RE-EVALUATING THE RELATIONSHIP BETWEEN PATENT RIGHTS AND HUMAN RIGHTS FOR THE ENHANCEMENT OF ACCESS TO ESSENTIAL MEDICINES*

Abstract
This article analyses the relationship between patent rights and human rights with a view to making a case for broader access to medicines, as a right to health. From a human rights perspective, this paper points to the issues and conflict that arise between patent and human rights. It is argued that patent rights in national laws and the TRIPS Agreement do not exist in a socio-economic and cultural vacuum; instead, they should be enforced and interpreted with regards to public interest and human rights. It is also argued that human rights to health, provide a significant socio-economic and cultural framework for the consideration of patent rights and its effect on the right to access medicines. The study adopts a doctrinal methodology approach to examine, and evaluate the issues that have arisen in the context of patent protection of pharmaceuticals and its effect on women’s human right to access medicines. It recommends that states adopt a public interest, from a human rights perspective, to address issues of access to medicines in light of patent right.

Keywords: Access to medicines, patent rights, moral and material interests of inventors, right to health

1. Introduction
In recent years, scholars, courts and international organisations have devoted increasing attention to the connectivity between human rights and IP. As Professor Helfer remarks, ‘[h]uman rights and intellectual property, two bodies of law that were once strangers, are becoming increasingly intimate bedfellows.’1 This article aims to further develop the current conceptualisation and understanding of the relationship between patent right and human rights, within the context of access to medicines. The question that arises in this regard for the purpose of analysis in this article are: what is the exact nature of the relationship between a proprietary patent right and human rights? Does this relationship conflict or mutually coexist in a way that can reinforce each other for the common good of society? Are patent rights human rights? If so, how far, and subject to what laws and limits, can human rights be relied upon by patent right holders? These questions are relevant to the examination of the impact of patent rights provisions on access to medicines as a component of the right to health. The first part explains access to medicines through the lens of human rights and outlines the human rights elements for the realization of access to essential medicines. It also delineates the nexus between patent right and the accessibility of medicines. The second part examines the relationship between patent rights and human rights, and the contention that human rights also protect the patent holder’s right. The third part examines the tension between patent rights and human rights to health. The last part calls for a balances approach to the protection of the rights of inventors on the one hand, and the right to health and access to medicines on the other hand.

*Jennifer Heaven Mogekwu MIKE, PhD (Exeter), LLM (London Metropolitan University), LLB (Jos),BL, Director of the Centre for Governance, Human rights and Development, American University of Nigeria. Email: Jennifer.mike@aun.edu.ng, Jennifer2heaaven@yahoo.com.Phone No: +2348184713000

2. The Interconnectivity between Patent Right and Human Rights to Access Essential Medicines

Accessing essential medicines is recognized in numerous international law and regulations as a part of the right to the highest attainable standard of health and life. Implicit in the objective of the 1948 Universal Declaration of Human Rights (UDHR) to 'promote social progress' and 'better standards of life' is the recognition that health is a right worth protecting, and a responsibility of states to recognise, protect, enforce and safeguard in Article 25(1). The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) expounds on this right in Article 12. Article 12(1) gives a general recognition of the rights of everyone to 'the highest attainable standard of physical and mental health.' the second aspect of the right in Article 12(2) exhorts a duty on State Parties to take the necessary steps to guarantee and ensure the full realisation of the rights by providing the necessary health-related resources (medicines), facilities, environment, information and conditions. The United Nation’s Committee on Economic, Social and Cultural Rights (CECSR) in General Comment No 14 on the Right to Health has interpreted the normative content and conditions of Article 12 of the ICESCR to include access to essential facilities, products or drugs, means, and services necessary for the realisation of the right to health in a timely and appropriate manner.²

The right to the highest possible standard and protection of health is recognised and promoted in Article 11 of the 1996 European Social Charter (Revised). The African Charter on Human and People’s Rights of 1981 (African Charter) in Article 16(1) also provides that every person is entitled to the ‘best attainable state of physical and mental health.’³ The Article obligates states to take expedient measures to protect the health of their citizens and respond to their medical needs.⁴ Access to medicines as a right to health is also paramount to the enjoyment of other basic human rights such as life, liberty, freedom, etc., since health is indispensable to living a meaningful and fulfilling life in dignity.⁵ The Inter-American Court of Human Rights in Villagran Morales v Guatemala⁶ clarified that the right to life also includes a right that a person ‘[…] will not be prevented from having access to the conditions that guarantee a dignified existence.’⁷

