Book Review: Patents, Human Rights, and Access to Medicines

By:

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September 19, 2022

Patents, Human Rights, and Access to Medicines is a book authored by Emmanuel Kolawole Oke and published by Cambridge University Press in February, 2022. The book discusses the manner in which patent rights adversely affect access to medicines by developing countries and proposes ways to mitigate this. From the author's point of view, the current international patent rights system as embodied in the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) is too concerned with protecting the interests of innovators at the expense of all other users. In this way, the TRIPS Agreement, by introducing mandatory minimum and stronger standards for the protection of patent rights, has provided an incentive for pharmaceutical companies to charge inflated prices while concentrating their investments mainly towards diseases that affect developed countries. Further, the TRIPS Agreement has diminished the policy space available for developing countries to design patent regimes that are suitable for their developmental and technological needs and circumstances.

So as to facilitate access to medicines in developing countries, the book proposes a recalibration of the international patent rights system through the application of two tools: endorsement of a socio-centric theory as the justification for intellectual property rights (IPRs); and application of a human rights framework to resolve any tension between IPRs (especially, patents) and the right to health.

The book draws a distinction between patent systems based on a creator-centric theory and those based on a socio-centric theory. According to the author, the creator-centric view, falsely, regards an invention as the result of the sole, isolated and pure efforts and genius of the inventor. On the other hand, the socio-centric view regards inventions as mere manifestations of the efforts of all members of the society. The inventor develops his inventions from earlier inventions while using knowledge drawn from the wider society. Thus, no single person is indispensable for the realisation of any invention since inventions are part of the culture and life of the society and are inevitable once certain social conditions are achieved. Consequently, by granting exclusive rights over inventions, patent systems that are based on the creator-centric theory misappropriate and misallocate societal resources to individual persons to the detriment of other members of the society. The socio-centric theory should, thus, provide a justification for excluding certain subject matter from patentability while limiting the quantum of rights granted to innovators.

The author argues for the application of human rights norms to resolve tension between patent rights and the right to health. The tension is brought about by the exclusive rights granted to innovators (pharmaceutical companies) which they often use to maximise returns by restricting access to their inventions while levying exorbitant prices for their products and processes. The author, thus, urges developing countries to incorporate a model of human rights in the design, implementation, interpretation and enforcement of their national patent laws. The model of human rights, as discussed in the book, requires that any regulatory instrument adopted by the state must not be in conflict with the state’s international human rights obligations.

In conceptualising the application of the human rights model, the author argues for primacy of human rights over patent rights. The author offers two broad justifications for this approach.

Firstly, the author outlines the nature of the legal obligations imposed on states by international human rights law. Specifically, the author relies on article 12(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and General Comment No. 14 by the UN Committee on Economic, Social, and Cultural Rights. The author argues that, so as to meet their right to health obligations, states must mitigate the possible implications of their patent laws on the enjoyment of the right to health and ensure that patent rights are not used to deny poor citizens access to generic drugs. The state must also ensure that its various arms and organs do not adopt an approach that impedes the enjoyment of the right to health while ensuring that it meets its core (non-derogable) obligation to provide essential drugs as defined under the World Health Organisation Action Programme on Essential Drugs.

Secondly, the author argues that patent rights, are not human rights under international human rights law. That there is no single international instrument that recognises patent rights as a human right. That patent rights merely constitute a regulatory tool for granting exclusive rights to creators and must give way where they run into conflict with the right to health. The author develops this argument further by cautioning developing countries against treating patent rights as a form of property. Relying on the regulatory justice theory of IPRs as developed by Shubha Ghosh, the author argues that intellectual property should be viewed as a policy instrument that defines and regulates the grant of exclusive rights to creators without creating a species of property right that enjoy protection as a human right. Shubha argues that, intellectual property laws should properly be concerned with regulating creative activity instead of focusing on material things which can be acquired and managed.

In chapters 4, 5 and 6, the author illustrates how courts in Kenya, South Africa and India have utilised the human rights model to resolve tension between patent rights and the right to health. However, this book review does not cover chapters 5 and 6 of the book.

