Chapter 13: Global justice

Case study: Pharmaceutical patent reform and access to health care in the developing world

1. Introduction

According to figures cited by the prominent cosmopolitan theorist Thomas Pogge (2005a, p. 182), some 18 million people die each year from curable diseases, and hundreds of millions more experience increased morbidity as a result of those same conditions. This suffering is overwhelmingly concentrated in the developing world, where extreme poverty is a leading determinant of ill health, and where ill health in turn hampers the ability of individuals to meet even the basic needs of their families.

These striking facts are clearly at odds with the ideals expressed in a number of key documents setting out the content of our human rights, and which enshrine a human right to health. For instance, article 25 of the Universal Declaration of Human Rights (United Nations, 1948) states: '*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care.*' Article 12 of the International Covenant on Economic, Social and Cultural Rights (United Nations, 1966), meanwhile, refers to '*the right of everyone to the highest attainable standard of physical and mental health*', and requires of states that they ensure '*the prevention, treatment and control of epidemic, endemic, occupational and other diseases*' and bring about '*the creation of conditions which would assure to all medical service and medical attention in the event of sickness.*'

What, then, is to happen when states cannot meet the health care needs of their citizens, as many developing countries cannot? We saw in Gillian Brock's chapter on global justice that the group of political theorists known as cosmopolitans claim that the human rights of the global poor to be free from poverty and ill health imply obligations of justice on the part of the affluent that extend beyond the borders of their own states of residence. Among cosmopolitans, a variety of views regarding the grounds and extent of these obligations is discernible. Some, controversially, propose that the human rights of the global poor and sick hold you and I under a duty, here and now, to transfer our surplus resources to them (e.g., Singer, 1972). Others, more moderately, contend that, in so far as we in the developed world help to sustain international institutions which operate to the detriment of the global poor, we thereby harm them; accordingly, we must require of our politicians that they work to reform those institutions to allow developing countries to benefit equally from international trade and cooperation, and that they redress the harm we have caused by pledging some of our resources to meet their needs (see especially Pogge, 2002).

This case study will not examine the difference between these views; instead, it describes an international institution, to wit, the *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) Agreement of the World Trade Organization (WTO) which, many maintain, harms the global sick by impeding their access to life-saving pharmaceuticals. If, as critics aver, TRIPS is indeed harmful to the developing world, then cosmopolitans of whatever stripe should be able to agree that it requires reform. One recent proposal for doing so will be discussed later.

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2. TRIPS: history and impact

Following successful lobbying by the United States, the European Union, and other developed countries, the TRIPS Agreement was negotiated in 1994, during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) which paved the way for the establishment of the WTO. TRIPS requires of signatories that they establish laws offering robust protection of intellectual property rights: crucially, for our purposes, including those held by pharmaceutical companies in respect of their innovations. Assent to the TRIPS agreement is now a condition of WTO membership. As such, developing counties seeking access to affluent western markets have found themselves compelled to sign up.

TRIPS vests patent-holding pharmaceutical companies with monopolies over their innovations, lasting for a minimum of twenty years, and allows them to maximize their revenues by selling their drugs at prices greatly in excess of production costs (Pogge, 2005a, p. 186). This arrangement, however, while conducive to the interests of the pharmaceutical giants and their shareholders, effectively excludes developing countries, who cannot afford the inflated prices, from accessing vaccines, cures and palliatives urgently required by their citizens. Countries who violate pharmaceutical patents by manufacturing generic copies of medicines, or by allowing them to be imported from elsewhere, are charged, in effect, with piracy, are vigorously pursued through the dispute resolutions specified under TRIPS, and may be subject to economic sanctions.

3. TRIPS: is it unjust?

On what grounds might the existing system of patent protection be defended? Some would argue that pharmaceutical researchers have a right to control access to their innovations; however, it will seem puzzling, to cosmopolitans, why their interest in doing so takes priority over the urgent needs of the global poor in getting affordable medicines. A more common argument is that intellectual property rights are beneficial not only to the drug companies, but to all, including the global poor. The argument runs as follows. It is a costly enterprise researching and developing some innovative treatment for an illness, and, moreover, there are no guarantees that a given programme of research will in fact be successful in yielding an effective product. Because of the costs and uncertainties associated with pharmaceutical research, companies would not commit the necessary investment unless they had good grounds for thinking that they would benefit in the long run; in consequence, we would all be denied many necessary drugs. The promise that one will be able to patent one's pharmaceutical inventions, and thereby recoup expenses and make a profit, stimulates and incentivizes life-saving research. And while the poorest nations may be excluded from purchasing the treatments developed in the early years of their availability, they will in time benefit more than they would under a system that did not recognize patents.