The right to life, including medicines, like other human rights, imposes enforceable responsibilities on states.⁸ These obligations are as follows. Respect: the obligation to respect human rights to health places a binding responsibility on all governments and its organs and duty bearers to desist from interfering directly or indirectly with the right.⁹ Protect: To protect obligates two duties: to facilitate and enhance; and to prevent any obstruction to accessing healthcare

---

² ibid
⁴ Article 16 (2), African Charter of 1981.
⁵ The right to life as a non-derogable right is enshrined in Articles 6 and 4 of the International Covenant on Civil and Political Rights (ICCPR)
⁶ Villagran-Morales et al. v Guatemala (Street Children Case) [1999] Inter-American Court of Human Rights (IACtHR), Joint Concurring Opinion of Judges in Paragraph 139. Also available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf, last accessed 11 April 2019.
⁷ ibid paragraph 144.
⁹ Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (n 22) 81, 82; Hoferzeil, Samson and Casanova (n 12) 10-11.
facilities, services and medicines by third parties.\textsuperscript{10} Essentially, this obligation mandates the state to facilitate access by preventing medical care providers (private and public) and third parties e.g. pharmaceutical companies, from violating the right to health. Fulfil: the government is obligated to take appropriate legislative, regulatory, budgetary, administrative, judicial, and other necessary measures to progressively fulfil and ensure access to medicines and healthcare facilities for the realisation of the right to health.\textsuperscript{11} This understanding of the general provision of the right to health is important to the articulation in this article because it would require states to be aware of any health consequences in all its legislation and to ensure that laws or policies, agreements and treaties do not obstruct its obligation to guarantee the enjoyment of the right to health.

Patent Law and right could impact on this human right to access to these essential medicines in a number of ways. Exclusivity and monopoly are inherent features of IP and patent law.\textsuperscript{12} Under patent law, no one can use a patented idea without the authorisation of the patent owner.\textsuperscript{13} While patents in theory only give the innovator a monopoly of rights to prevent others from practising the innovation, exercising this exclusionary right may, in many cases, control the actual access to the innovative resources.\textsuperscript{14} This results from the ‘right to exclude’ monopoly right which provides an opportunity for patent holders to restrict generic reproduction, control competition, and raise the prices of their innovative products as they deem fit.\textsuperscript{15} This temporary market exclusivity allows the rights owner discretion to set the price of the drugs, which they usually set much higher than the production costs.\textsuperscript{16} For poorer people, in developing countries who cannot afford to pay the premium prices that ordinarily flow from patent exclusivity rights, access becomes a grave concern.\textsuperscript{17}

3. Examining the Relationship between a Patent Right and Human Rights

The exact relationship between patent rights and human rights is the subject of diverse scholarly debate. Gold summarises the current views on the relationship between patent and human rights thus: the ‘subjugation approach,’ the ‘coexistence approach’ and the ‘integrated approach.’\textsuperscript{18} The ‘subjugation approach’ makes the point that patents, sometimes, comes into conflict with human

\textsuperscript{10}Koch, ibid 88-89.
Analysing the subjugation approach, Helfer observes that IPRs — patent protection — are seen to be incompatible with human rights, by undermining the enjoyment and realisation of a broad spectrum of human rights, especially socio-economic and cultural rights. Where this conflict arises, scholars argue that human rights should be given priority and trump patent rights. One commentator in arguing that human rights considerations should prevail over rights granted to authors and inventions, writes that ‘[i]ntellectual property rights should be limited when necessary to protect the public health and to the degree necessary to guarantee the general welfare.’ This article is more inclined to analysing the relationship between patent rights and access to drugs within this context.

The ‘coexistence approach,’ advocates assert that patent law and human rights law are two distinct areas of law; although they share the same fundamental goal of contributing to the common good and improvement of human welfare. Principally, this school of thought argues that rather than viewing patents and human rights laws as conflicting, they are compatible, mutually supporting each other to promote innovation and access. Proponents of this approach point to a number of human rights provisions that seek to assure creators and inventors a protection of their moral and material interest. This view may be totally hard to sustain in view of the effect of a patent right on the right to medicines. A patent right can interfere with the right to access medicines under human rights law, thus the question is how to strike a balance between the incentive to innovate on the one hand and access on the other.

