in battling the COVID19 pandemic.

4 Winnie Byanyima, *We must have a #PeoplesVaccine, not a Profit Vaccine*, UNAIDS (Dec. 9, 2020), https://www.unaids.org/en/resources/presscentre/featurestories/2020/december/20201209_we-must-have-a-peoples-vaccine.

5 Brook Baker, *South Africa and India's proposal to waive recognition and enforcement of Intellectual Property Rights for COVID19 Medical Technologies Deserves Universal Support, but countries also have to take domestic measures*, Info Justice (Oct. 11, 2020), http://infojustice.org/archives/42686.

6 Council for Trade Related Aspects of Intellectual Property Rights, "*Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa*," World Trade Organization, IP/C/W/669, Oct. 2 (2020).

The Inequality Crisis

A recent study published in *BMJ*, a leading medical journal, estimates 3.7 billion adults waiting to get their hands on Covid-19 vaccines, which calls attention to the importance of coming up with calculated and equitable strategies to ensure that the supply of the much-awaited Covid-19 vaccines can meet its demand, more particularly in low and middle-income countries.[7]

In another study published in the same journal, scholars from *Johns Hopkins Bloomberg School of Public Health* in the United States, examined the reservationsmade for the Covid-19 vaccines by countries around the world, ahead of their regulatory approval, showing a grim reality that is the delay that will be caused in making these vaccines accessible to nearly quarter of the world population until at least 2022.[8]

This shows an unpromising scenario being created for low and middle-income countries asthe study conducted by Johns Hopkins Bloomberg School and the PVA's report aforementioned provides an overview as to how wealthy countries have obtained a future supply of billions of Covid-19 vaccine doses while the access of the same in poor countries remains inadequate. The year 2020 speaks for itself when it comes to the burden on the healthcare systems worldwide. WHO also, in this line recognised and showed concern for the fragile health systems as the rapidly increasing demand and strain on them as well as the healthcare workers threatened to leave the infrastructure unable to operate effectively?[9]

The pandemic has not only disturbed the world healthcare systems but has also caused significant economic distress, especially to the developing and underdeveloped countries that encountered significant constraints in offering effective and affordable healthcare for their citizens in an already weak healthcare system. The global economy has suffered almost 11.7 trillion dollars due to the coronavirus pandemic till now, with 83% of this cost spent by 36 wealthy nations against 0.4% by low-income countries in order to cope

7 PTI Washington, *Quarter of world may not have access to Covid-19 vaccine until 2022: Study*, The Hindu – Business Line (Dec. 16, 2020), https://www.thehindubusinessline.com/news/world/quarter-of-world-may-not-have-access-to-covid-19-vaccine- until-2022-study/article33343545.ece.

8 *Id.*

9 WHOI, *WHO releases guidelines to help countries maintain essential services during the COVID19 pandemic*, World Health Organization (Dec. 19, 2020), https://www.who.int/news/item/30-03-2020-who-releases-guidelines-to-help-countries-maintain-essential-health-services-during-the-covid-19-pandemic.

with it, as per a reportby Oxfam, an international NGO.[10]

India- A Potential Ally

The current situation is similar to the time when the world was busy developing a treatment for HIV. The statistics at the time were equally scary with the treatment for AIDS being available to only 0.1% people.[11] The Antiretroviral (ARV) drugs were predominantly available with the manufacturing companies having patents on these medicines, resulting in them costing an exorbitant US $10,000 to $15,000 per patient per year.[12] This called for developing patent laws that accommodate the production of alternatives to expensive medicines, that would lower the cost of those medicines and make them affordable. The *Doha Declaration on TRIPS and Public Health* played an important role by ensuring large-scale availability of the generic versions of patented medicines.

On August 30, 2003, the World Trade organisation adopted an agreement permitting exports of drugs manufactured under Compulsory Licenses by the member states, subject to certain conditions in order to reduce legal barriers on such exports and ensure that the nations that lack manufacturing capacity could gain advantage from such Compulsory Licenses.

A majority of the developing nations then lacked the means to domestically manufacture the HIV Vaccine much similar to the situation today with respect to the Covid-19 vaccine. The industrial reality was that patents in the countries that were producing the drugs could become a hindrance for several importing countries in accessing generic medicines despite several nations arguing that the non-existence of Patents in various countries on the African Continent was evident of the fact that IPR should not have been an impediment to HIV treatment.[13] The *Joint United Nations Programme on HIV/AIDS* along with WHO, on December 1st, 2003 declared HIV/AIDS as a global public health emergency due to lack of a treatment, subsequently announcing a drive to get 3 million people to have access to

10 Correspondent, *Global Cost of Coronavirus: $ 11.7 Trillion*, Business Today (Dec. 16, 2020, 5:46 PM), https://www.businesstoday.in/current/world/global-cost-of-coronavirus-this-is-how-much-covid19-pandemic-ha s-cost-the-world-economy/story/425100.html.

