Review of Chapter 5 on India: From Little Acorns to Mighty Oaks

By:

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Review of Chapter 5 on India: From Little Acorns to Mighty Oaks (from *Patent Games in the Global South: Pharmaceutical Patent Law Making in Brazil, India and Nigeria*, Hart Publishers)

Introduction

In “Patent Games in the Global South”, Dr Vanni examines the varied frictions and politics at the centre of IP and public-health conflicts across three countries spread across the three continents of the global south - Brazil in South America, Nigeria in Africa, and India in Asia. In particular, the book expounds on the histories and relationships between different state and non-state actors, and how this affects the conceptualisation, framing and implementation of international patent norms in national contexts.

The monograph does a great job at providing an in-depth and relatively thorough examination of these synapses in each country, tracing their journeys from colonisation through to the present day. To this reader, the on-site nature

of the research behind the monograph (specifically, the 50 plus interviews over the three countries) attaches special relevance to this work, given the vast undocumented or invisibilised knowledges present within local actors in each of these countries, that routinely get white-washed or ignored in scholarship. In a similar manner, it was a pleasant change to see that a significant portion of the scholarship cited also originated from authors from these countries.

While the book is theory heavy and clearly geared towards an academic audience, it is written in a manner that should be accessible to most readers interested in this topic. The author uses a complementary set of theoretical lenses to examine the actors and their actions/paths in pharmaceutical patent law making in these countries:

a. the TWAILIAN lens (Third World Approaches to International Law) to (i) provide critical discourse around the universality of IP and (ii) the ever-maximising nature of global patent norms; and

b. the lens of Nodal Governance theory, to highlight (i) the inner workings of local law making and governance (nodal networks and super-structural nodes), (ii) the varied tactics involved in activating private and public assemblages within the state structure, and (iii) the ability to (re)frame contentious issues in manners that change the power dynamics in policy making.

The author successfully wields these theoretical tools to provide a compelling overarching narrative regarding the resistances to the mirroring of ‘the international’ pharma patent norms in the local governance contexts. In particular, she highlights the trifecta of active law, strong private sector engagement, and a robust civil society, for the emergence of a ‘successful’ (i.e., development agenda friendly) patent regime.

India chapter

This chapter, like much of the book, is exceptionally well researched, and brings seemingly unconnected developments neatly within the overarching narrative mentioned above. The author’s focus on how international law affects the ‘mundane’ everyday life, and vice versa, allows (or perhaps requires) her to examine much more than just the oft over-discussed ‘hot topics’ (i.e., compulsory licenses and patentability criteria) of the Indian pharma-patent

landscape. She starts her exposition by looking at the colonial origins of patent laws enacted in India between 1856 - 1911, and their effective gate-keeping function in keeping indigenous development stunted. She then runs through the reader through Independent India's most impactful patent law report - the Ayyangar Committee Report (1959), as well as its less impactful predecessor, the Tek Chand Committee Report (1950). Both these reports were crucial in reframing patent law as not just the grant of private rights but also tools for development that needed to be contextualised to the socio-economic realities of the country.

At this juncture, the author's dual lens approach brings forth some important points that are often glossed over in much of the patent law literature, for the simple fact that they are not directly related to patent laws. For example, Dr Vanni highlights the non-obvious role of the architects of the "Bombay Plan" (who were leading industrialists and technocrats of the times) in the changing attitudes towards industrial development (and thus pharma and patent policy) in the country. As is well known, the 1970s Patents Act (which disallowed 'product patents') was crucial to the development of India's giant generic pharmaceutical industry today. And the generic pharma industry is largely responsible for the drastic change - from India having some of the highest drug prices in the world, to India becoming known as the pharmacy of the developing world. However, the other governmental policies were just as crucial to this germination - including investment in local manufacturing firms and overall relevant scientific infrastructure, as well as in creating a skilled human capital for the pharmaceutical sector. Though never officially adopted, the Bombay Plan and its architects had set the tone and tenor for many of these government policies. Significantly, it also led to close industry-governmental interactions, regarding the business class' aspirations for India's economic development. Many of these industry - government relationships were also crucial later on, such as when the Indian Drug Manufacturers Association (IDMA) urged the government to oppose the inclusion of IP in the multilateral trade forum. Similarly, Dr Vanni contextualises India's resistance to the presence of IP in the multilateral trade framework, by highlighting the role of the (then-present) New International Economic Order (NIEO) in bringing issues of North-South inequity in development, to the international stage.

Dr Vanni's focus on the earlier mentioned trifecta (law, industry, CSO) also brings to the forefront the importance of collaborations and multi-site actors such as BK Keayla, a former bureaucrat in the Finance Ministry, who headed the National Working Group on Patent Laws (a CSO), as well as an executive at Ranbaxy (a large generic pharma company). At the same time, Dr Vanni takes note of the intra-sectorial oppositional forces, such as the association of foreign based pharmaceutical companies (OPPI) vis-a-vis generic pharma bodies (IDMA and IPA - both of which also do not have aligned interests). She also points to the gravitational effect that the TRIPS negotiations had on bringing civil society interests together. From academics to activists, lawyers to patient groups, civil society was abuzz with activity in varying degrees of protest during and after the negotiation of TRIPS. Though not made explicit in the text, the 'territoriality' of some of these varied positions also often led to more vigorous claim-staking. Nonetheless, as a whole, these activist and advocacy movements have played a large role in the retention of public health safeguards in domestic law, and the formulation of policy positions at the international level. The fragmented spaces and positions within both civil society as well as the industry, continues to significantly contour discussions and shape the counter-hegemonic responses at the domestic as well as international levels.

