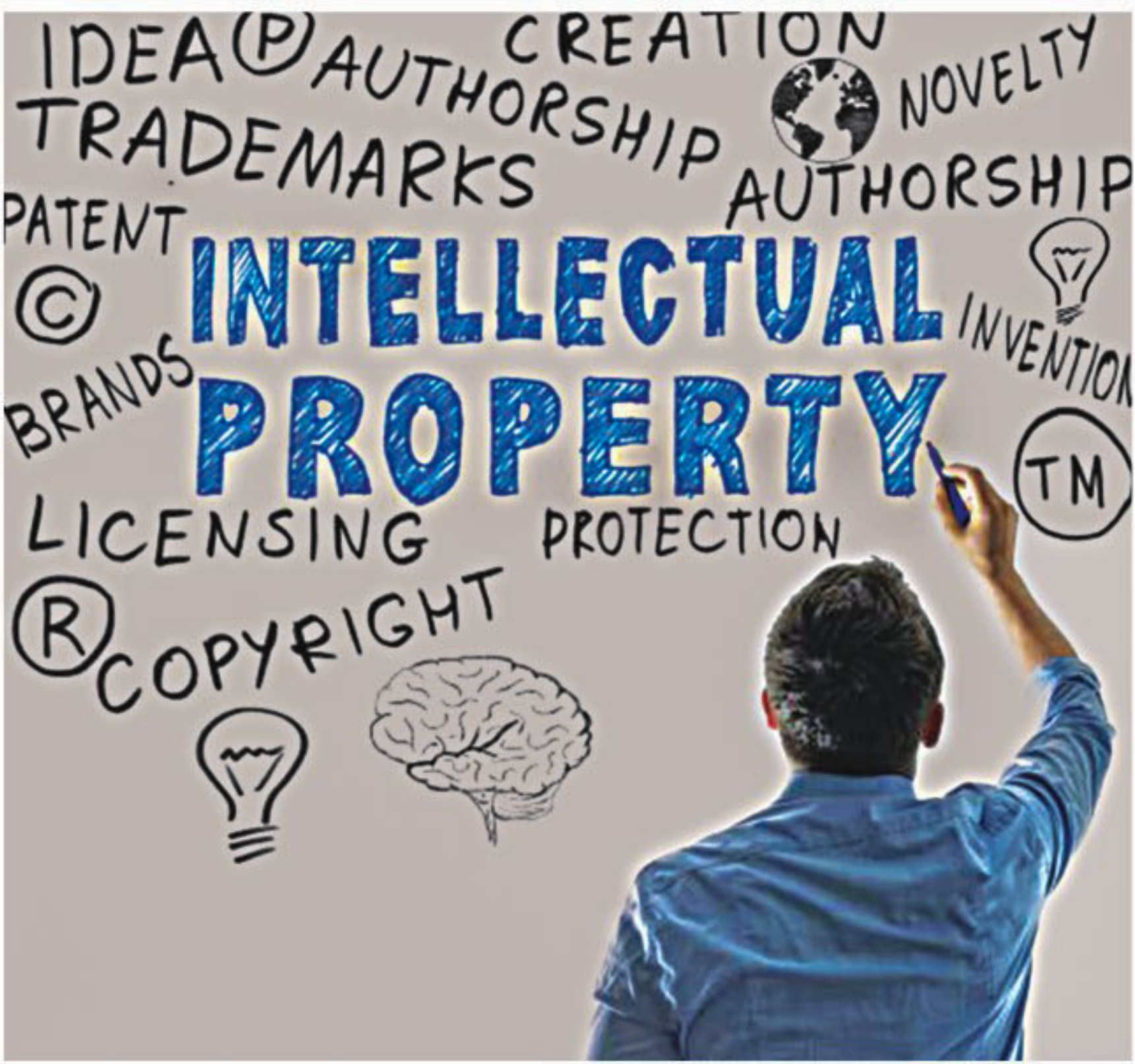


**LAW ANALYSIS**

# Human rights in IPRs regime



*IP laws encourage creativity and innovation by granting individual of monopoly rights for a certain period of time. In one way it creates opportunity for the individuals, on the other it confronts the basic provisions of human rights.*

MAZHARUL ISLAM

**I**NTELLECTUAL Property Rights (IPRs) and Human Rights (HRs) often come in conflict. Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the uniform and strict IPRs protection obligates all member countries irrespectively. Thus, the TRIPS Agreement causes concerns and challenges some important provision of human rights. Intellectual Property (IP) laws encourage creativity and innovation by granting individual of monopoly rights for a certain period of time. In one way it creates opportunity for the individuals, on the other it confronts the basic provisions of human rights. The people of the developing and the least developed countries (LDCs) are deprived from technological equipments and research opportunities. Therefore, many provisions of TRIPS are not consistent with the basic human rights instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant of Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 27.2 of the UDHR and Article 15.1 of the ICESCR guarantees creators' right to IPRs protection. On the other hand, the TRIPS Agreement defines private monopoly of individual and also advocates for protection of public health through IPRs protection. It facilitates public access through flexibility provisions.

