

Law, Art and Life: a critique of economic analysis of law based on integrity

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ABSTRACT

The objective of this paper is to reveal and study how legal theory can effectively contribute to the critique of a cost-efficient society. Taking into account the Dworkian theory, one should revisit the distorted conflict between the right to intellectual property (patent rights) and the right to health. In order to analyse this specific field of law and its implications, the first part of this work will depart from an aesthetic hypothesis whose scope is to guide the construction of a substantial critique of inconsistency in attributing rights according to principles of economic policy. The object of this study is a well-known film, "The Constant Gardener", directed by Fernando Meirelles and based upon the novel by John Le Carré. This film is the unit of observation and analysis so as to conduct unobtrusive research. Considering the theory of law as integrity, the movie plays an important role in this legal study on the relationship between patent rights (pharmaceuticals) and human rights (the right to health). Using Dworkin's theory, as a point of departure, crucial questions are raised and commented on in the second part of this paper: is it lawful to use human beings as guinea pigs to test new drugs? How far can a pharmaceutical company go in order to embody patent rights or intellectual property protection? The aesthetics approach leads legal theory to the constructive-reflexive interpretive concept of law and its application to patent law. Therefore, economic policies must be reconsidered in the best lights of law. As the film is interpreted as an art movement which expresses a serious legal concern, it is necessary to rethink the legal issues above in order to find a solution that will, in the end, demonstrate the application of law in its fraternal attitude. Finally, this paper intends to prove that morality plays an essential role in legal practice, as a matter of fact, judicial decisions which take rights seriously may occasionally result in economic losses for the market in virtue of serving a coherent system of law.

1 Introduction

This paper is part of a research project whose aim is to study how legal theory can effectively contribute to the critique of a cost-efficient society without disregarding the actual importance of the economic system. Before criticising the economic analysis of law and its utilitarian logic, it is necessary to establish the theoretical basis of this research. In this context, Dworkin's legal theory in which he develops the idea of law as integrity is the theoretical point of departure of this research.

As a matter of fact, the theoretical discussion proposed here focusses on “pure integrity”. According to Dworkin (1986, p.407), “it consists in the principles of justice that offer the best justification of the present law seen from a perspective of no institution in particular”. Pure integrity is directly connected to the constructive and reflexive attitude which Dworkin (1986) applies to the concept of “law beyond law”. This constructive-reflexive interpretation is an essential element of a legal theory, morally and institutionally conceived. Only capturing this theoretical framework above can a jurist start to adjudicate and legislate patent property rights in a new context of law of contracts. Based on the Dworkian theory, this paper aims to revisit the distorted conflict between the right to intellectual property (patent rights) and the right to health.

In order to analyse this specific field of law and its implications, the first part of this work will enhance an aesthetic hypothesis whose scope is to guide the construction of a substantial critique of inconsistency (pure integrity) in attributing rights according to principles of economic policy. The object of this seminal study is a well-known film, “The Constant Gardener”, directed by Fernando Meirelles and based upon the novel by John Le Carré. This film was released in the year 2005 and received four Oscar nominations. The film is used in this paper neither as a mere example of symbolism nor even as a metaphor. On the contrary, it is the unit of observation and analysis so as to conduct unobtrusive research. Taking into consideration the Dworkian theory of law as integrity, the film plays an important role in this legal study on the relationship between patent rights (pharmaceuticals) and human rights (the right to health). According to Dworkin (1985, p. 166), “politics, art, and law are united, somehow, in philosophy”.

In fact, using Dworkin’s theory, as a point of departure, crucial questions are raised and commented on in the second part of this paper: is it lawful to use human beings as guinea pigs to test new drugs? How far can a pharmaceutical company go in order to embody patent rights or intellectual property protection? Can economic efficiency authorise to adjudicate patent rights to large drug companies thus

jeopardising the basic human right to health? How can jurists solve this dilemma without creating an unsustainable conflict between law and economy?

