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# Vaccine & Right to Health Covid-19 Perspective

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## ABSTRACT

*Coronavirus has caused devastating effects both in terms of economic and health around the globe. No country be it the United States or India is left untouched by this notorious virus. Many Pharma companies around the world situation are running against the time to find the vaccine for this virus before it can cause more mayhem. However, the question comes up that for instance, any pharma company is successful in developing a vaccine against the virus, so can it have patent rights over the same? Moreover, having patent rights also creates a kind of monopoly in the market, thus helping the patent owner to earn huge profits through its vaccine because the price of the vaccine shall be high, which results in poor people deprived of the same. There are precedents both in international as well as domestic level including laws, judgments which provide states that the states have over-riding power on the patents, to help the poor people get the vaccine at the cheapest rate possible.*

## I. INTRODUCTION

In the history of human civilization, there have been several epidemic events which had a profound impact on the social, cultural, economic and health of the person. For instance, the Black Death or bubonic plague which happened around the 14th century in Europe resulted in the death of almost 200 million people in Eurasia and North Africa. The primary reason for such a disastrous result was that there was no vaccine available at that time which can create an antibody to make the humans immune from such virus. Today, with scientific development, we have the vaccine to fight some of the notorious viruses like Polio, Bubonic plague, smallpox and many other.

Coronavirus or scientifically named as COVID-19 originated in China in December 2019 and within a time gap of 8 months, it has engulfed almost every country because of which more than one crore people are infected and has resulted in the death of 7 lakh people around the world. India has total cases of 25 lakh in which 45 thousand people have lost their life. Many big pharma companies around the world are running against time, making vaccine as soon as

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possible because many experts are predicting that if the vaccine does not come in time, then many more people will die and economies around the world will crumble. Many newspapers have pointed out that Bill and Melinda Gates Foundation came into an agreement with Serum Institute, India in which the former shall provide \$100 million funding to the institute so that the vaccine is available for \$3 to the people. However, the question here is, suppose these companies would not have come into an agreement with each other and the Serum Institute would have launched the vaccine by patenting it thus earning huge profits on it, then whether the State has interfered in the same and provided the drug at an affordable price? Moreover, with a vaccine still awaited, it is imperative to look at other alternatives to at least restrict the spread of Coronavirus.

In this paper, we have outlined three cases or in other words, solutions through which the vaccine can be made available at a large quantity as well as a cheaper rate. These cases are not being analyzed in isolate manner but taking into consideration the international perspective. Moreover, through this paper, we intend to delve into specific other legal alternatives to combat the outbreak of Covid-19 disease.

## **II. PUBLIC HEALTH EMERGENCY**

In the context of India, section 92 of the Patents Act provide the power to Central Government to issue compulsory licensing on the patent product in case of "national emergency" or in circumstances of extreme urgency. In case of an epidemic or public emergency when there is an urgent requirement of the drugs/vaccine to control the spreading of the virus, the Government has the power to issue compulsory licensing on the vaccine on which a company has a patent on it so that the domestic companies can produce the same at a larger rate to make the vaccine affordable as well as available. It will not be the first time that many countries around the world have used their power of compulsory licensing, which is backed by DOHA declaration as well as Article 31 of TRIPS Agreement.

On October 18, 2001, Canada government-issued compulsory licensing on the Bayer's patent ciprofloxacin to authorize the domestic manufacturers to start producing the drug in order to tackle the anthrax attack in the country.<sup>3</sup> A regulation was issued by European Union under which the Government has the power that in case of national/public health emergency, any

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<sup>3</sup> Mullin, Thomas F. "Aids, Anthrax, And Compulsory Licensing: Has The United States Learned Anything? A Comment On Recent Decisions On The International Intellectual Property Rights Of Pharmaceutical Patents," *ILSA Journal of International & Comparative Law*: Vol. 9 : Iss. 1 , Article 7 (2002) Available at: <https://nsuworks.nova.edu/ilsajournal/vol9/iss1/7>

prior negotiation with the patent holders and royalty payment waived off.<sup>4</sup>

