

# Preface

This book looks at the regime of international intellectual property law from the perspectives of human security. The concept of human security, we believe, provides a good framework for a contemporary reassessment of international intellectual property laws and for their modernization.

The concept of human security, though not directly labeled as such, received initial attention in theoretical works such as Barry Buzan's *People States and Fear*, which argued that national and international security must be anchored in individual security.<sup>1</sup> Subsequently, as the concept received express affirmation and prominence in the 1990s, it came to signify that the rationale of human endeavors nationally, regionally, and internationally should be to advance the security of human beings as individuals, as groups, and as constituent elements of humanity as a whole.

Professors McFarlane and Khong in their authoritative work on the intellectual history of human security at the United Nations, discuss how the concept of human security came about, how it came to refer to the individual as the subject in need of security, and how the concept has fared in its development dimensions and its protection dimensions (human rights).<sup>2</sup>

Seen in broad terms the regime of international intellectual property laws can be said to have had a core rationale from the outset of advancing human security by fostering and protecting the creativity of human beings so that it can help advance human progress and development. The literature on the regime of international intellectual property law has many examples of scholars and practitioners arguing that it helps to promote economic and social development. At the same time it is contended more and more that due to power imbalances in the world and the differing stages of economic development of many countries the regime of international intellectual property law operates often to the detriment of human security and welfare. The debate over access to drugs needed for the protection of human life is a case in point. There is well-documented evidence that, in practice, international intellectual property laws operate to the detriment of protection

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<sup>1</sup> Barry Buzan 1985.

<sup>2</sup> MacFarlane and Khong 2006, 10.

of the rights to life, to health, and to food in many situations. There are also many claims that the traditional knowledge of societies in Asia, Africa, and Latin America, which is their birthright, has been appropriated by the allocation of patents to corporations in western, developed countries.

A contemporary reassessment and modernization of international intellectual property laws must strive for reconciliation between the approach that intellectual property laws help promote economic growth and development and the counter-vailing contentions that they often operate to the detriment of people in developing countries. The ongoing 'Development Agenda' deliberations<sup>3</sup> within the WIPO seek to examine how WIPO as an institution, and its programmes and operations, could help advance the Millennium Development Goals articulated by the United Nations General Assembly. That is a broader debate which has many political ramifications. In this book we take as our starting point the perspective of the enhancement of human security and we seek to inquire how such an approach might help attenuate international intellectual property laws. The human security framework can help the international community arrive at equitable balances between the regime of international intellectual property law and the needs of developing countries and indigenous peoples on the ground.

Recent publications in countries such as India and South Africa help to bring out the need for new perspectives poignantly. A recent publication on *Indian Patents Law*, based on a conference organized by the Goa Institute of Management, highlighted the strains on Indian patent law as a result of India's having to bring its legislation in conformity with the requirement of the TRIPS Agreement. Opening the Conference, Dr. Anil Kakodkar, remarked that the question of patents and intellectual property rights had become a very crucial and important matter, particularly for India, which, he said, was going through a civilizational transition: India needed to bring about a synergistic impact of modern knowledge and traditional knowledge which was its heritage.<sup>4</sup> The need was to preserve old knowledge and build on it with the new. The book highlighted the case of the patenting of turmeric in the USA, which had required the Indian Government to initiate legal proceedings to get the patent revoked.

As changes were taking place in the management of knowledge, he continued, there was corresponding need for a transition of the people from weaker economies to stronger economies. The intellectual property system needed to be sensitive to the requirements of the poor and the less endowed and to requirements of national importance.<sup>5</sup> He highlighted concerns regarding access to medicines for the poor and the weak. As a nuclear scientist himself, he gave the example of a plumbing valve that could have helped filter radioactivity and better protect people in their water supplies. He said that when he and his colleagues thought of getting

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<sup>3</sup> See <http://www.wipo.int>. Accessed 1 June 2012.

<sup>4</sup> Kakodkar 2009, 3.

<sup>5</sup> Id., 3.

the valve from the market they had been told that it had been built under technology license from a foreign manufacturer and could not be used for the nuclear industry. He complained, “We cannot copy that valve because it is protected under IPR-Patent regime. I would object to granting of patent in such a case. If the product cannot be used in a program of national importance what is the wisdom in granting it?”<sup>6</sup>

In a powerful presentation in the book, Professor N.R. Madhava Menon pleaded that because India had to comply with the TRIPS regime and modify its patent laws, Indian society was suddenly moving from a culture of openness and sharing to a culture in which information was considered a commercial product to be “encashed” in the international market without concern for the disadvantaged sections of the people. He stressed the need for an integrated approach to knowledge in order to promote creativity, innovation, and development.<sup>7</sup> He highlighted problems for Indian society stemming from the TRIPS Agreement. The revised Indian Patents Act, he complained, “was adopted not particularly to meet the immediate needs and aspirations of the people of India; it was adopted because of the compulsions of TRIPS and to be able to discharge the obligations that India has undertaken under the WTO.”<sup>8</sup> He added plaintively: “Very few people to my mind in the developing world consider the TRIPS Agreement as a fair arrangement for all the trading nations because it imposes unbearable burden on technologically backward countries.”<sup>9</sup> He noted that developing countries, struggling to fulfill the basic needs of their people in relation to health, nutrition, and food, were encountering problems in having to deal with an IPR regime developed in the west during their industrialization:

...if an IPR regime developed in the west during industrialization were to be applied across the board to all products and processes regardless of the social cost and benefit, we may end up jeopardizing the livelihood of millions of people and exposing them to the risk of loss of livelihood, malnutrition and ill-health. Biodiversity, agriculture, traditional systems of medicines, folklore and similar common property assets today subserve the health of Indians. They are not owned by any single person. It is a community resource, a shared resource which cannot be monopolized or appropriated to the common detriment. Now we are suddenly told that these knowledge systems are to be put into the IPR route if they are to be saved by its legitimate owners, the communities to which they belong. It is an impossible task and will take a long time and expense. However, that seems to be the only way which western countries will recognize this wealth which we have been enjoying for hundreds of years and sharing it with non-Indians as well. We are suddenly faced with the situation in which neem or turmeric will be patented elsewhere and we will have to spend hard-earned dollars to fight the cases against it in foreign courts. Is this the only way in which intellectual property rights can be so organized to give the inventor his due and at the same time make it available for public good?<sup>10</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Menon 2009, 7.

<sup>8</sup> Id., 9. WTO refers to the World Trade Organization.

<sup>9</sup> Ibid.

<sup>10</sup> Id., 10.

Professor Menon made a powerful argument for fairness and equity in the regime of intellectual property law:

The rules of the game are to be fair and equitable to both sides. Fresh negotiations to change the rules appropriately seem to be the only suitable option available to countries like India seeking to increase their share in global trade...There is no doubt of the possible conflict of private rights and public interests when it comes to patenting of food, drugs and pharmaceuticals as it concerns the basic necessities of life of a large number of people living below the poverty line.<sup>11</sup>

Professor Menon went on to point out potential threats to bio-diversity and traditional knowledge in the TRIPS regime: “In my view a separate treaty like the TRIPS Agreement would be also necessary for the purpose” of protecting biodiversity and traditional knowledge.<sup>12</sup> “Developing countries like India having rich unexplored biodiversity and a wealth of traditional knowledge have to realize that they are in risk of losing heavily under the TRIPS regime if they fail to persuade the TRIPS Council to establish effective mechanisms within TRIPS or parallel to it to protect these sources of wealth of developing countries.”<sup>13</sup>

Professor Menon recognized that the originators of innovations should get their just reward by way of suitable royalties and that there should be no grudge in providing the same. Simultaneously the door should be open for obligatory licensing involving the domestic enterprises in the production of patented drugs. The profit-driven model of the TRIPS was not suited to the health needs of the developing and poor countries.<sup>14</sup>

We see similar arguments in Africa generally and South Africa in particular. Armstrong et al., have advanced the view that the beginning of the twenty-first century foreshadowed a new phase in global intellectual property governance, characterized neither by universal expansion nor reduction of standards, but rather by contextual ‘calibration’. They considered that a systemic calibration was taking

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<sup>11</sup> Keayla 2009, 39. The argument for equity was made as follows by Dr. Yusuf K. Hamied, then Chairman and Managing Director of Cipla Limited and a leading scientist, who is quoted in Kealya as follows: “[T]he patent regime in this country should be devised so that the utmost priority is granted to securing people’s rights of access to affordable and quality healthcare, without monopoly.” Id., 32–33.

<sup>12</sup> Menon (2009), 15.

<sup>13</sup> Id., 16.

<sup>14</sup> Id., 39. The need for equity regarding price control was made as follows: “TRIPS Agreement is silent about the price control of patented products. The products protected under patents would enjoy monopoly in the market place and would command high prices. Appropriate law should be strengthened to deal with the prices of the patented products at least for the initial period of 5 years. The importance of this aspect can be understood on the basis of examples of prices of similar products sold in India, Pakistan and India. A pack of ten 500 mg tablets of Ciprofloxacin costs Rs 29 in India whereas the prices in Pakistan is Rs 424 and in Indonesia it is Rs 393 (converted to Indian rupees). The prices of other pharmaceutical products are almost in the similar proportion.” Keayla 2009, “The Amendment Patents Act of 1970: A Critique,” in Parulekar and D’Souza 2009, 38.

place, based on an understanding of the positive *and* negative implications of intellectual property for broad areas of public policy:

In essence, a newly emerging intellectual property paradigm is based on a richer understanding of the concept of development. While development was once defined as mainly an issue of economic growth, there is now a more nuanced view, a view that emphasizes the connections between development and human freedom... WIPO's new 'development agenda', formally adopted in 2007, is premised on promoting a more holistic appreciation of the real relationships among intellectual property and economic, social, cultural, and human development.<sup>15</sup>

In similar vein, as we shall see later, Brazil has taken a leading role in pushing for a development agenda within WIPO. All three IBSA countries (India, Brazil, and South Africa) are thus in the vanguard of efforts for a more equitable regime of international intellectual property laws.

In this book, we shall argue that the underlying rationale of the regime for the international protection of intellectual property rights needs to change so as to strike a balance between the rights of authors and the requirements of human security. At the beginning of the twenty-first century it is increasingly recognized that international protection regimes must be mindful of the need to do justice to those in dire need.

Until now one can say that the rationale of the regime of international protection of intellectual property rights has been premised primarily, if not exclusively, on protection of the creativity and the rights of authors/inventors so as to foster innovation.

However, authors and inventors do not create in a vacuum. They create in a national environment that has been shaped by intellectual currents from different parts of the world, and it must be recognized that creativity and authorship need to advance the interests and rights of humanity. In this book, it will be suggested that the rights of access of poor people to medicines and to the basic means of survival must influence the future evolution of the regime of international intellectual property law.

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<sup>15</sup> Armstrong et al., 2010, 4.



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