GLOBAL HARMONIZATION OF INTELLECTUAL PROPERTY LAW UNDER TRIPS: BETWEEN SOVEREIGNTY AND GLOBAL JUSTICE

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ABSTRACT

The paper is a critical review of harmonisation of intellectual property law under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the context of globalization and the theory of law[1]. Although TRIPS is a major initiative in the direction of integrating and standardizing intellectual property standards across borders, it has also changed the conventional concepts of state sovereignty and distributive justice. The paper questions the existence of TRIPS as a valid system of international regulation that encourages innovation and economic integration, or a neoliberal reformulation of the law-making power at the expense of the developing countries. The paper is based on globalization theories, theories of sovereignty, the Rawlsian theory of justice, the global institutional harm proposed by Thomas Pogge[2] and the capability approach proposed by Amartya Sen in their analysis of tension between international harmonization of intellectual property and domestic policy[3]. Specific focus is put on access to medicines, compulsory licensing, and the Doha Declaration as examples of conflicts between global trade and human rights issues. It is contended in the paper that even though harmonization under TRIPS increases predictability and trade across national borders, it also incorporates structural asymmetries that bring substantive global justice into question. The flexibilities in the TRIPS regime need to be recalibrated to balance sovereignty, innovation and equitable development.

Keywords: Globalization, TRIPS, Harmonization of Law, Sovereignty, Global Justice, Intellectual Property, WTO, Access to Medicines.

[1] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
[2] Thomas Pogge, World Poverty and Human Rights 13–18 (2d ed. 2008).
[3] Amartya Sen, The Idea of Justice 225–29 (2009).

INTRODUCTION

The modern process of globalization has altered the architecture of law making outside of territorial borders of the nation-state[4]. The transnational institutions, multilateral agreements, and economic structures in the world both create legal norms more and more. The harmonization of intellectual property law by the TRIPS Agreement of the World Trade Organization (WTO) is one of the greatest examples of this change[5]. In past, the protection of intellectual property was an issue of internal legislative preference, and this was in accordance to the economic interests and the developmental requirements of the various nations. Nevertheless, TRIPS brought in minimum global standards which can be enforced by the binding dispute settlement mechanism[6]. The question created by this development is a fundamental jurisprudential question, which is whether harmonization of intellectual property law under TRIPS enhances global cooperation or whether or not it undermines state sovereignty and distributive justice. The paper explores that question by framing TRIPS in the context of the globalization theory and normative jurisprudence. It claims that even though TRIPS promotes legal integration and predictability, it also restructures sovereignty and inserts disparities into the global legal structures.

1. GLOBALIZATION AND THE IDEA OF LEGAL HARMONIZATION

1.1 Globalization as Legal Transformation

The globalization can be frequently referred to with the economic coloring of free markets, trade across the borders, financial integration[7]. And yet it is not the whole of such a description. Further into the matter, globalization is akin to a change in the form and place of legal power[8]. It changes not only the economic circulations, but the structure of the law. The law that was conventionally understood as a manifestation of sovereign will in territorial jurisdictions is becoming more and more active in the form of transnational institution, bilateral agreements and supranational courts of justice. In the classical jurisprudence, the law-making power was the main domain of the state. Legal positivism, especially within the Austinian tradition, had a

[4] William Twining, Globalisation and Legal Theory 3–12 (2000).
[5] Marrakesh Agreement Establishing the World Trade Organization art. 3, Apr. 15, 1994, 1867 U.N.T.S. 154.
[6] Panel Report, Canada – Patent Protection of Pharmaceutical Products, 7.1–7.2, WTO Doc. WT/DS114/R (Mar. 17, 2000).
[7] Manfred B. Steger, Globalization: A Very Short Introduction 15–22 (3d ed. 2017)
[8] Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization and Emancipation 337–42 (2d ed. 2002).

concept of law in the form of an order of a sovereign that is supported by sanctions[9]. The various refinements of positivism even later went on to argue that legal validity was a matter of institutional sources found within the state. The model is challenged by globalization. The creation and enforcement of norms has now been undertaken by institutions like the World Trade Organization (WTO) whose dispute settlement mechanism has the ability to impose the authority to adopt trade sanctions against non-compliant states. This phenomenon marks that law is no longer a flow of domestic constitutional processes.

William Twining describes this change as the development of a kind of general jurisprudence which can explain plural legal orders outside the nation-state[10]. He writes that the modern theory of law should transcend methodological nationalism and be able to deal with transnational normative systems. This change is specially apparent in the framework of intellectual property. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is not just a coordination of domestic policies, but introduces binding minimum standards which are enforceable through trade retaliation[11]. It in effect reorganizes the interrelationship between local legislatures and international economic policies. This change gives a critical theoretical issue: whether law is becoming more and more a product of multilateral structures and not a product of pure domestic procedures? Harmonisation of the intellectual property law under TRIPS is an example of how globalisation reinvents sovereignty not by abolishing it, but by institutionalising sovereignty within an international system of rules. States are formally independent, but the legislative decisions are limited by the international obligations. Globalization is therefore not the loss of the state, but the change of its independence.

