



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

CPR & NYU WORKSHOP ON GLOBAL REGULATORY GOVERNANCE

INDIA, THE SOUTH AND THE SHAPING OF GLOBAL ADMINISTRATIVE LAW

5-6 January 2008

The Ambassador Hotel, New Delhi

Participants: Bina Agarwal, Upendra Baxi, Simon Chesterman, Bhupinder Chimni, Philippe Cullet, Shekar Dasgupta, Nitin Desai, Rochelle Dreyfuss, Navroz Dubash, Samir Gandhi, Menaka Guruswamy, Robert Howse, Andrew Hurrell, Samuel Issacharoff, Asmita Kabra, Ratna Kapur, Benedict Kingsbury, Sudhir Krishnaswamy, Malathi Lakshmikumar, CV Madhukar, Sudha Mahalingam, David Malone, Pratap Bhanu Mehta, Geoffrey Miller, Raju Narisetti, Smita Narula, TN Ninan, Pamela Philipose, Vikram Raghavan, Lavanya Rajamani, Surabhi Ranganathan, Mahesh Rangarajan, Richard Stewart, Nirmalya Syam, Yukari Takamura.

Rapporteurs: Kavitha Chalakkal, Abilash Gopinath, Rohan Mukherjee.

Report prepared by: Rohan Mukherjee, Surabhi Ranganathan.

REPORT

Global Administrative Law is an important new area of practice and theory with important implications for both global and national regulatory governance. At the global level, it addresses the use of administrative law techniques, such as transparency, participation, reasoned decision, and judicial review, to promote greater accountability and responsiveness of global regulatory bodies, including to developing countries and civil society interests. At the domestic level, global administrative law addresses the impact of global regulatory authorities and procedural and institutional practices and norms on domestic systems of decision making, including domestic administrative law and the role of courts and other tribunals. [c.f. [The Emergence of Global Administrative Law](#)]

In 2004, the Institute for International Law and Justice at the New York University School of Law launched a Project on Global Administrative Law to foster research, publications, conferences and workshops, and international exchange and discussion on the emergence of Global Administrative Law [GAL]. The Delhi workshop, organized in collaboration with the Centre for Policy Research in New Delhi, is part of this initiative.

The objective of the workshop was to discuss different conceptions of GAL, and its role in global governance. The agenda thus sought to include sessions and speakers that would address conceptual issues as well as practical implications of GAL in different fields. Over the course of two days, the workshop addressed the role of GAL in: regulation of economic regulators, the international patents regime, the global climate change regime, and development induced displacement. Other themes discussed were administering democracy, security and media accountability. This report provides a brief overview of the proceedings in these sessions.

INTRODUCTORY SESSION

Panelists: Benedict Kingsbury (NYU), Bhupinder Chimni (JNU) and Pratap B. Mehta (CPR)

Benedict Kingsbury opened the workshop with an overview of GAL as an academic enterprise at NYU. As conceived by the GAL project, GAL encompasses administrative law mechanisms - such as transparency, consultation, participation, and effective independent review of rules and decisions - that promote or otherwise affect the accountability and responsiveness of global, regional and domestic bodies.

Increasingly, it is seen that a large part of global governance is administrative, consisting of procedures for rule-making and decision-making. Administrative law plays the same role at the global level as it does at the domestic level: it channels government power. Domestic administrative law performs two functions. First, it limits government power and protects values like human rights, democracy etc. Second (and this is the more subtle function) it serves to *enhance* government power. For instance, administrative law mechanisms can be used by the federal government to exercise control over state governments; government at either level can control independent agencies; and private actors can be mobilized to work toward public goals.

At the global level, it is possible to identify a “global administrative space” populated by regulatory administrative institutions and subjects of regulation (states, individuals, firms and NGOs). Global administrative bodies include: formal international organizations (e.g. Security Council); transnational cooperative networks between national regulatory officials (e.g. Basel Committee); distributed administration by national regulators (e.g. in the telecom or financial services); hybrid inter-government and private arrangements (e.g. Codex Alimentarius Commission); and private institutions with regulatory functions (e.g. International Olympic Committee).

One element of the project is to chronicle the development and application of GAL in all these regimes. In addition, the project inquires into whether, on the basis of these case studies, it is possible to claim the emergence of a normative discourse. And, if so, is it developing the right way. While administrative law does provide a language for articulating the demands of global governance, it is possible that “bad” normative outcomes might result from a focus on these alone.

Two factors may lead to such a “bad” normative outcome. First, the thus-far Euro-American focus of the GAL Project. This realization is a major driver for the Delhi conference, as of other GAL workshops including in Buenos Aires (March 2007) and Cape Town (March 2008).

The second related factor is the procedural focus of the GAL project. This focus on procedure, and on imparting legitimacy to structures of global governance if they follow procedure, may result in unequal structures that reinforce the North-South divide. Some commentators suggest that the scope of the GAL project be extended to take into account substantive disparities of power. This however, is a complicated (and risky) exercise. Broadening the scope of the project could blunt its ability to check arbitrary exercises of power. For the moment, it may be best to eschew a substantive normative view of globalization in favor of the more procedural approach.

Bhupinder Chimni focused on the procedure versus substance debate. He agreed that applying principles of transparency, participation, review, etc., to international regulatory bodies would help articulate the concerns of the South, but doubted whether a procedural GAL could significantly further the agenda of global democratic governance. He raised the following concerns:

First, there are limits to GAL in an unequal world. Experience suggests that administrative law does not work in certain contexts, e.g. non-liberal societies. Likewise, in an unequal international system, voices of subaltern states and peoples will not find reflection in the work of administrative bodies.

Second, administrative law focuses more on process and procedure, less on the substantive international law regime within which administrative bodies operate. However, the administrative bodies often make decisions based on substantive law. To the extent that there is this divergence between procedure and substance, GAL is of limited effectiveness.

Third, to succeed in practice, GAL has to engage with national and global civil society. In the absence of civil society involvement in the decision-making procedures of international standard-setting committees, it is difficult to voice the concerns of the global South. A fundamental problem is lack of information. Civil society organisations are not aware of what they can do to make a difference at the global level. A global right to information campaign would be a way of engaging civil society.

Thus, although GAL is one of the few ideas emerging from international law that have the potential to reform global governance, it will need to prioritise engagement with substantive international law and civil society or else its objectives might be undermined.

Pratap Bhanu Mehta delved into the ideas underlying GAL to emphasize its fundamental importance to the future of democracy. He illustrated this point through an exploration of three questions:

First, how may we today conceive the relationship between the North and the South? Is it an over-determined structural feature of the international system, or is it contingent on how institutions in the global arena position themselves along shifting alignments? Traditionally the former view has dominated. Now, this question is not so easily answered, and therein lies the importance of GAL.

Second, there is a set of principles of “good governance” that we would like to see in GAL (transparency, accountability, etc). Should we assume that good governance practices that inform GAL can be harmonised into a coherent workable system? For example, is a representative system necessarily a responsive one? Or is a transparent system necessarily one that enjoys meaningful participation? These questions need to be explored, and GAL provides a good medium for doing so.

Third, in part the CPR-NYU conference is attempting to respond to the so-called “crisis of liberal representative democracy.” The question is, are we entering a phase of “post-democracy”? One notable feature is the increasing power of non-representative institutions (independent courts, regulators). The current vocabulary and normative framework for looking at democracy is under severe stress. Concepts like representation, legal accountability of officials, collective-will formation, are strained. GAL is important for it attempts to examine these concepts.

Thus, the issue is not whether GAL focuses on procedure or substance, but that no matter which aspect we focus on, without dealing with the issue of representation we will be skirting the central democratic concern of our times. Thus, this conference is not just about GAL but about the very definition of democracy and the future of democratic theory.

SESSION II REGULATING THE ECONOMIC REGULATORS: GLOBAL GOVERNANCE DIMENSIONS

Panelists: *Sudha Mahalingam (CPR, Chair), Robert Howse (U. Mich., Speaker), Geoffrey Miller (NYU, Speaker), Navroz Dubash (JNU, Speaker), Vikram Raghavan (World Bank, Speaker), Sudhir Krishnaswamy (NLSIU, Commentator) and Nirmalya Syam (JNU, Commentator)*

Robert Howse addressed an ongoing debate on when regulatory standards and principles from other specialized regimes may be legitimately imported into WTO law by WTO dispute settlement organs to determine the scope of member-states' obligations under the GATS.

"Importation" is necessary because of the lack of well-defined rules, especially rules relating to the market access requirement in the WTO. Until the Uruguay Round, domestic administrative law was of concern to the international trading regime only in so far as it fostered "import-discrimination" - this was prohibited. Beyond this, the GATT regime lacked the institutions and expertise to explore positive integration. In the Uruguay Round, the focus shifted to "market access". The WTO, especially the GATS, requires members to amend their laws to allow competitors to access their markets. This is a relatively new challenge for the WTO, and explains the lack of well-etched rules.

