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Theoretical Underpinnings of IP Laws

Patent Law: Decisions of the Supreme Court of India

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This Paper seeks to examine the theoretical underpinnings of The Patents Act, 1970 (Patents Act), as constructed by the Supreme Court of India (Supreme Court) in the last 71 years. An analysis of decisions of the Supreme Court reveals that: (i) in none of the cases, validity of The Patents Act was challenged; (ii) unlike the decisions on copyright and design laws where the Court invoked both Labour and Utilitarian frameworks as supplementary and complimentary to each other to justify the 'why' of two distinct copyrights envisaged by The Copyright Act, 1957 and The Designs Act, 2000, the Court in patent cases has used only Utilitarian Theory; (iii) Court has not ignored Natural Right and Labour theories as in its opinion Natural Right justification is only a means to achieve the end of social good; (iv) in the opinion of the Court, both 'sense' and 'nonsense' of Bentham may coexist as means and end; and (v) protection of patent rewards labour put in by the inventor and in exchange provides invention and knowledge to the society. Paper argues that the Court should have applied judicially manageable standards to rigorously scrutinize the theoretical underpinnings of Patent Law from all possible angles.

Keywords: Utilitarian Theory, The Patents Act, 1970, Theoretical Underpinning, Supreme Court of India, Ratiocination, Intellectual Property, Labour Theory, Natural Right Theory, *Publici Juris,* Society, Scientific Research, Nonsense on Stilts, Industrial Progress, Invention, Discovery, Patent System, Common Law, Utility

This Paper is in continuation to the Paper 'Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India' published in the *Journal of Intellectual Property Rights*,[1] which examined the theoretical underpinnings as to 'why' of two distinct copyrights envisaged by The Copyright Act, 1957[2] and The Designs Act, 2000.[3] This Paper examines the theoretical underpinnings of The Patents Act, 1970[4] by analyzing the decisions of the Supreme Court void in the intellectual property (IP) literature, particularly relating in the last seventy-one years and aims to fill some to theoretical frameworks of the patent law. Although, in the cases relating to patent, the Supreme Court has deployed only the Utilitarian theory, yet the paper refers to other theoretical frameworks[5] to explain, justify or question IP.

Theoretical Underpinnings of Patent Law

From the date the Supreme Court of India (Supreme Court) came into being[6] till 30 September 2021, the Supreme Court has delivered twelve direct decisions on The Patents Act, 1970.[4]Out of them, three are twentieth-century decisions and nine decisions are from the twenty-first century. These twelve decisions include three Full Bench decisions and nine Division Bench decisions. There is no reported Constitution Bench or Single Bench decision on the Patent Law. The first decision is the *Biswanath Prasad Radhey Shyam* v *Hindustan Metal Industries*[7] and the recent one is *Monsanto Technology LLC* v *Nuziveedu Seeds Ltd*.[8]

Only two decisions invoke the theoretical underpinnings of patent law which include one Full Bench decision and one Division Bench decision — one each from the twentieth and twenty-first centuries respectively.

The first case *Biswanath Prasad Radhey Shyam* v *Hindustan Metal Industries*[9] is a Full Bench decision of the Supreme Court. The lead opinion on behalf of the Court was delivered by Justice R. S. Sarkaria. The Court in this case expressed the opinions as to the theoretical underpinnings of the Patent Law. Explaining the object of the Patent Law, the Court observed as under:

'The object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the

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disclosure of the invention at the Patent Office, which after the expiry of the fixed period of the monopoly, passes into the public domain.'[10]

The objects of Patent Law as identified by the Supreme Court may be summarized as:

(i) Encouragement and stimulation of scientific research, new technology and industrial progress.
(ii) Grant of patent to the inventor in exchange of disclosure of invention to the society to enrich public domain of knowledge and technology.

Explaining the principle of Patent Law, the Supreme Court observed:

'The fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful. That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own "discovery" as opposed to mere verification of what was, already known before the date of the patent.'[11] *(emphasis added)*

As to the 'requirement of useful' in invention, the Court observed:

> *'It is to be noted that unlike the Patents Act 1970, the Act of 1911 does not specify the requirement of being useful in the definition of 'invention. But Courts have always taken the view that a patentable invention, apart from being a new manufacture, must also be "useful".'*[12]*(emphasis added)*

The Court further observed as to 'patentability' and 'patentable inventions' as:

> *'To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working inter relation they produce a new process or improved result. "Mere collocation of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent".'*[12]*….(emphasis added)*

The Court further observed that the law relating to patentable inventions as prevailing in Britain is substantially the same in India and extracted from the Encyclopedia Britannica[13] as:

> *'A patent can be granted only for 'manner of new manufacture' and although an invention may be 'new' and relate to a 'manner of manufacture' it is not necessarily a 'manner of new manufacture'—it may be only a normal development of an existing manufacture. It is a necessary qualification of a craftsman that he should have the knowledge and ability to vary his methods to meet the task before him-a tailor must cut his cloth to suit the fashion of the day-and any monopoly that would interfere with the craftsman's use of his skill and knowledge would be intolerable'*[14]*…'A patentable invention, therefore, "must involve something which is outside the probable capacity of a craftsman-which is expressed by saying it must have 'subject matter' or involve an 'inventive step." Novelty and subject matter are obviously closely allied…[I]n fact 'subject matter' is the crucial test, for which they may well be novelty not involving an 'inventive step', it is hard to conceive how there can be an 'inventive step' without novelty.'*[15]*(emphasis added)*

The fundamental principles of Patent Law as recognized by the Supreme Court may be summarized as:

(i) Patent is granted only for new and useful inventions.
(ii) Discovery (invention) must be the result of inventor's own creation.

Although the Supreme Court used the word "discovery" instead of 'invention', yet the Supreme Court did not mean what it said for it meant only invention. In this case, the Supreme Court was clearly Utilitarian for it emphasized encouragement and stimulation of scientific research, new technology, and industrial progress. The Supreme Court also underscored the benefit of patent to the society. In other words, the Supreme Court highlighted the point that without patent system the researchers may not be interested in doing vanguard research. The society will be poorer without new knowledge and technology. Further, even if they do research and come up with new knowledge and technology but do not disclose the same to the society, the new knowledge and technology will never come in the public domain for the producer of the new technology does not have the incentive to disclose in world without patent system. Furthermore, the Supreme Court underlined the fact that patent is not granted only if someone has invented something new.

Invention is only a necessary but not a sufficient condition for the grant of a patent. Patent can only be granted if there is an invention and the knowledge about invention is also disclosed. So, the invention and the knowledge about the invention moves from the side of the inventor to the society and in exchange patent moves from the side of the society to the inventor. If inventors do not disclose the knowledge about the invention, they will not get a patent, though they may protect their invention as a trade secret under a constant apprehension that if someone else comes up with the same invention on their own through honest means they will not have a remedy. Therefore, grant of monopoly in the form of patent is a tradeoff between the inventor and the society. In other words, patent serves a social purpose by maximizing and enriching the public domain of knowledge and technology.

Monsanto Co. v *Coramandal Indag Products (P) Ltd.*[16] is a Division Bench decision of the Supreme Court Justice O. Chinnappa Reddy delivered the unanimous opinion of the Court. No opinion on the theoretical underpinnings of Patent Law was expressed in this case.

Research Foundation for Science, Technology and Ecology v *Ministry of Agriculture*[17] is a Full Bench decision of the Supreme Court. The Court was unanimous in this case but no opinion as to the theoretical underpinnings of the Patent Law Was expressed by the Court.

Garware-Wall Ropes Ltd v *A. I. Chopra Engineers and Contractors*[18] and *J Mitra & Co Pvt Ltd* v *Assistant Controller of Patents & Designs*[19] are the Division Bench decisions of the Supreme Court. In *Garware-Wall Ropes* the Court was unanimous and in *J Mitra* Justice S. H. Kapadia penned down the unanimous opinion of the Court. But in both the decisions the Court did not express any opinion as to the theoretical underpinnings of Patent Law.

In *Glaxo Smith Kline PLC* v *Controller of Patents & Designs*[20] and *Cipla Ltd* v *Union of India*,[21] both Division Bench decisions, the Court did not express any opinion as to the theoretical underpinnings of the Patent Law. In *Glaxo Smith*, Justice Dr. Arijit Pasayat delivered the judgment whereas in *Cipla Ltd* the Court was unanimous.

Novartis AG v *Union of India*[22] is a Division Bench decision of the Supreme Court of India. Lead opinion was delivered by Justice Aftab Alam. The Court cited from the Justice N. RajagopalaAyyangar Committee Report (popularly known as 'Ayyangar Committee Report')[23] as:

> *'He (Justice Ayyangar) described the patent law, in his report, as "an instrument for managing the political economy of the country". He observed:*
>
> *It would not be an exaggeration to say that the "industrial progress of a country is considerably stimulated or retarded by its patent system" according as to whether the system is suited to it or not.'*[24] *(emphasis added)*

He also quoted from *Michel*[25] with approval as:

> *'Patent systems are "not created in the interest of the inventor but in the interest of national economy.""The rules and regulations of the patent systems are not governed by civil or common law but by political economy".*[26] *(emphasis added)*

The above observation recorded by the Supreme Court explicates the Utilitarian justification of Patent Law. No opinion as to the theoretical underpinnings of the Patent Law was expressed by the Supreme Court *Aloys Wobben* v *Yogesh Mehra*[27] and *Glenmark Pharmaceuticals Ltd* v *Merck Shapr and Dohme Corporation*.[28] In *Aloys Wobben*, Justice Jagdish Singh Khehar delivered the unanimous judgment on behalf of the Court, and in *Glenmark Pharmaceuticals* the Court was unanimous. Also, the same remained the position in the Full Bench decision of the Supreme Court in *Research Foundation, Science, Technology and Ecology* v *Ministry of Agriculture*.[29] The Court did not express any opinion as to the theoretical basis of the patent law in this case.

