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

By:

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Equitable access to medicines and vaccines are key determinants of a country's resilience to emerging health threats. As the world tries to figure out how to live alongside the SARS-CoV2 virus with the constant threats of emerging variants and new waves, several challenges remain globally for the supply of and access to medicines. For example, the AIDS drugs access crisis, which highlighted the challenges in accessing lifesaving medicines and vaccines. People all over the world are affected by the crisis which is a result of either unavailability or unaffordability.

Further, the way Covid vaccines were distributed, showed a clear divide in access to vaccines between high income countries and low-income countries. Fewer than 20%, in some cases less than 5%, of lower income countries have

received one dose of the COVID-19 vaccines, whereas higher income countries have not completed booster vaccination of more than 80% of their population but are now considering a fourth dose for certain groups. It is a disturbing fact that COVID-19 vaccines could be developed in less than a year alongside fostering extreme access inequalities.

It is in the backdrop of this reality, Emmanuel Kolawole Oke's book on Patents, Human Rights, and Access to Medicines serves as an important and insightful read. Through a detailed discussion of the interface between patents, human rights, and access to medicines, Oke emphasises the need for incorporating a human rights model into the national patent regime. For doing so, Oke follows the case of three countries: Kenya, South Africa, and India.

This book is built on Oke's doctoral research from the year of 2015. The very fact that, seven years later this area of research continues to foster debate and action, highlights the value of writing this book.

In the introductory chapter, Oke looks at the problems faced by developing countries while accessing affordable medicines, the changes in availability of patent policy space, the history and explains the roadmap for rest of the book. In doing so, he establishes the link between the patent policy space and access to medicines. Globally, patent regimes of different countries play a major role in access to medicines of developing and underdeveloped countries. While there exists considerable literature on the relationship between patent policy space and access to medicines, Oke's work stands apart. This is perhaps the first book which comprehensively describes and unpacks the concept of "policy space". Oke defines this term and explains its emergence from the United Nations Conference on Trade and Development in Sao Paulo consensus document of 2004. Oke further discusses the how there has been shrinkage in the overall policy space for intellectual property law; specifically, with respect to the access to medicines for developing countries. Oke also points out how World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides for flexibilities that can be used by the developing countries in securing better access to medicines. However, he is mindful of the fact as to how developing countries face immense economic and political pressure from developed countries around the application of the flexibilities provided under TRIPS Agreement. Professor Abbott explained such

challenges. He explains that when developing countries attempt to issue government use or compulsory licenses, even for AIDS medicines, sustained political pressure from countries where pharmaceutical companies are based has had a substantial dampening effect on use of TRIPS flexibilities by the developing countries. Oke makes a compelling case for developing countries to incorporate a model of human rights into their national patent law systems arguing based on the TRIPS and Doha Declaration. The introductory chapter concludes with a nuanced justification for choosing India, Kenya, and South Africa as the case studies for contending incorporation of a model of human rights into the national patent law system.

Oke examines the appropriate theoretical justification for granting patent rights. While he discusses the major theories such as that of Lockean theory, the Hegelian theory, the Utilitarian theory, and the Regulatory theory, this chapter is largely built on Subha Ghosh's discussion of creator centric and socio centric theories. Oke convincingly contends that to improve access to medicines for developing countries it is important that patent laws are justified on the basis of socio centric theory rather than the creator centric theory. In contending so, he examines which of the abovementioned theoretical justifications imbibe the socio centric approach to patent protection.

In Chapter 3, Oke answers two key questions. Firstly, if patents rights are human rights, and secondly, whether incorporating a human rights model is compatible with TRIPS Agreement. In answering the first question, the analysis deep dives into the relationship between patent rights and right to health under international human rights law. Oke further analyses Gold's three conceptual approaches: subjugation approach, integrated approach, and the coexistence approach to concretise his arguments relating to relation between patent rights and human rights. To answer the second question, Oke critically analyses the provisions under TRIPS Agreement. In doing so, he provides an almost "how-to guide" approach to capitalize on the flexibilities available under TRIPS Agreement to ensure that patent rights are not in contrast with enjoyment to right to health and right to access to medicines. This approach advanced by Oke is a necessity in considering how negotiations enforcing of TRIPS-plus standards in bilateral and multilateral treaties strengthen patent protection which in turn negatively impact the purchasing power and access to medicines.

While examining the patent law system of Kenya, South Africa, and India, Oke discusses the different decisions by the courts in these countries to offer an insight as to how the countries are or are not incorporating a human rights model into their national patent regime.

Explaining the situation in Kenya, Oke contrasts two decisions by the Kenyan courts in the case of *Pfizer v Cosmos* and *Ocheing v Attorney General*. While one decision balanced the rights of patentees against right to health and access of medicines, the other decision tipped the scales overtly in favor of the patentees against right to health. Oke analyses the decisions to highlight how the model of human rights was eventually incorporated by the Kenyan High Court. Kenyan Constitution considers both intellectual property rights and right to health as human rights. Considering this, Oke makes a commendable recommendation on how one of Gold's approaches (discussed previously) can be used bring a balance between rights of patent holders as against right to health.

In studying South Africa, Oke provides a detailed discussion on right to health, and the lacunas in intellectual property policies which could impede the enjoyment of right to health. In doing so, he explores the "reasonableness approach" followed by South African courts while approaching the subject of right to healthcare. While South African Constitution does not elevate status of intellectual property rights to that of human rights, the Courts have been reluctant at places to let right to health trump over right of patentees. The South African courts nevertheless pave the way for Oke's prime argument that incorporating human rights model will not absolutely abrogate the rights of patentees.

Right to health is a fundamental right under the Constitution of India and subject of health finds mentions under the part of Directive Principles of State Policy chapter of the Constitution. Oke rightly discusses in detail, the expanded reading of contours of right before delving into history of Indian patent law and decision of Indian courts over the years. From the numerous cases that have discussed the right to health, Oke has successfully churned out the landmark cases which have settled the contour of right to health. From an Indian perspective, the *Novartis AG v Union of India* (Novartis case) was an impactful judgement in the realm of improving access to medicines. The judgment served

as a reminder to world as to why India is dubbed as “pharmacy of the world”. Starting his analysis with the *Novartis case* and the cases that were presented before different Indian courts and tribunals, Oke drives his point home as to how patent policy space can be preserved to incorporate a model of human rights and at the same time also strike a balance between rights of patent holders and right to health.

Oke’s book follows a pragmatic approach throughout to convince the readers that patent rights can co-exist with right to health and in fact, that the States can and should incorporate a model of human rights in their national patent regimes. Throughout the book, Oke maintains a fine balance between discursive and citational footnotes, giving the readers ample insights into arguments from the cited research. This book is a must read for students and researchers working with the interface of intellectual property rights and human rights. Policymakers reading this book would gain an insight on how national patent regimes could incorporate a human right model without stepping over the rights of patent holders.

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