Importation raises several questions: when is it legitimate? What is the manner in which it should be carried out? And, to what extent should the dispute settlement organs follow the interpretative practice of the regime from which it is sourcing standards and principles?

Howse develops a conceptual framework in response. Acceptable (manner and extent of) importation depends upon how we conceive the purpose of the GATS. Three views are suggested:

First, the purpose is greater international competition facilitated by more complete deregulation. International regulatory standards would be benchmarks against which *domestic* measures would be evaluated as more, or less, trade-restrictive. The adjudicator must therefore ascertain that the standards applied reflect common practice; their internal legitimacy is immaterial. Furthermore, the adjudicator must keep in mind whether, given the decentralized and horizontal relations between different regimes, principles of "deference" or "comity" are to be applied.

Second, the GATS represents a balance between public policy values and values of liberalization. Importation of baselines or benchmarks from international regulatory regimes may be to facilitate this balance. The weight and value given to external standards may well depend on the extent to which they legitimately reflect non-trade values and interests. Thus here, the internal legitimacy of the standards matters, this being defined *inter alia* by adherence to GAL principles of transparency, participation and deliberation, giving of reasons, etc. The use of the standards should not undermine effects or purposes intended by the other regime. The practice, culture and process of the other regime should be taken into account.

Third, liberalization of trade may require upward harmonization of regulation. Here, international regulatory standards may be applied to assure external conditions necessary for trade-liberalization. Legitimate importation depends only on the instrumentality of the imported standards in promoting a shift to liberal trade. At the same time, the issue of comity does arise if the manner of importation produces distributive effects that are not intended by, or legitimate under the regime from which the standards are sourced. The question again arises: is comity a necessary structural principle for the international legal order (given fragmentation)?

Geoffrey Miller focused on the reasons for the success of Basel Committee's risk-based capital guidelines. Issued in 1988, these guidelines have been adopted by more than 100 countries, and have contributed to a fundamental change in regulation of banking fraud.

The success of these guidelines presents a puzzle for the study of global administrative law. First, they violate fundamental requirements of legitimate global governance: no participation of affected countries; no transparency; no judicial or external review; and, no other formal mechanisms of accountability of the Basel Committee. Second, the Committee is essentially a club of central banks and regulators from a few small countries with no power but to recommend banking reforms, and no power to enforce adherence to its rules. Yet many countries have adopted the guidelines. Why?

Miller suggests the following explanations. First, the Committee's non-formal nature is one of its strengths. It relies upon governments to implement recommended reforms though compliance is not mandatory; and governments realize that they must adhere to the guidelines to attain international financial credibility. Financial institutions also support compliance, for the free flow of capital is enhanced because financial actors can assess the stability of banks more easily. The Basel standards are effectively embedded in a range of other policies and market practices that make it difficult to resist adherence to them in one form or another.

It is however also important to note the efforts made by the Committee to inject more administrative rigor into their proceedings. The Committee has significantly enhanced its transparency and invites greater participation by non-member countries. Another factor to take into account is what its guidelines do not do. They do not threaten domestic political stability, since they do not impact major social groups. Their impact is esoteric – affecting only the operation of the financial system.

The prestige of the Basel process has been enhanced by experience, and it could in fact, be a model for global administration. At the same time, further evolution of the process is necessary, especially in terms of greater participation from developing countries. For, the Committee is not just a club whose rules impact only its members; ultimately its recommendations pressure all governments into compliance.

Navroz Dubash examined electricity regulation in India as a possible model of distributed global administration. The regulatory model in this sector owes its origin in part to the global movement towards privatization. More directly, it resulted from a 1993 World Bank directive which made lending for the electricity sector conditional on the establishment of transparent regulatory processes independent of power suppliers and able to prevent government interference in the day-to-day operation of power suppliers. It encouraged several Indian states to establish state-level regulators. The Bank's objective was to facilitate a more credible investment climate, in particular through tariff-reforms, including abolition of tariff-subsidies.

Orissa was the first state to embrace the regulatory model, assisted by Bank-funded consultants. Though the regulator did not function quite as the Bank had expected: refusing to agree to more than a moderate increase in tariff, the model caught the fancy of (and was sought to be replicated by) other states. For the sake of uniformity, the Central Government passed the Electricity Regulatory Commissions Act (1998) to provide an alternative legal basis to these states for establishment of state regulators. In 2003 a national Electricity Act was passed which embedded electricity regulators within a larger project of transition toward a competitive electricity market. The Electricity Act endowed regulators with a range of responsibilities including tariff setting, issuance of licenses, definition and enforcement of standards, promotion of renewable energy, and advisory functions with regard to competition and investment.

Electricity regulators are transplanted institutions. They owe their origin to the global movement towards privatization coupled with a specific World Bank policy. They have been closely embedded

in the national political economy, as a result de-linking electricity regulation from political forces. Adoption of explicitly articulated administrative procedures resonating with the language inherent in the good governance paradigm is also a result of global influences. Traditionally, administrative law in India has been judge-made; laying down rules is a departure from precedent.

At the same time, the regulators are increasingly taking on a national hue, owing to: first, the unraveling global electricity regime. The regime has always been informal, based on networks and knowledge sharing; now substantive differences are creeping in. Second, the government is expanding its control over electricity regulation. The emergent climate change may again reverse this trend. The conclusion that emerges is that domestic regulators acting within the “global administrative space” are part of both global and national administration; and the relative emphasis on domestic versus global considerations depends on the surrounding context.

On a separate note, the explicit articulation of administrative procedures coupled with the powers that regulators possess suggests the possibility of a shift toward administrative law as an instrument for democracy (and not just internal administrative accountability of regulators). This raises the question: how are the regulators used? Does explicit articulation of administrative law procedures for regulatory bodies provide greater scope for democratic accountability? In many instances administrative procedures are only honored in the breach, their adoption has failed to produce the political space for effective articulation of multiple interests. However, there has been a gain in transparency in the functioning of regulators.

Another question is: have regulators been able to promote the World Bank agenda of private service provision and competitive markets? Regulators have tended to align with government agencies and incumbent utilities, against opening up to private players. Can the regulators gradually become more accountable to a larger global regulatory regime? Administrative procedures do offer potential for this but the manner of their use depends on the conditions in the local political economy.

Vikram Raghavan focused on the Telecom Regulatory Authority of India. The role of economic regulators is to sustain economic reforms in India’s transition from a restricted to a liberal economy. The TRAI is India’s leading regulator, and was constituted in 1997 during Supreme Court litigation on telecom reforms. Its jurisdiction extends to telecom, broadcast, and cable services.

TRAI does not readily fit within the typology of Global Administrative Bodies described in the introductory session. It represents a new structural mechanism through which GAL emanates - there are considerable GAL dimensions to its creation and functioning:

First, the technological underpinnings and seamless nature of communications gives it a distinctly international flavor. Second, its creation was based on India’s acceptance of an emerging international practice, fostered by the WTO telecom negotiations, to separate regulatory and service-delivery functions. TRAI exists as an independent telecom regulator, unconnected with service provision. Third, TRAI regularly makes use of international and comparative regulatory material, from a diverse range of sources including the experiences of developed and developing countries. It also relies upon WTO and International Telecommunications Union standards, although its final decisions naturally address the particularities of Indian conditions. TRAI also maintains direct contacts with other regulators and participates in several regional and multilateral forums.

Finally, TRAI displays remarkable observance of GAL principles, such as: due process; stakeholder participation, including reaching out to consumer and telecom activist groups; and external review - the TRAI act provides for review by the Telecom Disputes Settlement and Appellate Tribunal as well as the Indian Supreme Court. The Act also provides for legislative and executive oversight.

To fulfill its obligations under the new Right to Information Act, TRAI has adopted a regulation to facilitate public access to information, providing that TRAI may disclose even confidential information if in the public interest. Other institutional arrangements include appointment of a public information officer. Even prior to the RTI Act, TRAI had established a high standard of transparency through its consultative exercises and user-friendly website. The TDSAT, armed with the transparency requirement in the TRAI Act, also checks unwarranted withholding of information.

Sudhir Krishnaswamy provided comments on the papers by Howse and Raghavan. On Howse's paper, he agreed with the use of the process of norm formation as the key to legitimacy. Given the absence of hierarchy between international institutions, Howse's caveats regarding comity provide scope for institutions to talk to each other. The GAL project holds the promise of facilitating this. Internet governance is another example of the effort to evolve a process-based protocol, through which the hybrid networks can talk to each other.

On Raghavan's paper, he highlighted one aspect not covered in the paper: most material, including policy papers produced by TRAI are written by foreign consultants - another source of 'global' influences.

Nirmalya Syam commenting on the papers by Miller and Dubash, suggested that although both papers repose faith in the democracy-enhancing potential of GAL, there remains need for reform.

Discussion

The discussion revolved around two related themes: the scope of the GAL project, including the procedure versus substance debate; and the potential of GAL to foster democracy.

