

## **CUT FROM THE SAME CLOTH: THE PHILOSOPHIES OF INTELLECTUAL PROPERTY RIGHTS AND THE INDIAN CONSTITUTION**

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### *Abstract*

*India is new to the field of intellectual property law. While much of the Western world already has an established jurisprudence on the subject, India is only just scrambling to join the race. The recent amendment of our domestic laws to comply with the WIPO's intellectual property laws is only the first step taken on the road to the fully developed field of intellectual property.*

*But whether the amending of legislations or statutes such as the Indian Patent Act or the Copyright Act, etc. would alone be sufficient to develop our own jurisprudence and keep pace with the rapid changes that are taking place in the field of intellectual property law, is questionable. In this regard, it would be pertinent to take a look at the supreme law of the land, the Constitution of India and examine its compatibility with intellectual property law. One would say it certainly is*

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*compatible, seeing as how it provides for patents, copyrights, trademarks and designs as a subject in the Union List. This by itself, however, is not enough. The Constitution needs to be in sync with the true spirit of the intellectual property. And for that, one needs to see if the philosophies for intellectual property, which embody the spirit of intellectual property, can be read in consonance with the Constitution.*

*The authors have attempted a comprehensive analysis of the main provisions in the Constitution which have potential for interpretation or those that could be interpreted along the lines of the philosophies. Through a study of case laws and scholarly works, the authors will try to identify the implications of the Constitution bearing such philosophies on everyday IP law. Finally, the authors would attempt to determine the role played by case laws in this regard.*

## I. INTRODUCTION

The recent landmark decision in *Novartis v. Union of India*<sup>1</sup> has brought the rapidly burgeoning field of intellectual property rights into the limelight once again. The exceedingly difficult question of balancing the need to promote research and development in science and technology and keeping private monopoly of essential

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<sup>1</sup>Novartis AG v. Union of India, (2013) AIR SC 1311.

commodities at the minimum was answered by the Supreme Court in this case.<sup>2</sup> Ultimately, the Court chose to protect better access to affordable drugs<sup>3</sup> and ruled to keep private monopoly limited. In essence, the Right to Health under Article 21 of the Constitution was prioritized over private monopoly as well as India's intellectual property commitments to the outside world. In the aftermath of this epoch-making case, a much larger question is being asked and furiously debated. Is the supreme law of our country, in other words, the Constitution of India, in sync with intellectual property rights? Have we incorporated the philosophy behind intellectual property into our Constitution? And if we have, is it sufficient to enable us to deal with issues of importance, of the like discussed in the *Novartis AG*<sup>4</sup> matter?

It is a common misconception that the Indian Constitution is not in line with, or does not recognize the principles embodied by intellectual property rights. After all, the words "intellectual property rights" find no place in the Indian Constitution. Understandably, it is possible that nascent India was more concerned with down-to-earth tangible property rights rather than intellectual property rights and as such, while drafting the Constitution of India, detailed provisions regarding the same did not percolate into the Constitution.<sup>5</sup>

However, the Constitution does indeed deal with intellectual property and not just in one instance. The various provisions in the Constitution that deal with the different aspects of intellectual

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<sup>2</sup>*Id.*

<sup>3</sup> Amy Kapczynski, *Engineered in India- Patent Law, 2.0*, THE NEW ENGLAND JOURNAL OF MEDICINE (Oct 18, 2013).

<sup>4</sup>*Supra* note 1.

<sup>5</sup>Dr. Avinash Shinde, *Intellectual Property Manual* (2004).

property include the Right to Property<sup>6</sup>, Entry 49 of the Union List<sup>7</sup>, Article 51A of the Fundamental Duties<sup>8</sup>, Article 51 of the Directive Principles of State Policy<sup>9</sup>, etc.

The authors will deal with each of these aspects in detail. But first, what is intellectual property and why should the law of any country be in sync with its philosophy?