11 Gellman B., *An Unequal Calculus of Life and Death; As Millions Perished in Pandemic, Firms Debated Access to Drugs; Players in the Debate Over Drug Availability and Pricing*. The Washington Post (Dec. 27, 2000), https://www.washingtonpost.com/archive/politics/2000/12/27/an-unequal-calculus-of-life-and-death/4f6d22c0-d918-441c-b6e9-e270554bc73b/.

12 1 Perez-Casas C, Mace C, Berman D, Double J, Accessing Arvs: Untangling The Web Of Antiretroviral Price Reductions (Geneva: Medecins Sans Frontieres/Campaign for Access to Essential Medicines) (2001).

13 A Attaran, L Gillespie, *Do patents for antiretroviral drugs constrain access to AIDS treatment in Africa?* 286(15) JAMA 1886 (2001).

ARV by 2005. It isnoteworthy that by the year 2008, 95% of donor-funded ARV market at the world level consisted of generics, predominantly manufactured in India.

India played a significant role during this time as a number of developing countries were able to access generic ARVs owing to India's manufacturing and exporting capacity.[14] As a result,there existed skepticism in the public health arena when India began awarding patents for pharmaceutical inventions in 2005 in accordance with the TRIPS Agreement. However, the Indian legislature had incorporated public health safeguards, including strict patentability criteria, the possibility for opposition to granting of patents and also entailed provisions regarding Compulsory Licensing.

India has over the years made its reputation as the 'Pharmacy of the World', being responsible for manufacturing 60% of the world's vaccine supply. With Covid-19 vaccine's starting to reach the population in countries such as the UK and USA, the developing and under-developed nations are thus starting to turn to India, that can mass produce vaccines that are effective and cost much less than its expensive counterparts.[15]

The Legal Framework

The TRIPS Agreement, adopted concomitantly with the constitution of the WTO in 1994, targets to establish a globally harmonized IP regime that would ensure equitable legal standards among the member states.[16]

The aforementioned treaty, under its article 31 provides for the concept of compulsory Licenses with regards to Patents, for those member States whose National Laws also provide for the same. The provision refers to compulsory licensing as "*other use without authorisation of the right holder*". The aforementioned concept can be understood as an abrogation of another person's Intellectual Property Rights. It is an exceptional legislative right granted by the Government to allow, either itself or any other interested entity, to utilize, produce, access, or offer for sale, a patented invention or process without the

14 Brenda Waning, Ellen Diedrichsen, Suerie Moon, *A lifeline to treatment: the role of Indian generic manufacturers in supplying antiretroviral medicines to developing countries*, 13(35), J. Int. Aids. Soc. 113 (2010).

15 James Oaten & Som Patidar, *With a reputation as the 'pharmacy of the world' India is geared to mass-produce COVID19 vaccines*, Abc News (Dec. 19, 2020), https://www.abc.net.au/news/2020-12-19/inside-covid-19-vaccine-development-in-india/12980614.

16 Hillary Wong, *The Case of Compulsory Licensing during COVID19*, 10(1) J Glob Health, 43 (2020).

permission of the intellectual property owner.[17] These involuntary and mandatory Licenses can be granted for IP Rights such as Patents, Copyrights etc. A Compulsory License granted for a Patent purport to provide a safeguard against the abuse of the exclusive rights bestowed upon the owner of such patent in furtherance of public interest. It may also be granted to provide protection against the lack of use of a patented invention.[18]

The TRIPS agreement provides for compulsory licensing on fulfilment of certain conditions such as previously failed attempts by the applicant to acquire a private License from the owner of the patent. However, such mandatory requisites can be bypassed during a national emergency, circumstances of utmost urgency or public non-commercial usage. The provision restricted the use of a Compulsory License only for distribution in the local markets of the member State granting such Licenses thereby excluding the countries lacking manufacturing capacity from the benefits of the concept of Compulsory Licensing.[19]

Many developing countries were required to grant patents for pharmaceutical products for the first time on adoption of the 1994 treaty.[20] Emerging anticipation that Pharmaceutical Patents would lead to a surge in the price of medicines worldwide resulted in various occurrences around the world to challenge such rules, ultimately leading to the formulation of the WTO's Doha Declaration on the Agreement on TRIPS and Public Health in 2001.[21]

The Doha Declaration calls for the Patent laws to be construed and enacted in a way that encourages equitable access to medicines globally. The said declaration had the effect of easing the rules related to Compulsory Licensing as provided in the TRIPS Agreement. The Doha declaration, by virtue of Paragraph 6 (implemented by the WTO in 2003) provides for exemption from the 'domestic market' condition in Article 31(f) of TRIPS, on compliance of certain conditions.[22] The provision allows member countries to make use of compulsory licenses to manufacture generic pharmaceuticals and offer them for export to those least developed nations that lack sufficient manufacturing capacity in the pharmaceutical sector.[23] This provision has also been incorporated in the TRIPS Agreement

17 Manpreet Kaur, *Compulsory Licensing - Bridging The Chasm Between Competition Policy and Intellectual Property Law - Patent Law In India,* Legal Service India (Dec. 18, 2020), http://www.legalserviceindia.com/article/l275-Compulsory-Licensing-.html.