1.2 Harmonization versus Unification

The difference between harmonization and unification should be made[12]. Unification is aimed at uniformity. It substitutes domestic legal systems with one, uniform legal system that is applicable in jurisdictions. Harmonization on the other hand does not abolish national legal regimes, but only harmonise some of their basic principles or minimum standards. The latter

[9] H.L.A. Hart, The Concept of Law 94–99 (3d ed. 2012).
[10] William Twining, General Jurisprudence: Understanding Law from a Global Perspective 72–79 (2009).
[11] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27, Apr. 15, 1994, 1869 U.N.T.S. 299.
[12] Jarrod Wiener, Globalization and the Harmonization of Law 1–7 (2004).

is a compromise and not complete integration[13]. Harmonization in the intellectual property law works by setting minimum levels of protection. TRIPS do not supplant domestic patent and copyright laws, but obliges member states to embrace minimum standards in respect to subject matter, term, enforcement and redress. States still have only some leeway to implement[14]. As an example, they can also dictate the procedural mechanisms, some exceptions, and some modes of enforcement. This flexibility, however, is limited to parameters. When gauging sovereignty, the difference between harmonization and unification is all the more important. The process of harmonization seems less obtrusive as compared to unification since the local legislative jurisdiction is not abolished.

Nevertheless, the real impact of minimum standards cannot be underestimated. In cases where the baseline is high then the range of divergence is significantly reduced[15]. To developing countries, whose economic systems are not as similar to those of industrialized states, the implementation of standardized minimum standards can have disproportionate effects. In the past, the intellectual property regimes were the development strategies of a country. Others used weaker patent regimes to promote a local industry and dissemination of technology. The policy space was greatly minimized by harmonization under TRIPS[16]. Though it is formally described as harmonization, the agreement can work in a number of ways as a global standardization mechanism. States are limited by an international binding obligation to shape intellectual property regimes to meet local social and economic priorities. Therefore, harmonization should not be conceived as only a technical harmonization but also as a reallocation of normative power. It is an indication of a transition to decentralized legislative heterogeneity to centralized international modes of governance. The next question is that will this redistribution increase the collective welfare or structural inequalities.

1.3 Neo-Liberalism and the Washington Consensus

The historical development of TRIPS cannot be discussed outside of the emergence of

[13] Jagdish Bhagwati, The Demands to Reduce Domestic Diversity Among Trading Nations, in Fair Trade and Harmonization 9, 12–15 (Jagdish Bhagwati & Robert Hudec eds., 1996).
[14] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 1, 27, Apr. 15, 1994, 1869 U.N.T.S. 299.
[15] Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options, 27 Third World Q. 861, 863–68 (2006).
[16] Ruth L. Okediji, Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection, 1 U. Ottawa L. & Tech. J. 125, 133–40 (2003).

neoliberal economic ideology in the last century[17]. The years after the 1980s were characterized by the convergence of what was to be referred to as the Washington Consensus a policy framework that focused on market liberalization, privatization, deregulation, and good protection of property rights[18]. The protection of intellectual property increasingly became a representation of necessary support to the economic growth, innovation, and foreign investment. According to neoliberalism, tangible and intangible property rights are considered to be the basis of efficient markets. Intellectual property protection can be strongly justified because it is one of the incentive mechanisms: the law should innovative, creative, and technologically progressive, providing exclusive rights. This economic rationale took center stage in the global trade talks at the Uruguay Round which culminated into the formation of WTO and integration of TRIPS[19]. The fact that intellectual property, which before was governed by treaties specializing in it, i.e., the Paris and Berne Conventions, became part of the trade regime is important.

This step made intellectual property not a sphere of cultural and technical collaboration but a part of the trade obligation that can be enforced[20]. Associating IP protection with trade sanctions, the WTO framework promoted intellectual property to the category of a fundamental economic tool[21]. Opponents believe that such integration is an extension of the dominance of the developed countries and big business to shape the world economic landscape[22]. The industrialized nations greatly influenced the negotiation of TRIPS in the form of push towards tightening the international application of the patent and copyright norms. In this sense, TRIPS reflects the interests of neoliberalism market expansion, commodification of knowledge and privatization of innovation. Advocates however argue that harmonized IP standards bring about predictability and promote cross border investment. The innovators might be reluctant to venture into foreign markets without a common protection.

Therefore, the neoliberal explanation accentuates efficiency, predictability, as well as growth[23]. The conflict between these points of view presents the more fundamental jurisprudential

[17] Manfred B. Steger, Globalization: A Very Short Introduction 40–46 (3d ed. 2017).
[18] David Harvey, A Brief History of Neoliberalism 2–7 (2005)
[19] Peter Drahos, Global Property Rights in Information: The Story of TRIPS at the GATT, 13 Prometheus 6, 10–15 (1995)
[20] Agreement on Trade-Related Aspects of Intellectual Property Rights pmbl., Apr. 15, 1994, 1869 U.N.T.S. 299.
[21] Ibid.
[22] Susan K. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights 96–105 (2003).
[23] Jagdish Bhagwati, In Defense of Globalization 180–84 (2004).

problem. Does harmonization of intellectual property law act as a neutral tool of economic coordination or is it the institutionalization of a certain ideological image of property and development? This question takes the center stage when it is analyzed in the context of global justice[24]. The distributive concerns of intellectual property as an absolute economic right by the neoliberals can interfere with the distributive concerns, especially in matters of public health and access to essential medicines[25]. TRIPS should, then, not just be thought of as a technical trade agreement but rather as an item produced by ideological and political decisions which are entrenched in globalization. Its rise indicates a wider trend towards market-based governance on the international level. The question of whether or not this change will promote justice or strengthen inequality is the fundamental normative question within the boundaries of this paper.

