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NEW HAVEN – Human rights norms and frameworks could be instrumental in expanding access to medicines (A2M) around the world by providing leverage against inappropriate intellectual property (IP) laws, according to a new policy paper produced by the Yale Global Health Justice Partnership.

Over the last decade, it has become clear that patents – and the international trade laws that require countries to provide them – can be very dangerous to health, particularly in developing countries. Patents increase the price of medicines and so decrease access to them. As a result, millions of people in middle- and low-income countries cannot afford the drugs they need to be healthy. There is thus a clear link between intellectual property law and human rights, and in particular the right to health. But it is only recently that the concrete implications of health-related rights for intellectual policy have begun to be articulated.

This paper provides a critical, up-to-date analysis of how human rights doctrine and arguments might be used at the international and domestic level to challenge intellectual property laws that undermine health. It identifies the domestic and international doctrine that creates a foundation for a new and more vigorous human rights approach to IP law, identifies key areas for research, and outlines possible next steps.

Specifically, the paper evaluates four domains where human rights-based strategies might have greater impact if further developed: (1) in domestic court cases that deal with IP laws; (2) in the United Nations human rights system; (3) in efforts to promote corporate accountability among pharmaceutical companies; and (4) in multilateral and regional alliances intended to more effectively oppose free trade agreements (FTAs) that threaten health.

The paper identifies work at the national level as particularly promising, citing several important recent cases where courts have used constitutional human rights protections to limit or invalidate IP law. For example, a court in Kenya recently struck down a law that threatened generic medicines, citing human rights grounds. A court in India also recently refused to allow a patent-holding company to bar a generic company from the market, again reasoning – on human rights grounds – that the implications for access to medicines would be too severe.

“The report demonstrates that courts are beginning to understand that intellectual property rights cannot be interpreted and protected in a vacuum; they must be read co-extensively with other, more fundamental rights, such as the right to health. We hope that the report helps activists and lawyers to make more effective use of human rights law to improve access to medicines. More specifically, we hope this paper spurs the development of more detailed litigation strategies that can be used in nations that respect the right to health,” said Hannah Brennan (YLS ’13), one of the report’s authors.

A leading international lawyer and IP expert, Carlos Correa, said: “Human rights, once seen as a diffuse ideal, are becoming a concrete and effective tool to mitigate the impact of intellectual property rights in the area of public health. This report shows an interesting evolution from the concept that States have the right to use TRIPS flexibilities to the idea that they have a duty to do so under their human rights obligations, as well as how these obligations have been enforced by national courts in cases where access to medicines was at stake. The report provides useful insights on ways in which governments, NGOs and the private sector can contribute to move human rights from concept to practice.”

The paper also recommends that activists assess and pursue select human rights mechanisms at the United Nations, especially as applied in specific, strategic moments and country contexts; advance discussions of how human rights norms can be used to enhance corporate accountability; and continue to invoke human rights to form alliances and resist regressive FTAs.

“We believe that human rights-based strategies are not a panacea, but they could make a real difference if access to medicines activists develop the strategies analyzed in this paper in a targeted way and build campaigns that take advantage of the potential linkages among strategies,” said Miriam Hinman (YLS ’15), another report author.

The Global Health Justice Partnership is an initiative of Yale Law School and Yale School of Public Health that works at the interface of global health, human rights, and social justice. It trains the next generation of scholars and practitioners to tackle the complex interdisciplinary health justice challenges and mobilizes research to help drive the social change necessary for improving the health and wellness of people around the world.

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