The ‘integrated approach’ views patents and other IPRs as human rights, with emphasis on property rights and the individual inventor’s rights under human rights instruments. Advocates of this approach argue that the provisions of tangible property rights should be extended to cover IPRs by assimilating the rights into human rights frameworks. The conceptualisation of intellectual proprietary rights as a natural human right was articulated after the French Revolution. Article 17 of the 1789 Declaration recognised property rights as an ‘inviolable and sacred right, no one shall be deprived thereof, except where public necessity, legally determined, shall clearly demand it.’

---

20 Helfer, (n 1) 48.
21 Gold (n 19); Helfer, (n 1) 48-49.
23 Gold (n 19) 188-189; Helfer (n 1) 48-49.
24 Helfer, (n 1) 48-49; Gold (n 19) 188-189.
25 Gold (n 19) 189.
26 ibid; Helfer (n 1) 48-49.
28 ibid 206.
30 Sprankling (n 30) 7.
This articulation of property rights sought to attach a sense of morality, equity and fairness to the right as an inherent human entitlement. From this proprietary rights assertion, it has been argued that all IP rights are sacred and inviolable human rights entitlements, as set forth in Articles 2 and 17 of the Declaration. In this view, a patent right is perceived to extend beyond a mere licence or privilege granted by the state; it is seen to possess characteristics grounded in legal, social and ethical human rights entitlement.

Viewed from this perspective, it would seem justifiable that pharmaceutical firms or innovators and researchers would want to draw on this ‘natural human right,’ commercially to capitalise on the fruits of their labour through patents. Nonetheless, the question remains, are patent rights human rights within the purview of international human rights law? Put in another way, can the interference of patents with the right to access drugs be justified under human rights law?

**Human Rights Protection of an Inventor’s Moral and Material Interest**

It appears that the arguments that patent rights are human rights might find some support in human rights instruments such as the UDHR and ICESCR. Article 27(1) of the UDHR acknowledges the right of everyone to take part in the ‘cultural life of the community.’ Furthermore, the right to benefit from a creative work as a moral and material legal entitlement is accorded recognition in Article 27(2) of the UDHR which provides that ‘everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’ This provision corresponds with the linguistic articulation and objectives of Article 15(1)(c) and 15(2) of the ICESCR, which obligates the state to recognise an author’s rights to ‘benefit from the protection of the material and moral interest resulting from any scientific, literary or artistic production.’ These provisions are commonly identified as the basis for the right to the protection of creators and inventor’s interests in intellectual creations. It can be said that Article 27(2) of the UDHR and Article 15(1)(c) of the ICESCR underscore the protection of the interests of authors (or inventors or creators, as the case may be) and the result of their intellectual efforts. This protection is not only for the broader advantage of the public to enjoy the benefit of scientific progress and its application in Article 15(1)(b) of the ICESCR, but also because the creative interests and moral rights of the inventors are recognised as worthy of such protection. These human rights provisions raise questions relevant to the present discussion on the relationship between patent rights and human rights to health and life, particularly with regards to access to medicines. Can it be said then that a patent as a proprietary right to the intellectual interest of inventors is a human right within the contemplation of UDHR and ICESR?

**Moral and Material Rights of Creators/Inventors**

From the foregoing, the wording of Articles 15(1)(c) of the ICESCR and Article 27(2) of the UDHR expressly seek the protection of an author’s ‘moral’ and ‘material’ interest in his or her intellectual creation. The ‘moral interest’ in an invention, resonates with the natural rights postulations of the

---

31Mgbeoji (n 30)19.
33Mgbeoji (n 30) 19.
34Article 15(1)(c) ICESCR. (Emphasis added.)
property rights argument. This right recognises that a person’s ingenious labour and effort to scientifically, artistically or literarily create a thing is to be protected. Moral rights, which are more relevant to the debate for authors of literary and copyrighted works, recognise and protect the non-material interest arising from the intimate connections of an author to his/her work. Essentially, the Articles, by recognising moral interests, seek to protect the intrinsic personal character of an invention or creation of the human mind, including the integrity of an author or creator’s work. A moral right also acknowledges the right of an inventor to be so named and recognised as the ‘author’ of the invention. The ‘material interest’ of inventors, on the other hand, protects his or her rights to deal with, enjoy, transact, and commercially utilise, reap and receive adequate remuneration from the fruit of their inventive labour and intellectual creations. It is often the material interest of the inventor that raises a number of questions on the interference of the right of patent holders to earn a living from their inventions and its effect on the right to access medicines.