2. TRIPS AS AN INSTRUMENT OF GLOBAL GOVERNANCE

2.1 Structure and Objectives of TRIPS

The intellectual property law saw a turning point in the internationalization of the law with the signing of the Agreement on the Trade-Related aspects of Intellectual Property Rights (TRIPS) in 1994 as a part of the Marrakesh Agreement creating the World Trade Organization (WTO)[26]. It was the first time that minimum standards of protection of intellectual property were entrenched in a multilateral trade setup with binding means of enforcement[27]. TRIPS provides a broad scope of the intellectual property rights, such as copyright and associated rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and protection of undisclosed information. In the structural level, TRIPS has two interrelated functions. To begin with, it codifies substantive norms. An example is Article 27 which requires the availability of inventions in all areas of technology under patents, with only a few exceptions[28]. Article 33 provides a minimum period of twenty years on the patent as of the time of filing.

The protection of copyright under TRIPS has incorporated great sections of the Berne

[24] Thomas Pogge, supra note 18, at 205–10
[25] Amartya Sen, supra note 19, at 121–25
[26] Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 1867 U.N.T.S. 154.
[27] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 1–8, Apr. 15, 1994, 1869 U.N.T.S. 299.
[28] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 9–14, 33, Apr. 15, 1994, 1869 U.N.T.S. 299.

Convention and the protection of computer programmes and databases[29]. These provisions considerably hiked the floor of intellectual property protection among the member states. Second, TRIPS enshrines duties of enforcement. Part III of the Agreement obligates members to grant civil remedies, provisional measures, border enforcement and criminal procedures in the event of willful trademark counterfeiting or copyright piracy. The protection of intellectual property is therefore not exclusive to substantive acknowledgement of rights anymore; it is expanded to the procedural and enforcement standards in detail. Article 7 of the stated objectives of TRIPS consists of the promotion of technological innovation, transfer and dissemination of technology, to the mutual benefit of both producers and users, in a conducive way to social and economic welfare. Article 8 acknowledges the fact that the members can assume the measures needed to defend the health of the people and ensure that people take an interest in areas that are of crucial importance to the socio-economic and technological progress[30].

Theoretically, thus, TRIPS has the advantage of offsetting the rights of the business with the interests of the population. The Agreement however is asymmetric in terms of rights and flexibilities[31]. Whilst rights are defined in narrow and enforceable terms, the flexibilities are laid out in broader terms and are usually subject to interpretative challenges. This imbalance in structure is the key towards comprehending TRIPS as the tool of global governance. It does not simply align national policies, it dictates a certain model of intellectual property control that member countries need to internalize into their national legal systems. In this respect, TRIPS is a constitutional tool of the international trade system. It establishes normative foundations, establishes tolerable policy space, and puts states in an institutional system of relations that goes beyond conventional diplomatic cooperation.

2.2 Binding Dispute Settlement

The fact that TRIPS is substantively minimal is not its most transformative aspect, but what is transformative is its enforcement architecture. TRIPS is part of the WTO dispute settlement system unlike the previous intellectual property treaties like the Paris Convention (1883) and the Berne Convention (1886) which were largely based on diplomatic pressures and lacked

[29] Berne Convention for the Protection of Literary and Artistic Works art. 7(1), Sept. 9, 1886, as revised July 24, 1971, 828 U.N.T.S. 221.
[30] Ibid.
[31] Ruth L. Okediji, supra note 34, at 140–45.

effective enforcement procedures[32]. This incorporation essentially changes the nature of intellectual property responsibilities. According to the WTO Dispute Settlement Understanding (DSU), countries are allowed to make complaints to other member countries concerning a failure to meet the requirements of the TRIPS[33]. Panels and the Appellate Body (where it operates) make binding rulings. In case a state does not follow suggestions after a reasonable time period, the state that complains can adopt retaliatory trade measures[34]. Compliance with intellectual property will consequently be connected with trade sanctions at large.

This type of enforcement takes intellectual property beyond a domestic policy discretionary issue to a trade requirement with economic implications. Any non-compliance ceases being a reputational matter; it has material costs. Existence of trade retaliation imposes structural pressure among the states especially developing economies whose economies heavily depend on the export market. In terms of governance, this mechanism is a change in soft coordination into hard law[35]. TRIPS obligations are not aspirational norms but legally binding obligations found within a coercive institutional system. This enhances predictability and consistency as well as limits domestic flexibility. Interpretation is also influenced by the dispute settlement system. The interpretation of the treaty takes place between panels and the Appellate Body through the Vienna Convention on the Law of Treaties and thus affects the interpretation of treaty provisions of TRIPS. This in the long term produces a body of quasi-jurisprudence which further reinforces standards globally. Effectively, transnational intellectual property norms are developed with the help of adjudicatory bodies. Agreement of intellectual property into the system of trade enforcement is a conceptual change[36]. It is the globalization of property rights in the form of the institutionalized sanction mechanism. The right to intellectual property is a prerequisite of belonging to the international trade system. This relationship highlights the point that TRIPS is not a mere treaty among equals but a cornerstone of international economic regulation[37].

[32] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 64, Apr. 15, 1994, 1869 U.N.T.S. 299.
[33]Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3, 22, Apr. 15, 1994, 1869 U.N.T.S. 401.
[34] Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1998, ¶¶ 242–45, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002).
[35] William Twining, supra note 26, at 369–75.
[36] Susan K. Sell, supra note 40, at 161–68.
[37] Thomas Pogge, supra note 18, at 199–205.

