Book Review: Patents, Human Rights, and Access to Medicines. Emmanuel Kolawole Oke. Cambridge University Press, 2022

By:

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The debate between pharmaceutical patent rights and the right to access affordable medicines has a long and recurring history- from its prominence in the fight against HIV/AIDs in the early 2000s to the present moment where vaccine inequality and health nationalism have plagued the fight against COVID-19. A number of measures are often proposed to mitigate the effects of exclusive patent rights on public health. These include: (1) pragmatic approaches that support the development of local pharmaceutical industries in developing countries, and (2) legal reform-oriented approaches that aim to abolish patents in favor of prizes and rewards, or to weaken patent rights by promoting pro-human rights interpretations of intellectual property laws.

In “Patents, Human Rights, and Access to Medicines”, Emmanuel Kolawole Oke provides a comprehensive and accessible analysis of how developing countries can secure access to affordable medicines and preserve their patent policy space by incorporating “a model of human rights into the design, implementation, interpretation, and enforcement of their national patent laws.” While many scholars have endeavored to show how human rights and pharmaceutical patent rights can co-exist as a matter of theory, Oke’s book provides an additional step that is not only grounded on history, theory, and international politics, but also includes a systematic analysis of national contexts, and specifically how national courts in developing countries can/should interpret their national laws in favor of the right to health. Through examination of a series of court cases from Kenya, South Africa, and India, Oke develops a two-step approach to the incorporation of his *model of human rights* into pharmaceutical patent law adjudication: the first step involves the *recognition* of the conflict between patent rights and the right to health, while the second step involves a *resolution* of the two by “distinguishing between the fundamental nature of the right to health and the regulatory nature of patent rights” (p. 112).

Before delving into the three case studies, Oke gives a historical analysis of the development of the global patent regime under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and in particular the shifts that have affected developing countries’ patent policy space and access to affordable medicines. This history, which includes the global politics of intellectual property law, will prove extremely useful for readers interested in understanding the drafting history of key international documents that changed the trajectory of the global patent regime such as the “Doha Declaration on the TRIPS Agreement and Public Health” that was adopted in November 2001, and the Draft Ministerial Declaration that preceded it. Equally important is that this history shows how developing countries struggled to reshape the TRIPS Agreement that was radically unequal at the time, and arguably still is.

Leaving no stone unturned, Oke builds the foundations for the *model of human rights* in pharmaceutical patent adjudication by conducting a theoretical examination of the relationship between patent rights and human rights. This examination includes, first, a normative explanation for the justification of

patent rights in Chapter 2, and thereafter, an analysis of how the relationship between pharmaceutical patent rights and the right to health ought to be construed in Chapter 3. He takes what is known as the "socio-centric theory of invention" under which invention is not a sole activity but one that results from inventors and the repository of knowledge that already exists in a given society. According to Oke, the fact that inventions are socio-centric presupposes that patent law should also be user-centered rather than creator-centric. In turn, viewing patent laws as user-centered means designing, interpreting and implementing patent law in a manner that takes into account the interests of users of inventions, and not just inventors and corporate actors. In the case of pharmaceutical patents, this includes patients and generic drug manufacturers. After examining key theoretical justifications for intellectual property rights, Oke finds that only Shubha Ghosh's regulatory theory of intellectual property is amenable to the socio-centric view of inventions. He builds on this theory by proposing an additional lens through which patent rights should be regulated i.e., *the model of human rights.*

In Chapter 3, Oke examines how the relationship between patent rights and the right to health ought to be construed. He takes on the often-made argument that patent rights are human rights by virtue of Article 15(1)(c) of the International Convention on Economic, Social and Cultural Rights (ICESCR) and Article 27(2) of the Universal Declaration of Human Rights (UDHR) both which recognize the right of a person 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". After a thorough evaluation of the drafting history of these provisions, Oke concludes that patent rights are not fundamental human rights as they are only one of many possible methods for protecting the material interests of intellectual workers. Thus, patent rights should never be interpreted in a manner that supersedes the right to health.

Having provided a theoretical underpinning of the *model of human rights*, Oke conducts case law analysis in Kenya, South Africa and India in which he shows how courts applied or failed to apply the model in their adjudication of pharmaceutical patent disputes, and how these decisions impacted either the domestic application of TRIPS flexibilities or access to affordable medicines more generally. In the Kenyan chapter for instance, Oke shows how failure to apply the *model of human rights* in a patent infringement case foreclosed the

opportunity to provide much needed generic drugs for the treatment of opportunistic infections in HIV/AIDs patients. In the case, *Pfizer Inc v Cosmos Limited at p. 106*, Cosmos had imported medicines containing the patented product to Kenya from India, Bangladesh and China, where they had authorization to manufacture the patented product. They further argued that Kenya's Industrial Property Act allowed for such parallel importation; that Pfizer had renewal fees on their patent, and that the said drug was also listed by the World Health Organization as an essential medicine. Despite this, Pfizer won its patent infringement case. Oke uses this case to demonstrate the dangers of intellectual property fundamentalism and shows how the two-step approach of recognizing and resolving the tension between the right to health and patent rights could have changed the trajectory of the decision. He makes the same conclusion in the South African case of *Pfizer v Cipla Medpro at p. 127*.

In other cases, he shows how the application of the model of human rights led to legislative interpretations that were more in tune with the right to health and access to affordable medicines in particular. In the Kenyan case of *Ochieng v Attorney General at p. 109*, Oke demonstrates how the Court incorporated the *model of human rights* in interpreting the definition of the term "counterfeiting" under Kenya's Anti-Counterfeit Act and its conclusion that the definition was so expansive that it could erroneously include generic medicines. Similarly, in an Indian case, *Natco v Bayer at p. 153*, Oke shows how the model of human rights was applied to determine that the price of a patented drug was not "reasonable" as required by India's Patents Act. Thus, a compulsory license was granted to enable production of cheaper generic drugs.

These decisions provide valuable lessons to courts determining pharmaceutical patent disputes across the world. While not the emphasis of the book, it is also apparent that transformative constitutions have a great role to play in realizing the right to health, which underpins the right to access affordable medicines. All three jurisdictions under study have a tradition of transformative constitutionalism i.e., "a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction." This arguably enabled them to expansively interpret the right to health or the right to life in the case of India, and the impact of patent rights on social welfare.

I credit this book with providing an extremely thorough analysis of the relationship between pharmaceutical patents and human rights and moving us forward to an understanding that will undoubtedly improve access to medicines if applied. It will no doubt prove invaluable to policy makers, judges, legislators, activists, governments, students, and the general public.

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