In the year 2004, many countries in Europe, including France, were outraged by the high price of the medicine used for treating breast cancer as it was patented. As a result, the Government of France amended its patents act to provide power to the minister in charge to issue compulsory licensing ex parte in case of national health emergency in the case where the company is not ready to issue the license.<sup>5</sup>

In the year 2005, due to the rising number of Tamil flu infected patients, China was forced to use the warning of compulsory licensing to the companies having the patent over the drugs.<sup>6</sup>

The Government of Taiwan in the year 2005 issued compulsory licensing over the drugs manufactured by the U.S. Pharma companies Roche and Gilead Science when the talks between the parties broke down. Taiwan government argued that the companies insisted on allowing them to manufacture and send the drugs to Taiwan as and when Tamil flu broke out to which the Government refused. The government stand was that we could not wait for the time when the epidemic shall knock at the door leaving thousands of people dead. Hence, it is necessary to issue compulsory licensing to domestic pharma company to manufacture the drug.<sup>7</sup>

### **III. ACCESS TO DRUGS/VACCINES AS A "HUMAN RIGHT"**

There is still no cure of HIV/AIDS, but there are "anti-retroviral" medicines in the market, which help in improving the quality of life and life expectancy of the infected person. The country has the maximum number of these HIV/AIDS patients in Africa. Though many reasons pointed out as to why this infection spread so quickly in the continent, the inability to afford the medicine of the same is the major factor. As per the report, the cost of ARV therapies cost around \$10,000 in western countries, which is far beyond the means of the sufferers of the African region.<sup>8</sup>

In the arena of International I.P., in the early times, there was no set of international I.P. practices which led to much confusion and many staunch criticisms. When TRIPS came into

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<sup>4</sup> The Regulation (E.C.) No. 816/2006 of the European Parliament and of the Council of May 17 2006 on Compulsory Licensing of Patents Relating to the Manufacture of Pharmaceutical Products for Export to Countries with public health problems available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R0816>

<sup>5</sup> Jerome H. Reichman, "Compulsory Licensing of patented pharmaceutical inventions: evaluating options", *J. law Med Ethics* (2009) available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2893582/>

<sup>6</sup> Ibid

<sup>7</sup> Timothy Feddersen, Jochen Gottschalk, Lars Peters, "Roche and Tamiflu®: Doing Business in the Shadow of Pandemic", *Kellogg School of Management Cases* (2017) available at: <https://www.emerald.com/insight/content/doi/10.1108/case.kellogg.2016.000286/full/html?skipTracking=true>

<sup>8</sup> Sarah Joseph, "Pharmaceutical Corporations and Access to Drugs: The 'Fourth Wave' of Corporate Human Rights Scrutiny", *Human Rights Quarterly*, May, 2003, Vol. 25, No. 2 425(May, 2003)

force, many scholars pointed out that unlike previous laws, this convention has "teeth" as it has some basic procedure for solving the dispute if they occur and also talked about some important provision regarding compulsory licensing.<sup>9</sup> However, TRIPS suffered criticism from developing countries as it was argued that its provisions favour the developed countries only. Many sub-committees of U.N. also argued that I.P. regime should be in co-existing with the human rights and after many deliberations DOHA Declaration came into force in the year 2001 which provided the power to the Government to issue compulsory licensing on products in case of national emergency.<sup>10</sup>

While launching any vaccine or drug for that matter, big pharma companies point out that it is an expensive matter of R&D on the drug and launching the same in the market. Therefore they always demand patent rights on their products so that a profit generated through it is used for manufacturing and research on the vaccine. In many cases especially in African countries, which is always at the helm of some of the worst diseases like HIV/AIDS, Zika Virus, Ebola Virus, many humanitarian groups out there have always raised their voice with regards to the availability of the drugs at a very low affordable price as everyone has a right to life. Therefore these drugs are an essential part of the survival of a human being.<sup>11</sup>

