An IPR policy needs to ensure that technology innovation remains on track to eventually reduce the gap between an innovation leader and an innovation follower. That’s what South Africa needs to do.

Two centuries after Adam Smith talked about ‘wealth of nations’, economists still disagree on reasons that make nations wealthy. Professor Paul Romer, the best known endogenous growth theory economist, has put this debate to rest. He has shown that ideas, innovation and technological change are the real engines of economic growth and prosperity. He believes that the world is a playground of nearly unbounded opportunity, where new ideas beget new products, new markets, and new possibilities to create wealth. Romer won the prestigious Nobel prize few days ago on 8th October 2018 for this contribution to economic science.

A number of economists have shown that inventors and entrepreneurs are motivated by financial return. A robust Intellectual Property Right (IPR) regime provides the basis for such mechanism to work effectively. It attracts investors and innovators that help drive economic growth and prosperity. Because of this, awareness and standards of IPRs have undergone significant change across the globe, with the exception of some countries that seem to be bucking the trend. A robust and effective IPR regime is as important as making sure that it is not weak or poorly enforced to not just attract foreign investment but to also incentivize innovative companies from investing openly.

To address the issue of lack of access to medicines, for instance, one needs to look for reliable and efficient solutions. If tested economic principles were adhered to, then that would largely solve the problem of lack of investment and lack of access. South Africa, whose IPR policy was unveiled recently, is already well positioned in the African continent to offer foundational support (physical, human and financial capital) for R&D
and manufacturing in several sectors, including pharmaceutical. While public health is the most important issue addressed in Phase-I IPR Policy of South Africa (and rightly so), the policy does not make any reference to economics literature that has so much to offer in this debate. Policy documents and roadmaps based on unsubstantiated claims leave room for doubt and concern for neither being “evidence-based”, nor deliberative in creating a foundation to build IP laws on. The 2018 policy states that “economic literature reveals an inconclusive link between increased IP protection and economic development”, and to support this claim cites a WIPO report on international patent system. Not only is this an unbalanced view, the WIPO report that is cited is ten years old.

The South African policy document overall seems more like a patent policy document geared towards improving public health, rather than a holistic policy for all intellectual property rights to induce innovation and creativity. Further, there must be a clear understanding of the differences in aims and objectives between a national IPR policy, national innovation policy and a long term STI policy. Some of the objectives that this policy tries to address fall under the ambit of a broader innovation policy, or perhaps industrial policy, that might be well beyond the scope of an IPR policy per se.

SA policy proposes an end of the depository system and adoption of SSE system, which is already being followed in India. While a substantive-examination system will provide an additional level of scrutiny to all patent applications, the tremendous lack of capacity to operate an effective system of substantive examination must be addressed first. This will also make the pre-grant opposition procedure more efficient. Around the time India’s IPR policy was released, the patent office was expanding its patent examination capability and capacity to accommodate some of the proposed changes.

The policy, in making comparisons with India, describes a set of systemic problems. (1) Patents being granted at a much higher rate than in other countries, including India and Brazil, (2) more so with pharmaceutical patenting, (3) several granted patents are actually invalid. But, numbers of patent filing and grant are significantly lower in South Africa than even in India. For instance, the number of overall patent filings in 2016 in India was more than six times than that in SA in the same year. Moreover, most the filings and grants are non-residential. This may suggest that either the applicants do not consider the South African market suitable for commercialization of their intellectual property, or, more plausible, they are highly selective in choosing the most valuable patents to seek protection for. It is also surprising to not witness litigation around these invalid patents as well as initiation of revocation proceedings to remove them from the register. This raises more questions than it answers.

When it comes to a national IPR policy, especially for a developing country, deriving benefits from shooting in the darkness of policy space might still be a possibility in the short run. But, in the long run, IP policy makers realize that they only hit what they aimed
at. An IPR policy needs to ensure that technology innovation remains on track to eventually reduce the gap between an innovation leader and an innovation follower. That’s what South Africa needs to do.