'Brazil: The Juridical State' - Review of Amaka Vanni's Patent Games in the Global South

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"*Health is democracy*". Sergio Arouca, inverting the re-democratization slogan "democracy is health", 8th Brazilian National Conference of Health, 1986

Brazil's relation with intellectual property (IP) since the 1990s has been deemed a bold, if ambiguous, attempt to introduce public health and development concerns into IP policies. Its long-standing role as an access to medicines “champion” across international organizations contrasts with the rapid and unbalanced implementation of the TRIPS Agreement in the country, when a new industrial property law was approved in 1996. A deep social mobilization led to the creation of a universal and free public healthcare system (SUS) and the right to health by the 1988 Constitution, but these are at least partly

countered by a remaining sheer inequality in healthcare, persisting high prices of medicines and a recurrent pattern in judicial health litigations that tends to benefit richer echelons of society.

In the chapter “Brazil: The Juridical State” of her award-winning book "Patent Games in the Global South", Dr. Amaka Vanni offers a comprehensive analysis of the subject that fills some of the recurrent gaps in this literature and attempts to make sense of these contradictions. It pays attention to the political economy embedded in the implementation of TRIPS in Brazil and the colonial origins of IP in the country; addresses the consequences of specific IP norms such as patent term extensions (Article 40, sole Paragraph, Industrial Property Law); takes into account the inter-relation with public health policies and social movements since the 1988 Constitution; explains the crucial role of the Judiciary and civil society for Brazilian politics and for the implementation of public policies; and addresses the mismatch between the country's international organization's stance and some of its national policies. For example, it notes the early 1990s unstable political context in Brazil, which have (justifiably) concentrated all civil society efforts towards ensuring political accountability and the re-establishment of democracy, could be an important explanation why there was little objection from civil society against the Industrial Property Law adopted in 1996. In my view, the chapter provides a remarkably clear synthesis - rather than a mere summary -, as it offers important insights in the interaction of broader socio-economic processes, the specificities of legal norms and judicial rulings, and the various political entanglements in Brazil´s patent policies.

More broadly, the chapter provides an account of the pivotal role of politics and social mobilization with regards to law and social change in developing countries, and how legal institutions and tools have become a central field of contemporary political disputes in many such countries - a process that is always surrounded by paradoxes, unfulfilled promises and shortcomings. Law, particularly in Latin America constitutionalism, has been understood to be a possible channel of social transformation; it has similarly been regarded as a legitimizing tool of centennial economic and political elites' power. The example of IP law and health in Brazil as per described by Vanni serves as a complexifying argument for the discussion, given the multiple paradoxes of the experience - both "transformative" and "regressive", both uniquely savvy in

terms of adjusting international obligations to national laws and reaffirming of existing macrostructures of power imbalances. The "health-oriented" patent examination (Vanni, 2020, p. 105) in Brazil is necessarily a piece of this ampler and sometimes paradoxical setting.

A central point highlighted in Vanni's analysis comes in the title of the chapter itself, “the Juridical State”. Brazil's social and political conflicts are for the most part moderated, and often even defined, by the role of courts. Hence, this centrality of the Judiciary in legal-political disputes is an unavoidable aspect of the analysis (and particularly as this was perhaps not always the case in the country's history). In IP and health policy, the influence of the Judiciary is crucial, where certain courts may take decisions on the validity of pharmaceutical patents - directly affecting conditions of competition and access to medicines - and superior courts may decide upon the constitutionality of aspects of laws and regulations that may either legitimize or fully impede the implementation of public health policies in IP matters. Vanni´s chapter distils some of such legal disputes, including the political background and the various interests involved in each of them, which provides an overview of how the construction of IP law, as much as the “patent games” in Brazil, have become a complex web of legal arguments and advocacy simultaneously. Her examination of the processes that led Brazil to amend its patent law to include the participation of the sanitary regulatory agency ANVISA in pharmaceutical applications (a clear health-oriented patent policy in parallel with the creation of a broad generics policy), and its multiple discontents later on, which finally led to a drastic reduction of its role, highlights both the merits and the caveats of this approach.