There is nothing wrong with turning scientific knowledge into property, however law has not been effective enough to avoid the disrespect for human rights. The aesthetics approach leads legal theory to the constructive-reflexive interpretive concept of law and its application to patent law. Therefore, economic policies that put private interests first and tend to negotiate matters of principle, such as, justice and fairness, in spite of respecting correct procedures for enforcing rules and regulations, must be reconsidered in the best lights of law.

Interpreting the film as an art movement which expresses a serious legal concern leads one to rethink the legal issues above in order to find a solution that will, in the end, demonstrate the application of law in its fraternal attitude, according to Dworkin (1986, p. 413). This means that, although diversified by project, interests and convictions, we are united in a community of principles. Consequently, everyone should understand the relationship between economic and human rights, taking into account and certainly not for granted the last sentence of Dworkin's book, *Law's Empire*, "this is, anyway, what law is for us: for the people we want to be and the community we aim to have".

2 Law and Art: an aesthetic hypothesis

The film "The Constant Gardener" plays an important role in this essay. It is the aesthetical hypothesis for revisiting the interaction between economic goals and principles of law. As far as unobtrusive research is concerned, the film is both the unit of observation and the unit of analysis. Not only does the plot of the film reveal an intrinsic disrespect for the law, but the artistic approach also pinpoints a fierce contempt for human rights. It may seem to be stretching a point to extract real legal concern from fiction. However, in spite of the dramatic murder scenes, the film presents a true case of the protection of patent rights over the basic human right to

health.

The pharmaceutical corporation interested in developing a drug for tuberculosis takes advantage of poor people in Africa who need HIV-controlling medication. The company does distribute these drugs for free, however, those receiving them must agree to be tested for tuberculosis. Tuberculosis sufferers were subsequently unknowingly given "dypraxa", a drug known to have deleterious side-effects. In this context, human beings are used as guinea pigs for the development of an improved form of dypraxa.

The last scene of the film is the major component of this aesthetic hypothesis. Tessa's cousin, while giving the eulogy at the couple's funeral, exposes the scheme involving KDH, Three Bees and the British Government in exploiting "expendable" lives in Africa. He ends the eulogy by asking "Who has gotten away with murder?" "Who has committed murder?" Questions that are raised in order to reveal the total contempt for peoples' lives. The highly respectable pharmaceutical firm continues to test its drugs in Africa, forming a new partnership with Zimbamed, for economic viability justifies anything. "There are no murders in Africa, only regrettable deaths. From those deaths we derive the benefits of civilisation, the benefits we can afford so easily, because those lives were bought so cheaply". (THE CONSTANT GARDENER, 2005)

Submitting members of a country's population unknowingly to laboratory tests is a major critique raised by Fernando Meirelles's film. The aesthetic discourse, based upon the John Le Carré novel, represents the paradox between human rights and the search for economic development. Undoubtedly, observing the film from the perspective of legal theory makes one wonder if there is any hope for these forsaken people in devastated, poor regions of the world, unless law can effectively prevent the economic system from jeopardising the free development of human lives. Unobtrusive research reveals hidden legal problems in the major scenes of the film. Firstly, Tessa learns about the "marriage of convenience" between Three Bees and KDH Pharmaceuticals. Three Bees agrees to test the KDH medicine "dypraxa"

(the drug produced by KDH supposedly for curing tuberculosis). Secondly, Tessa and Justin, the latter after Tessa's death, start to seek evidence of the harmful side-effects of dypraxa. Thirdly, little by little, the scheme is unveiled and the involvement of British authorities is revealed during the investigation.