Is a Patent Right a Human Right?

A first reading of the human rights provisions in ICECSR and UDHR may suggest that they equate IPRs with other types of human rights. This leads some authors, such as Marks, to argue that they provide a human rights justification for patent rights, as well as other forms of human rights. That is, the recognition of the inherent human rights interests of creators in their inventions broadly extends to patent rights. Other IP scholars are, however, sceptical of this approach. Schermers argues, for example, that IPRs cannot be rightly categorised as fundamental rights since human rights are ‘of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement’. Schermers’ argument is premised on the fact that IPRs do not command the sort of protection and enforcement as other types of human rights which are so imperative to humans that ‘no legislative organ may lawfully take these rights away from the citizens.’ This article shares the opinion that a patent right arising from statute law is not a fundamental human right within the purview of human rights laws. By its very nature, a patent is a statutory creation, whereas other categories of human rights, such as the right to health, are derived from the inherent nature, dignity and worth of all human beings. A further distinction can be drawn from the regulatory structure of patent rights. The state, in recognising the rights of patent holders under a national statute, can withdraw or override that right in the interest of the public.

---

39 Hestermeyer (n 40) 157.
40 ibid 157.
41 Oke (n 20) 95.
42 Stephen P Marks, ‘Access to Essential Medicines as a Component of the Right to Health’ in Andrew Clapham and Mary Robinson (eds), Realizing the right to health (Rüfer & Rub 2009) p.89-90.
44 ibid 565-580.
45 ICECSR, General Comment No 17, paragraph 1. See also PokuAdusei, Patenting of Pharmaceuticals and Development in Sub-Saharan Africa: Laws, Institutions, Practices, and Politics (Springer 2013) p.205; Hestermeyer(n 40)154.
rights under the UDHR and ICESCR, however, accrue to inventors as inherent rights; hence they are independent of the state’s recognition and grant of exclusivity rights. Most importantly, patent rights exist within a fixed length of time, unlike human rights which are perpetually vested in human beings. Similarly, patent rights, being statutory creations, are assignable, transferable and revocable, an attribute that is not shared by any human right. The inherent nature of human rights, one that recognises the inalienable interdependence and indivisibility of all human rights to all human beings, is, in short, fundamentally absent in patent rights. PN Bhagwati, in describing the character of human rights, maintains that they are: Not ephemeral, not alterable [...] not the product of philosophical whim or political fashion. They have their origin in the fact of the human condition and because of this origin, they are fundamental [...] constitutions, conventions or governments do not confer them...Human rights were born not of humans but with humans.

Sganga, also observes that ‘IPRs belong to the realm of national policies and international trade, as proven by the fact that, contrary to human rights, they are limited in time, limited in scope and— with the exception of moral rights—revocable, forfeitable, licensable and assignable.” Stretching this argument further, the right to health is universal, whereas patent rights are territorial in character. This opinion finds support in the clarification by the CECSR in paragraph 3 of the General Comment No 17 which categorically states that IPRs are not to be equated with the human rights provisions of Articles 15(1)(c). The CECSR stresses the point that the human rights recognised in Article 15 (1)(c) solely ‘safeguards the personal link between authors and their creations [...] as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living.’ IPR regimes, on the other hand, ‘primarily protect business and corporate interests and investments.’ In other words, a patent right is not coterminous with human rights. To further underscore this point, the CECSR in paragraph 1 of the General Comment 17, clarifies that

Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary, and artistic productions for the benefit of society as a whole.