Intellectual property is the creative work of the human intellect<sup>10</sup> and consists of the results of human creativity.<sup>11</sup> Its subject matter is formed from new ideas generated by man. New ideas may be applied in as many ways as the human mind can conceive. Their application to human needs and desires can be of considerable benefit to mankind. New ideas can be embodied in familiar things such as books, music and art, in technical machinery and processes, in designs for household objects and for commercial ventures, and in all other sources of information. The list is infinite, as is the potential for discovery of new means of expression. Once applied to human needs, the value of ideas ranges from the industrial and commercial to the world of literature, art and design and contributing to technological, economic, social and cultural progress. Protecting the development and application of new ideas aids realization of the benefits which can be derived from them.<sup>12</sup>

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<sup>6</sup>CONSTITUTION OF INDIA, 1950, Article 300A- Persons not to be deprived of property save by authority of law.

<sup>7</sup>CONSTITUTION OF INDIA, 1950, Schedule 1, Union List, Entry 49.

<sup>8</sup>CONSTITUTION OF INDIA, 1950, Chapter IV-A, Art. 51A, Fundamental Duties.

<sup>9</sup>CONSTITUTION OF INDIA, 1950, Chapter IV, Art. 51, Directive Principles of State Policy.

<sup>10</sup>DR. V. K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS (Lexis Nexis, 2007).

<sup>11</sup>CATHERINE COLSTON AND JONATHAN GALLOWAY, MODERN INTELLECTUAL PROPERTY LAW 2 (Routledge, 2010).

<sup>12</sup>*Id.*

The philosophy or the reasons behind the development of intellectual property is similar, if not identical to the growth of property in its basic form. This is because intellectual property shares much of the origins and orientation of all forms of property.<sup>13</sup> The philosophies or justifications for intellectual property typically take one of three forms: the Lockean Theory of Labour, the Personality Theory and the Utilitarian theory.<sup>14</sup> Now, the question is whether the Indian Constitution conforms to these theories when it deals with intellectual property law?

First, in examining whether the Lockean Theory of Labour and the Indian Constitution are in consonance, the most obvious reference seems to be the Right to Property. The right to property, although one of the many rights granted to us by the Indian Constitution, is perhaps the least celebrated. Overshadowed by its more prominent cousins in Chapter III, which includes the Right to Life and Personal Liberty and the Right to Freedom of Speech and Expression, all of which have been given a higher status of a Fundamental Right, the Right to Property seems less significant especially so after its relegation from the status of a Fundamental Right to that of a mere legal right in the Constitution.<sup>15</sup> Nevertheless, an understanding of property and its constitutional aspects is essential to be able to fully appreciate its basis for intellectual property.

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<sup>13</sup>Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

<sup>14</sup>Intellectual Property, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 18, 2013), <http://plato.stanford.edu/entries/intellectual-property/#JusCri>.

<sup>15</sup>Art. 19(1) (f) was omitted by Section 2 of the Constitution (44<sup>th</sup> Amendment) Act, 1978 and retained as a constitutional right under Art. 300-A of the Constitution of India.

## II. THE LOCKEAN JUSTIFICATION FOR INTELLECTUAL PROPERTY

Reference to Locke's two treatises of Government is almost obligatory in essays on the constitutional aspects of property.<sup>16</sup> For Locke, property was a foundation for an elaborate vision that opposed an absolute and irresponsible monarchy.<sup>17</sup> The Lockean justification for property is embodied in his 'Labour Theory'. According to Locke, there existed a nature in which goods were held in common through a God-given grant.<sup>18</sup> God granted these bounties for the enjoyment of humans, but they could not be enjoyed in their natural state.<sup>19</sup> Some labour had to be exerted on them so that they could be converted into a state for the use and enjoyment of human beings. It is this labour that adds value to the goods, making it a product of whoever exerts that labour. Thus, they are converted into private property.

Article 300A of the Constitution grants the right to property in India, which is as follows: "Persons not to be deprived of property save by authority of law.-No person shall be deprived of his property save by authority of law." This clearly means that no one can be deprived of his property, thereby granting the owner absolute rights over his

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<sup>16</sup>CONSTITUTION OF INDIA, 1950, Chapter IV, Art. 51, Directive Principles of State Policy.

