



**FEMINISTS
FOR A PEOPLE'S
VACCINE**

FEMINISTS FOR A PEOPLE'S VACCINE PODCAST EP9 Transcript



IP, TRIPS Waiver & the Knowledge Economy

With Shree Baphna, Dr. Hyo Hoon Kang and Vanita Nayak Mukherjee

Vanita [00:00:04] Welcome to the Feminists for a People's Vaccine podcast, a space for imaginations, discussion and feminist analysis from the Global South. In this creative journey, we approach the tough questions brought to life by the pandemic. Join us to look at this once in a lifetime event as a passageway to imagine a fair and just world for all.

Shree Baphna [00:00:35] Hello, everyone. Welcome to this episode of the Feminist for a People's Vaccine podcast. My name is Shree Baphna, I'm a research associate with the FPV campaign, and today I'm very honoured to introduce our guest, Dr. Hyo Yoon Kang, who is a professor at the University of Kent. Hyo, could you please introduce yourself and just tell us a little bit about what you teach?

Dr. Hyo Hoon Kang [00:01:02] First of all, thank you so much for DAWN and the Feminists for a People's Vaccine initiative for inviting me to this programme. I am an admirer of your work, and I think the current debate about vaccine inequity is crucial and really important. So thank you for having me. I teach mainly intellectual property law, but also law, science and society at the University of Kent Law School. My background is actually pretty mixed. I'm a lawyer by training, but I have actually started as a political science student where I also studied international relations, economics, also the history of science where I did my postdoc. I have a lot of interests in various fields. But at the end of the day, I'm happy to be back in my so-called home field, law, because what really fascinated me was how law is actually not just legal, it's not just doctrinal, but how it is deeply implicated in governance systems and also taken as a policy tool, which gives various countries and actors different discretionary room to manoeuvre in. So, in a way, it's prescriptive, but also it's inhibitive.

00:02:11] I still like the technicalities that legal scholars wrestle with, that we try to figure out, and that's what actually brought me back fully into the legal realm. But as you might have noticed that we can never separate the environment in which law operates. And what I tried to convey also in my pedagogy is the way in which law arises in historical contexts, political contexts, the hidden assumptions in laws, the premises on which certain laws are based, and to provide a broader contextual overview of the laws and their justifications. And I think that actually provides a good vision of the alternative that law could take and also its limitations. So this is really my teaching philosophy and my work. I'm straddling different fields. I've been very much focused on the issue of TRIPS and TRIPS Waiver in relation to the pandemic and the development of vaccines in the last couple of years. But, before that, I was really interested in the law science transactions or transpositions, in patent law specifically, and then more and more into the question of patent value. So, in normative terms as well as in financial economic terms, strategic terms, why is it that people think patents are so valuable and empirically it turn out to be much more ambivalent. Some are very valuable, but a lot of the patents are not.

Shree Baphna [00:03:31] Like you said you were involved in the TRIPS agreement and the TRIPS waiver. So I want to know more about how you got involved and how you became an activist championing tech transfer at the WTO. So, basically, how did you get on that path? And I guess maybe a little bit more about your experience.

Dr. Hyo Hoon Kang [00:03:49] When the pandemic started, I knew that there were and there will be IP issues involved and how to share the IP that would arise by the activities of the researchers and the pharmaceutical companies. We've been there before. We have seen it. But what was fascinating at the beginning of the pandemic was that there was a new technology involved, the mRNA technology which, as we know, Moderna and BioNTech, who have really developed the technology in the field of the current COVID vaccine, they haven't really brought to practise. So we know that they have actually never had a product on the market before then. They succeeded later on. So from an IP perspective, it was quite hard to see in an exceptional situation such as the current pandemic, how the current rules would play out: if they would be modified, if they would be suspended, if they would just proceed business as usual. And just recall back, spring of 2020, people had really very very little idea about how badly the pandemic would pan out. We didn't know about transmission. There was a lot of data coming in on an everyday basis. People were glued to their newspapers on live feeds. So I felt very much unable, from the perspective of the rolling news, to give a diagnosis of what was happening. So, for the first year of the pandemic, especially with the various instances of racism and all the social effects of the pandemic, as I witnessed them here in Europe at that point of time, I felt unable to give a point of view. And that's why, in 2020, actually I didn't write anything about it because I was more or less in the holding position trying to figure out what was really happening. And then after the TRIPS Waiver proposal was made by South Africa and India in October of the year, it was pretty clear that there was something larger at stake because, at that point of time, the vaccines started to be in trial and it was clear that at one point they would get approved. And then the question would be: who would get the vaccines first? So I was really more or less an observing position for the first year, and then it was in 2021, when I could see that the WTO was not really budging and not really progressing with the same urgency as one would have actually expected at that point of the pandemic. I could see that it would become very critical and the typical candidates that we know who actually also pushed the TRIPS to be the way it is, that they would actually defend their interests despite the whole world being in an emergency situation. And that's when I started putting down my thoughts together and I wrote a blog post which was called "Critical