One such flexibility is of 'compulsory licensing': *NATCO v Bayer* [2012] case from India is an example of a compulsory licensing matter. The case in brief is that Bayer's Anti cancer drug called 'Nexavar' was not a manufactured product in India and marketing it with extremely high prices was out of reach for common people. Thus, NATCO Pharma had filed the case against Bayer and won. This resulted in gaining a compulsory license on the drug leading a scope of saving many lives of cancer patients.

Another flexibility is of 'parallel importation'. Parallel imports allow a developing nation to take advantage of the common practice of differential pricing of drugs across different countries. For instance, if a package of 'X', a patented drug, is being sold at \$250 in France and at \$275 in Bangladesh; a Bangladeshi company (or the government itself) can import the drug from France and sell it at a lower price without the authorisation of the patent holder.

Further, experimental use also known as the 'bolar exception' works as a TRIPS flexibility for the LDCs. The bolar exemption provides an exception from patent infringement to the generic manufacturers from using and importing patented drugs for research and development. These flexibilities permit member countries to balance IPRs protection with HRs standards by serving the public interests.

With regard to the patent protection for pharmaceutical products, the TRIPS Agreement determines minimum protection of 20 years. This provision enables the patent holder to sale drugs comparatively at a high price for a longer period. Therefore, the TRIPS Agreement creates an obstacle to the enjoyment of a right to health as mentioned in article 12 of the ICESCR and

article 3 of the UDHR. However, the Doha Declaration of 2001 ensures that the TRIPS Agreement will not impede a member country from exploiting measures for the protection of human, animal or plant life or health, or of the environment. Furthermore, the developed countries are insisting the developing and the LDCs to recognise the TRIPS-plus obligations.

Article 27.3 (b) of the TRIPS Agreement and the International Union for the Protection of New Varieties of Plants (UPOV) Convention recognise plant varieties protection. It also extends protection from 18-20 to 20-25 years. However, 'farmer's privilege' has been excluded from these international conventions, and hence, it would surely increase the cost of farming specially for the farmers of the developing and the LDCs. Therefore, it would affect the farmers' right to food as inserted in article 25 of the UDHR and article 11 of the ICESCR.

Article 27.1 of the TRIPS Agreement states that bio-technology may be protected through patent. In case of bio-technology, most of the part is done through the process of modification of traditional knowledge. However, the TRIPS Agreement is silent for the protection of natural resources and traditional knowledge, and undermines the principles of prior informed consent (PIC), and access and benefit-sharing (ABS) as recognised by the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

Existing HRs standards and IPRs protection framework are not adequate for the recognition and promotion of the specific rights of the indigenous community across the world. Thus, it affects indigenous rights (traditional knowledge and others) as recognised in articles 2 and 6 of the ICESCR and articles 2, 14, 24, 26, and 27 of the ICCPR.

The provision for copyright protection as inserted in article 9 of the TRIPS Agreement limits reproduction and circulation of expressive works. Thus, it not only restricts the HRs interests in case of freedom of speech/expression, but also curbs the right to education - specially for the students of the developing and the LDCs.

There are diverging views as regards the question: what would be the situation, if any conflict arises between the TRIPS Agreement and the international human rights law? Some authors acknowledge that such a conflict, and they give preference to the TRIPS Agreement over the international human rights law, by mentioning article 59 of the Vienna Convention on the Law of Treaties. However, the UDHR is not in itself a binding treaty; some of its provisions have the status of customary international law. It is binding on all states except those that have clearly and persistently objected. Thus, the threshold of customary law or HRs are higher than the provisions of the TRIPS Agreement. As a result, it appears that a balance is needed between public interests (HRs) and private interests (IPRs) to ensure our right to health, food, education as well as the specific rights of the indigenous community from both the developing and the LDCs.