<sup>17</sup>P. LASLETT, TWO TREATISES OF GOVERNMENT (JOHN LOCKE, SECOND TREATISE OF GOVERNMENT) 138-40 (Cambridge University Press, 1963).

<sup>18</sup>*Id.*

<sup>19</sup>Hamilton, *Property- According to Locke*, 41 YALE L.J. 864 (1932); Locke's theory of property based on popular perception in the seventeenth century that all property derives from "magnanimity of a bountiful creator"; government established by compact can have no other goal than to preserve possessory rights of citizens without doing prejudice to property rights of others in the same natural property.

property. The 5<sup>th</sup> Amendment in the American Constitution has a similar clause. It states: “*No person shall be held to..... nor be deprived of life, liberty, or property, without due process of law....*”<sup>20</sup>

Both these clauses protecting the right to property can be justified using Locke’s theory. Locke believed that the very existence of the Government was to protect basic rights such as life, liberty and property. According to Locke, consent-based civil society governments are established so that individual rights to liberty, life and property can be safeguarded.<sup>21</sup> Thus, individuals can obtain security in producing and possessing the fruits of their *own labour*, consistent with respect for equal rights of others.<sup>22</sup>

Of course, one could argue that in our country the Government also has the right to acquire private property, implying that perhaps the labour one exerts on one’s property could be rendered meaningless by the State. The words “*save by authority of law*” do indeed seem to be granting the Government arbitrary powers to acquire private property. But it is in actuality, extremely difficult. The Government can only acquire property through the “*authority of law*”, in other words, legislation. If such legislations do not meet constitutional standards, they will be immediately struck down. Even if the legislations are satisfactory, actions based on the legislations must also pass extremely strict standard tests.<sup>23</sup> Hence, in most cases, the property that one obtains by exerting labour remains one’s own.

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<sup>20</sup>Constitution of the United States of America, Fifth Amendment.

<sup>21</sup>Randy May and Seth Cooper, *The Constitutional Foundations of Intellectual Property*, 8 (13) THE FREE STATE FOUNDATION, 'PERSPECTIVES FROM FSF SCHOLARS', (Oct. 18, 2013), [http://www.freestatefoundation.org/images/The\\_Constitutional\\_Foundations\\_of\\_Intellectual\\_Property\\_050813.pdf](http://www.freestatefoundation.org/images/The_Constitutional_Foundations_of_Intellectual_Property_050813.pdf).

<sup>22</sup>*Id.*

<sup>23</sup>Pritam P. Hans and Chandralekha Mukherji, *Spotting a Safe House*, MONEY TODAY (Oct. 18, 2013), <http://businesstoday.intoday.in/story/greater-noida-land->

Thus, the right to property in the Indian Constitution also has Lockean justifications. The same justification holds good for intellectual property rights. This is because the word “property” in Art. 300A includes “intellectual property” as well. Property, in this Article, means only that which can by itself be acquired, disposed of or taken possession of.<sup>24</sup> Subject to this limitation<sup>25</sup>, it is designed to include private property in all its forms<sup>26</sup> and “*must be understood both in a corporeal sense as having reference to those specific things that are susceptible of a private appropriation and enjoyment.....*”<sup>27</sup> Thus, the word ‘property’ connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.<sup>28</sup> It thus includes intellectual property rights. The same was reaffirmed by the Supreme Court in *R.C Cooper v. Union of India*<sup>29</sup> and *Entertainment Network India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)*<sup>30</sup> where it held that “*the ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article*

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acquisition-troubles-hit home-buyers/1/18137.html; “The Allahabad High Court, which in May struck down land acquisition by the Greater Noida Industrial Development Authority (GNIDA), an Uttar Pradesh government undertaking, in Shahberi village.”; Call for rational land acquisition policy, TIMES OF INDIA (Oct. 18, 2013), [http://articles.timesofindia.indiatimes.com/2013-07-14/hyderabad/40568994\\_1\\_land-acquisition-act-land-allotments-singur](http://articles.timesofindia.indiatimes.com/2013-07-14/hyderabad/40568994_1_land-acquisition-act-land-allotments-singur); Justice Gopala Gowda, in a lecture in NALSAR University, said, “Mere invoking of words like public purpose before slapping a land acquisition notice is not enough. It has to pass several constitutional tests, the judge said, and hoped that the new Land Acquisition and Rehabilitation Act would meet the growing aspirations and changed circumstances.”.