18 *Id.*

19 Raadhika Gupta, *Compulsory Licensing under TRIPS: How far it Addresses Public Health Concerns in Developing Nations*, 15 J. Int. Prop. Rights 357, 358-59 (2010).

20 Ellen't Hoen, Jonathan Berger, Alexandra Calmy & Suerie Moon, *Driving a Decade of Change: HIV/AIDS, patents and access to medicines for all*, 14 J. Int. Aids. Soc. (2011).

21 *Id.*

22 Raadhika, *Supra* note 20.

23 *Id.*

by way of an amendment in 2017. The Declaration permits each member country to specify the grounds for the grant of such compulsory licenses. It also empowers the member states to establish what constitutes National Emergency, Circumstances of Extreme Urgency or Public Health Crises for the purpose of Compulsory Licensing.

Domestically, The Patents Act 1970 deals with Compulsory Licensing under Chapter XVI, consisting of sections 82 to 94. Broadly, the Patents Act provides for compulsory licenses on two grounds, namely, Abuse of Patent Rights (Section 84) and Public Interest (Section 92).[24]

The patents Act 1970, by virtue of section 84 lays down certain circumstances for awarding of Compulsory License. When the rational demands of the public for such patented product have not been met, or, when such patented invention is not priced at an affordable rate, or, where the patented product is not worked in the territory of India. A Compulsory license under the aforementioned provision can be granted to an individual provided that the patent was granted at least 3 years ago.

The Act, under section 92 authorises the State to declare, through a notification, for the award of Compulsory Licenses in cases of Public Interest, irrespective of the time that has lapsed since the grant of such patent. This provision is applicable in times of a National Emergency, Circumstances of Utmost Urgency or for Non-Commercial usage.

Once the aforementioned proclamation has been made by the State, any interested individual can apply for obtaining such license to the Controller of Patents. The Controller shall grant such a license on the terms and conditions that he deems fit and also ensure the availability of such patented products to the population at the cheapest rate possible.

Conclusion

The COVID-19 pandemic thus has led to an important time with regards to the Intellectual Property Rights regime globally, with the fundamental issue being the dilemma between safeguarding IPR of individuals or the public health at large, which in general is resolved through private licensing.[25]

The current regime is one where big Pharmaceutical Companies who are funded by third-party investors and/or the Governments tend to keep the monopoly rights on medicines or

24 Shamnad Basheer & Mrinalini Kochupillai, *The 'Compulsory Licence' Regime in India: Past, Presence and Future*, Oct. SSRN Elec J., (2005).

25 Jennifer Hillman, *Drugs and Vaccines Are Coming—But to Whom?*, Foreign Affairs (May. 19, 2020), https://www.foreignaffairs.com/articles/world/2020-05-19/drugs-and-vaccines-are-coming-whom.

vaccines by holding on to the technology used for such inventions to give a boost to their profits.

The COVID-19 pandemic has served a devastating blow to the healthcare systems of the countries around the world especially to the developing and underdeveloped nations having barely standing economies. With the vaccine development reaching the final stage, wealthy nations have started hoarding them and this act of bulk buying, according to a PVA statement, risks 9 out of 10 people in 67 poor countries remaining without any access to the vaccine,[26] resulting in a situation where either these countries would be taking on huge debts or a majority of their population would remain unvaccinated. This creates a situation ominously similar to the initial response days during the HIV crisis leaving poor nations without a vaccine for years.

The proposal put forward by India and South Africa maintains that several underdeveloped nations might encounter legal difficulties besides institutional hurdles, even with the flexibilities such as the provision for parallel imports available under the TRIPS Agreement.

An Oxfam report[27] showed that although the wealthy nations increased their financial aid to developing countries by $5.8 billion for social protection, the figure that comes as more shocking & upsetting is that this help is equivalent to less than five cents for every $100 raised for battling the ongoing pandemic. The fact is further supported by PVA claiming that AstraZeneca, the pharmaceutical company manufacturing the Oxford vaccine, that promised making the vaccine available on a nonprofit basis to the developing world, can only provide enough to vaccinate 18% of the global population by 2021.

As the present unprecedented time has nations working incessantly for developing and manufacturing Covid-19 vaccines, distribution of the same internationally remains a daunting challenge. India has turned out as a prominent entity during this time for the purpose of manufacturing the vaccines with data supporting India's adequate manufacturing capacity, and that it would be sufficient to meet the demand both domestically and globally.[28]

Therefore, it is submitted that by way of scrupulous forethought and policy formulation, the developing nations can make attempts towards ensuring public health while still conforming with TRIPS.

26 DW, *Coronavirus: Rich Countries hoarding COVID vaccines, campaigners warn*, DW Akademie (Dec. 1, 2020), https://www.dw.com/en/rich-countries-hoard-coronavirus-vaccines/a-55879841.

27 Ct. Business Today, *supra* note 10.

28 Sohini Das, *Covid-19: Vaccine production is not a problem for India, Cold Chain is*, Business Standard (Nov. 17, 2020, 12:35 AM), https://www.business-standard.com/article/current-affairs/covid-19-vaccine-production-is-not-a-problem-for-ind ia-cold-chain-is-120111600288_1.html.