It was suggested that the GAL project, although admirable as an agenda for describing what is happening, is normatively deficient for it does not provide resources for resisting what is happening. The project must also aim at transforming regulatory structures, for regulation is different from law: the former aims at re-orienting behavior in a technical manner, the latter foregrounds politics. Exercise of the former limits the latter. In response it was argued that defining regulation as "reorienting behavior in technical ways" obscures the broader potential of regulation. Should regulation be viewed solely as an expertise-based process? This does not adequately capture the reality of regulators as the locus of political contestation.

The above point was closely related to the ensuing discussion on the potential of GAL to foster democracy. One speaker referred to the democratic deficit in the international sphere, and suggested that the debate limit itself to questions of effective state participation in the operation of global regulatory organizations, not on how GAL can foster democracy. Another noted the impact of global regulatory processes – even when routed through "international consensus" to overturn domestic regulation shaped following proper democratic processes. He took the example of the Financial Task Force which requires positive changes in Indian law, including Indian criminal law. Does this signify a move to "post-democracy"?

Another speaker suggested that there are three ways of understanding why people listen to regulators: first, they are democratically constituted; second, they are instruments of political interests; and, third, (as in the case of TRAI) when an order is passed it contains reasons that speak to people, not at them. People listen to a regulator to the extent that its decisions embody public reason. This extent in turn depends on how much public dissent the regulator expects in reaction to its decisions. A regulatory body, like a court, gains legitimacy as a forum of principle. And, like a

court, it provides a forum for representation of public views. The operation of GAL encourages this endeavor.

SESSION III ADMINISTERING TRIPS : DETERMINING WHO WINS AND WHO LOSES IN GLOBAL INTELLECTUAL PROPERTY GOVERNANCE

*Panelists: Robert Howse (U. Mich., Chair), Rochelle Dreyfuss (NYU, Speaker),
Phillipe Cullet (SOAS, Speaker), Samir Gandhi (Economic Law Practice, Commentator) and Malathi
Lakshmikumaran (Lakshmikumaran & Sridharan, Commentator)*

Rochelle Dreyfuss focused on regulating dynamic innovation. The intellectual property regime is closely concerned with GAL because first, intellectual property rights [IPRs] have a long history of international regulation. The major institutions/arenas for intellectual property [IP] lawmaking are the World Intellectual Property Organization [WIPO], established in 1970 and the World Trade Organization [WTO], established in 1994, as a consequence of developed countries' frustration with the WIPO. The WTO's Trade Related Intellectual Property Rights [TRIPs] Agreement is now the principal international instrument in this area.

Second, TRIPs has created new demands of administration. A major issue is accommodating developing countries as their concerns are poorly addressed. With respect to developed countries the regulatory challenges posed by digitization and the internet were not even anticipated. There is the additional problem of accommodating emerging economies that are part neither of the North nor the South.

Third, the TRIPs governance system has not worked in practice. Domestic lawmakers lack clear understanding of what TRIPs permits. TRIPs contains some normative terms, which are thought to afford an opportunity for flexible interpretation of obligations, but these have not found voice in the mechanical approach adopted by WTO adjudicators.

What are the avenues for reform of TRIPs? One option is to revert to the WIPO to facilitate a more balanced approach at the international level, one that takes into account the needs of different countries. WIPO has experience in dealing with problems of development and technological change and its governance structure is conducive to legal experimentation for it operates through small working groups, has promulgated generally accepted "soft law", allowed NGOs and non-members to participate, and formally adheres to a voting process, although it attempts at a consensus on major issues.

Furthermore, since the shift to the WTO left the WIPO bereft of its original purpose of promoting IP protection, it has sought to reposition itself on the side of a stronger development agenda. The political economy has also changed: the old WIPO was conflicted by differences between the North and South, but now there are groups in the North championing public access, and the emerging economies could join hands with the South to push for stronger "user" protections.

The TRIPs Council is another alternative. Unlike WIPO the Council directly impacts the TRIPs Agreement. The Council could formulate recommendations, balancing different interests, for presentation to the General Council. However, it is doubtful whether the Council has the capacity to formulate recommendations that can genuinely lead to reform.

For, the WTO lacks IP expertise. The Dispute Settlement Understanding [DSU] does not provide clear standards because TRIPs negotiators knew very little about IP law. This knowledge deficit

continues: IP experience is not a necessary qualification for a DSU panelist and members of the Appellate Body have not dabbled in IP. Also, there is insufficient transparency and participation in TRIPs Council proceedings. Minutes and reports are posted after meetings; the agenda is not made public beforehand. NGOs have no role; other intergovernmental organizations get only observer status (sometimes on ad-hoc basis).

The best approach would be to devise some means of combining the expertise and openness of the WIPO with the potentially legitimating role of the TRIPs Council. In other areas within the WTO there is provision for deference to expert bodies such as the Codex Alimentarius Commission. The TRIPs however only contemplates highly specific and limited cooperation with WIPO.

In sum, to create a functional international IP system we need global norms governing the interaction between relevant expert bodies. This presupposes an understanding that sovereignty can be exercised through delegating to international bodies. We need to inquire into the utility of regulatory competition resulting in the availability of alternate forums: does it facilitate a balance of interests or perpetuate higher levels of IP protection? Is there a need for principles of “comity” or “res judicata”?

International norms on participation, transparency, prevention of corruption, etc. are desirable. Procedures must take into account the special challenges faced by least-developed economies, for even with the new bridges between the North and the South, the interests of the South are unique. Technical assistance for instance would be highly desirable for the countries of the South.

Globalizing the market for intellectual goods also has substantive implications. With international protection of rights, there is no longer a good case for maximizing returns in every national market. We need a mechanism for considering issues of distributive justice.

Philippe Cullet focused on the interaction between the domestic and global regimes, discussing whether the patent regime adequately balances the interests of the patent holder with the values of poverty alleviation, human rights and sustainable development. It is difficult to distinguish between procedural and substantive issues in patent law. Equity concerns must play a role in any consideration of patent law: equity between the North and the South at the international level, and between users of the system and the society at large at the domestic level.

Independent India adopted its own patent law after a significant policy debate. The 1970 Patents Act retained the basic western model (that a colonized India had been exposed to) but with some modifications aimed at mitigating the negative impacts of the monopoly inherent in the patent system. As such, it provided a model for a TRIPs Agreement sensitive to developing country needs.

The adoption of TRIPs brought an end to differential treatment of states and consequently, the implied flexibility in adopting domestic laws. All countries were required to move to a uniform standard. This made it necessary for India to amend the Patents Act. Three rounds of revision followed; none were preceded by the kind of domestic debate that had characterized the original Act. The amendments were guided by foreign private interests and there was little participation from the people who would be affected by the proposed changes. With each revision the distinctive socio-economic protections of the Patents Act 1970 were stripped away.

Assessment of benefits and losses from the global patent system indicates that there is little space for a balancing of interests. Certain types of innovators in certain fields of technology benefit (and lobby for increasing patent protection), and the socio-economically deprived suffer. TRIPs provides few benefits for the poor: it is unable to promote better access to drugs; as inventors, the poor find it difficult to “use” the patent system; and, research and development by other innovators is rarely to

the benefit of the poor for TRIPS incentivizes development of particular types of technology over other types. Global patent regulation fails to consider the developmental impact of patents.

Reform of patent law and patent law-making is necessary. Two measures in particular are called for. First, it is imperative to restore the balance between the rights of patent-holders with rights of the society to benefit from the development of new technology as a legitimating condition for the patent. Second, patent law must not be considered in isolation from social development, environment policies and realization of human rights. It is possible to embed social and environmental goals within incentives for technology development. The realization that patents may impact directly upon the realization of human rights and environmental protection should inform patent law.

Samir Gandhi commented on both papers. The problems in the Dispute Settlement Body's [DSB] functioning may be intrinsic to every international adjudicatory body, for essentially it is faced with the same problem of a tussle between domestic and international law. With the emergence of a global regulatory order, national laws and public opinion have to play second fiddle to global norms and to the decisions of the global regulator. The actions of administrative actors, including the DSB, must be subject to regulation. The DSB must neither interpret treaty provisions in an arbitrary manner nor overstep the WTO-prescribed mandate. Short of such judicial overreach however, national governments would be best served by adhering to DSB recommendations.

Similarly, much of the WTO's opacity of process and decision-making is due to its size, income, resource disparity and the differential levels of technical expertise amongst WTO members. Some opacity is intrinsic to any large international organization catering to the interests of several nations. Furthermore, for any new or existing organization to effectively administer international IPR, administrative rules must go beyond merely stipulating standards of transparency and participation in decision-making, and must address lack of technical expertise and provision of financial support.

Malathi Lakshmikumaran observed that the national debate prior to the adoption of the Patents Act spurred the pharmaceuticals sector to develop process patents and challenge multinational corporations and other big companies. There was no such debate during the three revisions that followed because TRIPs had come into existence and virtually dictated the terms of the Indian law.