Finally, this aesthetic structure brings to light a deep concern for human rights as well as presenting a legal case that demands a solution, but, above all, needs to be understood, in spite of being fragmented in a fictional drama of suspense and criminal investigation. This hard case which demonstrates the paradox between a basic human right to health and economic development represents a moral dilemma. This moral dilemma can be defined as the contempt for the lives of human beings in third world countries, lives sacrificed so that "civilised" people can enjoy enhanced quality of life, which includes efficient medicines, better medical assistance, higher level of biotechnological development etc. In a cost-efficient society, it is justifiable to disregard minimum costs in order to obtain a greater good, even though these minimum costs are human lives.

3 Law as integrity: a substantial legal theory

Evaluating the aesthetic approach proposed in this paper means a necessary incursion in Jurisprudence. Law as integrity is the theoretical basis for studying the film above described.

Beforehand, a major question must be raised: What is the concept of law? Dworkin presents a preliminary answer to this question in the beginning of "Law's Empire". According to him, law is an interpretive concept, not semantically structured, but constructively and creatively forged. In this context, the author elaborates a comparative text between social practice and artistic interpretation. Both of them share a common ground of evaluation as far as interpretation relates the purpose with the object of both a social practice and a work of art. Here one cannot view a

revealing approach which has always been used to define the art of interpretation. Indeed, it is not the case of discovering some meaning or some new structure of a social practice or a work of art, but more so a case of reconstructing the object and the purpose of it so as to make of it the best, one can arguably come up with.

Conceiving the community as a working personification, Dworkin (1986) elaborates his theory of law as integrity in such a way as to demystify the relationship between law and morality, considering it neither as something static nor as something innate. Actually, law is intertwined with morality due to the fact that the moral agent, the community, consists of an association of principle. It represents the political morality of all its members. Yet it is not the sum of individual and personal moralities. Ideally, the community makes its own moral choices for which its members are responsible, not individually but communally.

Dworkin (1986, p. 188) asserts that “a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force”. Integrity is the bond that significantly assists conflict resolution involving matters of justice and fairness, in spite of the possible contradiction between these two values that may arise in hard cases.

The basis for applying law as integrity to legislation and adjudication should be the existence of a true community. According to Dworkin (1986, p. 201), “the responsibilities a true community deploys are special and individualized and display a pervasive mutual concern that fits a plausible conception of equal concern”. It may be asked why Dworkin cares so much about the community, and, why this concept plays a relevant role in his theory of law as integrity. Simple as it may seem, the answer demands a full understanding of Dworkin’s theoretical concern. In order to achieve coherent and articulate consistency in the law system, he devises a concept of law whose underpinning is the idea of “fraternal attitude”.

The concept of true community is not an isolated point in Dworkin’s theory of law.

Indeed, a true community is an essential structure which serves as a point of departure for elaborating and applying integrity in law. Having a solid community does not engender the constructive interpretation proposed by Dworkin. In fact, the most relevant issue here is to consider the importance of establishing the community as something prior to justice, fairness and due process, for these elements are to be construed taking into consideration a particular political group. However, it is not a political group based on the rulebook model or de facto circumstances. It is a community based on an association of principle. Dworkin (1986, p. 211) elucidates that "members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but, depend, more generally, on the scheme of principles those decisions presuppose and endorse". This means that the community forged according to a coherent set of principles is not created and consolidated by political compromise. In this context, the model of principle satisfies the conditions of a "morally pluralistic society", according to Dworkin.

It may be asked how this community of principle fulfills the requisites of a morally pluralistic society. Obviously, Dworkin is the one who gives the precise answer to this question. This community is formed by citizens who respect the principles of justice and fairness which are part of the political arrangement of a certain society and, beyond that, these citizens are subjected to the same commands which make responsibilities in this community not only special but also personal. In addition, the community of principle requires deep, constant, pervasive equal concern for all its members based on a coherent conception of what that means. This community does more than merely accept integrity, it truly embraces the nature of this concept. In fact, in the name of fraternity, one is deeply committed to the principles which found the basic structure of this political association. Nonetheless, it is a tricky path one must follow so as to comprehend the essence of mutual concern in a political community of principle. Whenever Dworkin reveals his deep respect for fraternity as a means of achieving integrity in law, he is not protesting for a merger of personalities, just as, it may occur between lovers, or among close family members. He is quite incisive when he contests this misinterpretation of his theory. Mutual