2.3 Standardization and Domestic Legislative Change

Introduction of TRIPS demanded great changes in both the developed and the developing countries in terms of legislation[38]. The compliance required by many developing states involved an overhaul of intellectual property laws. Pharmaceutical products were also included in the amendments to patent laws as they had not been covered in certain jurisdictions before. The regulations of copyright were extended to secure digital works and software. There was an intensification of enforcement procedures to be in line with TRIPS standards. A good example is found in India. Before TRIPS the Patents Act, 1970 only enabled process patents on pharmaceuticals, as a policy decision driven by the desire to encourage generic production in the country and affordable medicine. India under TRIPS obligations changed its patent law in 2005 to bring product patent in pharmaceuticals and further extend the term of patent. Although measures like Section 3(d) have been brought on board to deter evergreening, the entire patent regime structure changed drastically[39]. These legislative changes reflect the fact that harmonization under TRIPS is not formal re-alignment but restructuring.

The domestic policy decisions that were based on developmental priority were re-adjusted to meet international requirements. Where they are not flawless as in the flexibilities like compulsory licensing, their exercise is under a strictly controlled international system. This procedure shows one of the significant aspects of global governance: internalization. States consent to engage in agreements at their will, but once they have signed, the legal frameworks of these countries should incorporate international norms[40]. The line between the domestic law and the international law becomes even less solid. The sovereignty in laws has been formally preserved yet the text of the law is determined by the external obligations. In the case of developing countries, this internalization tends to be one of balancing between compliance and socio-economic requirements. Although TRIPS has transitional provisions and some flexibilities, the overall trend is toward standardization. The intellectual property systems that state develops and that fit their local industrial strategies are limited. Through this, TRIPS is illustrative of a form of governance in which the global economic norms intrude into the domestic law orders. It harmonizes the protection of intellectual property in the various jurisdictions thus helping in integrating the global market. Meanwhile, it limits regulatory

[38] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 65–66, Apr. 15, 1994, 1869 U.N.T.S. 299.
[39] Novartis AG v. Union of India, (2013) 6 S.C.C. 1 (India).
[40] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

discretion, especially in the area of pharmaceuticals, agriculture and technology. The importance of this change is not just in its technical aspects in the legal context but also in its normative consequences. Generally, when global trade requirements become the driver of domestic legislative change, issues of justice, development, and sovereignty are bound to be brought up. TRIPS thus gears towards the crossroads of law, economics and political force. It entrenches a specific conception of intellectual property protection into the structure of globalization[41].

3. SOVEREIGNTY UNDER STRAIN

3.1 Traditional Concept of Sovereignty

Classical notion of sovereignty is based on the notion of supreme power over a territorial area[42]. Since Bodin to Hobbes, sovereignty meant ultimate legislative authority an authority that cannot be legislated by a superior authority. In the contemporary constitutional democracies, the principle that the state is the source of law-making authority developed, in the sense that the state does so through its constitutional institutions. Although positivist jurisprudence is based on the rule of recognition, even there the supreme rule of recognition is not situated outside the national legal order[43]. In this classical model, the intellectual property law was a sovereign discretion. States decided on the extent, length and application of the patent and copyright rights as per their social or economic interests. In the early twentieth century, many jurisdictions had a very diverse intellectual property regulation. Other nations took robust patenting to encourage invention whereas others made specific intent to keep protection minimal to enhance local industry and welfare of the people.

This conception is troubled by globalization. In the event that states commit themselves to multilateral agreements in terms of predetermined legislative standards, the sovereignty is conditioned and not absolute[44]. TRIPS is representative of this change. Even though states entered the WTO system at will, under the system they had external limitations on national legislative freedom. Freedom of isolating the intellectual property regimes is limited by the treaty that can be stopped by imposing trade sanctions. This does not imply that sovereignty is

[41] Upendra Baxi, supra note 17, at 119–25.
[42] Jean Bodin, Six Books of the Commonwealth 84–89 (M.J. Tooley trans., Basil Blackwell 1955) (1576).
[43] H.L.A. Hart, supra note 25, at 100–10.
[44] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1(1), Apr. 15, 1994, 1869 U.N.T.S. 299.

lost. Rather, it is reconstituted. The concept of sovereignty during globalization is turned into involvement into international regimes of rules[45]. States do not act in autonomy to impose power over an intertwined body of law. This change is structural in nature: national legal policy is becoming more influenced by international obligations, and national policy decisions are put in the prism of international legal obligations. The tension is due to the fact that intellectual property is not just a technical discipline; it cuts across the health, agriculture, and education, and technological development. The classical concept of sovereign autonomy is seriously limited when international standards are enforced in states with extremely different economic abilities[46]. The main issue is whether such restrictions are cooperation in governance or redistributing power.

3.2 Policy Space and Developmental Autonomy

The term policy space describes how nations can create their own legal and economic systems to fulfill their national development requirements[47]. Many countries which exist today established flexible intellectual property systems throughout their first industrial development period. The restricted patent protection allowed technologies to spread while building up local industrial sectors. The company chose to create better intellectual property regulations after they had reached their peak technological development. TRIPS narrows this policy space by mandating uniform minimum standards regardless of developmental stage[48]. All technological domains require patent protection to defend their entire spectrum of innovation. The patent term is standardized. The enforcement measures need to reach specific minimum levels. These levels have been set. The Agreement allows member states to use flexibilities through Article 30 exceptions and Article 31 compulsory licensing, but these flexibilities have established boundaries which members must follow[49]. The process of standardization creates problems for developing nations because they need to follow rules which conflict with their social, economic, and development goals. The presence of strong patent protection leads to higher expenses for medical products, agricultural supplies, and technological advancements. The process creates obstacles for domestic businesses because it restricts their ability to reverse engineer and customize new technologies. The system encounters problems when it tries to

[45] William Twining, supra note 26, at 393–400.
[46] Upendra Baxi, supra note 70, at 134–40.
[47] Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective 2–5 (2002).
[48] Carlos M. Correa, supra note 32, at 880–86.
[49] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 30–31, Apr. 15, 1994, 1869 U.N.T.S. 299.

protect intellectual property rights because its existing framework does not match national industrial policies.