The WIPO may be forcing the laws of the North upon the South. Post-TRIPs, patent offices in India are flooded with patent applications but lack the infrastructure and capacity to review them. Perhaps India is being forced to adjust too rapidly to a system essentially designed for the North.

Discussion

The discussion centered on the demands of developing countries and why they do not get factored into TRIPs. Participants pointed to: the democratic deficit in the global IP regime; the move towards bilateralism and propagation of TRIPs+ agreements more aligned with interests of developed states; and, the need to address concerns of food security and transfer of technology.

It was observed that from the perspective of global administration, what we see is a sovereign developing state being transformed into an administrative unit of an international institution. The developing state is required to develop institutional structures to implement standards of a regime that fails to take its interests into account.

In response it was suggested that developing countries may not have benefited much from the TRIPs but that is because they gained more in other areas of the WTO, e.g. access to agricultural markets, at the expense of TRIPs. Patents are one means of securing the ends of social justice

through incentivizing innovations, but not the only means. We need other incentives to produce the goods that non-market economies need, such as food security. Another speaker observed that benefits and losses should not be assessed at the level of the state, for the state is not a unified actor. It is made up of divergent interests and even in the South, some groups actually benefit from TRIPS.

Another speaker observed that while “human rights”, “global justice” and “basic needs” can be employed to include concerns of distributive justice into the current IPR discourse, essentially these are contested terms. Proponents of global justice suffer from factionalism. Perhaps the language of “basic needs” warrants greater consideration.

SESSION IV ADMINISTERING DEMOCRACY IN POLITICAL CRISES: EMERGING GLOBAL NORMS?

***Panelists:** Simon Chesterman (NYU/NUS, Chair), Samuel Issacharoff (NYU, Speaker), Upendra Baxi (Warwick, Commentator), Pratap Bhanu Mehta (CPR, Commentator) and David Malone (Canadian High Commission, Commentator)*

Samuel Issacharoff addressed an issue of concern to all democracies: how do you ensure the continuity of the democratic process. In other words, how do you administer a democracy so that it does not consume itself? Democratic regimes around the world are besieged by anti-democratic groups that seek to use the electoral arena for propaganda of their cause. Virtually all democratic regimes respond by restricting participation of groups and political parties deemed beyond the range of tolerable conduct or views. Prohibiting such groups from participating raises problems for any liberal theory that locates legitimacy for government in the democratic consent of the governed. At the core all definitions of democracy include the primacy of electoral choice and the majority’s right to rule. Restricting a few groups from the electoral arena calls into question the legitimacy of the choices that are then permitted to the citizenry and, by extension, the entire democratic enterprise.

Under what circumstances may democratic governments act to prevent the capture of state apparatus by anti-democratic groups? That the first election is followed by a second? That minority rights are guaranteed? Three models are presented:

The American model: The US strongly endorses freedom of speech; all ideas should find space for expression. Speech is only barred on the standard of clear and present danger: imminence of direct harm, prohibitions carefully tailored to and no wider than the threat. No formal provision to ban particular views. At the same time, the structure of American politics: two-party, first-past-the-post, Presidential elections operate to exclude minority views, including of anti-democratic groups.

The Prohibition model: Certain groups are excluded from the political system. In Germany a party propagating Nazism is ineligible to participate in the political process. In Turkey Islamic parties are prohibited despite majority support, because they oppose the existing democratic setup.

The Ex-post model: In India, the primary form of regulating elections is ex-post. The Corrupt Practices Act provides for removal from office of candidates contesting on the basis of religious or ethnic hostilities. Thus the act seeks a middle ground between the constitutional right to free speech and protection of democracy by specifying acceptable electoral speech. While this is the least intrusive form of regulation, it may raise the most concerns about vagueness. The speech codes lack clear guidelines and are applied after the fact, giving rise to the possibility of abuse in application. Furthermore, ex-post action may result in removal of the majority-approved candidate from office.

A common factor for India and Turkey is that groups politically marginalized due to their views have responded either by becoming more militant or by moderating their views to gain office.

In limiting anti-democratic mobilization, democratic governments must observe some administrative principles. First, they must employ the least restrictive means to achieve this objective. Second, the object should be clearly articulated to enable judicial review. Power to restrain participation should not be exercised by those who are part of the political process, but rest with an independent authority that is transparent, representative and not accountable to the political process.

The real definition of democracy presupposes the ability of majorities to form and re-form, and to remove incumbents from office. Many deeply anti-democratic groups are willing to vie for power through the electoral arena but few are willing to give up power the same way. The definition of groups that are tolerable within a democratic order must turn, at the very least, on the capacity to be elected out of office, should they come to hold actual power.

Upendra Baxi commented chiefly on the conception of democracy employed by Issacharoff in his paper. According to Baxi, Issacharoff proceeds with a “thin” theory of democracy, understood primarily as an electoral arena which somehow constitutes the periodical investment in some with the right to govern others. He privileges this conception as a necessary (though not sufficient) condition for developing a framework of applied ethics that may enable understanding and evaluation of constitutional, legislative, and adjudicatory public reason. However, construction of thinness remains a hazardous enterprise. “Democratic elections” seems at first sight a fairly useful minimalist device because it only makes claims about “process” (procedures) and avoids making normative claims of any universal or substantive notion of democracy. Yet on a closer look, it contains at least four elements of a thick notion of liberal democratic constitutionalism: the right to political “participation”; the notion of separation of powers enabling judicial invigilation of restrictions on the right to participation; notions of politically responsible freedom of speech, expression and association; and finally, a pre-commitment to the preservation of democratic process. In turn, Issacharoff’s narrative device of constitutionalizing “extremism” presented as a “thin” conception emerges as rather remarkably “thick.”

Pratap Bhanu Mehta noted the paradox relating to tolerance, addressed in Issacharoff’s paper. To some extent, every tolerant doctrine will ignore those that do not agree with it, and sometimes it will resort to intolerance to tackle intolerance. This raises the question of just what constitutes a doctrine so intolerant that it should be excluded from the political process? A parsimonious universal threshold for excluding political parties from the political process will be useful. “Clear and present danger” might be an applicable basis. India’s case is not that different from the US clear and present danger doctrine for what is prohibited is winning elections on grounds that may incite violence.

David Malone offered some general observations. First, Issacharoff’s paper deals with countries that are systemically important for the future of democracy: Turkey for the Middle East; India for South Asia and as the world’s largest democracy; and the US as the world’s oldest democracy. However, although comparisons are useful, generalizing on the basis of comparisons often leads to propositions that are “generally” true, but not true for any individual society.

In addition he noted that it is important not to underestimate the extent to which those designing regulation can become delusional themselves, the Security Council for example. The lure of administrative process must be subjected to transparency requirements. Governments always resist. The media can play a role. Civil society, although it is affected by the outcomes, may not have much to contribute to the design of the processes.

Discussion

The discussion touched upon several points. The first on majoritarianism. One participant felt that extreme majoritarianism was of greater concern than minority viewpoints at the margin. Another cautioned that in a country like India we should be careful in identifying majorities. Potential divisions may be along regional, religious, language, ethnic and caste lines; therefore crude forms of majoritarianism cannot describe the political process.

The second was the similarity between Indian and US positions on exclusion. The suggested similarity was the dangerous powers both countries allowed their governments. The US can jail political objectors and India can allow a majority government to continue even if it espouses undemocratic values. The distinction, another speaker suggested lay in extra-parliamentary activity: the gap between law and implementation. The practice of the two countries differs greatly.

The third was whether the Indian Constitution expressly provided for any form of political exclusion. One speaker suggested that it did not, another pointed out that the Constitution includes “socialism” as a preambular principle.

In his concluding remarks, Issacharoff noted that the panelists spoke to the heart of the paper, in discussing how thick a notion of democracy must be for it to be effectively regulated. He took it to be, at the very minimum, the renewal of electoral consent.

SESSION V ROUND-TABLE PANEL DISCUSSION: NEWS MEDIA AND ACCOUNTABILITY IN GLOBAL GOVERNANCE

Panelists: Ratna Kapur (Centre for Feminist Legal Research, Moderator),
Pamela Philipose (Senior journalist, formerly Indian Express), CV Madhukar (Parliamentary Research Service),
TN Ninan (Business Standard) and Raju Narisetti (Mint)

Ratna Kapur asked the panelists to comment on the following questions. Global media today is deeply implicated in global governance; it decides what we see and what we don't. Are there background factors that influence its decisions, including norms espoused by media actors? How is the media itself made accountable? What constitutes a newsworthy story? Are transnational information flows unidirectional or multidirectional?

Pamela Philipose noted that the right to expression is a constitutional right. In India the right to information is viewed as complementary to the right to expression. Whether the Indian media is free or not is an open question. There is great diversity in Indian media today simply due to the diversity of languages in India.