<sup>24</sup>*Chiranjit Lal v. Union of India*, (1950) SCR 869.

<sup>25</sup>*Dwarkadas v. Sholapur Co.*, (1954) AIR SC 119.

<sup>26</sup>*Commr. H.R.E v. Lakshmindra*, (1954) SCR 1005.

<sup>27</sup>*State of W. B v. Subodh Gopal*, (1954) SCR 587.

<sup>28</sup>D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA (LexisNexis Butterworths Wadhwa, 8<sup>th</sup> ed. 2011).

<sup>29</sup>*R. C. Cooper v. Union of India*, (1970) SCR 3 530.

<sup>30</sup>*Entertainment Network India Ltd. v. Super Cassette Industries Ltd.*, (2008) 4 ALD 47 (SC).



*19(1) (g) read with Article 300A of the Constitution, besides the human rights on property.”*

It naturally follows thence, that if the right to property can be justified using the Lockean theory of labour, then intellectual property rights that form part of the right to property are justified by the same. This essentially means that the Constitution of India has, through the Right to Property, incorporated the Locke’s philosophy of intellectual property rights.

### **III. OTHER CONSTITUTIONAL REFERENCES TO INTELLECTUAL PROPERTY**

Now, another aspect in the Constitution regarding intellectual property rights is the Chapter on Fundamental Duties. Part IV A of the Constitution is the Chapter on Fundamental Duties. The distinguished jurist Durga Das Basu stated that the purpose behind incorporating Article 51A in the Constitution was to eradicate superstitions in which India is deeply soaked and to remove the bone of religious fanaticism, regional chauvinism and linguistic frenzy which have ever plagued India and retarded her unification into a cohesive society.<sup>31</sup>

On the face of it, it does not seem as if Article 51A has anything to do with intellectual property rights. But, it can also be argued that it forms another constitutional basis for intellectual property rights. Article 51A (h) is as follows:

*“It shall be the duty of every citizen of India to develop scientific temper, humanism and the spirit of inquiry and reform.”*

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<sup>31</sup>D. D. BASU, *supra* note 28, at 4216.

The words “scientific temper” refers to the call for the diffusion of “science mindedness” throughout the population.<sup>32</sup> It was maintained by India’s early leaders, primarily Nehru, that the growth of scientific temper was measured by the extent to which ordinary people were using the methods of science to life’s problems.<sup>33</sup> Further, in *AIIMS Students Union v. AIIMS Management*<sup>34</sup> the Supreme Court categorically ruled that every citizen of India is fundamentally obliged to develop a scientific temper and a spirit of humanism.

As has already been discussed previously, the main objective of intellectual property is to generate ideas that can be applied in a myriad of ways for furthering development. Developing “scientific temper” can be interpreted to mean development of society through science and the *use of intellectual property*. Thus, another constitutional basis for intellectual property and the rights associated with it can be found in the Fundamental Duties, namely Article 51A (h).

It is fascinating to note that it is the Utilitarian Basis for intellectual property that this aspect conforms with and not the Lockean theory of labour. Under the utilitarian theory, intellectual property rights are considered as “an appropriate means to foster innovation”<sup>35</sup> provided that protections be provided for a limited term \so as to balance the social welfare loss of monopoly exploitation.<sup>36</sup> The Chapter on Fundamental Duties has been incorporated in the Constitution for

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<sup>32</sup>SRIRUPA ROY, *BEYOND BELIEF: INDIA AND THE POLITICS OF POSTCOLONIAL NATIONALISM* 125 (Duke University Press Books, 2007)

<sup>33</sup>*Id.*

<sup>34</sup>*AIIMS Students Union v. AIIMS Management*, (2000) AIR SC 3262; See Ashok Kumar Thakur v. Union of India, (2008) 56 BLJR 1292.