The matter at hand is not just legal but distributive as well[50]. Rich countries may have the technological infrastructure and research capacity that allows them to benefit more from strong patent monopolies that a poor country only dreams of. Simply by imposing the same standards on very different economies, the resultant gains and losses of harmonization become unevenly shared[51]. In fact, the main beneficiaries of global protection are developed countries which host the majority of patent holders. Developing countries might face the problem of increased costs without a matching level of technology transfer. TRIPS has some provisions for promoting technology transfer to the least developed countries, but not much progress has been made in their implementation. The imbalance between the obligations and benefits that each side has only serves to increase the feeling that harmonization is a one-way model of top-down governance rather than an equitable cooperative framework. Consequently, pressure on sovereignty is reflected in diminished developmental autonomy[52]. Technically, states still have the power to make laws, but the scope of variations in legislation allowed is so greatly reduced that policy space is effectively confined. Moreover, domestic priorities are being constantly reshaped as part of the process of global economic integration in which trade commitments at the international level have become a major constraint[53].

3.3 Compulsory Licensing and the Doha Declaration

The conflict between sovereignty and global intellectual property standards was most clearly illustrated in the public health context. The HIV/AIDS crisis in the late 1990s revealed the potential danger to lives if patent protection were to be too strong. The high costs of patented antiretroviral drugs made the treatment, which could save lives, inaccessible to millions of people in developing countries. This problem led to the global debate on whether TRIPS is compatible with public health goals. As a result, members of the WTO adopted the Doha Declaration on the TRIPS Agreement and Public Health in 2001[54]. The Declaration emphasized that the TRIPS agreement "does not and should not prevent Members from adopting measures

[50] Thomas Pogge, supra note 18, at 199–210.
[51] Peter Drahos & John Braithwaite, supra note 46, at 205–12.
[52] Ruth L. Okediji, supra note 34, at 150–55.
[53] Upendra Baxi, supra note 70, at 142–47.
[54] Declaration on the TRIPS Agreement and Public Health ¶ 4, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).

to protect public health" and it recognized the right of members to issue compulsory licenses and practice parallel importation to ensure access to medicines[55]. It made it clear that each member has the authority to decide what a national emergency is and under what circumstances a compulsory license can be issued. In theory, the Doha Declaration seems to grant sovereign flexibility again. It stresses that the interpretation and implementation of TRIPS should be aligned with the public health and access to medicines. Nevertheless, the actual use of compulsory licensing shows that there are still structural limitations.

Granting a compulsory license might provoke diplomatic pressure, lead to trade retaliation threats, and political negotiations with powerful pharmaceutical companies[56]. A small economy without enough manufacturing capacity might be less able to use compulsory licensing effectively unless it involves complex export-import arrangements. The economic and political costs that are usually associated with compulsory licensing therefore act as deterrents even when it is lawfully permissible to do so. Also, compulsory licensing works as an exception in a system that is mainly focused on protecting exclusive rights. It does not significantly change the original patent protection system. On the contrary, it is only a limited remedy[57]. The fact that such exceptions have to be used means that the normally structured, harmonized standards are very inflexible. The Doha Declaration shows the tension between the flexibility of a country's sovereignty and the limits set by globalization. It recognizes that governments have certain rights under the TRIPS agreement but at the same time the global trade hierarchy remains unchanged. Public health can be safe guarded, however, it has to be done within a system that first and foremost upholds intellectual property rights. This situation is precisely the main disagreement discussed in this article. Sovereignty remains under TRIPS but to a great extent it is conditioned, negotiated, and limited. The international intellectual property regime is a clear example of how globalization has resulted in the metamorphosis of the concept of legislative autonomy, whereby national laws are now interwoven with a complex structure of economic governance at multiple levels[58].

[55] Carlos M. Correa, Implications of the Doha Declaration on the TRIPS Agreement and Public Health, WHO/EDM/PAR/2002.3, at 3–8 (2002).
[56] Frederick M. Abbott, The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health, 99 Am. J. Int'l L. 317, 321–27 (2005).
[57] Ruth L. Okediji, supra note 34, at 156–60.
[58] Amartya Sen, supra note 19, at 245–50.

4. GLOBAL JUSTICE AND DISTRIBUTIVE CONCERNS

4.1 Rawls and the Limits of International Justice

The distributive issues of the world can be examined by starting with the theory of justice formulated by John Rawls and expressed in the A Theory of Justice and in The Law of Peoples[59]. Rawls is known to argue that a set of principles of justice are those that the rational individuals would adopt on a veil of ignorance, without knowing their social status. In domestic societies, it generates two principles which are equal basic liberties and the principle of difference, whereby inequalities are only allowed to help the least advantaged. But the global justice position by Rawls is more humbled. In The Law of Peoples, he does not generalize the difference principle on a global scale. Rather he suggests a duty of assistance toa burdened societies but does not go as far as to suggest global redistribution. According to the theory of Rawls, justice is mostly functional in political communities rather than between communities.