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**HUMAN RIGHTS RIGHTS ADVOCACY**

MD MUSTAKIMUR RAHMAN

**S**ECTION 54 of the Code of Criminal Procedure (CrPC) has given sufficient power to any police officer to arrest a person without warrant but the police can exercise the power only in those circumstances where a police officer possesses some evidence indicating involvement with the offence. Unfortunately, in most of the cases it can be seen that most of the police officers are arresting the people without collecting any reasonable indications connecting with the offence. Perhaps section 54 is the most pervasive section that is being misused by the police officers.

Fazlu Miah, a 55 years old man has spent 22 years in Sylhet central jail for no offence. In July, 1993 he was arrested from Sylhet under section 54 of the CrPC and later on he was charged under section 13 of the Lunacy Act 1912 on charge of 'wandering at large' being a man of unsound mind, officials records shows. On 15th October, 2015 he has released from the prison after spending 22 years in jail without any offence. It feels good when we know that he is free now but can he get back his 22 years of his life? Can we call this limited period of imprisonment is false imprisonment? Is false imprisonment related with our Constitution? Can he claim compensation for 22 years in jail without offence?

**What is false imprisonment?** False imprisonment is restraining a person in a bounded area without justification or consent. It is a common law misdemeanour and a tort. It is not the degree of the impris-

# LAWFUL ARREST and false imprisonment

ment that matters but it is the absence of lawful authority to justify unlawful confinement which is of relevance. To prove false imprisonment, period of confinement is necessary. In general, if the detention period is stretched for an irrational period of time than the detention may become unlawful. Fazlu Miah has spent 22 years in jail which is unreasonable at any circum-

stance. The time period is of crux while determining the aggregate of compensation to be awarded to the injured party.



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**Constitutional effect of false imprisonment**

Article 32 of the Constitution says that "No person shall be deprived of life or personal liberty saves in accordance with law". This provision clearly shows that personal liberty should not be curtailed in any wrongful manner. Given the fact, it can be said that the long

term imprisonment of Fazlu Miah without any offence was arbitrary and hence, article 32 is violated. In addition, article 21 says that person in the service of the Republic has a duty to perform public duties with discipline. If a person is facing long time imprisonment for no offence then how can we say that the public servant has performed his duty with discipline? Isn't it a violation of the

article 21 too? And any violation of article 21 attracts the provision of article 27 which equality before law. By providing arbitrary imprisonment, it shows that they are creating the situation of inequality of citizens.

Although in our country, there is no provision of claiming compensation for false imprisonment but we can see the practice in India.

In *Bhim Singh, MLA v State of J & K & Ors.* (1985) 4 SCC 677, holding illegal detention in police

custody of the petitioner Bhim Singh to be violated of his rights under articles 21 and 22(2) of the Constitution, this Court, in exercise of its power to award compensation under article 32, directed the State to pay monetary compensation to the petitioner.

In the case of *Rudul Sah v State Of Bihar* 1983 AIR 1086, 1983 SCR (3) 508, the fact was the petitioner who was detained in prison for over 14 years filed a habeas corpus petition under article 32 of the Constitution on the ground of illegal detention. The Supreme Court directed immediate release of the petitioner and directed the state to grant the damages.

Apart from these 2 cases there are so many case law examples that have given compensation for false imprisonment in India.

On the basis of the discussion above, can we say that the imprisonment was false which violated several provisions of our constitution? If so, then can Fazlu Miah claim for compensation? I think it is also time for us to think about the victim rights and compensation policies to restore the life of victims. False imprisonment is one of the torts and a form of human rights violation. Our socio-legal system is based on non-violence, shared respect, and human dignity of the individual. Personal liberty is protected under article 32 of the Constitution and cannot be abrogated without any lawful necessity and false imprisonment is incongruous of the same.

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**WRITING FOR EQUALITY**

KHANDAKAR KOHINUR AKTER

**W**Henever we think of the treatment of a girl child, in the fraction of a moment we recall the famous 'Mina Cartoon' and surprisingly the situation is quite the same in Bangladesh. As the socio-cultural environment contains persistent gender discrimination, girls face obstacles almost in every sphere of their life. They are often considered to be financial burdens on their family, and from the time of birth, they receive less attention for their health, care and education.

With the advent of puberty, differences in the ways that adolescent girls and boys are treated become much more evident. Adolescence is not viewed as a distinct phase of life; the beginning of physical maturity is rather seen as an abrupt shift from childhood to adulthood. At youth, girls' mobility is often restricted, which limits their access to education, social activities and perhaps even livelihood.