<sup>35</sup>Peter S. Menell, *Intellectual Property: General Theories*, (Oct. 18, 2013), <http://encyclo.findlaw.com/1600book.pdf>.

<sup>36</sup>Mathew M. Lievertz, *Intellectual Property: Policy for Innovation, not ‘fairness’*, (Oct. 18, 2013), [http://www.academia.edu/1929510/Intellectual\\_Property\\_Policy\\_for\\_Innovation\\_Not\\_Fairness](http://www.academia.edu/1929510/Intellectual_Property_Policy_for_Innovation_Not_Fairness).

social change and improvement. This can be seen from Durga Das Basu's 'Commentary on the Constitution of India' where he says "*duties are observed by individuals as a result of dictates of the social system and the environment in which one lives...*"<sup>37</sup>

The utilitarian theory has much the same purpose. It seeks to provide rights, for a limited period perhaps, to authors and inventors, so that they are encouraged to innovate. The ultimate intention is for the betterment of society. It is in this way that Article 51A (h) conforms with the utilitarian basis for intellectual property rights. Intellectual property related aspects can even be found in the Directive Principles of State Policy.

The importance attached to Treaties and International Obligations is emphasized in Article 51 of the Indian Constitution. As a Directive Principle of State Policy, it mandates the fostering of respect for international law and treaty obligations in the dealings of organized people with one another.<sup>38</sup>

The World Intellectual Property Organization (WIPO) was established in 1970, following the entry into force of the WIPO Convention in 1967, with a mandate from its Member States to promote the protection of intellectual property throughout the world through cooperation among States and in collaboration with other international organizations. One of the most important agreements within the WTO is the Trade-Related Aspects of Intellectual Property or the TRIPS Agreement, which mandates that all WTO members adopt and enforce certain minimum standards of IPR protection.<sup>39</sup> The main objective of TRIPS was to maintain the uniformity of

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<sup>37</sup>*Id.* at 4224.

<sup>38</sup>S. Jagannath v. Union of India, (1997) AIR SC 811.

<sup>39</sup>Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

intellectual property rights across the globe. India signed the TRIPS agreement in 1996, meaning that India was put under the contractual obligation to amend its intellectual property laws in compliance with TRIPS. Hence, the Patents Act, The Copyright Act and the Trademarks Act were all subsequently amended in order to bring it on par with TRIPS.

Article 51 of the Constitution speaks of creating and enforcing laws on par with international treaties. The idea behind the creation of TRIPS, and the various other treaties as signed between member states of WIPO was to regulate IP law and create uniformity throughout the world, for better regulation and enforcement. This regularization and uniformity of Indian IP laws in accordance with the TRIPS, required by Article 51, would lead to the aforementioned ideals being fulfilled.

This particular intellectual property related aspect of the Constitution is not without a philosophical basis either. It is backed by the Utilitarian justification for intellectual property rights. The philosophy propounded by most Utilitarians can be summed up with Jeremy Bentham's famous phrase, "*The greatest good for the greatest number, show that utilitarian theories are concerned with maximizing benefit to society.*"<sup>40</sup> The Utilitarian justification for intellectual property rights embodies the same principle. For society's benefit, intellectual property utilitarians seek to award incentives in exchange for a requisite degree of valuable artistic, scientific, and technological creation.<sup>41</sup> Simply put, they wish to reward innovators in return for the right to use their innovation. This in turn increases innovation.

This theory claims that governments should assign limited intellectual property rights to creators, inventors, and discoverers and that these

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<sup>40</sup>Jeanne C. Fromer, *Expressive Incentives In Intellectual Property*, 98 VA. L. REV. 1745 (2012).

