'JUDICIAL PROTECTION OF RIGHTS IN THE CONTEXT OF CHANGING ECONOMIC CONDITIONS

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All of us associate globalisation with the free movement of capital, labour, goods and services across national borders. However, these parameters of economic globalisation cannot be viewed in isolation from other aspects such as the free exchange of ideas and practices. Especially from the viewpoint of developing nations, the benefits of increasing foreign investment in any particular sector should be assessed not only in terms of capital-flows and wealth creation but also in terms of technology-transfer and the infusion of know-how and best practices. From this perspective the legal systems in various countries have a lot to learn from each other – both in terms of institutional design and the evolution of substantive laws. However, there have also been some arguments made against the free exchange of ideas and practices between legal systems of different countries.

In this note I would like to briefly comment on the linkages between increasing globalisation and the law. One approach for examining these linkages is to survey the legal challenges thrown up by the changing socio-economic conditions. With increasing trade and investment across borders, it is important for all nations to be sufficiently invested in the multilateral processes of rule-making and dispute-resolution while at the same time offering a balanced response to the resulting complexities through our domestic legal systems.

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The reverse linkage is of course the impact of globalisation on our respective legal systems. In the age of the internet and frequent international travel - judges, lawyers, academics and even law students from different countries have a lot of opportunities to interact, collaborate and learn from each other's experiences. In particular, I would like to comment on the growing importance of fields such as comparative constitutional law.

Legal challenges thrown up by the forces of globalisation

Until a couple of years ago, much of discourse about the legal challenges arising out of economic globalisation was centred on the multilateral efforts to promote international trade and investment. In this regard, there has been considerable scholarship on the dispute-resolution functions of the World Trade Organisation (WTO) as well as the role of arbitral institutions which facilitate dispute-resolution in the event of commercial disputes between private parties located in different national jurisdictions. There has also been some attention given to the settlement of investment disputes between foreign investors and host governments. Hence, themes such as international trade law and investment law have become quite prominent in legal exchanges.

However, the collapse of several financial institutions in recent times highlights the need for paying more attention to strengthening our domestic legal and regulatory systems before shifting the focus to multilateral negotiations and rule-making. In India, the retention of stringent governmental controls over the banking sector has mitigated the impact of the recession, but many export-dependent sectors have indeed faced some difficulties.

For a country like ours where financial sector reforms began only in the 1990's, there is an obvious need to adopt a pragmatic approach towards international trade and investment. There is no doubt that the progressive lowering of restrictions on foreign investment and private enterprise has led to the expansion of several sectors such as banking, telecommunications, information technology, broadcast media and infrastructure among others. The inflow of foreign capital and firms in these sectors has undoubtedly created many jobs, shaped an environment of competition and increased the choices available to consumers. The expansion of these sectors has also created 'regulatory gaps' which have been addressed through the creation of independent regulatory agencies. The task of these independent regulatory agencies is to assist in the formation of policies and devise rules to ensure a fair balance between the interests of service-providers, consumers and the government. Several specialised tribunals have also been set-up for sectors such as telecom, securities regulation and competition law to expeditiously decide disputes relating to these areas.

However, there is no consistent correlation between the quantitative growth of foreign trade and investment on one hand and the indicators of social welfare and inclusive development on the other hand. Many economists have argued that the progressive financial sector reforms have only benefited the traditionally elite sections of society and that the 'trickle-down' benefits for the masses have been negligible. Some have even argued that the forces of economic globalisation have actually widened the existing socio-economic inequalities. A glaring symptom of the same is the rapidly increasing rates of migration between the rural areas and the urban centres. Cities such as Delhi, Mumbai, Bangalore and Hyderabad among others have grown exponentially on account of the expansion of the services sector, which creates both well-paying jobs for qualified professionals as well as low-end jobs in the informal sector.

Millions of people leave their country-side homes each year with the hope of better employment prospects. Instead many of them end-up living in even worse conditions in the cities where the infrastructure has not kept up with the rise in population. Our persistent failure to provide quality education and healthcare to a large part of our population further exacerbates the socio-economic inequalities in our society. There is a wide gap between the opportunities available to those who can speak the English language and operate computers as opposed to the rest of our people. Such inequity sometimes results in localised conflicts between the 'haves' and the 'have-nots', which are often re-inforced by traditional social divisions based on caste, religion and regionalism.[2]

On account of such complex social realities, it becomes very difficult to gauge the substantive benefits of foreign trade and investment. In such a scenario the onus is on the government and the legal system to devise strategies for ensuring a more equitable distribution of the pie. It is the concern with the prospects for our agricultural exports in foreign markets, which has prompted India's vehement stand against the policy of export-subsidies given to farmers in some Western countries. There is no principled opposition to the reduction of tariffs and other trade barriers which will enable more foreign firms to trade in goods and services in India. However, Western governments should also be willing to reciprocate by removing the unfair advantages given to their respective agricultural sectors. If the same is done, Indian farmers will be able to improve their earnings from exports and the same will translate into meaningful development for our rural communities. Even though the negotiations at the WTO seem to have