Bangladesh has one of the highest rates of child marriage worldwide, and this high rate mostly constitutes girls of 15 years. 65 per cent of female population is married off by their 18 years of age and 29 per cent by the age of 15. While the practice of child marriage has decreased in Bangladesh over the last 30 years, it is still common in rural areas and urban slums, especially among the poor where many families believe that the onset of puberty signifies readiness for marriage.

Though there have been some modest improvements in past decades, but the

# GIRL CHILD Issues to re-consider

nutritional status of girls in Bangladesh remains alarming. Almost one-third of women of reproductive age have a body mass index less than 18.5; this means they are very underweight. Even among the wealthiest quintile of society, 13 per cent of girls are underweight. Inadequate intake of food and poor diet are the primary causes of malnutrition. Anemia is a severe public health problem which is experienced by 30 per cent of adolescent girls.

Domestic violence continues to be an omnipresent problem for the security of girls; includes beating, physical assault and sexual violence etc. Moreover, Adolescent girls are often victims of 'eve teasing' or sexual harassment and are not prepared to face such situations. The violence can also take the form of acid attacks. Miserably to add, suicide is also common among girls aged between 14-17 years. The Bangladesh Health and Injury Survey reported that about 1500 girls committed suicide due to eve-teasing in recent years.

In education sector, we still have not been able to reach out to nearly 10 per cent of our female population. The exclusion of nearly 1.5 million girls can be construed as a violation of the fundamental and basic right of education for every child.

Being a signatory of Conventions on the Rights of Children (CRC), Bangladesh is under obligation to eliminate discrimination of all kinds among children. Article 2 paragraph 1 of the CRC provides that States should respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. Children Act 2013 was passed to ensure overall protec-

tion of the children and their rights. But the National Child Policy 2011 specially addressed that the following steps should be taken to remove or eliminate the existing discrimination between a male and a girl child from our socio-economic perspective:

- Necessary rights of the female child shall be ensured for proper development of their physical and mental health.
- All discriminatory behavior towards female child shall be eliminated and gender equality in the family shall be ensured.
- Regular attendance of female children in educational institutions shall be ensured.
- Necessary arrangements shall be ensured so that the female children do not victimize of any sexual harassment, pornography and physical and mental abuses in various situations such as in the streets including inside educational institutions.
- Safe and quality recreation, sports and cultural practice facilities shall be ensured.
- The elimination of discriminatory attitude to disabled female children and safety in all areas shall be ensured.

Nevertheless, education, eradication of poverty and the meaningful participation of girls are key factors in breaking the cycle of discrimination and violence. Moreover empowering girls requires their active participation in decision-making processes. Their active support and engagement with the state, parents, families and other care providers can bring positive changes in our society.

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**GLOBAL LAW UPDATES**

# The prosecution of a prosecutor



**A** former Texas prosecutor who won a conviction that sent an innocent man to prison for nearly 25 years, agreed on Friday, 16 October to serve 10 days in jail and complete 500 hours of community service.

The former prosecutor Ken Anderson also agreed to be disbarred and was fined \$500 as part of a sweeping deal that was expected to end all criminal and civil cases against the embattled

ex-district attorney, who presided over a tough-on-crime Texas County for 30 years.

Anderson faced up to 10 years in prison if convicted of tampering with evidence in the 1987 murder trial of Michael Morton, who wrongly spent nearly 25 years in prison.

"In a case like this, sometimes it's hard to say what meets the ends of justice and what doesn't. There is no way that anything we can do here

today can resolve the tragedy that occurred in these matters," Judge Kelly G Moore said while prosecuting Anderson. "I'd like to say to Mr. Morton, the world is a better place because of you."

Anderson has previously apologized to Morton for what he called failures in the system but has said he believes there was no misconduct.

Anderson accepted the plea deal in the same Williamson

County courthouse where he later spent 11 years as a state judge. He resigned in September.

Since being freed from prison, Morton has become a visible embodiment of problems in the legal system in Texas, which leads the nation in prisoners set free by DNA testing - 117 in the last 25 years. Earlier this year, the former Republican Chief Justice of the Texas Supreme Court urged lawmakers to act on the issue.

In an unusual move, the plea deal bundled a resolution to both criminal and civil cases against Anderson. The State Bar of Texas had accused him of professional misconduct in the Morton case, while a Special Court of Inquiry pursued the felony charges this year.

COMPLIED BY LAW DESK (SOURCE: THEGUARDIAN.COM)