<sup>41</sup>Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245 (2001).

rights should be strongly enforced against violators. This practice of allocating and administering strong intellectual property rights is believed to maximize the incentive to create, innovate, and discover. It is assumed that by maximizing these incentives, the quality and quantity of social goods generated will be maximized. Thus, Article 51 of the Constitution, which required domestic legislation to be in accordance with TRIPS, is also in line with the Utilitarian theory. This is because the objective of uniform patent protection under TRIPS is to promote international trade and investment in an increasingly interdependent global market. The protection granted not only to patents but also the processes as under the amended Indian Patent Act, 1970 would protect innovation, which in turn would promote research and development, leading to social welfare. This is in principle what the utilitarian theory of aims for.

Articles 51, 253 and Entry 12-14 of List 1 in the Constitution of India, which speak of putting the Indian laws on par with international conventions and treaties, have put the various IPR related domestic laws on par with TRIPS. The aim of TRIPS to make a stronger IPR regime has been achieved by awarding innovation through various changes being made in domestic laws, for example, the concept of product patenting was brought back and patents are now to be granted for 20 years. Hence, there is more incentive for people to innovate. This in turn leads to maximizing social welfare. Thus, we can say that Article 51 of the Constitution mandating compliance with TRIPS, when read along with the international standards for intellectual property, is in complete consonance with the utilitarian theory of IPR.

One of the strongest debates against the TRIPS, which can also be construed as an argument against the Utilitarian theory, is that such strong IPR laws would actually retard competitiveness, hence reducing innovation, thereby hampering society's development. It can be seen that the courts are also grappling with how to balance the pro-innovation and anti-competitive effects of IPR. This was evident in

the case of *Cipla v. Roche*<sup>42</sup>, where the judge opined that where the granting of an injunctions against, ‘life saving drugs’ would affect the public at large, the court should not grant an injunction against that drug. Also, in *Novartis v. Union of India*, the Supreme Court had to choose between monopolization of the product and the welfare of the people of the country and other countries. In such a situation, the courts said that, “*The government fulfilling its commitment under the TRIPS agreement notwithstanding, a patent regime where all the gains achieved by the Indian pharmaceutical industry are dissipated and large sections of Indians and people in other parts of the world are left at the mercy of giant multinational pharmaceutical companies, should not be brought in.*”<sup>43</sup>

However the argument that such strong IPR laws would affect innovation, thereby defeating the Utilitarian theory, does not hold water because there has been an increase of 9.67% in the filing of patents and 2.38% increase in the filing of trademarks in the year 2011-2012 alone.<sup>44</sup> Had the TRIPS been against innovation and the Utilitarian theory, it would have affected the rate at which new products were introduced and the same would have lowered after TRIPS. This has not occurred. Hence, the Utilitarian Theory of IPR can be seen to have worked out in practice in the Indian scenario. Perhaps not in a perfect manner, but it can be seen that it is in theory the most acceptable form for the current Indian scenario.

#### IV. CONCLUSION

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<sup>42</sup>F. Hoffmann-La Roche Ltd. and Anr. v. Cipla Limited, (2008) MIPR 2 35.

<sup>43</sup>*Supra* note 1.

<sup>44</sup>Annual Report Of The Office Of The Controller General Of Patents, Designs, Trademarks And Geographical Indication’ (2011-2012), [http://ipindia.gov.in/cgpdm/AnnualReport\\_English\\_2011\\_2012.pdf](http://ipindia.gov.in/cgpdm/AnnualReport_English_2011_2012.pdf).

As has been explained so far, the fact that the Constitution of India is not completely devoid of the philosophies behind intellectual property rights is clear. Case laws too support this fact, namely, the case of *Novartis AG v. Union of India* in the Madras High Court. The constitutional validity of Section 3(d) of the Indian Patents Act was challenged as arbitrary and violative of Article 14 of the Constitution. The Court upheld the validity of Section 3(d) of the Act. The Court further looked into Article 51 of the Constitution and while holding that it did not have the jurisdiction to look into the matter of Indian IP laws not complying with TRIPS and that the Petitioners must take recourse to the WTO for any relief, it also mentioned that Article 51 could be a source of intellectual property law, seeing as how it mandates the compliance with TRIPS.

The *Novartis AG* judgement by the Supreme Court is a testament to the philosophies of intellectual property law as well. Although many criticize it as a retrograde step in the development of intellectual property law, it is in fact, very much in sync with the philosophies behind intellectual property law, especially the utilitarian theory.

