The struggle for the COVID vaccine: Social human rights have priority over intellectual property

STATEMENT

– *The human right to health must have priority over the protection of intellectual property*

– *Germany and the EU are neglecting their duty to protect to protect the human right to health globally*

– *Pharmaceutical companies must respect their human rights due diligence obligations*

The COVID-19 pandemic has created an intensifying health, economic and social crisis that increases social injustices on national and international levels. It is therefore also a human rights crisis. In this situation, German politics should be guided by a human rights approach, not by transnational pharmaceutical companies’ interests in making a profit or a nationalist “first come, first serve” mentality that only benefits one’s population.

German chancellor Angela Merkel only recently called potential COVID-19 vaccines a *global public good*. Nevertheless, the German government’s current behavior disregards its human rights obligations, which apply especially with view to social human rights – beyond German borders.

Germany’s and other industrialized countries’ selfishness can be seen on several levels. According to the development aid organization *Oxfam*, a small group of industrialized countries, representing only 13 percent of the global population, already secured more than half of all future COVID-19 vaccines in September 2020.

In the beginning of October 2020, South Africa and India demanded that the World Trade Organization temporarily waive intellectual property rights on COVID-19-related products (the so-called *TRIPS waiver*). They argued that this could guarantee the global population the fastest possible supply of COVID-19 medications. Even though the waiver would lower pharmaceutical companies’ patent rights, medical products and medicines could be manufactured faster and less centralized. Countries in the *Global South* with sufficient capacity would be able to produce medications and vaccines, as well as medical supplies like masks, respirators and ventilators, without lengthy negotiations with patent holders. Furthermore, they could export these products to countries lacking equipment or production capacity. South Africa and India declared that they did not want to be dependent on donations from industrial countries or voluntary measures like the *UN COVAX initiative*. Germany, along with other EU member states and industrialized countries, has refused to consent to the TRIPS waiver.

The dispute on patent rights scorns human rights

From a legal perspective, does the human right to health take priority over the protection of intellectual property? Article 12 of the UN Covenant on Economic, Social and Cultural Rights recognizes the ‘right of everyone to the enjoyment of the highest attainable standard of
physical and mental health.” This includes access to essential medicines and vaccines. The signature states therefore must undertake measures to prevent and treat epidemics.

Intellectual property rights are regulated internationally by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement provides for different mechanisms that allow member states to reduce patent rights in times of health emergencies, for example through compulsory licenses, which can only be granted at the national level and are limited to certain products and procedures, and do not allow for a quick and globally coordinated solution. Many countries fear compensation claims for the measures taken to protect the right to health during the coronavirus pandemic. Law firms are already advertising compensation claims based on bilateral investment treaties. Apart from that, compulsory licenses are only an option for countries with sufficient production capacity.

The right to health must take priority over the protection of intellectual property

Against this backdrop, South Africa’s and India’s initiative is even more necessary to enable states from the Global South to fulfill their human rights obligations. A multilateral solution is needed so that countries from the Global South can produce and receive COVID-19 vaccines and treatment, and other medical equipment as quickly as possible.

In the current crisis, states need to strike a balance between the human right to health and intellectual property rights. Would it be acceptable from a legal perspective to temporarily waive the right to intellectual property – to benefit billions of people in the Global South? In the present context, patent rights mainly protect pharmaceutical companies’ interests, whose research is publicly funded to a large extend. On the other hand, billions of people’s health and lives are at stake. The answer seems obvious from a human rights perspective: The right to health must be prioritized over the protection of intellectual property, especially in the current crisis, as UN human rights experts have recently confirmed.

Human rights due diligence obligations also apply to the pharmaceutical companies themselves, as set out in the UN Guiding Principles on Business and Human Rights. Pharmaceutical companies have a responsibility not to negatively affect the right to health and life with regard to access to medicine, including vaccines. Companies must therefore not stand in the way of these rights by excessively calling on their intellectual property rights and prioritizing economic profit.

Overcoming neocolonial structures and increasing the Global South’s autonomy

Industrialized nations’ current blockade of the TRIPS waiver, as well as their emphasis on voluntary and donation-based solutions like the COVAX initiative, are a form of neocolonial behavior. Instead of granting countries in the Global South leeway and autonomy in addressing the crisis, they are supporting mechanisms that massively increase dependence and global structural imbalances. Rights to intellectual property are a European idea that spread across most parts of the world during a brutal colonization process. Western states are again on a path to use international trade law against those in the Global South and infringe their human rights while doing so.

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