



RESEARCH PAPER

Intellectual Property Rights and Right to Health: An International Perspective

¹Saima Butt* ²Dr. Naseem Razi

- 1 PhD Scholar, Department of Shariah and Law, International Islamic University Islamabad, Pakistan
- 2 Associate Professor, Department of Shariah and Law, International Islamic University Islamabad, Pakistan

PAPER INFO	ABSTRACT
<p>Received: February 24, 2022</p> <p>Accepted: June 9, 2022</p> <p>Online: June 11, 2022</p> <p>Keywords: TRIPS Agreement, Patent, Right to Health, International Law</p> <p>*Corresponding Author: saima.butt2010 @gmail.com</p>	<p>Right to health is protected under the international law and World Health Organization (WHO) bounds the member states to ensure the basic health facilities to its citizens. Intellectual Property Rights (IPRs) are also protected internationally under the umbrella of WTO. WTO also compels the member states to provide minimum protection to IPRs as prescribe by the TRIPS Agreement. The object of this research is to find out a middle way for the member states when conflict arises between right to health and patent protection as exclusive patent monopolies leads towards the high prices of medicines and hindered state authorities to perform its duties regarding the health of its citizens. Methodology has been applied for this research is primarily analytical and bears the qualitative aspect of the issue. This research concluded that state powers seemed to be circumscribe after the implementation of TRIPS Agreement but Doha Declaration circumvent the state powers and it is clearly elaborated in Doha declaration that whenever conflict is arises between right to health and IPRs than right to health will prevail. This research further recommends the developing countries not to indulge in FTAs which restrict the use of TRIPS flexibilities for public health.</p>

Introduction

Right to health is fundamental right of every human being irrespective of his religion, region and race. It is the basic right of every human being to be provided with appropriate health facilities whenever he needs for himself or for those to whom he cares and loves. Age, gender, race, territory, religion and political affiliation should not be barrier to access to the indispensable right of having health facilities. Every right has a simultaneous duty hence it is the responsibility of state to provide proper health facilities to its citizens. In my opinion the right to health and the right to life are interlinked, we cannot deviate the dependency of these two rights. Life means you are able to perform your duties, take a good care of your family and become a productive part of society but if you are suffer with a disease and treatment is not available to you or not affordable to you then definitely you cannot perform your duties. It is not the end that you cannot perform your duties but this is just the begging of a story that has a long tragic way. Your family suffered by your illness and you will become a burden for your family and the society. Life without appropriate health facilities is just breath in and breath out and nothing more. In short we can say that security of life or enjoyment of life cannot be completed without a good health. Good health ensures a decent and dignified life.

WHO (2021) in its report insist that the appropriate health facilities should be available to all citizens without any discrimination. Right to health is incomplete without the availability and affordability of medicines. WHO issue periodical lists of essentials medicines and it is the obligation of state to ensure the availability of these essentials medicines in their countries (p. 3). Just availability of essential medicines is not enough and it must be accomplished with affordability concern. High prices of medicines create discrimination in society which resulted in restlessness and agitation.

Right to Health under the International Law

Right to health is the internationally recognised right. Many of international agreements provide protection to the right to health. Internationally World Health Organization is specialised agency of United Nation which deals with health concerns of all around the world. It deals with the health issues from pregnancy to the old age.

World Health Organization

World Health organization is a specialised agency of United Nation. It works to promote health facilities worldwide. It has its headquarter in Geneva with six regional offices, 150 country offices and 194 member states. WHO plays an important role in improving the health system of poor countries and help them to be prepared for health threats. The goal of WHO is to provide basic health facilities to everyone, everywhere in the world. The preamble of constitution of WHO (1946) narrate right to health as “the enjoyment of the highest attainable standard of health is one of the fundamental right of every human being”(p.1). It further explains health as “a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity” (p.1).

Right to Health as the part of the International Human Right Law

Right to health has become the part of international human right law and many international declarations and treaties provide protection for right to health. Some of the important document which provide right to health will be discussed here for better understanding of right to health.

Universal Declaration of Human Rights (UDHR)

After the Second World War the Universal Declaration of Human Rights was adopted by the UNO. The purpose of this declaration was to acknowledge the rights of every human being anywhere in the world. UDHR also recognised the right to health as basic right of everyone. Article 25 of Universal Declaration of Human Rights (1948) narrates the right to health as “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”(p. 1).