Patents for pharmaceuticals, by way of an example, are more concerned with the protection of the investors’ right than the right of inventors who, in most cases, are scientists and researchers whose

---

46 Hestermeyer (n 40) 154.
50 CECSR, General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Paragraph. 1 (c) of the Covenant) (Hereafter CECSR, General Comment No 17) paragraph 2.
51 CECSR, General Comment No 17.
laborious efforts lead to the intellectual production. In the case of a pharmaceutical patent, many people, and in some cases institutions, are involved in the research and production.52 In some cases, employees undertake the research, yet the ownership rights’ may be vested in an individual(s) or an institution who may not be the actual inventors. Indeed, patents are mainly used as economic and utilitarian instruments to advance the policy of the rights-owners.53 This character of patents is unlike the provisions on human rights which are more concerned with the inventor as a person.54

Moreover, human rights are applicable to individuals as humans and cannot be vested in legal entities.55 Patent rights on the other hand can be owned by companies, in fact, the bulk of pharmaceutical patents are actually owned by corporations.56 The CESCR has made it clear that the language of ICESCR is addressed to a natural person; hence the beneficiaries addressed are humans.57 The CESCR adds that under the ‘existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, […] their entitlements, because of their different nature, are not protected at the level of human rights.’58 What this means is that legal personalities cannot derive benefits from the protection of their moral and material interest in an invention under the ICESCR.59 Still on this point, there is a conceptual difference between IP rights and the moral and material interest of the inventors under ICESCR and UDHR.60 The scope of IPRs extends beyond the material and moral interest of the ‘author’ or inventor.61 Although the overall objective of patent protection is to serve a larger development goal for society’s benefit and thus shares a similar goal to human rights values, it is an instrumental right rather than a ‘fundamental’ right.62 This is indicative in the temporal nature and transferable character of patent rights.63

Perhaps a hybrid approach to the relationship between patent rights and human rights may be to argue that a patent right, one that necessarily prevents others from unlawfully appropriating or free riding on a patented invention in order to recoup the cost of investment in the inventive enterprise, recognises the human right i.e material interest of the inventor. From this IP-human rights dimension, the patent rights of inventors, and the moral and material interests of right-holders in human rights law could overlap. That is, a patent holder’s rights under patent law can, at the same time, have human rights characteristics. The patent rights-holders can, within the specific limit of his proprietary interest in the creation, rely on the rights conferred in the human rights instruments to claim the moral and material ownership and benefit of an invention. Likewise, creators/inventors

53 Hestermeyer (n 40) 157.
54 ibid
55 CESCR, General Comment No. 17 paragraph 7.Hestermeyer (n 40) 155.
56 Adusei (n 47) 204.
57 CESCR, General Comment No. 17, paragraph 7.
58 ibid
59 Hestermeyer (n 40) 155.
60 ibid 154-155.
61 ibid 154-155.
63 ibid.
could rely on the patents right protection under statutory law to seek legal protection and draw material benefit from the invention.

However, it is possible for one of the rights to exist without the other. Therefore, even when the patent term has elapsed, the right holder’s moral and material interest as a creator in the invention is not extinguished. In other words, it is possible to have a human rights entitlement to the protection of a scientific and material interest without a corresponding grant of patent right protection. In this manner, a patent protection is also an important medium through which the government can promote the human rights of an inventor as contained in the ICESCR and UDHR. This argument should, however, be treated with caution as human rights within the contemplation of the ICESCR and UDHR are clearly not to be equated with patent rights. Thus, to the extent that a patent under the law is a statutory instrument granted by the state within specific boundaries and conditions, it is erroneous to say that it is a human right in its entirety. In this respect a patent protection as a legal instrument under patent law, cannot be said to be a human right in itself. What this indicates is that an inventor’s right in a patent cannot be expected to carry the same weight of enforcement as other fundamental human rights such as the right to health. Thus to answer the question asked at the start of this section, human rights offers little justification for patent holders, and certainly pharmaceutical companies, to interfere with the public interest and the human right to access to medicines.

4. ‘Balancing’ the Rights of Inventors, and the Public’s Human Rights to Health and Access to Medicines

On the issue of the human rights protection of an inventor’s interest on the one hand and the public’s access to the invention such as medicines on the other, the UDHR and ICESCR attempt to strike a balance. This is indicative in the provision of Article 15(1)(a) and 15(1)(b) of the ICESCR which recognises the right of everyone to enjoy and take part in ‘cultural life’ and to enjoy ‘the benefit of scientific progress and its applications.’ Fundamentally, these rights provide a moral and legal claim for users to access the fruits of scientific and technological innovations. In this sense, access to the benefits of scientific R&D is placed on an equal standing with the protection of the rights of inventors under Article 15(1)(c). Okediji argues that the ‘user’s interests are just as rights-based as the interests of owners.’ On her part, Chapman observes from a human rights perspective that benefiting from the products of science and technology presupposes that everyone will have access to them. Along this line, the CESCR relates the public policy goals of protecting the moral and material interest of creators to the realisation of other economic, social, and cultural rights. In paragraph 2, the right to benefit from the protection of a ‘scientific, literary and artistic production’ is described in the General Comment No 17 as a means through which creators are