Rawls limited globalism in terms of application to TRIPS has a tension. Harmonisation of intellectual property creates distributive inter-border effects[60]. Effective patent safeguards are mostly favorable to corporations and inventors in developed nations, whereas developing nations tend to incur greater expenses when obtaining the drugs and technologies. Assuming that we apply the domestic difference principle suggested by Rawls at the international level analogically, we will only have a justification of TRIPS when its differences favor the poor in the world. This is complicated by the empirical reality. As much as the supporters believe that robust IP protection spurs innovation which eventually becomes beneficial to any society, the short-term distributive impacts are not equal. The poorer nations are disproportionately affected by high drug prices and barriers in accessing technology. The skeptical internationalism of Rawls makes it undecided whether the global organizations such as the WTO ought to have more distributive protection[61]. In this respect, therefore, TRIPS reveals the disparity between national conceptions of justice and international economic regulations in a Rawlsian perspective. This lack of strong global distributive implies that harmonized IP standards will be exercised without any decisive pledge to the global least privileged.

[59] John Rawls, A Theory of Justice 11–17 (rev. ed. 1999)
[60] Thomas Pogge, supra note 18, at 247–52.
[61] Rawls, supra note 100, at 106–12.

4.2 Thomas Pogge and Institutional Harm

Thomas Pogge has a more direct criticism of world institutional arrangements. Contrary to Rawls, Pogge suggests that the rich societies and world institutions play an active role in perpetuating poverty[62]. He argues that world economic systems are not neutral; they are designed so as to discriminate against poorer groups of people in a systematic way. The notion of institutional harm developed by Pogge can be applied especially well to TRIPS[63]. Pogge claims that when world regulations can reasonably and preventable cause intense deprivation, the authors and enforcers of the regulations are morally accountable. The question however, is not that TRIPS does or does not generate innovation, but rather that the structure of the agreement is a contributor to avoidable damage in developing nations. This is because harmonization of high standards of patent could increase the price of life saving medicines and other technologies[64].

In case such consequences are predictable and there are other possible models of innovation incentives, then global IP regime can strengthen structural injustice. This criticism is further reinforced by the fact that developing countries were not in a strong bargaining position as their counterparts were bargaining during the Uruguay Round. The design of TRIPS is also asymmetric in terms of economic and political power[65]. In the view of Pogge, justice demands a transformation of world institutional structures which propagate inequality. TRIPS, which is a component of the WTO system, is an example of how the economic opportunities and access to the essential products are influenced by the global governance structures. When such structures are disfavored by the powerful states and multinational corporations, then it requires normative scrutiny[66]. In this way, TRIPS is not only a technical tool of harmonization, but it turns into a locus of distributive struggle on the global scale. Intellectual property harmonization should be evaluated on its potential to encourage innovation, as well as its effect on the vulnerable groups in the society.

4.3 Amartya Sen and the Capability Approach

Amartya Sen is able to provide an alternative but complementary framework. Focusing on

[62] Thomas Pogge, World Poverty and Human Rights 6–8 (2d ed. 2008)
[63] Peter Drahos & John Braithwaite, supra note 46, at 211–18.
[64] Carlos M. Correa, supra note 32, at 884–90.
[65] Susan K. Sell, supra note 40, at 122–30.
[66] Upendra Baxi, supra note 70, at 158–64.

distributive patterns is not all that Sen is keen on, but capabilities are substantive freedoms that people possess to live life as they appreciate[67]. The issue of justice in this perspective deals with the enlargement of human capabilities and not just the issue of institutional design. When Sen capability approach is applied to the intellectual property law, the emphasis is shifted to the actual results, rather than the abstract rights. Availability of cheap medication has a direct impact on the ability to lead a healthy life. Capability to participate and access educational materials is influenced by access to educational materials. Patent regimes can limit the basic human abilities by inhibiting such access[68]. Another similarity between Sen and his framework and ideal institutional design is that it focuses on comparative justice instead of ideal institutional design.

Rather than posing whether TRIPS is a perfect justification of a global order, the question to be posed is whether arrangements can be advanced to lessen real manifest injustices. This solution is in sync with arguments on TRIPS flexibility and community health protection[69]. As an example, access to medicines can be made easier with the help of compulsory licensing and parallel importation. Capability-wise, the ethical instinct would be to make sure that protection of intellectual property would not deny basic human liberties. Sen also questions the fact that justice is merely defined by market efficiency[70]. Growth in economies does not necessarily result in the increase in capabilities. In case the strong IP standards catalyze innovation but limit access on a short-term basis, policymakers need to consider whether the overall balance is expected to improve or not improve the well-being of humans. Therefore, the capability approach reminds us that intellectual property harmonization can never be evaluated in the absolute on the basis of trade. It should be determined based on its effects on the flourishing of humans[71].

4.4 Upendra Baxi and Southern Perspectives

Another important critical dimension comes out of Southern and postcolonial views of human rights and globalization[72]. Upendra Baxi claims that modern world legal systems tend to represent the hegemony of the influential groups and can discriminate against the vulnerable.