International Covenant on Economic Social and Cultural Rights

International Covenant on Economic Social and Cultural Rights (1966) also recognised the right to health as a fundamental human right. In article 12 it narrates the right to health as “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (p.4)

Convention on the Rights of the Child

Covenant on the Right of the Child (1989) adopted by the General Assembly resolution 44/25 of UNO and it also discuss the right to health in the article 24 as “State parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such health services.....States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures”(p. 7)

Alma Ata Declaration

Alma Ata declaration (1978) is also a significant publication adopted at international conference on primary health care by the WHO and UNICEF. This declaration discusses right to health as basic human right and put a responsibility on the state to provide appropriate health facilities to its citizens. Declaration explains right to health as “The Conference strongly reaffirms that health, which is a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector.....The existing gross inequality in the health status of the people, particularly between developed and developing countries as well as within countries, is politically, socially, and economically unacceptable and is, therefore, of common concern to all countries.....Governments have a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures.” (p. 1)

Alma Ata Declaration also explains right to health not only as physical health but as a “complete physical, mental and social well-being”. It widens the scope of right to health and declared it as a “worldwide social goal”. It also acknowledged that this goal cannot be achieved only with the efforts of health sectors but “other social and economic sectors” should also come forward and played their part to achieve the health objectives. This declaration highlights the inequalities that exist between developed and developing countries regarding health facilities and often in one country inequality exists between different economic and social groups. All the signatories of declaration affirm that this inequality is not acceptable so government are held responsible to take appropriate measures to provide the health facilities to its citizens.

International Convention on the Elimination of All Form of Racial Discrimination

International Convention on the Elimination of All Form of Racial Discrimination (1978) also protects in article 5(e) (IV) the right to health as “States Parties undertake to prohibit and eliminate racial discrimination in the enjoyment of the right to public health, medical care, social security and social services.”(p.3)

Convention on the Elimination of All Form of Discrimination against Women

Convention on the Elimination of All Form of Discrimination against Women (1979) also narrates the right of women and their right to appropriate health facilities without any discrimination. Article 12 of the convention explain right to health in the following words “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” (p. 3)

Intellectual Property Rights and its Importance

On the other side of the picture we see that we are living in the era of ever widening rights. Intellectual Property Rights are also one of the rights which emerged as the result of progress in science and technology. Intellectual property rights are the monopolies which are given to the creators and innovators for the creation of their intellect. Any other person is not allowed to interfere with their rights. No other person can create, sell or use the invention without the due permission of creator and inventor. Purpose of these monopolies is to give confidence to the creators and inventors that they have right to utilise their invention as they think appropriate; this confidence leads towards the more research and ultimately more inventions.

Research and development cost for pharmaceutical invention is very high. According to an estimate the approximate cost of a new drug is \$800 million in America. Cost of a new drug is so high because only few chemical substances succeeded to come in the market. Only 1% chemical compositions are applies for trial on human beings (Abdulkadir 2015). Several studies are conducted to demonstrate the importance of patent on medicines. Patents are very significant for pharmaceutical industry otherwise there would be only few investments in R&D of pharmaceutical industry. Pharmaceutical patents are very imperative for the continuation of new and advance medicines of new and old diseases. Without the patent protection there would be apprehension that cost of R&D could not be retrieved hence pharmaceutical companies would invest a lesser amount.

Intellectual Property Rights under the International Law

Intellectual property rights became an important part of international discussion. It would not be wrong to say that no international debate complete at the present time without discussing the intellectual property rights. We can bifurcates the intellectual property rights into two categories

1. Copyright and right related to copyright
2. Industrial property

There are the following international documents which deals with the protection of intellectual property rights.

Paris Convention for the Protection of Industrial Property

Paris convention for the protection of industrial property was first adopted in 1883 and revised several times. Paris Convention was the first international treaty that gave priority rights to the applicant who applied in one jurisdiction and claim the same right in other jurisdictions. It also gave the provisions of national treatment that is the same treatment for citizens and others (Wolfgang E. Et al, 1990).