International Law Patents and COVID-19 Pandemic Times”. It became quite clear to me that there was structurally no reason for the IP holding companies and countries in which they’re housed to change anything. There is no structural incentive or reason for them to share their IP, and one way in which that could have happened would be by governments asking them to share either the vaccine doses or to publish or to share trade secrets or to not enforce the patents. And, as we know, patents don’t really disclose all of the information for which the fact that’s been granted, that’s always insufficient information. But with the vaccines, it’s more complex because there are layers of IP that are crewed on one product, i.e. the vaccine. And I think the hardest one to find out about is trade secret or undisclosed information. And, for that, it’s very hard to crack, to think about. If something is a secret, how do you even know what this secret contains? Right? So where do we start to delineate the actual object that we are trying to find the bad? We are all tapping in the dark. So, I think, on the one hand, it was an intellectual curiosity about the complexity of the layers of IP that are accrued in one product, i.e. the Covid-19 vaccine, which the whole world was waiting for with urgency. Just think back of the moment when the vaccination started then. It’s been only a year really when you think about it that the vaccines were rolled out. It’s pretty incredible how recent it was, but also how long the Covid feels like. And, for me also personally, I felt very aggrieved by the fact that me, personally, as a younger person, compared to my elderly parents, would get vaccinated first, and that the WHO guideline of priority vaccination has been completely ignored by the countries that produce the vaccines and hoarded the vaccines in the sense of just putting in massive advance market orders so that the production pipeline just would be clocked. So, on the one hand, this was, I think, a situation where my personal circumstances overlapped with my research interests and I thought: it’s not just me, I mean, there are millions of us in the same situation with diasporic families where you could see the injustice of someone who would need the vaccine much more had to wait just because another country would just, you know, act in a very very egoistic way. So the sense of the public, and who the global public is, that got very much contested I think, and we can see the sense of global solidarity and the notion of global public really crumbling in the face of what we’ve witnessed: every country for themselves. And this is really what interested me about the TRIPS Waiver proposal and then also how badly it was pushed back against. So, in a way, I think, it’s astonishing and also frightening to see the lack of global solidarity and coordination in this situation. Because this is a test case for climate change and policies towards a global policy for climate mitigation and corrective measures. And this is relatively probably a smaller problem compared to the challenge of climate change. So it was highly distressing.

Shree Baphna [00:09:38] You mentioned something called a knowledge economy in some of your academic papers, and from my understanding a patent is kind of like a form of currency or like a gatekeeper into participating in this knowledge economy, for example. So to contextualise this kind of proposition that you make, I’ve heard a lot of phrases where people are like “the TRIPS waiver is a foot in the door to structural reform”, which kind of also links back to what you said about how these pharma companies have no structural incentive to share their know-how, technology etc etc.. And so I’m wondering, you know, is a TRIPS waiver kind of like a way to get our foot in the door to structural reform? Does it symbolise something significant for this current capitalist structure of knowledge economy?

