

Project:

Sovereigns as Trustees of Humanity: The Obligations of Nations in an era of Global Interdependence

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Title:

Sovereign Trusteeship and Multilateral protection of Intellectual Property Rights: accountability vs Social responsibility

Introduction

Multilateral legal integration has led States to assume greater roles than the predominantly subjection of territorial jurisdiction. The expansions of new sovereign roles have led to formidable changes in the socio, economic and cultural lives of the people around the globe. The post-Holocaust epoch offered new directions to the concept of sovereignty. The State Powers were no long exhausted in just the promulgation and enforcement of laws instead it went beyond this to the cultural and moral life along with the promotion of well being of the society in general. As Del Vecchio holds, 'the empirical antithesis between the individual and the society finds in the state a more rational composition.....and enables the individual to be tempered within it'. The Universal Declaration of Human Rights is an embodiment of this higher aim that enables the fulfilment of positive and enhanced role of sovereign States. Its provisions have been incorporated into national constitutions, regional conventions, and international covenants-the most important of which are the International Covenant on Civil and Political Rights' (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Intellectual property occupies an important status in the array of these rights. While the right to property is protected under the **ICCPR**, "the author's right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production, "is one of the cultural rights enshrined in the **ICESCR**. Article 15 of the CESCR recognizes 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.

The article also seeks to achieve full realization of the rights through the conservation, the development and the diffusion of science and culture. The Article also hopes that benefits to be derived from the encouragement of such rights lead to international contracts and co-operation in the scientific and cultural fields among nation states. Thus, the conservation of culture and sharing of its benefits is an end to be achieved through intellectual property. This is consistent with an understanding of works of culture as being both individually created and socially shared.

However juxtaposed to this higher aim of encouraging creativity and sharing of knowledge, the rat race for economic dominance has led IP rights to be the centre state of global economics and politics. The widening economic gaps among nations having different classification of development prompted the economic orientation of Global relations. The TRIPS (Trade related aspects of Intellectual property law) to which these States accorded recognition, tilted the economic positioning in favour of the developed States, which had obvious reasons for such benefit. The Less developed and Developing Nations continue to sense a threat to their sovereign economic and political interest. As a consequence of the Uruguay Rounds, State sovereignty over IPRs no longer appears especially significant in terms of ensuring that intellectual property protections meet domestic public interests. Nonetheless, States with an international human rights commitments retain a significant power, though largely untapped, to ensure that IPRs serve larger goals of global social justice. The aim of this paper would be to examine how sovereign considerations of such commitments could contribute to serve its obligations as being trustees of humanity. This paper *Firstly* looks at redefining the scope of State Sovereignty contextualising intellectual property and trade law background. *Secondly* it aims to assess the institutional and other leeway open to sovereign action in the interest of common good. *Thirdly* it looks at case studies in context to examine the scope of trusteeship role of Sovereign. *Lastly* it is also the aim of the paper to find the foundations of balance in the conflict of accountability versus social responsibility.

Sovereign Social responsibility

The strengthening of intellectual property rights has been an obligation of the State parties to the multilateral trade agreements as they were held accountable in a number of ways. Although the TRIPS agreement has not taken away from the member states the right to

independently adopt and shape its own Intellectual property laws yet this exists only in principle. The TRIPS require the national laws to be within the constraints of minimum standards. The implementation and management of these minimum standards have a number of socio-economic impacts particularly for the developing countries for the State needs to ensure that the local economy is not harmed along with protecting traditional knowledge assets. While on one hand sovereign responsibility requires adherence to multilateral agreements, social responsibility obligations on the other hand is something from which the States cannot abjure. In a radically altered world politics, there needs a qualitative shift in the sovereign's response to issues not only affecting the self but those affecting the society at large, like health hazards, environment, climate and the like. These social obligations necessitate a global solution that cuts across the competing interest of sovereign Nation States. It may seem rather rustic to get across the barriers of the multilateral agreement barriers. But there are different means to approach the issue to secure a rightful balance of obligations at the national and international front which is in fact the forethought to this paper.

It is often argued that legal protection of intellectual property rights is legitimate as a means of preventing what Garrett Hardin famously termed a "tragedy of a commons." Hardin argued that self-interested agents have an incentive to either overuse a material commons and will do so until it is overused and depleted because the benefit of overuse accrues entirely to the individual while the costs are spread over all other users. Proponents of IP rights argue that such rights are needed to protect against an analogous tragedy of the information commons. While this seems justified to a certain extent opponents of such intangible rights brings out its bottom side by pointing to other arguments like the diminishing information or information spoilage.