---

64 Hestermeyer (n 40) 154-155.
65 See also SmithKline and French Laboratories Ltd v Netherlands Application 12633/87, (1990) ECHR Decision and Reports.
66 In Article 27 (1), ‘[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’
encouraged to contribute to ‘arts and sciences and to the progress of a society as a whole.’ It may be argued that Article 15 of the ICESCR as a whole tries to strike a balance between the recognition of a creator’s right to control his/her intellectual capital and derive benefit from its innovative value and the public’s right to access the products of the invention. In this manner, the objective of the protection of the inventor’s interest is to serve a broader societal goal as the right is intrinsically linked with other rights of users in Article 15 to ‘enjoy the benefits of scientific progress.’ Other fundamental human rights, such as the right to access medicines, will also come under this public welfare benefit to society. Moreover, paragraph 35 of the General Comment No 17 emphasises that the states’ obligation in the context of Article 15 has to take into account other rights recognised under the ICESCR. This mandate would require States, to strike a balance between protecting the private interests of inventors and promoting the larger socio-economic and cultural rights of society to have access to the products of creators. Accordingly, ‘in striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration’.

Although there is no delineation of this balance, the clarification that the rights should be balanced with the right to access offers a platform to bolster the argument for a broader reliance on human rights to promote access to medicines within the context of patent rights. This argument can best be understood within the context of the drafting background to Articles 15 of the ICECSR and 27 of the UDHR. A study of the original draft ESCR Covenant of 1954 reveals that Article 15(1)(c) was not included in the first draft. The original draft only contained provisions guaranteeing the rights of everyone to partake in cultural life and enjoy the fruits scientific progress (i.e Articles 15(1)(a)(b)). Likewise, in the original draft of Article 27 of the UDHR, Article 27(2) which seeks to protect the moral and material interest of authors and creators was not present. The Article only included provisions for participation in cultural development and enjoyment of the benefits of scientific advances. It would therefore appear that Articles 15 of the ICECSR and 27 of the UDHR were drafted and construed from an ‘end-user’ perspective. This is to guarantee that users can derive benefits from scientific creations and inventions and also freely engage in the cultural development of the community. It follows that human rights values and places emphasis on social welfare and promotes society’s interest to have access to scientific developments. Thus the later addition of Article 15(1)(c) to the ICECSR cannot qualify the first two paragraphs of Article 15.

69 CECSR, General Comment No. 17, paragraph 4.
70 Hestermeyer (n 40) 158.
71 CECSR, General Comment No. 17, Paragraph 2.
72 CECSR, General Comment No. 17, Paragraph 35.


Note that Article 15 of the current text was in Article 16 of the 1954 Covenant.
73 ibid
74 United Nations, Report of the Third Session of the Commission on Human Rights (UN Doc E/800 1948) 13. Article 27 of the current text was in Article 25 of the draft Declaration.
75 ibid
77 ibid
78 ibid
With regards to IPRs and societal benefits (user’s rights), Professor Cullet argues that ‘[h]uman rights treaties require the balance to be attempted from the perspective of society at large.’

In addition, the CECSR stresses that the recognition of inventor’s or creators’ interest should not be at the risk of the state’s core obligation towards the realisation of the rights to health and access to medicines ‘as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications.’ The CECSR goes on to emphasise that State Parties have a duty to ensure that the protection of inventor’s rights under IP law does not occasion ‘unreasonably high costs of access to medicines.’ Furthermore, this rights-based approach also implies that the obligation on states extends to the implementation of patent rights in a way that does not conflict with the right to access the products of the inventor’s scientific progress. Therefore, the moral and material interests of the inventors in patent law should not interfere with the right to access medicines.