concern is not love at all. Although being akin to love, it cannot be confused with it. Love is a special, rare kind of mutual concern, which may eventually happen among lovers, true friends, siblings, parents and their offspring. For this reason, one must not confuse the level of mutual concern that integrates a political community with the most intense and ultimate concern that expresses love in the most intimate human relationships. It is impossible to disagree with Dworkin, for the basis of integrity, while coming very close to love, is not so intensely personal. This difference empowers and gives greater significance to the mutual concern which the members of a true community of principle ought to share.

Risking imprecision, I proffer a concise definition of integrity. Integrity means nurturing equal concern for all those who belong to a community based on principles. Similarly, Dworkin confirms that integrity is a key to the constructive interpretation of legal practices and hard cases in law. Integrity demands coherency from judges and legislators both when treating like cases alike and when deciding or legislating according to the best view of the legal standards of their political community. At this point, it is possible to grasp the true meaning and importance of this political community for Dworkin. He does not see politics as a means to an end. On the contrary, he makes a true attempt to portray a moral entity whose primary goals are rights and duties, as a matter of principle. This specific part of his theory is extremely relevant for those seeking arguments against rigid conventionalism and all kinds of relativism. Integrity sheds new light on legal theory, for it enables one to reconstruct the meaning of legal practices within a reflexive and critical approach which represents consistency in principle and, likewise, a great leap towards taking rights seriously.

Studying Dworkin's legal theory leads to considerations of the comparison between literature and adjudication in law. Explaining integrity in law means thinking of the chain of law just as writers and critics evaluate the chain novel. In order to decide a hard case, a judge should take as a role model the idea of writing a chain novel. In fact, integrity requires respect for previous judicial decisions in a context of intrinsic awareness of justice, fairness and procedural due process as principles which

consolidate the particular political association. The comparison with a chain novel rests on an author's ability to write a new chapter without losing track of the plot and those chapters already written. The similarity is quite impressive, for the judge should write his (her) decision taking as a point of departure a coherent system of law in a particular association of principle as well as the history of precedents in the judicial system. It is not a political compromise with former decisions in previous cases, but it is a way of considering them without disregarding the association of principle as a compass which analyses not only the factual circumstances of a case but also the precedents.

Some critics accuse Dworkin of formulating an obscure concept of integrity in law where anything fits the idea of integrity, making the principle of adjudication vague and hollow. Nonetheless, a cautious scholar would disagree with such a critique, for Dworkin (1986, p. 255) is extremely precise when he points out that "judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community". It is not an imprecise, vague definition of integrity in law, but a theory based on morality. Law and morality intertwined, de facto, demand a total commitment to a coherent set of principles which identify a particular political association as well as its choices for moral values as the underpinning of rights and duties of members in this community.

In Dworkin's legal theory, there is plenty of scope for strong evaluation, as defined by Charles Taylor (1989). A judge who is part of an association of principle cannot decide a hard case if he is not capable of analysing his choices, his values and, above all, the kind of life it is worth living. The same must be applied to the legislator. All decisions in law are to be entirely made in such a way that mutual and equal concern are not vague terms, but universal standards for applying attitudinal respect, described by Taylor (1989), to all intricate judicial matters. The other is not a nameless, faceless stranger, irrelevant to one's existence. In fact, fraternal attitude represents a means of valuing the individual identity, the self as part of the

political association, the international community. Mutual concern is not a hollow expression. On the contrary, it reveals a necessary inclusion, sympathy and solidarity for others whose interests and projects may not coincide with yours in the short term, but, indeed, ought to be closely observed, thoroughly understood and above all, considered as important as your own.