Globalization is important in terms of bringing capital and energy into the Indian media, but it does have negative implications. Technological progress has reduced the time between the occurrence and reporting of an event. The media is obsessed by readership and television rating points, for revenues are linked to advertising. The market is highly competitive and this does not make for the larger social awareness that one associates with the role of the media. There is an inordinate focus on the “scoop”. Often the wrong issues are focused on just because they make for an attractive story, especially in the mainstream media. It is left to small publications to highlight the reality of issues like Millennium Development Goals, female employment, the National Rural Employment Guarantee Act, etc.

This has an interesting effect on viewers and readers. Confronted with the dizzying roundabout of news, they begin to believe that they can exercise little control over the events taking place. This has implications for the accountability of global media. The media ultimately is a public sphere which connects people with each other and with the world. It is the foundation for legal initiatives. Therefore we need to debate not just the law but the way it is received in the media.

C V Madhukar addressed the media's contribution in promoting accountability among state institutions. With respect to judicial accountability its powers are limited. We have laws that make it difficult for the media to write or say anything about judges. The 1971 Contempt of Court Act requires the media to prove that the report is in the public interest; that it is true is not enough. A Bill to change this and make truth a defense was passed by the lower house of Parliament. Also in the offing is a Judges Inquiry Bill which provides procedures for the public to hold judges to account.

With respect to legislators, the media is subject to few restrictions. Much of the coverage is negative and at times exaggerated. The media has on occasion influenced policy decisions. Even so, it can do more to address some of the core issues we face today. For instance, newspapers could do an assessment of the policy cost of time lost in Parliament.

T N Ninan made four points. First with respect to the legal framework within which media functions, he observed that while the first amendment to US Constitution guarantees freedom of press, the first amendment to the Indian Constitution took away some of the freedom that the press enjoyed. Further, courts are now introducing prior restraint in regulating what the media does. There is a much broader clash between freedom of speech and other laws, such as those seeking to protect communal harmony or public order. There are therefore serious lacunae in the environment in which the press functions.

Second, a developed public opinion and countervailing sources of information are both necessary for the media to function as an effective force for accountability.

Third, with respect to the internal dynamics of the media, both in television and print, the reader/viewer pays (and is willing to pay) only a fraction of the cost of the service. The bulk of revenue comes from advertisers. This creates automatic pressures, so how do you cope? If publishers cross over to the advertiser's side, they cease to be watchdogs and become public relations machines, else they lose revenue.

Finally, on the media's relationship with society, ultimately the condition of the media is a reflection of the conditions of the society.

Raju Narisetti remarked that though news-media plays a key role in governance issues, it is an institution increasingly seen as lacking self-governance. Anecdotal evidence suggests that public trust in the media is declining. 20 newspapers and 40 news channels signify a vibrant media sector but pose problems for its future because: first, media proliferation doesn't work if the result is lesser coverage. Often, if a national newspaper breaks a story other newspapers will not touch it because they don't want to be seen as "followers". Thus an important issue may not receive adequate coverage. Second, politicians often take the media to task for mildly criticizing them. Third, journalists tend not to admit their mistakes, e.g. factual errors. Fourth, many media companies lack strong codes of conduct. Finally, some large media houses own stock in companies they write about. The reader is in ignorance of the ownership of shares and the (potentially) ensuing bias.

Discussion

The discussion addressed the following questions.

Can problems of coverage and accountability be addressed by the entry of blogs? In response, it was noted that blogs are popular, but given the low internet penetration in India, they are yet to play a major role.

Has there been a shift in the media's attitude towards globalization over the years? As also attitudes towards the US? In response, it was stated that there has been a shift. This is because globalization is creating winners in some sectors in India; engagement with the rest of the world is seen as beneficial for India. The shift in the attitude towards the US dates back to the Clinton Presidency and the Kargil war when India saw that the US was willing to offer it support in the conflict with Pakistan.

What are the language dynamics of media? In response, it was noted that English newspapers set the policy and news menu for the rest of the country. There has been an explosion in circulation of English newspapers in semi-urban and rural areas due to neo-literacy.

Two other points made were: Self-regulation exists on paper; in reality there is none. There is a degree of circularity in coverage - politicians turn to media for information on policy issues; the media takes its cue from politicians in deciding what to cover. An important reference was also made to the issue of "private treaties" in the media. The panelists elaborated on this concept, whereby private companies pay for advertising in the media with their own shares. This creates a significant conflict of interest, since a media house's advertising revenues become tied to the fortunes of the companies with which it has entered into these "private treaties". As a result, there is a considerable incentive for the media house to give consistently positive coverage to these companies. The panelists cited general instances of top-down pressures within the hierarchies of their publications to give greater column space and better coverage to certain companies for this reason. Therefore, the issue of private treaties has a significant impact on the prospects for transparency, accountability and representativeness in the media.

SESSION VI GOVERNANCE OF DEVELOPMENT AND DISPLACEMENT DISPLACEMENT AND DISRUPTION OF LIVELIHOODS: TRANSPARENCY, ACCOUNTABILITY AND CIVIL SOCIETY IN THE GOVERNANCE OF DEVELOPMENT AND CONSERVATION PROJECTS

Panelists: Benedict Kingsbury (NYU, Chair), Smita Narula (NYU, Speaker), Asmita Kabra (Delhi University, Speaker), Bina Agarwal (Delhi University, Commentator) and Mahesh Rangarajan (Delhi University, Commentator)

Smita Narula addressed development-induced displacement, with a focus on the recent Indian projects for setting up special economic zones (SEZs).

Some general propositions: first, quite often, different international organizations impose conflicting obligations upon developing countries; for instance encouraging both rights-based and market-based measures. With respect to SEZs, India is on the one hand in violation of international human rights treaties. On the other, SEZs are encouraged as a means of augmenting international capital flows.

Second, global norms fail to take intra-state vertical distinctions into account. The North-South divide is an intra-country phenomenon as well as an inter-country one. In India, a growing middle class has benefited from post-1980s economic reforms, of which SEZs are a recent manifestation.

Third, different global norms enjoy different levels of credibility and institutional backing, which affects the extent to which they are implemented in domestic spheres. Domestic courts are required to balance their state's multiple goals of development, sustainability, and human rights. Usually development and market-based reforms prevail over human rights or sustainability concerns.

SEZs, announced in 2000 to generate economic activity and promote foreign investment, are fairly deregulated zones. They are subjected to few environmental restrictions and benefit from tax holidays and relaxed labor laws. For purposes of trade regulation, they are deemed foreign territory.

SEZs have been at the root of tremendous social and political controversy. To obtain land for SEZs, the Land Acquisition Act was invoked and rules for transfer of lands formulated. There was no representation or participation of those affected. The state is far more accountable to the corporations setting up SEZs than to the people displaced. The displaced do not benefit from the jobs created by SEZs. The IMF has criticized the extensive tax subsidies and lost revenue potential. SEZs have also created strain in centre-state relations in India. The deregulated environment makes them in effect "lawful lawless" zones when it comes to protection of human rights. In sum, SEZs corrupt the character of Indian democracy.

Protests against SEZs have been vociferous and widespread. Increasingly, protestors will begin to connect with global movements and transnational networks. However, their ability to impact policy (and connect with global networks) is restricted by the dominance of the development agenda. At the national level, the Government has been somewhat responsive to protests, but only in procedural terms, for instance there is an initiative to amend the Land Acquisition Act.

The SEZs example touches upon the roles disavowal and resistance play in global governance. There is little coordination between international organizations at the global level, whereas clashes regularly occur at the domestic level. Public discourse tends to balance development concerns with human rights ones. Through the Narmada protests activists brought about a change in the World Bank policy, and forced it to have regard to the human rights violations of the displaced. Now, it is important for rights-considerations to play a greater role in government policies and the GAL project has the potential to facilitate this.

Asmita Kabra discussed conservation-induced displacement through a micro level case study of Sahariya Adivasis in the Kuno wildlife sanctuary. Together, globally important 'biodiversity hotspots', apart from being the repository of endangered flora and fauna, are home to 1 billion people, 60% of whom are indigenous. The 20th century witnessed rapid marginalization of such groups due to increased demands for resource extraction on the one hand, and biodiversity conservation driven pressures on the other. The "conservation" community has increasingly viewed with concern the supposedly unsustainable resource extraction practices of communities who live in and around biodiversity-rich areas and depend on these for survival. To them conservation implies creation of inviolate spaces where ecological species can exist without human interference.

Kuno is inhabited by the Sahariya, an indigenous group of food-gatherers and agriculturists. The Sahariya are mostly illiterate and lack access to basic amenities, but prior to displacement, food security was not in issue. They were displaced by a government initiative to bring them into the "mainstream". The government offered a resettlement package consisting of 2 hectares of cultivable land for each family, with homes and amenities.

The government took steps to ensure a smooth transition. The displacement was not coercive, i.e. it was voluntary in the way this is defined by the government. It was, however, involuntary in the sense that it was not based on full, free, fair and informed consent.