Moreover, Article 30 of the UDHR also stipulates that ‘[n]othing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ Clearly, the right given to inventors in Article 27(2) should not affect the human right to health as stipulated in Article 25, which will include the right to access medicines. What this means is that inventors have very little ground in human rights to stand on as justification for encroaching on the right to access drugs. One author notes that, if any of the socio-economic rights is at risk from the protection of the creator’s interest, the ‘pendulum swings towards supporting diffusion and access to the benefit of the new technology.’ The cases of *Patricia Asero Ochieng, Maurine Atieno, Joseph Munyi, and AIDS Law Project v. Attorney General* and *Smith Kline and French Laboratories Ltd v Netherlands* and illustrates the point that public interest is given paramount importance where there is a conflict of interests. In *Patricia Asero Ochieng, Maurine Atieno, Joseph Munyi, and AIDS Law Project v. Attorney General*, the Kenyan Courts recognised the precedence of public health and basics human health over private IP rights. The court stated that the ‘right to life, dignity and health of the petitioners must take precedence over the intellectual property rights of patent holders.’ The Court relied on the constitutional human rights of the petitioners to human dignity and highest standard of health as protected under Articles 26(1), 28 and 48 of the Constitution to make the order. Although the public policy objective of the Kenya Anti-Counterfeit Act was to prohibit counterfeit goods, the court took into account the effect of the provisions on the petitioners’ access to available and affordable essential medicines, including generic drugs. Importantly, this case supports the position adopted that the right to access affordable essential medicines is greater and more critical than the enforcement of IP rights.

---

80 | ibid 152.
81 | CECSR, General Comment No. 17, Paragraph 35.
82 | ibid
83 | Hestermeyer (n 40) 158-159.
84 | Petition No.409, 2009 paragraph 56.
85 | SmithKline and French Laboratories Ltd v Netherlands Application 12633/87, (1990) ECHR Decision and Reports.
86 | Paragraph 85 of the court’s decision ibid.
87 | Paragraph 52 of the decision.
88 | Paragraph 52 of the decision.
89 | Paragraph 85 of the decision.
In Smith Kline and French Laboratories Ltd v Netherlands, the ECHR stated that the granting of compulsory licensing for a patented drug was not an interference with the human rights entitlement under Article 1 of Protocol No 1 of the ECHR. Even when the patent holder’s right was recognised as a human right, the court gave primacy to the public interest. The ECHR in its ruling found that, although the compulsory license ‘constitutes a control of the use of property,’ the grant was lawful in accordance with the general interest of the public. Notably, the general public interest was adopted as a yardstick by the courts to test whether the interference with the use and enjoyment of the proprietor’s right was lawful. In the end, the ECHR came to the conclusion that, ‘the grant of the compulsory licence was lawful and pursued a legitimate aim of encouraging technological and economic development.’ Since the applicant’s invention prevented the working of a patent that was beneficial to society, the ECHR considered the long-term interest of the public to benefit from technological and scientific progress to decide in favour of the compulsory licence.

It could be said that the right and interests of the patent holder were recognised; hence the ECHR found that the decision of the patent office to grant the licence constituted an interference with the inventor’s rights and use of its property. Yet, the ECHR took into account the broader development goal of the public (the dependent patent in this case) to access and use the patented invention since it was clear that the applicant’s patent limited the use and working of CentrafarmBv’s invention. The ECHR attempted to strike a balance between two competing interests (SmithKline and French Laboratories Ltd and CentrafarmBv) by recognising the overall objective of encouraging technological and economic development as a yardstick to measure their various interests. Perhaps, states can adopt this public interests approach to address issues of access to medicines in light of patent right.

In sum, it is imperative to carefully strike a balance between promoting innovative pharmaceutical R&D activities, promoting further innovations and facilitating the availability of cheaper generic drugs and also, promoting competition to facilitate better access to medicines. The key to striking this balance lies in the patent system through its patentable requirements and exclusions, its patentability criteria including the legal exceptions to patent rights, and the public interest related-flexibilities.

5. Conclusion
The analysis above highlights the interrelationship between patent rights, inventors’ rights, human rights and the human rights of end users to access scientific advancements. Consequently, it has been argued that the rights of inventors, particularly their patent rights, should not constitute a hindrance to the fundamental right to health. If the rights of inventors lead to a reduction in the quest to obtain cost-effective medicines for better health, it may be in violation of fundamental human rights. In particular, the States have a duty to ensure that patent rights, as a means to protecting the human rights and moral and material interests of inventors, does not negatively impact on the quest of women to obtain medicines, and indeed, other follow-on inventors.

90 ibid
91 ibid paragraph 2.
92 ibid
93 ibid