Berne Convention for the Protection of Literary and Artistic Work

Berne convention was first adopted in 1886 and last revised in 1971. Initially 8 countries became its member and now 177 countries adopted it (Encyclopedia Britannica, 2018). Basically Berne convention provides protection to the literary and artistic work not only in the native land of the author but in other countries as well. Berne convention provides the protection for life plus 50 years after the death of the author (J.H.Reichman,1995).

Madrid Agreement Concerning the International Registration of Marks

There are 108 contracting parties to Madrid Union (marks) assembly and Madrid system facilitates trademark owner and make the system much easy. It is not an easy task to file application in different countries, using different languages, observe different procedures and deposit multiple different fees. International registration make it more easy by one application, by using simple language and just paying one fee one can enjoy the protection (WIPO, 1989).

WIPO Convention

In July, 1967 the draft of WIPO Convention was signed and in 1970 it enforced. International Bureau which was established under the Paris and Berne Conventions replaced by the World Intellectual Property Organization through the WIPO Convention. WIPO ensures the protection of IP right and look at the administrative activities of IP unions created under different treaties(WIPO, 1967).

TRIPS Agreement

World Trade Organization (WTO) was emerged in 1995 as a multilateral trading system with its three pillars, General Agreement on Trade and Tariff (GATT), General Agreement on Trade and Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS Agreement is the most contentious among the three (Ben Wills, 2013).

Before the TRIPS Agreement developing countries are not bound to implement the intellectual property rights. Some developing countries provide the partial enforcement to intellectual property right and others are not. Before TRIPS Agreement intellectual property rights are governed by the Paris and Berne Conventions. These conventions had not effective enforcement mechanism that was the main reason to attach intellectual property rights with WTO. WTO's dispute settlement mechanism and threat of trade sanctions bound the developing countries to change the existing IP legislation to meet the TRIPS standard. TRIPS provide the minimum standards for enforcing IPRS. State may make more extensive provision to protect and enforce IPRS however developing countries cannot provide IPRS protection less then provided under TRIPS (Peter K. Yu, 2009).

Contradiction between the Right to Health and the Intellectual Property

Countries were free to adopt any system of IP protection according to their needs before TRIPS Agreement. To enjoy this relaxation many countries did not grant patent on pharmaceutical products as they apprehend that the patent on drugs will leads towards the high prices of medicines but implementation of the TRIPS Agreement left them with no choice. Apprehension of the developing countries about the patent protection proved correct as the prices of the patented medicines became very high (Sudip, 2019). Exclusive patent monopolies leads towards no competition and patent owner can charge the prices of medicines with his own choice for twenty years. During this period all the competitors are not allowed to made, sell or even import this patented drug without the permission of patent owner.

Almost 2 billion people have lack of access to the basic medicine in developing countries. Availability of medicine is a key to an effective health care system. Availability of medicine means that medicines must be of good quality (safe to use) and its price must be affordable. High prices of new medicines burdened the health care system all around the world especially in developing economies. There is dire need to increase the access to essentials medicines. In developing countries 90%people bear their health expenditure of

their own without any assistance from government. High prices of patented medicines burden the poor people (WHO, 2018)

Right to appropriate health facilities is basic right of every human being irrespective of his religion, region and race. Right to health is essential to access to medicine. Access to medicine is indispensable to control the disease and epidemics. The reports of World Health Organization have revealed that 1.4 million people die from tuberculosis (WHO, Tuberculosis, 2020) 680,000 people die with HIV/AIDS (WHO-HIV/AIDS, 2020) and 409,000 death accord due to malaria in 2019 (WHO-Malaria, 2021). These diseases are curable but people in poor countries have no access to medicines or if medicines are available but not affordable for them. All international human rights documents and treaties recognised the right to health and also realised the link between right to health and economic resources. Affordability of medicines is very significant issue to the health facilities (Chadha, 2014).

TRIPS Agreement resulted with a lot of changes regarding the implementation of intellectual property rights. All countries being the member of WTO changed their standards of implementing intellectual property. These new minimum standards of enforcing intellectual property rights create a direct conflict between right to health and intellectual property. Patent standards under the TRIPS Agreement provide the monopoly to the patent holder for a particular period. During this period patent holder can charge the price of his own choice. Patent protection of medicine makes the prices of new medicines very high (Chuan-feng, 2010). Consumption of medicine is directly linked with its price. Affordable prices of medicines would help to save the lives of people who died every year due to the non-availability of medicines. High prices of medicines limit its use and poor people deprived from the treatment which is available but not affordable for them.