Dr. Hyo Hoon Kang [00:10:30] It’s quite interesting to read historical accounts of the making of the TRIPS and kind of think about why the developing countries actually agree to the TRIPS when it was so disadvantageous to them in the sense of not being granted the policy space anymore to adjust to their own economic needs, to their own social and political needs, and being

straitjacketed it into a transnational regime in which they are ultimately very much IP leasing countries. So I think in one of my pieces, I talk about IP capitalist countries or IP capital-rich countries and IP leasing countries, and it's a kind of a black and white way of putting things just to really exemplify the fact that the vast majority of IP rights are held by a minority of countries and these are real monopolies. I mean, they can be also turned into monopoly rights, that can be turned into monopoly markets if the IP is really utilised and maximised for market domination. For example, the mRNA vaccines right now, it's a duopoly, right? So the world is supplied by Moderna and BioNTech-Pfizer. But think back a little bit further is the fact that a lot of value is accrued via intellectual property. In one of my earlier pieces, I talk about the fact that when you look at the S&P 500, which is one of the main market index for U.S. companies, the large caps, the value accrued to S&P used to be mainly with companies that are engaged in manufacturing with tangible goods, tangible commodities. At one point, there comes a point, where the main value of the S&P is really dominated by intangible assets or the value of intangible assets, of which IP is also one. So, on the balance sheet, you see IP listed as an intangible asset, which really shows that the financial market and the way it actually values intangible asset has really shifted historically. It wasn't regarded as very valuable, and now it is. Why is that? So let's think about the big, big market players who are dominating the financial markets right now. These are the big technology companies. So Google, now Alphabet, Facebook, now Meta, we have Microsoft for software, etc. Where do these companies derive their value from? It's not necessarily tangible goods. I think Apple is an exception, perhaps Amazon is a hybrid, but these companies derive mainly their values in the strength of their IP protection. They can stop others from making certain software, we know a lot of examples from Microsoft in that regard. Then they have their proprietary algorithms from which they direct their advertising avenues and data value. So all of these things are intangible goods, you might say, that are highly valuable. And this is what really drives the financial market at the moment, the valuation. That's something that probably 30 years ago we could not even imagine that Facebook and Google would be so valuable. So all of this is based on, of course, market domination, but also the IP protection that they could get and enforce in order to keep certain knowledges inclosed and private. So these are not shared, they're not public domain, they don't belong to a certain kind of knowledge commons. This is all proprietary, and I think this is where the kind of overlap between knowledge, economy and IP is most apparent. And the same thing now, I think. With vaccines is slightly different because they involve real goods, real medicines, real substances, but ultimately the knowledge of making them stay secret or they are not sufficiently disclosed. With the TRIPS agreement, also with the liberalisation of trade and services, financial services included, they actually went hand in hand historically and there is a very close correlation between how knowledge flows and the lack of tech transfer in developing countries. As you might well know, we're promised tech transfer, it's one of the objectives and aims of the TRIPS that, in return for enforcing transnational IP rights, they would be receiving tech transfer and knowledge transfer. Now, one part of the equation has worked very well, the transnational enforcement of IP via TRIPS. The other side of the equation hasn't worked at all. Even if there was tech transfer, it was done secretly or behind closed doors. Everybody knows how difficult it is to get licensing agreements or joint venture agreements. There's also confidentiality issues, you can sue someone for breach of confidentiality. Breach of confidentiality is also a big IP subfield, which people might not be so attuned to because we mainly talk about patents, trademarks and copyrights. But confidentiality is a form of trade secret, too. And these are all regulated by private contract, which you know, they don't pop up on the public agenda very much.

Shree Baphna [00:15:25] So what does the TRIPS waiver mean for this knowledge economy?