Critics of the TRIPS agreement, however, reject this argument from mutual benefit. First, they argue that the research programmes of the pharmaceutical corporations are inadequately aligned with health priorities in the developing world. For to state the obvious, if the poorest nations will not be able to afford the drugs developed, then there is little incentive to cater to their needs. Thus, a disproportionate amount of money is channeled into treatments for relatively minor complaints, such as erectile dysfunction, rather than, say, for the big three killer diseases (AIDS, malaria, and tuberculosis) that afflict swathes of Africa and other developing countries. Second, opponents of TRIPS will

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be unsatisfied with the prospect of developing countries acquiring access to pharmaceuticals only twenty or more years down the line, given the suffering caused by treatable diseases in the Third World every day. Third, fatal diseases are themselves innovators; crucially, by the time a patent expires and a given treatment reaches the developing world, the disease it addresses may have mutated, rendering the drug obsolete.

4. Compulsory licensing arrangements

The above-cited problems with patent protection for live-saving medicines led some to argue that it is morally permissible for developing countries to disregard intellectual property rights by producing or importing generic copies of branded drugs if this is necessary to meet the health care needs of their peoples (see, e.g., Brock, 2001). Furthermore, one provision within the terms of the TRIPS agreement gives states some leeway in this regard, namely a clause which allows countries to obtain a ‘compulsory license’ for the domestic manufacture of generic copies of patented medicines in cases of ‘national emergency’, subject to their paying a fee to the patent holder. This leaves open two key questions: (1) how should the term ‘national emergency’ be understood?; (2) what are nations who urgently require drugs but lack the industrial capacity to produce their own entitled to do? WTO member states debated these issues for roughly two years, finally reaching an accord in 2003 (for an account of the negotiations that preceded this agreement, and the obstacles encountered, see Macklin, 2007, p. 709ff). To cut a long story short, under the 2003 agreement, developing countries themselves are now given discretion over the matter of what constitutes a national emergency in health care, and the right to issue compulsory licenses permitting the copy and manufacture of branded drugs accordingly. Moreover, countries that do not have the necessary facilities for domestic production of generic drugs may import these from those that do.

5. Pogge’s proposal for further reform

Compromises brokered over compulsory licenses, then, go some way to addressing the needs of developing countries. There are, however, still considerable barriers to health care access for the global poor. First, some bilateral trading agreements, and in particular those forged between the USA and its poorer trading partners (such as the Central American Free Trade Association, or ‘CAFTA’) impose stricter controls over intellectual property than those set out by the WTO in 2003 (Macklin, 2007, p. 713). Second, the awarding of compulsory licenses does not address the problem noted above in relation to skewed research priorities; indeed, one might think that, if developing countries are entitled to bypass product patents, pharmaceutical companies have even more reason to concentrate on satisfying the health priorities of wealthy consumers, rather than tackling the major killer diseases.

As a means of addressing these continuing problems, Thomas Pogge has proposed that pharmaceutical researchers should be offered the choice to take out a new form of multi-year patent in preference to the conventional patent. This alternative patent would not grant monopoly pricing powers; instead it would reward innovators, out of public funds, for producing medicines that tackle pressing global healthcare needs as effectively as possible.[1] Much of the concrete policy details would need to be decided by governments who were willing to take Pogge’s idea further (Pogge, 2007, p. 104). However, in broad outline, he envisages a system under which pharmaceutical firms are granted financial

[1] See Pogge (2005a); a short summary of the plan is to be found in Pogge (2005b).

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rewards proportionate to the proven success of their medicines in alleviating global ill-health over time. The largest rewards would, then, be paid out to innovators who target the world's most dangerous and widespread diseases, and who produce drugs that can be cheaply reproduced and made available to the very poorest. Pogge notes in particular that, under his proposed scheme of rewards, patent-holders would have a strong interest in cooperating with generic pharmaceutical manufacturers, so as to ensure that their medicines are circulated as widely and affordably as possible. In short, Pogge's floated system of rewards would, he argues, create harmony between the currently antagonistic interests of drugs companies and the global poor.

Pogge commends his proposal on both moral and pragmatic grounds. In moral terms, to repeat, he believes that international institutions that harm the poor must be reformed; however, he also believes that affluent countries will find, upon examining his scheme, that it is in their own interests to adopt it, given (a) the goodwill from poorer nations that will thereby accrue to them; (b) the extra stimulation that will result for pharmaceutical research; (c) reductions in the prices of drugs that citizens in rich countries will also need, and in the cost of their medical insurance.

In sum, we have seen how international patents, when applied to the pharmaceuticals needed urgently by poor nations, demand reform at the bar of cosmopolitan justice; we have also examined one proposal for doing just that, put forward by Thomas Pogge. For the cosmopolitan, then, as citizens of affluent nations, we are all under a duty to ensure, through our elected representatives, that a scheme such as Pogge's in enacted.

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