This is the theoretical environment for understanding the distortion depicted in the film "The Constant Gardener". According to Dworkin, whereas a hard case should be analysed and solved, more attention must be given to the questions than the answers. In this vein, do international authorities know how to balance nonarbitrarily the relationship between the right to patent and the right to health? Have these authorities comprehended and internalized the meaning of mutual concern? Is there any kind of hierarchy in international relations whose goal is to divide, rank and separate developing from developed countries? Are some civilisations superior to others, all things considered? Is it just or fair to sacrifice any civilisation for the benefit of others?

Definitely, the answer to these questions depends on the way the law's empire is viewed. It is not a matter of territory or power, but a fraternal attitude. Dworkin (1986, p. 413) reaffirms this: "law's attitude is constructive... it is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction." Even discounting racial, class and gender differences, why does it still remain so difficult to understand and apply this fraternal attitude to rights and duties in any kind of relationship?

4 Economic development, patent rights and the right to health – what is lawful after all?

According to Chapman (2002, p. 864), "all human rights imply duties for both individuals and governments. Under international human rights law, states and their governments are assigned the primary responsibility to assure implementation". At

first sight, it seems a reasonable, yet abstract and vague assertion. From this simplistic perspective, it is easy to understand the meaning of human rights if states are focussing on their members' entitlements. Nevertheless, it becomes far more complex if the controversy involves the human rights of different members of diverse countries. At this point, one should acknowledge the importance of a moral entity which is not a monopoly of developed countries. Specifically, it is not a sum of common values shared by individuals whose priorities can easily be identified and distinguished from other cultures. A community understood as an association of principle must not be reduced to national identities which may aim to alienate other relevant cultures.

The community, under these Dworkian terms, is not informed by strict moral conventionalism. It can be consolidated by incorporating other relevant moral values which may not be present in standard western society. Regarding the aesthetic hypothesis elaborated at the beginning of this paper, one will naturally realise the relevance of reconstructing the concept of any international community, if the intrinsic relationship between law and morality is accepted. Law and morality being interwoven, it becomes obnoxious to separate people into categories all over the world as if some of them had less rights than others. A non-egalitarian perspective, of course, engenders a distorted notion of hierarchy. Worse still, it ignores a fundamental value responsible for defining and specifying the concept of community, that is, "pervasive, mutual and equal concern". Undoubtedly, people in Africa while being tested for tuberculosis and subjected to a specific medication were appallingly being deprived of fundamental rights.

It may be alleged that even those used as guinea pigs would enjoy the benefits of new medication, considering that all the experiments carried out on them are arguably justifiable by an economic policy which could eventually promote positive public health results all over the world. As soon as the company succeeded in registering the patent of the drug, the free exploitation of this medication, in spite of being legally monopolised by this specific company, would contribute to the availability of a new and better tuberculosis medication for people who can afford it.

Considering benefits that could be achieved by these policies, should authorities allow people's health to be put in jeopardy in a less developed country? Can this policy be politically and morally justified when crossing international borders? Can lives be bought so cheaply, from the point of view of the artistic hypothesis, so that other people may enjoy the benefits of civilisation? What kind of law system is this, which establishes different degrees of protection and rights, according to nationality and economic status?

It is easy to criticise the economic strategies put into practice by pharmaceutical companies without taking into account a serious concern, not only for the implementation of human rights, but also for the effectiveness of economic policies. The aim here is not to demonise the pharmaceutical conglomerates. Nevertheless, it is crucial to understand which principle will guide either governments or companies in the pursuit of economic gain.

International competition demands aggressive efforts of multinational firms to conquer relevant market shares. However, patenting a newly developed drug requires fair commitment both to market regulations and to human rights. The myth of a perfect market system may not be used as an excuse for violating fundamental principles of law. Law as integrity supports the decision which will preserve the investments in R&D (research and development), none the less, will restrict the policies affecting the right to health. It is not a matter of balancing rights, it is, though, a question of promoting the coherency of the law system. In spite of dealing with international relationships among companies and peoples from diverse countries, coherency ought to be sought even in an international system of rights. It is true that economic policies are well accepted all over the world, because of a growing search for new market shares, technological improvements and high profits. There is, indeed, a mutual recognition of the relevance of policies providing incentives for R&D among states and multinational firms. However, it is common to view the disregard for agreements on human rights in order to receive economic gain.