Dr. Hyo Hoon Kang [00:15:29] So there are two lines of argument about the TRIPS waiver. I would say one is reformist and the other one is more fundamental. The reformist argument in favour of the TRIPS waiver is that it's the right instrument for a limited period of time, which is just for the duration of the pandemic. So the pandemic might go on for a long time, but it will pass at some point and we need to just make sure that everything is done at multiple levels, that even the legal barriers are all lifted to ensure a scale-up in production. And that's best done by a knowledge dissemination, transfer of skills, transfer of technology. Now exactly how that would be done, it's a big debate and we can talk a little bit more in detail about that later. The more fundamental argument for the TRIPS waiver is that it would, as you say, be a "foot in the door" to reassess the legitimacy and the workings of the TRIPS more generally. So, for example, Article 31 bis, this Article 31, Article 31 F, all of these things which used to be called, and I think people are actually quite more reticent to call it that now, as TRIPS flexibilities turn out to be not flexible at all. So we know that it's extremely difficult to apply for a compulsory licence, to register for a compulsory licence, to actually receive a compulsory licence at the WTO level, as well as on the individual domestic jurisdictional levels. So I think the TRIPS Waiver for me was very interesting, I would say as a case study, of how the current situation actually elucidates the dysfunction that has already been there since the beginning of the TRIPS or the broader structural level. In a way, it's just a symptom, a very acute symptom of the problems that there have already been built into the design of the TRIPS, including the broken promises of the TRIPS, as well as actually the non-practicability of the compulsory license provisions. They were designed in such a way that there are not really meant to work. The burden of proof falls on the person who actually applies for the compulsory license, not on the patent holder or the IP holder. So in a way, the procedure is not really designed an equitable way, and it doesn't really serve public health or even the interests or the economic interests of the broader global public at large.

Shree Baphna [00:17:51] So I just want to change track a little bit in that sense and just ask you a very straightforward question, which is: what would the TRIPS Waiver look like if implemented? And what would countries need to do and or what are the next steps they need to take to start producing enough vaccines, diagnostics and therapeutics?

Dr. Hyo Hoon Kang [00:18:10] Yes. So I think it very much depends on the different national jurisdictions and the different TRIPS plus agreements they have, whether they did opt into it or not, so that's pay tax exclusivity and also the various compulsory licensing measures they already have in place and the experience that countries have with them, right? So we know that certain countries such as Canada right now, they have been sitting on a compulsory license application for over a year, and they are not granting it because the COVID vaccine is not on one of the list for which compulsory license can be granted. And they have actually not moved very much forward with this. We also know that there were other countries, industrialised countries, such as Germany, which wanted to issue compulsory license. Russia wanted to issue its compulsory license at the beginning of the pandemic. So the TRIPS Waiver discussions, it's one there where countries then would need to implement their domestic laws to say that "we are temporarily not enforcing patent applications and these patents for a certain period of time". It would also need to take into account the various foreign direct investment agreements that one country has. Depending on which kind of bilateral trade treaties the countries were engaged in, there would need to go through every agreement. So the TRIPS waiver would require a lot of domestic implementation, as well as obviously the backing of the WTO to let the countries do so without punitive action. Now there are also other voices which say that the TRIPS Waiver is already just putting into place what already exists in TRIPS. So they say Article 73, which is a national security

exception already exists, that's not been used, they say the compulsory license provisions exist. Why did countries not invoke it? So why did, for example, India not invoke compulsory licenses in certain medicines? I think these are all valid points, and although I do think they're rather legalistic, they have always existed before. But we also know that, for example, when Thailand tried to use it, there were put on the U.S. Section 301 list, so they were threatened with possible trade sanctions or the prospect of trade sanctions. So, what is law in the books does not necessarily reflect the reality of law and action. And I think that would be a rebuke to the ones who say that TRIPS waiver is superfluous and just a repetition of what they already have. I think on a more broader political and policy level, it's very important that the national governments actually use all the rights they have in order to see if the use, let's say, Article 73 national security exception, what the response would be. I think the South African mRNA vaccine success is a great example. Moderna said they will not enforce their patents, and we have seen that it hasn't so far. And also that encouragingly, a lot of global scientists have helped, they shared what they know with the African mRNA vaccine hub. So I think it's all very encouraging, but also there are a lot of avenues that could be used that haven't been used. And the TRIPS waiver for me is not an end in itself right now, but I think it's a really important impetus to rekindle the awareness in the structural deficits of the TRIPS and to see how much and how far we can push the so-called flexibilities now and also obviously for future pandemic situations, right? So I think it's a test case and it goes hand in hand with the current negotiation about the WHO Pandemic Treaty. And I don't really think it's either the waiver or the pandemic treaty. I think actually the success of one is very much also shaping the success of the other. Some people try to see it as an either or one is a distraction to another. But I think if the Waiver gets messed up and we've seen, I think last week, reports about the WTO trying to do concurrent divide. So, for example, the TRIPS waiver only being applicable to Africa, but not to Asia or Latin America, I think that would be really a shame because that would set a nonbinding but still an important political precedent to the negotiations and the pandemic treaty that is happening right now.