The latest decision of the Supreme Court on patent law is *Monsanto Technology LLC* v *Nuziveedu Seeds Ltd*,[30] a Division Bench decision. The unanimous decision of the Court was delivered by Justice Navin Sinha. The Court did not express any opinion as to the theoretical underpinning of Patent Law in this case.

Conclusion

An analysis of the decisions of the Supreme Court reveals that in none of the cases the constitutional validity of the Patent Law was challenged. The Court did not engage in any philosophical discourse. If it would have engaged, it was obvious and expected that it would apply judicial standards to rigorously scrutinize theoretical underpinning of The Patents Act

from all possible angles. In none of the decisions of the Supreme Court on The Patents Act, the Court has referred the names of Labour–Utilitarian Frameworks or their proponents — which was also expected from the Court. But in the decisions of the Supreme Court relating to patents, the idea underlying the Utilitarian Theory is very much evidently present. Also, in all the analyzed decisions on Patent Law it has been found that the Court was unanimous and no dissenting or concurring opinion was delivered in any decision.

Following justifications may be culled out from the above analysis of judicial decisions:

(i) The object of patent law is to encourage scientific research, new technology and industrial progress —patent right is justified mainly for reasons of utility;
(ii) Grant of patent to the inventor in exchange of disclosure of invention to the society to enrich public domain of knowledge and technology — Natural Right justification of patent right is a means to achieve the end of social purpose; and
(iii) Patent systems are not created in the interest of the inventor but in the interest of national economy.

All the above justifications are clearly utilitarian in nature. However, the Supreme Court has not ignored the Natural Right or Labour Theory justification of patent right. In the opinion of the Supreme Court Natural Right justification is only a means to achieve the end of social good. Reproachment of both the theories will turn Bentham upside down in his grave for he described Natural Right Theory as 'nonsense on stilts'.[31] In the opinion of the Supreme Court, however, both the sense and nonsense of Bentham may coexist as means and end. This approach of the Supreme Court seems to be not only novel but also meaningful and useful for the simple reason that the inventor is getting reward of labour in the form of patent and the society is getting the invention and knowledge of invention in exchange. Invention begets invention. Knowledge begets knowledge. Result is enriched public domain of knowledge and technology. Both the inventor and the society are better off — a win-win situation for both.

It is not incumbent upon the inventor to go for a patent for the invention. Inventor has three alternatives to choose. First, the inventor may protect the invention as a trade secret. Second, the inventor may give the invention to the public for free. Third, the inventor may apply for a patent. If the inventor chooses the third alternative and applies for a patent, it is required to provide the full and particular description of the invention to enable other persons skilled in the field of technology to which the invention relates, to make and work the invention. The patent system, therefore, provides an incentive to disclose the knowledge relating to invention to come in the public domain or else the knowledge may be lost.

Knowledge is *publici juris* which is necessary for human flourishing and development of society.[1] Once an invention is patented, it helps others to invent and design around. Patenting promotes research and development in the field of patented invention. Invention is necessary for the progress and development of society. Invention is a measure of technology development. Patenting of invention is a tool to maximize the happiness of the maximum number. The Court, though, discussed that the invention being the fruit of labour of the inventor and, therefore, the inventor must reap the benefit. However, it is not only the act of inventing by and in itself which entitles the inventor to a patent rather it is the disclosure of the invention which entitles him to a patent. Utility of the invention is an essential of patentability. Utility of the invention means utility not only for the scientific community but also for the society. The invention to be patentable must be useful for the society. If the invention is against the interest of the society, the patent may not be granted.

It may be said that the theoretical framework of Patent Law in India is clearly utilitarian. The analysis of the decisions on The Patent Act also reveals that the Supreme Court has neither developed any new justification of the Patent Law nor has it evolved a new theory of IP. Approach of the Supreme Court in invoking *publici juris* and Utilitarianism seems sound and reasonable. But when the Court was engaged in philosophical discourse, it was expected that the Court should have applied judicially manageable standards of fairness and reasonableness to rigorously scrutinize the theoretical underpinnings of Patent Law from all possible angles. Paper being an analytical study does not proffer any reform in the patent law but suggests that there is a need to construct a theory of IP which can provide a reasonable, convincing and sound explanation making out a strong case for a fair and equitable regime of patent rights in particular and IP in general.

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