The plot of the film suggests a necessary incursion in this conflict between the right to develop new pharmaceutical patents and the right to health. Using human beings as guinea pigs is a heinous violation of human rights anywhere in the world. The informed consent which the firm has allegedly obtained from residents in the area of testing was a false document because it was an indispensable requisite for acquiring the AIDS controlling medicine. People in this situation are incapable of exercising free will. Private autonomy is, thus, entirely corrupted. In seeking "economic development" much can be said, alleged or proved in order to construct fake coherency. In this context, it is crucial to adopt a fraternal attitude, according to the theory of integrity in law, so that rules and regulations involving patent rights and human rights are to be reflexively and critically interpreted.

Although diverse in projects, convictions and interests, different peoples can share common ground principles. In this vein, the human right to health will restrict pharmaceutical firms' quest for new patents and more profit. No matter how much common good might be obtained from this kind of research, law's empire requires respect for human rights, based on neither a pragmatic nor a conventionalist argument, but because integrity creates a fraternal bond among diverse cultures in an attempt to find a solution for intricate cases underpinned by a coherent set of principles, derived from moral choices which, despite social fragmentation and pluralism, may be universally applied.

The attitudinal respect, proposed by Taylor (1989), assists in pinpointing universal moral values, for they will be intrinsically related to the concept of sympathy, solidarity and otherdirectedness. Moral values can not be measured through economic equation, utilitarian rationality or any other form of treating moral issues according to instrumental rationality. In fact, the construction of the self, the individual and identity is the source of all moral choices that will eventually structure a coherent system of law. Apart from all cultural and social diversity, the self will remain important and relevant in western and eastern societies, for the community is a result of morally created identities. According to the same author, "to understand our moral world we have to see not only what ideas and pictures

underlie our sense of respect for others but also those which underpin our notions of a full life" (TAYLOR, 1989, p. 14). While referring to the human being who is capable of making "strong evaluation", Taylor (1989, p. 14) demonstrates that this person will naturally ask how he (she) is going to live his (her) life which is inextricably linked to more general questions, such as, "what kind of life is worth living, what kind of life would fulfill the promise implicit in my particular talents".

In Dworkin's perception, despite occasional competition among principles, there will never be a contradiction between the human right to health and patent rights. It has been argued that, due to testing in human guinea pigs, pharmaceutical industries will better be able to develop effective drugs and thus contribute to the dissemination of better health care services, more efficient treatments and more biotechnological advances. Depriving drug companies of the chance to do this jeopardises many more lives than those which may be saved in the long term. As a result, it is proportionally justifiable to suffer a few casualties for the benefit of the great majority of people. Patent rights are a means of achieving progress, and, thus, warrant the waiving of other human rights in the name of the greater good.

At first sight, the argumentation abovementioned seems quite rational and reasonable. If you can save the great majority of people, why would one bother to guarantee the rights of a small number of people who are considered by some socially and economically unimportant? Proportionality in law tends to transform judicial reasoning into a choice based on economic grounds. Indeed, it is, sometimes, complicated to adjudicate certain rights which demand large amounts of money and investments from governments, especially, in the public health arena. However, a cost-efficient principle is not a suitable universal criterion, because it turns all the intervention in public health into an economic study of viability. Obviously, the relevance of finding feasible means of making public choices cannot be left out of the equation. Nonetheless, it must not be the main argument (reason) for jurists to adjudicate the correct decision for a specific judicial matter. The circumstances of the hard case are to be consistent with the most fundamental principles that justify the law as a whole. In the light of the atrocities exposed in the