For uninitiated readers, Dr Vanni also provides a walk-through of the key issues in Indian patent law. These have been well documented in much of the literature, and the author does a good job at touching upon the key concerns. Importantly though, she also points to 'newer' concerns that indicate there may be increasing 'internationalisation' of domestic (and traditionally more counter-hegemonic) norms, driven by the desire to compete in the global marketplace. As she points out, these can be seen in seemingly benign activities such as injunctions, voluntary licensing, and M&A activity.

The rise of the use/grant of ex-parte and interim injunctions - remedies that are meant to be used sparingly - is indeed troubling as it points to potential misuse/abuse of enforcement mechanisms and/or relative success in 'gaming' the judicial system. This affects not just the defendant parties (often generic pharma companies) but also the larger public interest, for whom access to medicines is denied or delayed on the basis of these actions. New dynamics between domestic pharma and big pharma are being formed due to the increasing opportunities for generic pharma companies to access richer

markets outside the country. Aside from leading to a chasm in the generic pharma - CSO relationship, this is also leading to voluntary licensing (which could otherwise be seen as a way of increasing access), being ‘wielded’ in a manner which instead of increasing access, actually subverts ideal usage of TRIPS flexibilities.

The chapter concludes by touching upon (perhaps, too briefly) the somewhat more recent phenomenon of domestic pharmaceutical firms being acquired by larger foreign firms and the potential impact that may have on the impact and independence of indigenous firms to push forward counter-hegemonic norms. Poignantly, if there is a singular key take away from this chapter, it seems to be that a patent regime wherein most if not all the key stakeholders are informed, (relatively) resourced and unhappy, then it is one that seems to be good for the continued development of said regime!

Finally, it is worth revisiting an earlier point regarding the significance of the fieldwork interviews conducted for the research here. In India, like many developing countries, there is inadequate documentation of much of the knowledges and experiences of the on-ground actors, including regarding their interactions with the law making and influencing process. This book brings in perspectives from several very key players from the Indian Pharma-Patent landscape including Justice Prabha Sridevan, Biswajit Dhar, KM Gopakumar, Dinesh Abrol, Leena Menghaney, Gopakumar Nair and others. Two such interviewees, Dr Amit Sengupta from the People’s Health Movement and DG Shah from the Indian Pharmaceutical Alliance, both of whom have been seen as leaders in their respective movements, have since passed on within the last year - highlighting the significance of any and all opportunities to record and document such perspectives.

Conclusion

The selection of three seemingly disconnected yet similarly situated countries for study, results in the highlighting of contrasting features of each country’s narrative, providing further insight into how and why their current situations are what they are today. India and Brazil are both countries known for their creative approaches to addressing public health concerns vis-a-vis patent law norms. While both underwent a colonial introduction to patent law and both

were fierce opponents to the introduction of IP in the world trading regime - their paths are still noticeably different. For one, India's trade liberalisation process was notably slower than Brazil's, with policies in place to support the local pharma industry. India also was one of the few countries that took advantage of the full 10 year transition period to become TRIPS compliant, in contrast to the mere 2 years used by Brazil, which ignored the interests of the local pharmaceutical industry. Perhaps most relevant though is the internal political crisis that Brazil was dealing with during the TRIPS negotiations. In contrast to India's active civil society and cautious government, both these limbs of Brazil were 'otherwise occupied' in trying to address their domestic concerns. Nonetheless, other factors such as governmental investment into creating a strong pharmaceutical and technology base (through Central de Medicamentos - CEME) and the constitutionalisation of the right to health in Brazil, have still ensured that it is a strong global player in the pharma-patent context.

India has even less in common with Nigeria. While Nigeria too started from a colonial experience of patent laws, a very significant difference is the continued absence of 'nodal networks' (domestic pharma industry as well as CSO) among other factors, leading to patent law being seen as irrelevant. Most interestingly, despite the apparent open disregard for patent laws (to the extent that the law is still not TRIPS compliant), Nigeria has not faced anything close to the levels of international pressure that India and Brazil have - not from the WTO nor even the notorious USTR 301 process. The author attributes this to the absence of traditional countervailing forces, such as big pharma, in Nigeria. Once again, this is all neatly presented through the lens of TWAILian and nodal governance theory.

The comparative study across these three countries makes this book a strong addition to the scholarship on TWAIL and patent law, and the in-depth research and compelling narrative building through the author's dual lens approach makes this book highly recommended reading for all those interested even in primarily "mainstream" patent norms.

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