[67] Amartya Sen, The Idea of Justice 231–35 (2009).
[68] Thomas Pogge, supra note 107, at 217–22.
[69] Declaration on the TRIPS Agreement and Public Health ¶ 5, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001)
[70] Sen, supra note 116, at 225–30.
[71] Upendra Baxi, supra note 70, at 170–75.
[72] Upendra Baxi, The Future of Human Rights 35–42 (2006)

He differentiates between market-friendly human rights which are trade-related and lived experiences of suffering populations[73]. The implication in the context of TRIPS here is that the harmonization of intellectual property in favour of corporate rights at the expense of socio-economic rights is a possibility. The normative hierarchy can be spotted when the enforcement of patents is a matter of trade priority and access to life-saving medicine still is a privilege. Southern views also raise the question of whether the process of legal integration in the world is a sign of mutual or not mutual consent or it is a reproduction of historical power imbalance[74]. The TRIPS negotiation was done in a geopolitical context whereby the developing nations were under immense pressure to adopt stronger IP standards in order to open their markets. This situation makes the story of equal multilateral collaboration complicated. The analysis transcends abstract theory and enters into lived realities by taking into account the critique of Southerners. Global governance is legitimately based not on the formal consent only but substantive fairness and inclusivity[75].

5. IS HARMONIZATION JUST OR COERCIVE?

The harmonization of intellectual property law under TRIPS is a topic that combines cooperation and coercion. A lot of times it is touted as a neutral tool that can help global trade, innovation, and legal certainty[76]. However, the unequal distribution of the benefits and the very nature of the power relations that are built into the system raise the issue of whether the global IP regime is a consensual integration or normative imposition. The focus is not on the existence of harmonization but rather on the justice of the harmonization model embedded in TRIPS within the global governance framework.

5.1 The Case for Harmonization

Proponents of TRIPS believe that evenly set minimum standards of intellectual property safeguards generate legal predictability and decrease transaction expenses in the international trading[77]. Multinational businesses, innovators, and investors are operating within a global market; the limited legal frameworks more often than not create more uncertainty and deter the

[73] Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., Law and Globalization from Below: Towards a Cosmopolitan Legality 1–6 (2005).
[74] Susan K. Sell, supra note 40, at 102–08.
[75] Thomas Pogge, supra note 107, at 247–52.
[76] Susan K. Sell, supra note 40, at 3–10.
[77] Jagdish Bhagwati, supra note 41, at 176–83.

spread of technology. TRIPS will decrease this uncertainty by creating standardized rules, which enhance a stable investment environment. Protecting the intellectual property is also strongly defended as an incentive mechanism[78]. Patents offer short-term monopoly where inventors recover the cost incurred in research and development. In the absence of such protection, innovation may be deterred by the threat of free-riding. In this sense, harmonization will make sure that innovation incentives work on an international level instead of being compromised by poor protection in some jurisdictions. In addition, harmonization helps to integrate into the global system of trading. Being a member of WTO regime indicates reliability of regulations and compliance with the international standard[79]. In the case of developing countries who want to have foreign direct investment, adherence to TRIPS would help increase credibility and foster technological cooperation. On top of this, the supporters argue that TRIPS has in-built protective mechanisms. Article 7 and 8 acknowledge the consideration of public interest and public interest is conferred by means of compulsory licensing, which offers flexibility in cases of an emergency[80]. The developing countries and the least-developed countries were also provided with transitional arrangements. To this perspective, TRIPS is not fixed but flexible, as it has struck a balance between innovation and the welfare issue. The TRIPS can be seen in a cooperative institutional sense as a result, thus, as an element of a rules-based world order aimed at supporting mutual economic advantage. In this respect, harmonization is a form of collective rule and not oppression.

5.2 The Argument of Structural Coercion

A more precise look however will show that the emergence of consensual cooperation might conceal asymmetries[81]. The negotiation of TRIPS was done in a geopolitical setting that had unequal bargaining power. Powerful pharmaceutical, technological, and entertainment sectors in developed countries had high pressure in the formulation of the content of the agreement. To most developing countries, TRIPS acceptance came along with wider trade concessions. The structural coercion does not always have to be implied by the coercion. It is able to function based on economic dependence and pressure[82]. The voluntariness of consent is complicated when it is necessary to take part in the global trade and accept high standards of intellectual

[78] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15, 1994, 1869 U.N.T.S. 299.
[79] Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 1867 U.N.T.S. 154.
[80] Declaration on the TRIPS Agreement and Public Health ¶ 4, WTO Doc. WT/MIN(01)/DEC/2 (Nov. 14, 2001).
[81] Peter Drahos, supra note 37, at 12–18.
[82] Upendra Baxi, supra note 125, at 150–56.

property. Smaller economies which rely on export markets might not have realistic options. Moreover, as much as TRIPS provides minimum standards, it does not provide minimum obligations in equal measure with respect to technology transfer or capacity building[83]. Imbalance structure is supported by the inequality between rights protection and the developmental course. The developed countries where the majority of the patentholders are located benefit tremendously economically, whereas the developing countries might incur more and more expenditure with no similar profit. The mechanism of enforcement increases this dynamic. The weaker economies are subject to the trade sanctions that are imposed under the WTO dispute settlement system. The threat of retaliation can discourage states to make use of flexibilities that they have such as mandatory licensing[84]. Therefore, formal rights can be in place, but real experience restricts their application. In this light, harmonization under TRIPS just fails to be true pluralism as it is normative centralization. It makes intellectual property regimes standard, which is in line with the neo-liberal market interests and contains other options of development. The resultant legal homogeneity can thus indicate power concentration rather than fair governmental administration.