Patents, Human Rights, and Access to Medicines makes an important contribution to the never-ending debate on how patent rights can undermine the right to health and what avenues remain available for developing countries to mitigate against this. Specifically, the use of case studies provides a useful

illustration to developing countries on how they can use the flexibilities within the TRIPS Agreement to safeguard their policy space and to promote access to medicines for their people. In this regard, I strongly recommend it to policy-makers and civil society actors in their endeavours to promote the right to health. However, I wish to highlight the following weak points in the book.

First, the book seems to proffer the wrong prescription for its diagnosis of the problem of why developing countries do not utilise the flexibilities within the TRIPS Agreement for promoting access to medicines. In the author's opinion, the major contributor to non-use of the flexibilities by developing countries is political pressure from industrialised countries. A stronger normative framework based on human rights is unlikely to resolve this practical challenge. Perhaps, hints to developing countries on how to deal with political pressure as they utilise the flexibilities would have been more useful. Indeed, the author's own illustration in the controversy relating to the introduction of a special regime for parallel importation of medicines in South Africa through the Medicines and Related Substances Control Amendment Act of 1997 shows the potential for using public-spirited stakeholders to respond to legal and political pressure by rallying them against wayward conduct by governments and pharmaceutical companies.

Second, on the relationship between patent rights, human rights and access to medicines, the author creates a false dilemma. To begin with, there is no guarantee that abrogating patent rights would automatically lead to price reductions or that lower prices would resolve access to medicines problems in developing countries. This assumption ignores other barriers like weak physical, medical, financial, political and administrative infrastructures and the structure of the economy. Further, abrogating patent rights is not the only mechanism available to states seeking to comply with international human rights obligations on access to medicines. Other available mechanisms that could be used to lower the prices of medicines include: encouraging more investments in the local pharmaceutical industries; use of tax incentives and carrying out competitive procurement processes when purchasing medicines.

Third, chapter 4, which discusses application of the human rights model in Kenya is based on the wrong interpretation of Kenyan law. In paragraphs 85 and 86 of the judgement in *Patricia Asero Ochieng and 2 Others v The Attorney*

General and Another, the judge expressed her opinion on how to resolve a conflict between the protection of the rights to life, dignity and health and the right to property in the form of IPRs. In an off-hand manner, the judge declared that in such a case, the first group of rights would take precedence because they are "...far greater and more critical than the protection of the intellectual property rights". In making this conclusion, the judge appears to have suggested that IPRs can be abrogated unconditionally when they hinder the protection of the rights to life, dignity and health. This is not true under Kenyan laws.

The constitution of Kenya defines **"property"** in the following terms:

> property includes any vested or contingent right to, or interest in or arising from—
>
> (a) land, or permanent fixtures on, or improvements to, land;
>
> (b) goods or personal property;
>
> (c) **intellectual property**; or
>
> (d) money, choses in action or negotiable instruments

In article 40, the constitution provides for the right to property as one of the rights and fundamental freedoms under the bill of rights. Under article 24, the right to property, just like the rights to life, dignity and health, fall within a group of rights that can be limited. However, the article stipulates a number of conditions that must be met before a right may be limited: limitation must be made by law; and limitation must be reasonable and justifiable in an open and democratic society. Further, the constitution in its article 40 provides clarity on the limitation of the right to property. It prohibits any law that is discriminatory or that arbitrarily deprives a person of his property. Where deprivation is by the state, the constitution only anticipates: instances where acquisition is done according to its provisions; is done for public purpose or in the public interest; and is done under the constitution or an Act of Parliament providing for prompt payment of just compensation and granting right of access to a court of law. Thus, to resolve a conflict between the protection of the rights to life, dignity and health and the right to property in the form of IPRs, under Kenyan law, one

must carry out a proper analysis using the relevant laws. It cannot be taken for granted that the right to property would invariably and unconditionally give way as implied by the judge and the author. Interestingly, in the author's analysis, just like in the court's determination, there is no mention of article 24 and 260 of the constitution.

The author further relies on the case of *Sanitam Services Ltd v Tamia Ltd and Others* and *Royal Media Services Ltd and Others v Attorney General and Others* to affirm his position that IPRs are not protected under the constitution's bill of rights. The precedents are part of a long string of cases that affirm the position that where there is an alternative remedy (statutory or common law), a Claimant would not be allowed to invoke article 22 of the constitution. These simply respond to a jurisdictional question and cannot be relied upon to support the argument that IPRs are not protected under the constitution of Kenya.

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