Millions of people in developing countries have lack of access to the medicines. Due to the intense patent protection prices of medicines become very high then its actual production cost. Strong patent protection leads towards the disability of government to provide the appropriate health facilities to its citizens (Sandy, 2011) It is the duty of state to ensure the access towards medicines but state is bound to ensure patent protection on one hand and to ensure availability of medicine on another hand. Obligations imposed by TRIPS Agreement handicap the Government to perform its other duties. Sovereignty of state became affected when external factors limit the power of Government to ensure appropriate health facilities to its citizens.

To solve this issue and for controlling patent abuse Doha declaration on TRIPS Agreement and public health was passed by World Trade Organization and World Health Organization. Doha Declaration was passed in 2001 at Doha, Qatar, it make the situation more clear that TRIPS Agreement should be interpreted by the member state in such a manner that it must not be inconsistent with the right to health and it must ensure the availability of medicines to those people who need it. Permission was given to the member states to use TRIPS flexibilities and issue compulsory licence in public health crises. Freedom was given to the member states to determine the grounds to issue compulsory license. Doha declaration decided to give priority to human right when it conflict with economic interest. Doha Declaration guide the member countries how to use and interpret the TRIPS exception while dealing with health emergencies (Chuan-feng, 2010)

Compulsory licensing provisions allow the government to manufacture the drugs without the due permission of the patent holder when emergency situation arises. TRIPS Agreement prohibits the exportation of patented medicines and country that issue compulsory license cannot export the medicine; permission is given to manufacture for domestic use only. TRIPS Agreement did not allowed the member countries to help the poor countries that do not have manufacturing capacity (Anuradha, 2014).

The countries that do not have manufacturing capacity faced problem because they cannot take benefit from compulsory licensing provisions. This problem was highlighted during the Doha Declaration and a committee was established to suggest solution for the countries without manufacturing capacity how these countries can take benefit from the compulsory license provisions.

On 30th august 2003 this problem is resolved as importation of patented drugs under the compulsory licensing was allowed for the countries that do not have manufacturing capacity. A developed country may issue compulsory license manufacture generic drugs and export in the country that need these drug but do not have manufacturing capacity (Chuan-feng, 2010). It was a great success for developing countries and a milestone towards achieving the universal health goal. The decision of 30 August gives permission to export the patented drugs under the Compulsory license to the country that do not have manufacturing capacity. A detailed procedure is also provided to avail the provisions.

Two compulsory license are issued, one in the country that will export the medicine and second in the country that will import the medicine because it do not have manufacturing capacity. Some requirement needs to be fulfilled before the compulsory license for export purposes is issued for instance notification must be given to the TRIPS Council. The compulsory license must be issued for least developed country or the country that do not have manufacturing capacity. Drugs exported for the low income country must not be export to the high income country (Anuradha, 2014).

Decision of 30 August relax the provision of compulsory licensing and facilitate the poor people to access the essential medicines. Use of these provisions can facilitate the many countries to take advantage of TRIPS flexibilities. Relaxation provided under the 30 August Decision is effective only for the countries that incorporated these provisions in their national legislation. To date in European countries only Canada and in our region only India have incorporated the provision of 30 August in their national legislation (Anuradha, 2014).

TRIPS Agreement which was adopted through WTO on the urge of developed countries is not satisfactory for them. This is the reason that developing countries are convinced to adopt more stringent rules through free trade agreements (FTA) with developed countries. These free trade agreements (FTA) between developed and developing countries carries TRIPS Plus provisions. Free trade agreements (FTA) restrict the developing countries to use TRIPS flexibilities. Without using compulsory licensing and parallel importation provisions the entry of generic drugs become more difficult. Developed countries and multinational pharmaceutical companies put pressure on the developing countries to incorporate more strict patent provisions in their domestic law then those provided under TRIPS. These strict rules of patent protection paralyze the Sovereign States to cope up with health emergencies. It is the duty of state to create a balance between two contradicting rights i.e. public right of health and private right of patent holder. There must be a balance between the right to health and intellectual property rights. It is observed from the practices of states that whenever inconsistency arrived between these two rights priority is given to the intellectual property rights. Main reason for this priority is the link of IP rights with trade relaxation under the umbrella of WTO.