Shree Baphna [00:22:28] This is more just from a very campaign-oriented perspective, which is that you have argued before that it is easy pointing to one actor and specifically giving them responsibility for their actions. For example, we could target Bill Gates and his persistent support for IP, and this is a strategy that a lot of campaigns use. We have as well ourselves because it just gives like a face to an opponent. But you have said that it's not as black and white as that and it's a little bit more of a grey area. And that kind of relates to your comments before when you were talking about how big corporations like Facebook, Google, they all have gotten and there's a million pieces of knowledge and IP floating around and it's kind of created like these layers. So I understand what you're saying that we can't directly point to one person or entity and put blame on them. But could you elaborate on that a little bit more?

Dr. Hyo Hoon Kang [00:23:29] I think there are different purposes of campaigning and effectiveness of a campaign which you know much better about than me and academic research. So, for me, what's interesting is of course there are personalities which have an outsized influence on a given field. For example, I think it's very well known that Bill Gates and philanthropic capitalist initiatives have an outsized influence on certain fields, such as global health, without any political accountability mechanism. So that's a huge problem because public interest points or shaped and decided without any kind of democratic control over people's preferences, grassroots, feedback, all of these governance issues that we very well know about. So I think it is important to acknowledge that and a lot of my colleagues are aggravated by the influence that the Gates Foundation has and also its influence over media. So that's all very well known. But I think what's more interesting

for me is to find out how did it get to a point that he could actually wield such power? So what are the structures that enable them to build up such a political power and to get away with it? I think that kind of goes back to the point of knowledge economy that we had and how IP actually plays a central part in financial value of these tech conglomerates, and they have made their money with that. So, in a way, it's almost like an organic kind of fusion of private money with public concerns that should ideally be held accountable and made more transparent. So I'm more curious about the structures, including the legal structures, which enable Bill Gates to become what he is, which does not necessarily negate the other point that he has been very influential and not always for the better ways and the current facts and debates by, for example, recommending that the Oxford University have an exclusive license with AstraZeneca. So one could say he did not force Oxford University to have an exclusive license, but he recommended or he suggested and given the philanthropic donations that universities and research institutions receive from Gates, a recommendation is not just a neutral recommendation. So, I think in a way, Bill Gates is himself an actor causing the problem, but also it's very much a symptom of the larger structural problem. And the larger structural problem is the current economic and financial infrastructure that we have right now, which is very much based on a trading system in intellectual property that is the TRIPS. So I think what would be really useful is to go and really assess the fundamentals of the TRIPS agreement and to criticise it point by point where it had failed and what it promised.

Shree Baphna [00:26:20] I think that's a fabulous point to end our podcast on. I think what you said is extremely important that we never lose sight of the big systematic issues that underlie all of these various opponents, so to speak, that we come across.

Dr. Hyo Hoon Kang [00:26:35] Thank you so much. And I think the latest success with the mRNA hub in South Africa showed us there are still very, very good and decent scientists who believe in the scientific ethos of what Robert Merton, the sociologists of science call "scientific communism". So it's the free sharing of scientific information because we believe that that will lead to greater progress. So I think that was really a ray of light, a ray of hope amongst all the scientist entrepreneurs that we have seen in the other fields and the other vaccine-making companies.

Vanita Mukherjee [00:27:16] The Feminists for a People's Vaccine podcast is produced by DAWN - Development Alternatives with Women for a New Era and TWN, the Third World Network. Today's episode was edited by Alice Furtado and engineered by Ernesto Sena. Thank you for joining us today. I'm Vanita Nayak Mukherjee. See you on the next episode!