[2] See generally: Surya Deva, 'Globalisation and its impact on the realisation of human rights – Indian perspective on a global canvas' in C. Raj Kumar and K. Chockalingam (eds.), *Human rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) at pp. 237-263

been stalled at the moment, there is no ambiguity about the merits of free trade. The only condition is that both the developed and developing nations should be equally committed to the reduction of trade barriers.

The construction of several large infrastructural projects as well as increasing investment in sectors such as steel manufacturing and mining has also created several legal complications. Especially in forested areas populated by tribal communities, several disputes have arisen from forcible land-acquisition. Sometimes companies take advantage of the lack of awareness and bargaining power on part of tribal communities to displace them from their traditional lands. In the fact the use of deception and coercion to displace local communities from their lands is a practice that can be traced back to the colonial period. Such disputes that involve questions of adequate compensation, rehabilitation and even environmental protection in some cases – are amongst the foremost challenges for the Indian legal system today. Policy-makers and judges are frequently called upon to walk a tightrope between the competing interests of promoting economic growth and protecting the rights of local communities. Even though the state exercises 'eminent domain' over land and natural resources, sometimes it is not appropriate to rely on utilitarian considerations to decide disputes involving the same. Due weightage must be given to the customary rights as well as the 'right to livelihood' of local communities, even if the same results in the loss of some investment opportunities.

Another area which requires rigorous analysis and interventions in India's domestic legal system is that of corporate governance standards and bankruptcy protection. Reports of accounting fraud in some leading companies have drawn attention to aspects such as the role of directors who serve on the board of publicly-held companies as well as the need to ensure independence on part of firms which perform auditing and

accounting functions for such companies. The separation between ownership and control is a characteristic feature of modern corporations, and hence their functions are dominated by the managers instead of the shareholders. In the pursuit of profits, the managers often make short-sighted decisions which prove to be detrimental to the interests of shareholders, employees and consumers. In such cases, there is a governmental interest in regulating the functions of business entities through robust disclosure norms. There is also an urgent need for large publicly-held corporations to realise that they are accountable not only to their shareholders and creditors but to several other stakeholders in society.

In the context of encouraging foreign investment and cross-border trade, the devices of Bilateral Investment treaties (BITs) and Free Trade Agreements (FTAs) are now being routinely used to safeguard the interests of firms which invest in foreign countries. Such treaties lay down obligations on part of host governments to ensure 'fair and equitable' treatment for foreign investors, favourable tax and regulatory schemes as well as safeguards against unjust expropriation. However, economists such as Joseph Stiglitz (2007) have made the point that sometimes the governments of developing nations accept unfavourable terms in these investment treaties on account of desperation to attract foreign investment.[3] While investors seek protections against unanticipated contingencies, they rarely undertake commitments to contribute to equitable development in the host country. Furthermore, treaties concerning trade and investment tend to be negotiated in an environment of secrecy with limited public participation. Critics also

[3] Refer: Joseph E. Stiglitz, 'Ninth Annual Grotius Lecture 2007 - Regulating Multi-national corporations: Towards principles of cross-border frameworks in a globalizing world – balancing rights with responsibilities', 23 *American University International Law Review* (2008), pp. 451-558

point to the fact that investment disputes between national governments and foreign firms are resolved through methods resembling commercial arbitration, where the orientation of arbitrators from the developed world are often incompatible with the needs and constraints of host governments in developing nations.

While each of the above-mentioned issues merits a substantive discussion, I felt it was necessary to draw attention to them. The lesson that all of us can conclusively learn from the tumultuous events of the past two years or so is that while the belief in free markets may be well placed, there is an equally important role for governmental intervention in our respective economies. Extreme viewpoints favouring market-fundamentalism on one hand and governmental control on the other hand, will not help us in arriving at constructive solutions. In these uncertain times, it is incumbent upon Courts and regulatory agencies to embody the voice of reason, accommodation and compromise.