5.3 Between Cooperation and Constraint

What is being on the ground is probably somewhere in the middle. TRIPS is neither coercive nor totally consensual[85]. It represents a realist compromise that is determined by economic interdependence, ideological commitments and politics. States do not lose their sovereignty, though the sovereignty is operated within a global system. The problem is to evaluate whether the restrictions that TRIPS introduce are compensated by the suitable benefits. Assuming that harmonization can have a major positive impact on global innovation, support the transfer of technology and eventually increase the welfare of societies, its drawbacks of sovereignty can be justifiable. Nevertheless, when the effects of distribution are systematically disadvantageous of vulnerable groups and limit developmental free will, then the ethical validity of the regime is in doubt. Justice in the international system goes beyond formal equality between the states; it must be sensitive to structural inequality[86]. A set of standards that are applied to unequal situations can create unequal results. Harmonization should thus not be judged solely on the

[83] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 66.2, Apr. 15, 1994, 1869 U.N.T.S. 299.
[84] Thomas Pogge, supra note 107, at 213–18.
[85] William Twining, supra note 26, at 401–06.
[86] Amartya Sen, supra note 116, at 296–302.

efficiency level but also on its ability to accommodate multiplicity and safeguard the vital human interests. This is the main conflict that has been detected in the course of this paper thereby reoccurring. TRIPS explains the impact of globalization, where sovereignty ceases to be an absolute power, but rather, sovereignty is the embedded involvement. The normative question that is of utmost concern is whether such transformation encourages inclusive growth or reinforces asymmetry[87]. In order to solve the problem of critique, the following section suggests recalibrations that can reconcile intellectual property harmonization with global justice.

SUGGESTIONS AND CONCLUSION

Suggestions

The above discussion has shown that harmonization of intellectual property law under TRIPS is not entirely a loss of sovereignty, but neither is it an entirely fair system of international governance[88]. It is a formal order, the distributive implications of which largely lie in the interpretation, implementation and balance of institutions. To have harmonization and reconcile it with global justice some recalibrations are needed.

To begin with, the interpretative approach to TRIPS should always preempt its goals in the matter of the public interest. Articles 7 and 8 of the Agreement specifically acknowledge that protection of intellectual property must help in technological innovations in a way that will be conducive to social and economic well-being. The purposive interpretations should be used by WTO adjudicatory bodies and national courts so as to provide meaningful interpretation of these provisions[89]. The intellectual property rights cannot be discussed as unconditional rights that are not related to the reality of development.

Second, flexibilities of TRIPS should be implemented without political coercion or economic sanctions especially compulsory licensing, parallel importation, and exceptions under Article 30. Rights ought to be formally recognized but their practice should not be chilled by structural pressure. There should be clearer procedural guidance in the WTO level with more robust

[87] Thomas Pogge, supra note 107, at 247–52.
[88] Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 7–8, Apr. 15, 1994, 1869 U.N.T.S. 299.
[89] Carlos M. Correa, supra note 32, at 892–96.

multilateral support mechanisms which would make these safeguards more workable.

Third, the presence of technology transfers requirements under Article 66.2 ought to be enhanced with quantifiable standards and disclosure. The harmonization costs developing countries compliance costs; justice requires mutual obligations that help to build capacity and spread technology. A lack of any meaningful transfer of technologies will result in homogenous standards continuing to maintain dependency, instead of creating innovation ecosystems in developing states.

Fourth, the least-developed countries and the low-income countries should receive greater different treatment. The inflexibility of standardization can be reduced by means of transitional periods, flexible implementation frameworks, and customized enforcement expectations. Harmonization is not necessarily the same degree of strength; economic diversity is better indicated through calibration.

Fifth, more consideration of human rights needs to be incorporated in intellectual property interpretation[90]. Socio-economic rights are directly involved in access to medicines, educational materials, and agricultural inputs. The subordination of welfare concerns to the market priorities can be averted by a dialogic relationship between trade law and human rights law.

These reforms are not against harmonization. Instead, they want to make it conform to tenets of equity, inclusion, and common growth. It is not aimed at destroying the global intellectual property regime but making it more sensitive to distributive issues.

Conclusion

The standardization of the intellectual property legislation under TRIPS is one of the brightest examples of globalization changing the structure of law. It converts intellectual property into an area of domestic regulatory discretion to an essence of enforceable global economic regulation. Through this, it redefines sovereignty. States are still legally independent, but the legislative independence functions in an organized multilateral system supported by trade sanction. This change is not necessarily unfair but it can also be just. Its normative assessment is based on its distributive implications and balance of the institution. TRIPS has certainly

[90] Upendra Baxi, supra note 125, at 176–82.

brought about predictability and helped in fitting in the global trading system. It has enhanced implementation systems and uniform protection across the borders. Meanwhile, it has reduced the policy space, sharpened the asymmetries of development and created tensions between property rights and the common good. The key revelation of the paper is that harmonization in the globalization process should be evaluated in the concept of justice, rather than just efficiency. Equal treatment under the law designed to fit in a dissimilar economy may only contribute to the entrenching of disparities unless supported with substantive safeguards and redistributive strategies. Sovereignty during the global age is not denied but contextualized; the validity of its contextualization lies in the fact that it facilitates an inclusive human development. TRIPS is an alternative to sovereignty as seclusion to sovereignty as membership to an open system governed by rules in a global community. The issue is to make sure that this participation is not forcing but fair. The intellectual property harmonization can be resolved with the global justice by a recalibrated approach that makes flexibilities stronger, technology transfer is more effective, and human rights are incorporated. Law legal integration is unavoidable in the process of globalization. Whether harmonization can go on or not is not the question but whether it will become increasingly balanced and humane global law.

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