Conclusion

Right to health and intellectual property rights both are protected under the international law. We believe that the rights of the creators and inventers should be

protected by law but this is also a reality that many provisions of existing intellectual property laws are unjustified. As the patent on pharmaceutical products make the treatment of diseases unaffordable. Inventors should be protected but not at the cost of society as the Doha Declaration on Public Health also admitted this fact clearly and reaffirm that whenever conflict arises between right to health and intellectual property rights TRIPS Agreement will be interpreted from right to health perspective. Doha Declaration also asserts that state parties should use flexibilities provided under the TRIPS Agreement to ensure health facilities to its citizens. It is the duty of the state under the constitution and under the international law to ensure basic health facilities to its citizen and create a balance between right to health and IPRs. To achieve this objective it is recommended state authorities be cautious while signing FTAs with developed countries that these agreements should not have such provision which hindered state to perform its duties regarding the health of its citizens.

References

- Abdulkadir Civan.(2000).*Academia: Access to Medicines and Intellectual Property Rights*.
https://www.academia.edu/22179941/Access_to_Medicines_and_Intellectual_Property_Rights
- Anuradha Chadha. (2014). *Intellectual Property Rights Vis-a Vis Right to Health: A Critique*. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529105
- Ben Wills. (2013). The Arguments For and Against the TRIPS Agreement. *E-International Relation*. Retrieved from <https://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/>.
- Chuan-feng Wu. (2010). Raising the right to health concerns within the framework of intellectual property law.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578865.
- Constitution of WHO, Basic document: Forty Nine edition.
https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=6
- Editors of Encyclopedia: Berne Convention. <https://www.britannica.com/topic/copyright>.
- Peter K.Yu. (2009). The Objectives and Principles of the TRIPS Agreement. *Houston Law Review*, 46:4, 979-1046
- Sudip Chaudhuri. (2019). Are Medicines Prices High and Unaffordable after TRIPS? Evidence from Pharmaceutical Industry in India. *ResearchGate*.
https://www.researchgate.net/publication/338828465_ARE_MEDICINE_PRICES_HIGH_AND_UNAFFORDABLE_AFTER_TRIPS_EVIDENCE_FROM_PHARMACEUTICAL_INDUSTRY_IN_INDIA
- Sandy A. Johnson, (2010) *Challenges in Health and Development*, (New York: Springer).
- United Nation Organization (UNO). (1948). *Universal Declaration of Human Right*.
<https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- United Nation Human Right (1966). *International Covenant on Economic Social and Cultural Rights*. <https://www.ohchr.org/sites/default/files/cescr.pdf>
- United Nation Human Right (1989). *Convention on the Right of the Child*. Retrieved from <https://www.ohchr.org/sites/default/files/crc.pdf>
- United Nations Human Right (1965). *International Convention on the Elimination of All Form of Racial Discrimination*. <https://www.ohchr.org/sites/default/files/cerd.pdf>
- World Health Organization(WHO). (1978). *Declaration of Alma Ata*.
https://cdn.who.int/media/docs/default-source/documents/almaata-declaration-en.pdf?sfvrsn=7b3c2167_2
- World Health Organization (WHO). *The Right to Health: fact sheet 31*,
<https://www.ohchr.org/documents/publications/factsheet31.pdf>
- World Health Organization (WHO). Addressing the Global shortage of the and access to medicines and vaccines, Report by the Director General of World Health Organization Executive Board 142nd session. (2018).

https://apps.who.int/gb/ebwha/pdf_files/EB142/B142_13-en.pdf. Assessed 19 July 2021

Wolfgang E. Siebeck (1990). Strengthening Protection of Intellectual Property in Developing countries: *World Bank Discussion Papers*.
<https://documents1.worldbank.org/curated/es/658721468739497745/pdf/multi0page.pdf>The

World Intellectual Property Organization (WIPO). (1967). Summary of the Convention establishing World Intellectual Property Organization.
https://www.wipo.int/treaties/en/convention/summary_wipo_convention.html.

World Health Organization (WHO). (2020). *Tuberculosis*. <https://www.who.int/news-room/fact-sheets/detail/tuberculosis>

World Health Organization (WHO). (2021). *HIV/AIDS*. <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>.

World Health Organization (WHO). (2021). *Malaria*. <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>