The impact of globalisation on legal systems

The functioning of our legal systems is also being continuously re-shaped by the various socio-economic parameters of globalisation. For instance, reliance on foreign decisions is necessary in certain categories of appellate litigation and adjudication. For instance in litigation pertaining to cross-border business dealings as well as family-related disputes, the actual location of the parties in different jurisdictions makes it necessary to cite and discuss foreign statutes and decisions. Hence, domestic courts are called on to engage with foreign legal materials in fields such as 'Conflict of Laws' where they are required to rule on aspects such as proper jurisdiction and choice of law as well as recognition and enforcement of foreign decrees and arbitral awards. Furthermore, domestic courts are also required to look into the text and

interpretations of international instruments (i.e. treaties, conventions, declarations) if their respective countries are parties to the same. However, the room for debate arises with respect to the citation of foreign precedents for deciding cases where they may not be enough guidance or clarity in domestic law. This trend has provoked some people to oppose reliance on foreign law, especially in cases that involve difficult questions of constitutional interpretation.

All of us will readily agree that constitutional systems in several countries, especially those belonging to the common-law tradition have been routinely relying on doctrines and judicial precedents from each other. The early years of the United Nations system coincided with a period that saw decolonisation in most parts of Asia and Africa. During this period, many new Constitutions incorporated mutually similar provisions by drawing from ideas embedded in international instruments such as the *United Nations Charter* and the *Universal Declaration of Human Rights (UDHR). The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)* which was adopted in 1953 also became a source for doctrinal borrowing by the emerging constitutional systems. In later years the provisions of the *International Covenant on Civil Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* have also emerged as reference-points for such constitutional borrowing.[4] Much of this constitutional transplantation that has taken place through the means of international instruments has also exported certain distinct features of the United States Constitution – such as a bill of rights, 'judicial review' over legislation and limits placed on governmental power through ideas such as 'equal protection before the law' and the guarantee of

[4] See generally: Bruce Ackerman, 'The Rise of World Constitutionalism', 83 *University of Virginia Law Review* 771-797 (1997)

'substantive due process'. It is only natural that the newly created constitutional systems have sought to learn from long-established ones.

While this transplantation was self-evident in the cases of most newly liberated countries in Asia and Africa, the Soviet-led bloc followed a divergent path by prioritizing collective socio-economic objectives over civil-political rights. Since the 1990's, the dismantling of communist rule in the former USSR and Eastern Europe has prompted a new wave of constitutionalism, with several countries adopting written constitutions that provide for justiciable civil-political rights.[5]

In recent years, the decisions of Constitutional Courts in jurisdictions such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law. In these jurisdictions, reliance on foreign precedents has become commonplace in public law litigation.[6] American academic Anne-Marie Slaughter used the expression 'transjudicial communication' to describe this trend. In a much-cited article published in 1994,[7] she described three different ways through which foreign precedents are considered – namely:

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[5] See generally: Clair L'Hereux-Dube, 'Human Rights: A worldwide dialogue' in B.N. Kirpal et. al. (eds.), *Supreme but not Infallible- Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000) at pp. 214-231

[6] See generally: Mark Tushnet, 'The possibilities of Comparative Constitutional Law', 108 *Yale Law Journal* 1225 (1999); Sujit Chaudhary, 'Globalisation in search of justification: Toward a theory of Comparative Constitutional Interpretation', 74 *Indiana Law Journal* 819 (1999); Martha Nussbaum, 'Introduction to Comparative Constitutionalism', 3 *Chicago Journal of International Law* 429 (2002)

[7] See: Anne-Marie Slaughter, 'The typology of transjudicial communication', 29 *University of Richmond Law Review* 99-137 (1994)

- Firstly, through *'vertical'* means, i.e. when domestic courts refer to the decisions of international adjudicatory institutions, irrespective of whether their countries are parties to the international instrument under which the said adjudicatory institution functions. For example, the decisions of the European Court of Human Rights (ECHR) and European Court of Justice (ECJ) have been extensively cited by courts in several non-EU countries as well. This also opens up the possibility of domestic courts relying on the decisions of other supranational bodies in the future.
- Secondly, through *'horizontal'* means, i.e. when a domestic court looks to precedents from other national jurisdictions to interpret its own laws. In common law jurisdictions where the doctrine of 'stare decisis' is followed, such comparative analysis is considered especially useful in relatively newer constitutional systems which are yet to develop a substantial body of case-law. For example, the Constitutional Courts set up in Canada and South Africa have frequently cited foreign precedents to interpret the bill of rights in their respective legal systems. Comparative analysis is also a useful strategy to decide hard constitutional cases, where insights from foreign jurisdictions may insert a fresh line of thinking.
- Thirdly, through *'mixed vertical-horizontal'* means – i.e. when a domestic court may cite the decision of a foreign court on the interpretation of obligations applicable to both jurisdictions under an international instrument. For example, Courts in several European countries freely cite each other's decisions that deal with the interpretation of the growing body of European Community (EC) law. It is reasoned that if judges can directly refer to applicable international obligations, they should also be free to refer to the understanding and application of the same in other national jurisdictions.