The displaced households have fared dismally according to all standards of human development. One reason is that the quality of the land given to them is lower than that of the sanctuary, but the crunch has really occurred because their access to community resources that contributed to their livelihood has been cut off. The bulk of their income today comes from wage labor, compared to the diverse income sources within the Kuno sanctuary; income levels have fallen greatly.

It is easy for governments to make conservation commitments in global forums, but implementation brings up considerations that are not easily resolved. An important question for the government is whether it should give preference to a human rights based approach over risk-balancing.

Bina Aggarwal, commenting on both papers made five points: First, although risk-based and rights-based approaches are pitted against each other they are not contradictory but complementary. Individually, both suffer from drawbacks. The “capabilities” approach articulated by Amartya Sen is more useful.

Second, on Narula’s paradigm of economic growth as development: since the 1950s other paradigms have emerged characterizing development differently, e.g. dependency, poverty, income-inequality, unemployment, human-development, sustainability, etc. Growth is a necessary but not sufficient condition for development. The relationship between the development paradigm and promotion of justice through law is not simple; sometimes shifts in the paradigm result in pro-poor legal change.

Third, on measuring the impact of displacement in Kabra’s paper: It is striking that one of the undisplaced villages is similar in per capita income to the displaced villages. Another village with better average income is actually an outlier because of its access to forests. And, its poorer access to health centers gives it a higher infant mortality rate [IMR]. This suggests that the impact of displacement is not clear.

Fourth, it is important to view displacement from the macroeconomic perspective. We cannot address displacement without addressing agrarian stagnation, non-farm growth, etc.

Finally, we need a new approach (besides protests) to empower the small farmer and ensure his substantive inclusion in the development process. A group approach has potential. Here groups of farmers pool resources for investment or joint cultivation.

Mahesh Rangarajan also commented on both papers. India provides rich examples of involuntary displacement and resettlement, a fact that we need to acknowledge.

During the process by which SEZs were agreed upon and commissioned in Goa, West Bengal and UP, the government remained entirely focused on investment and manufacturing, not at all on human rights. Are opposition parties able to block such initiatives?

Can we go further from specific movements against displacement to protection through legislation? We need legal remedies, not just policies, to address the issues at hand. On resistance, it appears that localized adivasi movements are more successful than transnational movements.

Displacement earlier concerned those with livelihood rights on uncultivable lands. Now the targets include those with rights over fertile agricultural lands. Is there a shift in our political economy against the agricultural sector? If yes, the government is playing an important role in facilitating this shift.

The process of land acquisition by its nature is secretive and coercive. Therefore there is an intrinsic conflict with the notions of natural justice and democratic governance. Land acquisition in this sense compromises the nature of democracy in India.

Discussion

Most of the discussion was focused on the issue of SEZs. Different approaches to the problem were suggested. One discussant suggested that the problem be analyzed in an international trade paradigm, i.e. in the context of Most Favored Nation treatment, investors' rights and trade law. Another approach, grounded in political theory, suggested that the real issue was that of property rights. Concern was expressed over the fate of the land sector in the hands of government. In this context SEZs can be viewed as government trying to create space and forging common policy for its use. In terms of domestic politics such an approach may backfire, yet it has leverage in the international arena. Another view suggested the opposite, i.e. the Indian state has become a "sabbatical state", whereby it has taken leave from its functions and human rights and natural justice have been reduced to the instance of employment. The role of the judiciary was also criticized, characterizing it as part of a broader trend of "judicial globalization", whereby transnational norms now promote judicial abstinence from macroeconomic policies.

In terms of the resistance to SEZs, it was pointed out that there are two aspects to the protests; one is focused on the issues and controversies over "public purpose" and the second is concerned with the specific impact of such projects on individuals. It was also noted that although there is no inherent illegality in the setting up of SEZs, the question of state failure turns on the issues of representation and participation of those impacted by SEZs. It has been on these counts that the government has failed to ensure adequate relief to its citizens. The emphasis should therefore be on the property rights concerned and how a balance of interests could be achieved while addressing the fact that there is little participation in the decision making process.

Mahesh Rangarajan responded to the discussion by emphasizing the fact that there exists very little political space in India for protesting the SEZs, and this in fact highlights the capital-driven nature of economic growth in India, which raises concerns regarding transparency and participation in decision making. Bina Aggarwal pegged the issue on international alliances and judicial globalization, which is a phenomenon that national governments have to accept. Who ultimately adjudicates and what happens on the economic front is therefore a major concern. Moreover, SEZs have to be looked at in a larger international context of regulations and investment – it is important to be sensitive to market conditions and overall socio-political stability when investing in a region. She also argued that constant and strict restraints on individual property rights are not the answer, and that a collective approach at the local level would be more important and practical at this stage. Finally, with regard to conservation-induced displacement, Asmita Kabra reiterated that the relevance of GAL in the context of this particular issue is, by virtue of its nature, abstract and generic. The discourse on conservation and development as opposites cannot be true in every case because the complementary nature of the two is necessary and in some senses an ideal outcome.

SESSION VII: CAN CLIMATE CHANGE BE CONTROLLED THROUGH GLOBAL REGULATION? AT WHOSE EXPENSE?

Panelists: Nitin Desai (TERI, Chair), Richard Stewart (NYU, Speaker), Lavanya Rajamani (CPR, Speaker), Yukari Takamura (Ryukoku University, Speaker), Andrew Hurrell (Oxford, Commentator), Shekhar Dasgupta (TERI, Commentator)

Richard Stewart opened the discussion with an overview of post-Kyoto strategies for addressing global climate change. He reiterated the importance of a post-Kyoto structure for global climate

regulation in which all major emitting nations participate to achieve increasingly stringent reductions in the growth of greenhouse gas (GHG) emissions and eventual reductions in absolute levels in order to stabilize atmospheric concentrations at levels that will avoid the worst adverse effects of global warming. This goal can only be accomplished by moving developed and developing countries to low-carbon, climate-sustainable paths to economic development. The post-Kyoto structure should use a comprehensive approach, covering all GHG and sinks, in an international GHG cap and trade system that would set a firm limit on the emissions of all participants and would include the US and other industrialized nations, as also major developing countries. Such a system would be compatible with the Bali Roadmap recently adopted by the 13th Conference of the Parties in Bali, and is ultimately the only way to ensure effective and cost-efficient limitations on emissions on the scale required, spur innovation by business in low-GHG technologies, and transfer sufficient capital and technology from developed to developing countries to assist them in implementing sustainable pathways to development.

While industrialized countries certainly need to regulate their emissions, developing countries too are responsible for a significant share of non-fossil emissions, including those GHG attributable to forestry, land use changes and agriculture. Some developing countries have already taken significant steps to limit GHG emissions, largely for reasons other than climate concerns. There is however a need for more ambitious steps to limit the growth in developing country emissions; at the same time continued economic development must be ensured. Indeed securing the right to development in a climate-constrained world poses a significant challenge. One way in which it can be met is by encouraging industrialized countries to offer developing countries generous “headroom” GHG allowances to participate in an international cap and trade system. Developing countries would benefit from reductions in the adverse effects of climate change; from new inflows of capital and technology assistance in pursuing sustainable paths to development; and from global environmental benefits. A global taxation system for emissions trading would also be desirable to finance adaptation measures in developing countries.

Ensuring compliance with regulatory obligations is also a critical aspect in post-Kyoto negotiations, and requires accurate monitoring of emissions and sequestration. Publicity about countries’ performances, technical and possibly financial assistance to countries struggling to achieve compliance, and the potential for meaningful sanctions including, possibly, trade sanctions, would be appropriate ways of ensuring compliance. In sum, a new cap and trade regime to replace the old command and control regime would be the most desirable way forward as a global response to climate change that also makes room for the right to development. Various entry strategies should be used to engage developing countries, including technology transfer and coordination, sectoral agreements, etc. These and other measures can best be developed through bilateral, plurilateral and regional agreements. Some of these arrangements can continue in parallel with or folded into an eventual global post-Kyoto climate regulatory regime.

Lavanya Rajamani explored climate change regulation at two levels. At the international level, she focused on the existing burden sharing architecture in the climate treaties between industrialized and developing countries, and the ways in which the framework for re-negotiation set in Bali is of concern. Central to the existing balance of commitments is the role of developing countries in the Clean Development Mechanism (CDM), and through the CDM in ensuring sustainable development in their countries. At the national level, she explored the Indian regulatory framework for operationalizing the CDM, and the work of national regulatory authorities in ensuring

“sustainable development” – the determination of which is a national prerogative, yet also an international commitment.

Global regulation in climate change negotiations is based on the Principle of ‘Common But Differentiated Responsibilities’ (CBDR). This principle is found in the Framework Convention on Climate Change (FCCC), and also under Kyoto Protocol. The balance of commitments between developed and developing countries is such that industrial countries have the primary (but not exclusive) responsibility to mitigate climate change, while developing countries have the primary (but not exclusive) responsibility to achieve sustainable development coupled with adaptation to the adverse effects of climate change and to cooperate in efforts to address climate change. The balance of commitments between developing and industrialized countries is likely to change under the future climate regime and the two-year process launched at Bali on 15 December 2007 contains a framework for this change.