But in particular, it is the involvement of judicial courts that perhaps comes as the most striking feature. For instance, the Supreme Federal Court´s pipeline patents (a system whereby foreign patents could be deposited and recognized in Brazil without substantial examination of the patentability criteria) constitutionality ruling is still pending after almost 20 years of discussions. As of now, such patents are already expiring, which renders a legal decision much less relevant from both an economic and health perspective. Vanni´s chapter is clear in denoting that courts are not intrinsically against or pro the implementation of health-oriented patent policies in Brazil, but stresses their role as active players, whether they acknowledge it or not.

In addition, the comparative analysis between global south countries - Brazil, India and Nigeria)- in the book highlights that industrial policy and health cannot be detached. Brazil's amendment to the patent law in the 1970s, which had excluded pharmaceutical and chemical products and processes from patentability, was a clear industrializing policy. It paved the way decades later, as noted by Vanni, for the adoption of a “health-oriented” patent policy. It somehow presupposes the sufficient industrial conditions to ensure access and reduce dependency on foreign pharmaceutical imports. Without industrial capacity - which is the reality for the vast majority of the global south, particularly LDCs, the leverage power and the policy space of countries is extremely limited. Amid the Covid-19 pandemic, the crucial role of public institutions such as Fiocruz and Instituto Butantan, who are partners for clinical trials of Covid-19 vaccines, is elicited. The major investments in industrial repurposing and transfer of technology are currently being done in order to (hopefully) ensure access rapidly and at low costs. What would be the case in the absence of such institutions and an industrial generics park is a necessary reflection to keep in mind in light of current de-industrializing pressures.

Vanni's theoretical background for her book, Third World Approaches to International Law (TWAIL), broadly highlights attempts to promote health in patent laws and policies in a context like Brazil are necessarily limited by the pressures of an unequal system that places the Global South under multiple constraints, and perhaps under a mental scheme that simply "believes" too much in the very notion of development. Yet, when HIV/AIDS activists in Brazil decided to engage with a highly specialized topic such as IP litigation, their activism "signified TWAIL in practice" (Vanni, 2020, p. 100). If there is some truth in the idea that Brazil managed to become a positive example in IP and public health, the chapter also reminds that this unavoidably came as a result of social and legal advocacy. The chapter can as such be read as a concrete example of some of the prospects of many scholars associated with TWAIL: produce a critique of law without necessarily disregarding it, and identifying some of the potentials therein. This to a certain extent shows that the historical swings in the canonical balancing of patent law - the adequate middle ground between private and public interests - are more contested and open-ended than expected at first, even in a country of such profound power and material inequalities such as Brazil.

To conclude, expectations of a deepening of a health-oriented patent policy, such as those described by Vanni at the end of her chapter (e.g. new IP laws, industrial policies and public-private partnerships), have in a sense disappeared. Brazil was portrayed as a “new developmental State” from the 2000s until the mid-2010s, but the political momentum has dramatically changed since. Brazil faces a deep economic and political crisis, a government that explicitly adopts a policy of proximity with the United States (including its stakeholders) and a liberalizing economic policy, at least in theory. These elements, although not dramatically, change the understanding of the country towards intellectual property and patent policies. Would this be another round of low resistance to IP reforms that will probably not consider public health implications, such as in the early 1990s? Or will the expertise and accumulated knowledge, particularly from civil society organization, be a strong enough counterbalance so that Brazil remains, at least in a sense, an overall positive example of how to retain its health-oriented patent model? In short, will it still be the case that Brazil "is not interested in a patent system that does not support health policies'' (p. 104)? The exact answer seems to remain open. It does however further prove the overall argument of Vanni’s chapter, and calls for the need of a continuous engagement with “patent games” at all times.

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