In the Lockean terms factors that restrict original acquisition from the commons are: (1) there must be enough of the material object for everyone else to appropriate; and (2) no one may acquire a material object to spoil or destroy it. The diminishing of the scope of the information commons has the effect of reducing access to intellectual objects which is, from the standpoint of Lockean reasoning, just as bad as depletion. Intellectual property rights have shrivelled the global governance by compelling nation states to proliferate with global economic regime. The resultant is the growth of economic interdependence constrained by both internal and external aspects of sovereignty. The increasingly transnational character of economic power, elite exploitation, indigenous political mobilization, flows of cultural information and genetic resources, indigenous knowledge sharing, and assertions of cultural significance suggest that traditional analyses of sovereignty cannot do justice to the

complexities of the networks of power and resistance in which intellectual properties are increasingly relevant. Multilateralism on the other hand does not allow for deviance from established norms. This poses issues on management and sharing of resources by the sovereign and designing the means to achieve this objective given the fact of a 'minimum standard' limitation. In other words the question is to what extent the sovereign is endowed with flexibilities to meet its specific and other higher objectives. For instance access to essential drugs for cancer, AIDS etc. Drugs are essentials in the perspectives of a nation developed or developing. Article 12 of the ICESCR obligates state parties to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Access to medicines are major issues for consideration for any Nations because they are protected by patents , which in turn enshrine a commercial monopoly over a period of time leaving the demand for cheaper essentials unattended. The establishment of TRIPS was a creative conclusion of IP arrangements but in a realistic setting of indifferences. Many countries like India, Brazil, and Israel face the problems with generic production of essential medicines. On the other hand many developed countries have consistently pushed for "TRIPS-plus" patent protection, forcing developing countries to provide greater protection than the minimum standards that TRIPS requires¹. These tend to affect the lives of several people living across the globe. Under such circumstance the rightful application of institutional mechanisms like flexibilities and compulsory licensing comes to rescue. This requires considerations of many elements to the issue like the Sovereign obligations for a sustained use of resources, benefit sharing obligations, humane considerations for common good and of course this entails a balanced human rights approach.

Protection and sharing of Traditional knowledge

The development of genetic engineering has enabled the isolation and production of genetic substances for use in pharmaceutical and other industries. This poses a threat to the traditional knowledge that has been handed over generations in given locations around the

¹ E.g. under 19 U.S.C. § 2411, the United States Trade Representative has the discretion to sanction countries for an "act, policy, or practice ... which (i) denies fair and equitable.., provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights." Whether such provisions stand the test of sovereign obligations towards others in the interest of global welfare is indeed a debatable question.

globe. There are significant conflicts among the governments of countries of origin and the holders of rights over such knowledge. While developing countries find themselves with such traditional resources, the developed world possesses the technology for processing it for use in different applications. While developing countries assert its claim against foreign right holders, little vent is given for such foreigners to assert any claims. This often becomes detrimental to the exploitation and beneficial use of resources. Sovereign have obligations to indigenous peoples subject to their own jurisdictions at the same time these obligations must also carry respect for and protection of the indigenous knowledge of indigenous peoples around the world. The application of IPRs as a tool to address the protection of indigenous knowledge and biodiversity must weigh carefully the consequences of such protection for peoples in other regions of the world. This calls for a mechanism of impact assessment and evaluation of the works claiming IPRs. Such assessment must be one to look at the aspects of human rights implications while rejecting those claims that conflict with humanitarian considerations. This would entail State obligations to multilateral agreements in a more meaningful setting.

Aim of the paper & Questions under consideration

The paper aims to look at the concept of sovereignty from the perspective of Intellectual property law. This aim of this study is to understand the new humanitarian role that could be played by sovereign as trustees of global resources. While undoing intellectual property rights may not do justice, so does its over protection do more harm than good. How sovereign obligations can cater to a harmonised application of IP laws is of interest to this paper. It looks at leading examples from across the Globe wherein sovereign actions mounted for common humanitarian cause like for instance access to drugs, protection of traditional indigenous knowledge and the like.

The paper proposes to address the following questions:

- a. whether and to what extend (if any) the concept of Sovereignty is condensed under a commercial law regime?
- b. Whether sovereignty can influence the ownership and management of cultural resources for a sustained growth and development?
- c. Whether and by what means can sovereign obligations as trustee of humanity be achieved through social responsibility under International Humanitarian law or any other institutional mechanism in place (specially in the context of IP rights)

Proposed chapters (not limited to)

I. Introduction

II. Transvaluing the Sovereign role under Intellectual property rights regime

III. Shaping a ‘Global Architecture’ of sustainable development law and Intellectual property protection

IV. Sovereign social responsibility versus Accountability: A Human rights perspective in the context of commercial law governance

V. Perspectives for future

VI. Conclusion

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