In this context, the commitment formula of the Bali action plan, which envisages that industrialized countries will undertake “nationally appropriate mitigation commitments or actions”, will permit some industrialized countries (like the US) to adopt nationally appropriate mitigation *actions* rather than *global commitments*, which is a significant departure from the Kyoto Protocol balance of commitments. On the other hand, Bali exhorted developing countries to take “nationally appropriate mitigation actions”, another significant departure from the Kyoto Protocol, which does not prescribe mitigation actions for developing countries. Therefore by putting countries like the US and India on the same footing, and not requiring “more, much more” from industrialized countries the Bali Action Plan is unlikely to lead to a secure climatic future.

As for the evolution of CDM in India, evidence suggests that India is an enthusiastic participant of the CDM, accounting for 33.9% of total CDM projects. CDM also finds a special place in the National Environmental Policy, 2006. However, the character of CDM in India has been different, particularly with regard to its unilateral nature and the relatively small size of projects. Moreover, it is evident that the system created in India for Designated National Authority (DNA) approvals, as well as the practice of the National CDM Authority, is designed to assist project developers in maximizing CDM revenues rather than in achieving any prescribed affirmative vision of sustainable development. On balance therefore, India’s regulatory framework is not faithful to the international climate regime in that it is not designed or operated to deliver sustainable development benefits, which is the *raison d’être* of the CDM in developing countries as per the Kyoto Protocol.

Thus by exploring climate regulation at the international and Indian level, Rajamani was able to offer insights on participation, effectiveness, equity, and sustainability in this domain – issues that are important from a GAL perspective.

Yukari Takamura addressed the impacts of climate change and the need for cooperation and coordination at the global level to reduce emissions globally. She focused on what has been taking place within the climate change sphere and how it contributes to the discussion on GAL. Particular emphasis was laid on the emerging and expanding carbon market created under the Kyoto Protocol and its influence on regime effectiveness, rule making and the relationship between international and domestic rules.

In evaluating the effectiveness of the current climate change regime, one is struck by the vigorous expansion of the carbon market created by the Kyoto Protocol. This has been largely driven by

soaring prices in the European Union Emissions Trading Scheme (EUETS) market for Phase 1 European Union Allowances (EUAs). Hence market mechanisms have now become an avenue for significant emission reduction in developing countries as well as a window for transferring technologies and funds to developing countries necessary for decarbonizing their economies and societies.

The compliance mechanism under Kyoto is a hybrid model. It institutionalizes and quasi-judicializes the process that identifies the cause of non-compliance and decides how to respond, thus improving predictability and legal stability. The compliance mechanism also makes use of market forces to provide incentives for parties to comply. From a regulatory perspective, the sound operation of the carbon market requires a specific regulatory framework with binding stringent emissions obligations to generate a demand for emission credits. However, the idea of linking one regulatory framework with others has emerged and this offers the potential for cost savings. The launch of International Carbon Action Partnership (ICAP) in October 2007 is an example of this trend. In general, the carbon market requires a strong regulatory and enforcement framework and harmonization of domestic regulations to ensure an equal footing among market players and to ensure the sound operation of the market, while seeking to expand it into a global one.

However, the market does not provide a perfect solution and has its own limitations. Firstly, being cost effective, the market will allocate funds and technology to places where more cost effective emission reduction options are possible, potentially accentuating global economic inequalities between industrialized and developing nations. Secondly, while the market as a whole demands rules for its functioning, individual countries and economic actors tend to behave in ways that maximize their profits and minimize their costs. They even go so far as to change in their own interest the rules essential for sound market operations. This could have negative impacts within countries on vulnerable populations. Ultimately, the question of how and to what extent the market should play a role in instituting and enforcing global climate change regulation should be further explored.

Andrew Hurrell, commenting on the papers, agreed with Rajamani's views on the Bali action plan, and characterized it as bringing about the "burial of the Kyoto protocol". He expressed concern in particular over the reduction in the obligations of Annex 1 countries, which essentially allows them to redefine the Protocol. He attributed the Bali outcome to a failure of leadership on the part of developed nations, a failure that has significant global costs attached to it. In terms of these economic implications, he concluded by saying that future prospects can only get bleaker as China becomes more protectionist and if the initial signs of economic recessions across the world take hold.

Shekhar Dasgupta focused on the importance of political feasibility for global climate change regulation. He was not entirely in agreement with Takamura's faith in the market as an effective compliance mechanism, especially since political intentions have the ability to shape economic relations. Keeping this in mind, he took a step back from Bali, to Kyoto, which he praised as one of the best international environmental agreements. He asked the panelists what the key lessons from Kyoto could be for future negotiations, especially in terms of the diffusion of technology and funds for emissions reduction.

Discussion

Two major concerns were raised. The first asked how the international community could engage in future arrangements beyond 2012. The second asked if against the backdrop of global economic justice concerns, countries would agree to a more stringent climate regulation regime. In response to the comments and discussion, Rajamani stated that in the future a truly “global” solution would require multilateral rather than bilateral or plurilateral approaches, and any such solution should supplement the existing framework of climate change commitments. She favored the technology diffusion model proposed by Dasgupta as an one element of the solution. Stewart agreed with Rajamani but stressed that plurilateral or bilateral approaches could be pursued alongside a multilateral regime.

The panel’s chair, Nitin Desai, concluded the session by remarking on the lack of accountability at Bali, and in other such international negotiation contexts, specifically the fact that the real decision-makers operated behind the scenes and were not answerable to the smaller countries that were impacted. He also stressed the importance of moving the climate dialogue from just the realm of administrative law to that of international politics. He cautioned that one should not underestimate the ability of diplomacy to secure positive environmental outcomes, as had been done by the international community in the past for fisheries and forest law.

SESSION VIII GLOBAL ADMINISTRATIVE LAW AND SECURITY

INTELLIGENCE AND SECURITY ISSUES: PROBLEMS OF TRANSPARENCY AND ACCOUNTABILITY

Panelists: Upendra Baxi (*Warwick, Chair*), Simon Chesterman (*NYU/NUS, Speaker*),
Surabhi Ranganathan (*NYU, Speaker*) and Menaka Guruswamy (*Advocate - New Delhi, Speaker*)

Simon Chesterman stressed the need for transparency and accountability in the collection of intelligence. There are few treaties that directly deal with “secret intelligence”, academic literature is also lacking. In part, this is due to the non-reciprocal manner in which intelligence gathering is viewed by governments; most states seek to prohibit intelligence-gathering by foreign agents, while safe-guarding their own capacity to gather intelligence in other countries.

Is obtaining covert information covertly, i.e. without consent from the state that controls the information, prohibited or regulated by international law? There are two traditional approaches: in one, collecting secret intelligence remains illegal despite consistent practice of it; in the other, its toleration may have led to a “deep but reluctant admission of [its] lawfulness...”.

A survey of laws on diplomatic and consular relations, arms control, industrial espionage as well as of the rights of states flowing from the principle of state-sovereignty (such as non-intervention), indicates that secret intelligence is dealt with only indirectly, at times with contradictory effects. Intelligence collection is recognized as a necessary evil, to be mitigated rather than prohibited.

Practice has led theory in the regulation of intelligence collection and states have been reluctant to establish a single regime that would impose undesirable limits on their activities. There is little prospect, for example, of a convention being negotiated on what is and is not permissible.

The piecemeal and indirect approach to regulating it does establish some normative guidelines. In addition, there may be domestic legal constraints upon intelligence agencies. These norms do appear to shape the way the various intelligence agencies behave.

The change in the normative context within which intelligence is collected (from war to war on terror) has coincided with a shift in norms concerning how it is used. From being an evil to being

tolerated, intelligence collection and sharing is becoming an integral part of collective security. The use of intelligence in international forums has exposed it to new forms of legal scrutiny as it expands from serving the traditional function of threat assessment to being treated as a form of evidence.

Surabhi Ranganathan addressed regulation of private military companies (PMCs). There is a range of views on private military companies: “outrage” at their existence, “optimism” about their potential, and “concern” that despite their advantages PMCs may harm human rights and state interests. The last drives the call for regulation.

There is no vacuum in the law, domestic and international norms are applicable as are non-binding codes and standards. However these do not ensure accountability in real terms; institutions capable of and willing to enforce these rules are lacking.

The home state, hiring state and host state can each extend control over PMCs. In actuality, the US is one of only two states that purport to regulate PMCs at home or abroad. And, it has shown little interest in exercising these controls. Despite legislation, general oversight over PMCs has been lax. Post Abu-Ghraib, it is significant that not a single prosecution has been launched.

At the international level, there are neither institutions to monitor PMC activities nor arenas of judicial recourse. An international “office” to regulate transfer of PMC services is unlikely. States will not easily cede authority over services that are among their most strategic exports.