In examining these three means of 'transjudicial communication' one can easily discern that references to foreign law contemplate both international and comparative law. We must also take note of the various structural factors that have encouraged the growth of such 'transjudicial communication'.

With the ever-expanding scope of international human rights norms and the role of international institutions dealing with disparate issues such as trade liberalisation, climate change, war crimes, law of the sea and cross-border investment disputes among others, there is a concomitant trend towards convergence in the domestic constitutional law of different countries. In this era of globalization of legal standards, there is no reason to suppress the judicial dialogue between different legal systems which build on similar values and principles.[8]

Another factor which sows the seeds for more 'transjudicial communication' is the increasing internationalisation of legal education. For instance, I have been made to understand that the leading law schools in Europe as well as the United States are increasingly drawing students from more and more countries, especially for postgraduate and research courses. The diversity in the classroom contributes to cross-fertilisation of ideas between individuals belonging to different jurisdictions. When students who have benefited from foreign education take up careers in their respective country's bar and judiciary, they bring in the ideas imbibed during their education.

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[8] See: Vicki Jackson, 'Constitutions as 'Living Trees'? Comparative Constitutional Law and interpretive metaphors', 75 *Fordham Law Review* 921 (November 2006)

Access to foreign legal materials has become much easier on account of the development of information and communication technology. To take the example of India where until a few years ago subscriptions to foreign law reports and law reviews were quite expensive and hence beyond the reach of most judges, practitioners and educational institutions. However, the growth of the internet has radically changed the picture. The decisions of most Constitutional Courts are uploaded on freely accessible websites, hence enabling easy access all over the world. Furthermore, commercial online databases such as LexisNexis and Westlaw among others have ensured that judges, practitioners and law students all over the world can readily browse through materials from several jurisdictions. Such easy access to international and comparative materials has also been the key factor behind the emergence of internationally competitive commercial law firms and Legal Process Outsourcing (LPO) operations in India.

The ever-increasing person-to-person contacts between judges, lawyers and academics from different jurisdictions have been the most important catalyst for 'transjudicial communication'. This takes place in the form of personal meetings, judicial colloquia and conferences such as the present one which can be devoted to practice areas as well as academic discussions.

While there are numerous examples of such person-to-person interactions in the past, a notable example was that of an initiative taken by the Commonwealth Secretariat in association with INTERIGHTS (International Centre for the Legal Protection of Human Rights). In February 1988, the first Commonwealth judicial colloquium held in Bangalore was attended by several eminent judges from different countries – among them being Justice P.N. Bhagwati, Justice Michael Kirby, Lord Lester, Justice Mohammed Haleem and Justice Ruth Bader

Ginsburg. That colloquium resulted in the declaration of the *Bangalore Principles* which deal with how national courts should absorb international law to fill existing gaps and address uncertainties in domestic law.[9] Special emphasis was laid on the handling of unenumerated norms so as to strengthen the 'rule of law' and constitutional governance. In December 1998, the Commonwealth Judicial Colloquium on the *'Domestic Application of International Human Rights norms'* was again held in Bangalore. The participants affirmed their commitment to the principles that had been declared in the 1988 colloquium as well as the deliberations in colloquia held in different commonwealth countries in subsequent years.[10] It may be useful to refer to the first principle which was part of the restatement and further development of the 1988 principles:

"1. Fundamental human rights and freedoms are universal. They find expression in constitutional and legal systems throughout the world; they are anchored in the international human rights codes to which all genuinely democratic states adhere; their meaning is illuminated by a rich body of case law, both international and national."

Despite considerable opposition from various quarters, the *Bangalore principles* have gradually found wide acceptance with judges in many jurisdictions looking towards the growing body of international human rights law to streamline their domestic laws. This also creates compelling reasons for constitutional courts in different jurisdictions to look to each

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[9] The text of the principles has been reproduced in: Michael Kirby, 'Domestic Implementation of International human rights norms', 1999 *Australian Journal of Human Rights* 27

[10] The subsequent Commonwealth judicial colloquia were held in Harare, Zimbabwe (1989); in Banjul, The Gambia (1990); in Abuja, Nigeria (1991); in Balliol College, Oxford, England (1992); in Bloemfontein, South Africa (1993); and in Georgetown, Guyana (1996). Refer: Lord Lester of Herne Hill, 'The challenge of Bangalore – Making human rights a practical reality', 3 *European Human Rights Law Review* 273-292 (1999)

other's decisions. The growth of constitutionalism will be better served with less resistance to the increasingly important discourse of comparative constitutional law. It is through this approach of recognizing a growing international consensus about the understanding of basic rights that judges can lead the way in engineering socio-political reforms in their respective countries.

With these words, I would like to thank the Supreme Economic Court of Belarus for inviting me and giving me an opportunity to speak at this forum.