The refusal to grant rights to Novartis has been criticized by many as a backward step in the promotion of innovation, thereby not in keeping with the philosophies of intellectual property rights. After all, theories such as the Utilitarian theory do state that limited rights need to be given to authors, inventors and the like so that more and more people are encouraged to innovate for the sake of the betterment of society.

This is the strongest argument put forth by critics of this ruling, that denying Novartis patent rights has an adverse impact on investments and more importantly *innovation*, in drug research and development

in India.<sup>45</sup> In fact, the Executive Vice President of the Global Intellectual Property Center, US Chamber of Commerce, Mark Elliot said, “The decision against patent rights in India today will negatively impact businesses’ ability to invest in tomorrow’s medical and technological advancements.”<sup>46</sup> He further stated that the decision was a “symptom” of “inadequate protection of intellectual property rights in India.”<sup>47</sup> Spokespersons from Pfizer, a pharmaceutical company, said that they were “disappointed” with the judgement and are “concerned” of the environment for innovation and investment in India.<sup>48</sup>

Such cause for worry is unwarranted. The ruling by the Supreme Court is, in spirit, on par with the philosophies of intellectual property. The Utilitarian theory states that limited rights need to be granted to authors, inventors and the like so that society can benefit from more innovation. The Supreme Court stated the same. It did not deny Novartis a patent. It simply stated that the product needed to satisfy a certain, reasonable at that, criteria. Had Novartis fulfilled that criterion, it would have been granted the patent. The keyword here is *limited*. Utilitarians do not argue that rights completely free of restrictions should be granted as and when authors and inventors ask for them. That would lead to a complete monopoly with everyone making insignificant variations and obtaining rights, with society being the ultimate sufferer. Such a scenario would be the anti-thesis to the Utilitarian theory.

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<sup>45</sup>PVX Law Partners, *Analysis of the Supreme Court’s Novartis Judgement*, (Oct. 18, 2013), <http://pxvlaw.wordpress.com/2013/04/04/analysis-of-the-supreme-courts-novartis-judgement>.

<sup>46</sup>*Novartis Judgement Will Hit Investments in Medicine: Says US Commerce Body*, FIRST POST BUSINESS (Oct. 18, 2013), <http://www.firstpost.com/business/novartis-judgement-will-hit-investments-in-medicine-us-commerce-body-681990.htm>; Suhrith Parthasarathy, *Adverse Reaction*, THE CARAVAN (Oct. 18, 2013), <http://caravanmagazine.in/reportage/adverse-reaction>.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*



Here, the Supreme Court ruling in addition to only conditionally denying Novartis patent rights, also saw to it that society benefitted, which is the true spirit utilitarianism. The benefit that society can receive has been maximized, keeping the rights granted to the inventors in control. Thus, the *Novartis* judgement really is in consonance with the jurisprudence behind intellectual property rights and not otherwise, as so many have claimed.

It can safely be concluded that although our Constitution may not have incorporated the concept of intellectual property as well as the United States Constitution, it certainly is *on par* with the philosophy of intellectual property rights, even if not all of them simultaneously. Article 300A of the Constitution is an example of Locke's Labour Theory, while Article 51A is the embodiment of the Utilitarian Theory. By way of the Madras High Court's interpretation, Articles 51 and 243 as well as Entry 49 of List 1 belong to the Utilitarian school as well. Today, many talk of granting intellectual property rights a constitutional status. Whether it is time to devote a specific provision for intellectual property rights in the Constitution or not, there is still a long way to go in the development of proper intellectual property jurisprudence in our country. Also, there is always that mammoth roadblock to the very concept of intellectual property, namely, the freedom of speech and expression which is given such an exalted status in the Constitution. Despite this, it cannot be stated that the Indian Constitution is devoid of, or not in consonance with the philosophies that have justified the very existence of intellectual property rights. And that gives us all cause for believing in the evolution of our existing law into a fully developed intellectual property law, within the framework of the Constitution.