#### IV. ROLE OF JUDICIARY AND EXECUTIVE

Many courts around the world have taken an active interest in ensuring that the health facility is being provided to the people even in rare genetic disorders or rare disease or even if a small percentage of the population is suffering from the disease. Argentina Supreme Court in the case of *Asociacion Benghalensis y otros v. Ministerio de Salud y Accion Social*<sup>12</sup> held that it is an obligation upon the State to provide an uninterrupted supply of HIV/AIDS drugs to the infected people. This court also held in another case that the State has to provide a facility for providing free medical help in case of bone disease.<sup>13</sup>

In India, courts have taken the lead in declaring that providing healthcare facility is a part of basic fundamental right under article 21 of the Indian Constitution. The Hon'ble Supreme Court of India in the case of *Parmanand Katara v. Union of India*<sup>14</sup>, held that there is an obligation

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<sup>9</sup> Aurora Plomer, "The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science", Human Rights Quarterly, February 2013, Vol. 35, No. 1 150 (February 2013)

<sup>10</sup> Declaration on the TRIPS Agreement and Public Health, adopted November 14 2001, Doha WTO Ministerial Conference, 4th Sess., WTO Doc. WT/MIN(01)/DEC/20, 1 5(c) (2002)

<sup>11</sup> Herman Reinhold, Patients v. Patents, 19 IPL Newsl. 1 (2001)

<sup>12</sup> case 323:1339, 1 June 2000

<sup>13</sup> Supreme Court of Justice, Campodonico de Beviacqua, Ana Carina v. Ministerio de Salud y Accion Social - Secretaria de Programas de Salud y Banco de Drogas Neoplasicas, 24 October 2000

<sup>14</sup> Parmanand Katara v. Union of India, (1989) 4 SCC 248

upon the state machinery to provide healthcare facility to the people under Article 21 as it is one of the basic human rights. Moreover, in the case of *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*<sup>15</sup>, the apex court observed that India being a welfare state, it is an obligation upon the state machinery to provide adequate medical facilities to the people. However, one of the critical judgment which analyzes a relation between patent rights and human rights was *Mohd. Ahmad v. Union of India*<sup>16</sup> which was decided by the Hon'ble High Court of Delhi. The facts of the case are the petitioner Mohd. Ahmed Khan, a minor child, was suffering from a rare genetic disease which is called as "Gaucher disease". The problem was that this disease is sporadic, and only one company deals with the same because of which the price of the therapy was too expensive to be affordable. The respondent argued that many schemes are going on, which provides healthcare facilities to poor people, but since the resources ran out, no further assistance was being able to be provided.

The Hon'ble Delhi High Court noticed that unlike many countries, India does not have specific provision to deal with rare diseases and since only one pharmaceutical company was dealing in the same, the price is obviously to go high. However, the court relied upon the ICESCR provisions and read it along with article 21 of the constitution to say that it is an obligation upon the State to provide healthcare facility to the minor child. The court though acknowledged the fact that the resources are a constraint upon the State, but it does not mean that the State can deviate itself from one of the "minimum cores" of basic fundamental rights, i.e. "right to health and are minimum decencies of life consistent with human dignity". It was therefore decided that the Delhi government has to bear the burden of the treatment of the boy.

With vaccine of Covid-19 still awaited, it falls upon the State to prevent or restrict the spread of the pandemic. As discussed above that there is an obligation upon the state machinery to provide healthcare facility to all under Article 21. No doubt the Government of India has framed policies and extended the scope of already existing yojanas to counter the pandemic, however, the scope of coverage of these policies has to be examined in as much as whether the benefit of the same is being made available to everyone or not. In a recent case of *Distress Management Collective v. Union of India and Ors.*<sup>17</sup>, the question as to whether there is discrimination in the scope of Pradhan Mantri Garib Kalyan Yojana of insurance protection and other benefits as the same was extended to only those healthcare workers involved in the treatment of Covid-19 patients and not covering those who are not working with Covid-19

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<sup>15</sup> *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1995) 6 SCC 213