Their strategic value explains states’ reluctance to press for greater transparency of PMCs, for they can be used for covert ends. Also, the less evident the link between the state and a PMC the less likely it is that the state will be called to account for PMC activities.

In terms of regulation, states must have incentives to promote PMC accountability; and PMCs must be separately answerable to “states” and “affected communities”. This is a task for domestic publics, policy advocates, NGOs, human-rights bodies, etc. The UN must also play a role. Openly acknowledging its own contracts with PMCs, and conditioning these on reputation and transparency of PMCs is one step. Another is the development of clear service standards.

States must also be persuaded to adopt these standards and apply them in their contracts with PMCs. The attitude of the US is very important. The EU given especially its growing membership may also play a significant role in the adoption and dissemination of quality of service standards. PMCs must be treated as partners in this process, as must industry level associations.

Menaka Guruswamy examined issues related to the financing of terrorism. First, globally, the use of draconian legislation to counter the financing of terrorism can instead lead to stifling civil society. And second, poor governance can contribute directly to the financing of terrorism and insurgency in India. Recent events in Pakistan have demonstrated the strong hold that terrorists have over the South Asian region. While this is clearly a problem, the response of states in the post-9/11 era has not helped either. Many states abuse the term “terrorism,” resulting in it being identified with independence movements, non-violent political opposition, immigrants, and movements that challenge traditional systems of persecution – none of which are technically “terrorist” movements.

It is therefore important to delve into the definition of terrorism in international and domestic law. Two Security Council resolutions passed in the wake of the September 11th 2001 terrorist attacks in the United States are important - Resolutions 1373 and 1566. These two resolutions establish that states have an obligation to criminalize and prohibit the direct or indirect financing of terrorism. What these terrorist acts are can be found in the second resolution - acts committed to cause death

or injury, to provoke terror amongst the public or to compel a government to do something prohibited by international instruments relating to terrorism. In India, the Prevention of Terrorism Act, 2002 (POTA) was initially promulgated weeks after the September 11th attacks. By the standards of Resolution 1566, POTA's definition of terrorism is way off the mark, in that it does not distinguish between aims and means, nor does it explicitly demarcate legitimate means (demonstrations) and illegitimate ones (violence, acts intended to evoke terror). As a result, POTA was used by the state against tribal women, Muslims, farmers and other groups that tried to change the status quo with legitimate aims and means.

The impact of the current climate of anti-terror regulation and legislation on civil society is often neglected. Wanton and heinous acts of terrorism have led to responses by states affected by these actions. In the best-case scenario these countermeasures have led to the capture of the perpetrators of terror. More often than not, the heightened scrutiny has led to the curtailment of that singular characteristic that marks a democracy—civil liberties. In countries that are low on the democracy index, alleged counterterrorism measures are used to counter dissent, and not terrorism. Such abuses are inflicted upon private citizens, political opposition, and on civil society organizations (CSOs).

The example of the United Liberation Front of Asom (ULFA) in Assam illustrates how poor governance contributes directly to the financing of terrorism and insurgency in India. As much as 70 percent of all funds available to the Assam government under the head of “rural development” is systematically siphoned off under a well organized network of the ULFA and SULFA (Surrendered ULFA) cadres, contractors, civil servants and members of the political executive.

Possible solutions to these problems include the following measures. First, CSOs should organize themselves into strong representative bodies, which formulate accountability mechanisms that can work in different contexts. Further, the international community needs to reach a consensus on a strong definition of terrorism, which will reduce the overuse and abuse of the term to curtail civil society. Within India, obviously larger reforms around governance are more urgently required. Ultimately, administrative bodies must reflect progressive political and legal regimes. These bodies must have members from outside the government, like experts, NGOs, etc. to monitor decision-making, and an “open institutional culture” must prevail, whereby the institutions must be accessible and accountable to those they are meant to serve.

Discussion

The discussion addressed the following issues:

How can the problem of lack of transparency in intelligence collection be resolved? To what extent would transparency be compatible with considerations of national security? In response it was suggested that measures for accountability and transparency would have to be established on a case by case basis. Meanwhile, greater political accountability would also facilitate transparency in collection. An effective media can also play an important role. On the legitimacy of “secret” intelligence one participant observed that the trend of secret information exists in other sectors as well – “trade secrets” are one mechanism for protection of intellectual property. Withholding information from competitors is seen as a right of ownership.

Do PMCs undermine the social contract between soldiers and the state? How do PMCs affect military accountability? PMCs interact with the military in several ways: providing operational

support and functions such as interrogation and intelligence collection, training military recruits and providing tactical advice. PMCs could potentially undermine military discipline and states do sometimes avoid accountability by directing attention away from the military to PMCs. At the same time, several PMCs criticized for callous disregard of civilian lives have also been commended for admirably delivering on service commitments, enabling the military to carry out its operations.

On terrorism, it was pointed out that a proper definition of the term was avoided since the 1960s. Furthermore there was clearly significant under-enforcement of laws against terrorism, which points to a lack of political will as also social will.

CLOSING SESSION: SUMMARY, FURTHER RESEARCH AGENDA AND POLICY ISSUES

Andrew Hurrell observed that the discussion during the workshop revealed that there are many analytical challenges that GAL needs to address. The first is the (in)adequacy of the procedural approach and its impact especially upon distributed administration. GAL also comes directly into conflict with the attempts to model governance on thin rationality assumptions, thus posing a challenge for political scientists. Third, it is necessary to determine the usefulness of structural constraints and forces; these have proved important in the Indian context but are they similarly important for other states? Fourth, can we derive any normativity from GAL? Does GAL legitimate a coauthored coercive order subject to principles?

GAL gives concrete focus to different faces of global public power; there is however a need to define its application and differentiate “public power” from “power”. The impact of GAL on states and non-state actors must be stated with greater clarity. Similarly, there is a need to address the boundaries of GAL in terms of the procedure versus substance debate and its underlying normative justification. It is not easy to set aside questions regarding democracy and representation. Moreover, GAL detracts from formal global constitutionalization making it all the more important to take into account both the law and power-based agendas. Finally, even in international law substantive issues for global action - like climate change – are growing in importance.

Lavanya Rajamani felt that the analysis of Indian experiences bolstered the understanding of GAL. It is not possible to divorce politics from procedure and the structures we legitimize through procedural guarantees of transparency, accountability, etc. We need to focus on substantive issues.

Pratap Bhanu Mehta suggested that there is much scope for discussion on the enabling context of effective global governance. For instance, in the banking sector, the enabling structures are strong, in security they are weak. There is a need to articulate some sort of preconditions for administrative law. Second, some terms used in the discussions such as “process” and “effective participation”, are ambiguous and need further conceptual clarification. Finally, there is not enough clarity on who are the account holders, in other words, which constituencies is entitled to administrative justifications. The success of GAL will turn on its capacity to articulate a coherent conception of public reason.

Vikram Raghavan reiterated that the typology of global administrative bodies must be re-examined. We also need to pay more attention to the “developed” versus “developing” country paradigm. In conceptualizing “global” administrative law, we pay attention to the “international” dimension, but we need to take into account the “comparative” dimension. We also need to reflect further upon the importance of substantive law, particularly as to when it must be taken into account in discussing the role of GAL. For instance one entry point for a focus on substance arises out of the need to determine what standards of review are adequate. Finally, we also need a better understanding of remedies available under GAL, for redress of administrative norms.

Upendra Baxi observed that participation does not always equal ability to make decisions. Finally, how does GAL take into account histories and languages of human rights (such as “governance”, “insurrection”, etc). He emphasized that a focus on human rights and human suffering is important, and must be incorporated into the GAL.

Bhupinder Chimni reiterated that GAL is an extremely worthwhile project. It can play a vital role in mapping the range of global administrative bodies and facilitating use of international standards. The project currently pays insufficient attention to the substantive concerns of the South, including the raw deal it has got in regimes like the WTO, asylum, climate change and monetary regimes. Interestingly, at the same time there is a constant slippage into the language of global justice and global democracy, which would indicate a turn to substance. The project also needs to pay attention to the role of civil society organizations and global social movements.

Perhaps it would help to select one issue to examine in an integrated fashion. This could be done, for instance, with respect to intellectual property rights to provide a snapshot of national administration and how TRIPs functions at the institutional level. Another area which would be suitable for such comprehensive study is climate change, especially the role of market forces in climate change negotiations.

Finally, the GAL project lacks a theory on the role of the state, in the face of emerging global administrative structures and global administrative law.

Samuel Issacharoff questioned the “source of justification” or “jurisdictional authority” of the GAL project. There is no state authority from which it derives justification. The legitimacy of procedural regularity is derived from need but there is a distinction between regularity and justification. He also observed that the project has been less successful when applied to things that are failures within the state: like national security, democratic process etc.

Rochelle Dreyfuss observed that there had been no focus on the efficiency of GAL.

Richard Stewart noted that the two days of the workshop had successfully brought to light the variation and diversity in GAL. He agreed that a primary consideration for the future development of the project must be to address the questions relating to the South.