<sup>16</sup> *Mohd. Ahmad v. Union of India*, (2014) IndLaw Del. 1272

<sup>17</sup> *Distress Management Collective v. Union of India & Ors.*, W.P. (C) 3599/2020

patients. The Hon'ble High Court of Delhi has held that the decision as to who will be covered under the Yojana is a policy decision to be taken by the State. The Hon'ble High Court has further observed that Nurses and healthcare professionals working directly with Covid-19 patients are at high risk and there are higher chances that these persons may get infected, and hence the insurance benefit has been extended for them. Persons who are not working with Covid-19 patients, e.g. those who are working with orthopedic patients who are not suffering from Covid-19, are not in the same position. The Hon'ble High has thus allowed the said classification holding that the same is a policy decision to be taken by the State.

It is pertinent to mention here that though the above decision of the Hon'ble High Court of not interfering with the policy decision of the State is legally sound. However, issuance of certain suggestions and directions in general to the Government by the courts in India to prevent or restrict the spread of Covid-19 disease would have been a welcome step by the Judiciary. Attention may be drawn here to the outbreak Dengue fever Epidemic in the year 1996. At the time despite the repeated warnings of WHO, no effective steps were taken by either the Union of India or the by the Delhi State Government to restrict the epidemic. It was only in 1997 when after the Hon'ble High Court of Delhi issued directions in the case of *Court On Its Own Motion v. Municipal Corporation Of Delhi*<sup>18</sup>, the State prepared their respective action plans. The Hon'ble High Court in its judgment firstly listed the factors which were responsible for the Dengue epidemic. Further, the Hon'ble High Court went on to observe that as there is no drug or vaccine discovered as yet, to prevent the Dengue epidemic, some immediate steps have to be taken to prevent the spread of Dengue. Thereafter, the court in addition to its suggestions on how to prevent Dengue also gave as many as 10 numbers of directions to the high level coordinating committee which was already set up by the Government of India considering the latest increase in the cases of Dengue. The Hon'ble High Court, in conclusion, held that the said committee must carefully examine the recommendations of the Pune Conference and the World Health Organization as well and implement them at the earliest and the State must ensure that any further suggestions, directions or warnings by the World Health Organization must be taken seriously and follow the directions meticulously.

## V. CONCLUSION

In the above research, we have provided a case wise scenario as to what procedure or rights or powers have to be followed or can be followed in case of the spread of an epidemic. It is also pertinent to note that many Big Pharma companies raise the argument that patent is a "property"

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<sup>18</sup> Court On Its Own Motion v. Municipal Corporation Of Delhi, 1998(75) DLT 327

and hence they have a right of property over it. It is interesting to note that right to property is provided as a human right under UDHR, which is just a declaration and in the conventions like ICCPR & ICESCR; such right is not being recognized.

All the countries around the world are suffering from COVID-19 atrocity, and many big pharma companies are in a later stage of vaccine trials. It is imperative to note that in such a situation if all the companies and the governments work together to provide vaccine to each and every person around the world without any barriers including different ideologies, race, sex etc., then only we can fight against this disease smoothly. Otherwise, there are many other viruses which were dormant, but due to global warming, they may spread around the world and are much more lethal than COVID-19. So the choice is simple: Right to health OR right to profits. Only time can decide this choice aptly.

No doubt, non-resumption of physical hearings in courts has affected the Indian legal system. However, it is noteworthy to mention here that the Apex Court and its subordinate High Courts have been appreciated for taking up matters through the medium of Video Conferencing. The Hon'ble Supreme Court has been dealing with various issues relating to Covid-19 ranging from 'De-Congestion of Prisons' to 'Provisions for Healthcare workers' or Issue relating to 'spread of COVID-19 in Children's Home' for that matter. The respective High Courts have also been following the footsteps of the Apex Court. It is only because of an effective judiciary that the citizen's Right to Health has been upheld during the present pandemic. What remains to be seen in times to come is whether the courts in India can completely substitute the physical hearings with the present system of video conferencing without any hindrance to people's right to health?

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