



## ***South Views***

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### **Mainstreaming Public Health Considerations in Adjudication of Intellectual Property Disputes: Implications of Specialized IP Courts and General Courts**

***By Justice (Retd.) Prabha Sridevan***

How can the public interest dimension be considered in the adjudication of intellectual property (IP) disputes, in particular those concerning patents on health technologies such as medicines and vaccines? This is the main question addressed by Justice (Retd.) Prabha Sridevan, former Judge of the Madras High Court and former Chairperson of the Intellectual Property Appellate Board (IPAB) of India, as an expert facilitator, at the Asian Regional Course for Judges on Intellectual Property and Public Health organized by the South Centre in August 2021. Justice Sridevan addressed the pros and cons of adjudication through specialized courts vis-à-vis general courts.

#### ***Address by Justice (Retd.) Prabha Sridevan***

I must say that I am in a uniquely good position to talk about the implications of use of specialized IP courts vis-à-vis general courts for adjudication of IP disputes, because from 2000 to 2010 I was a judge of a general court and after my retirement I became the Chairperson of the Intellectual Property Appellate Board of India (IPAB), which might be considered to be a specialized IP court. Hence, I know “where the shoe pinches” in both the spaces of judicial authority. One of the main reasons why specialized courts are set up regarding any field of jurisprudence is because it is felt that experienced judges integrate specialist courts. However, any litigant who comes to a court wants impartiality, independence, fairness and reasonableness in decision-making. It doesn't matter what the name of the court is, specialist or IP. Therein is the importance of having a good, able and impartial adjudicator. In my opinion, an adjudicator who comes from a specialized channel is less likely to have that broader vision that a judge from a general court will have.

A few minutes ago we heard Prof. Sarnoff speaking about injunction. If you ask me as a general court judge, I would say that the grant of injunction causes more harm than the denial of an injunction, as there can be no presumption of the validity of a patent. After the period of an injunction, if a patent is found to be invalid, who compensates the loss of quality of health in the meantime because generics did not enter the market? If you remember the four principles by

Prof. Joshua Sarnoff to grant an injunction,<sup>1</sup> I would definitely pose that the balance of convenience is heavily on the side of non-grant of injunction, especially if the patent relates to health and life-saving drugs.

Then the question would be: what about the expertise? IP is not just a general area of expertise, you need special knowledge, and how is the general court competent to deal with issues that relate specifically to intellectual property rights (IPRs)? Here we must remember that IPRs are not just patents, copyrights or trademarks. Even with patents, the list of specific disciplines to which a patent may relate to is endless. It could be biotechnology, electric engineering, anything! Pharmaceuticals is just one of the many. For instance, in the Novartis Case in India, where applying section 3(d) of the Indian Patents Act, the Supreme Court of India declined to grant a patent to Glivec. The judges who were in the bench were not specialist judges, they were general judges. In the Myriad case in the United States of America, the court was not comprised of specialist judges. Similarly, the decision in *Diamond v. Chakrabarty*, which is all the time cited. They were all opinions of general judges, not specialized IP judges. Therefore, a judicial temper is more important than specific knowledge of IP. Even if a judge has a technical member assisting her, which I did while I was at the IPAB, that technical member could be an expert in only one subject, for instance, chemistry. However, the IPAB also adjudicated disputes relating to electric engineering, and many more. So with regard to patents that were not the technical member's field, we were in the same place, we had to learn. It is just impractical to appoint all the technical experts required to cater to the different technology areas that could be the subject of a patent dispute.

In a particular case [*CFPH LLC's Applications*, 2005], [Deputy [High Court Judge](#) of England and Wales] Peter Prescott says about the words 'technology' and 'technical' that the hard truth is this - concepts on themselves have no existence, and words have no meaning except by human convention.<sup>2</sup> The most important thing is even the respondent agrees, that trying to define the

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<sup>1</sup> "Under Section 283 of the U.S. Patent Act and precedents established since at least the late 1980s by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), permanent injunctions were routinely granted to patent holders in the United States. However, in 2006, the U.S. Supreme Court in the *eBay v. MercExchange* patent case rejected the Federal Circuit's approach that a patent holder that successfully proved infringement and successfully defended against invalidity has a presumptive entitlement to an injunction. Rather, the Supreme Court established a four-part test (somewhat similar to the four-part test for preliminary injunctive relief) and placed the burden on the patent holder to establish its entitlement to this equitable remedy (in addition to obtaining a retrospective damage award). The four factors that the patent holder must establish are: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." J. Sarnoff, *TRIPS Flexibilities on Patent Enforcement: Lessons from Some Developed Countries Relating to Pharmaceutical Patent Protection*, Research Paper, No. 119 (Geneva, South Centre, October 2020).

<sup>2</sup> "At the risk of some inaccuracy, patents are supposed to be granted for non-obvious advances in technology. I said "at the risk of some inaccuracy". We sense that we know 'technology' when we see it. And no doubt that is correct, most of the time. [...] But it is not correct all of the time. Therein lies the delusion. You can prove that for yourself by trying to find a definition of 'technology' that everybody can agree on. The more you try, the more you will discover what a horribly imprecise concept it is. (Would it cover an astro-navigation chart?<sup>[4]</sup> Naval tactics?<sup>[5]</sup> Double-entry bookkeeping? The phonetic alphabet?<sup>[6]</sup>) Many have tried to frame an acceptable definition, but to the best of my knowledge none have succeeded<sup>[7]</sup>. It is like the equally vexing question, "What is Art?". The hard truth is this: concepts of that sort have no existence, and words of that sort have no meaning, except by human convention; but human beings are hopelessly in disagreement at the margin. And it is, precisely, at the margin of uncertainty that cases come up for decision. [...] The same goes for the cognate word 'technical'. A number of surveys in the context of patenting have shown that, not only is there no agreement about the meaning of the word, but that most informed respondents agree that "trying to define the words 'technical' or 'technology' is a dead-end"<sup>[8]</sup>. That 'technical' is vague has implicitly been recognised in our courts too." [2005] EWHC 1589 (Pat). Available from <https://www.bailii.org/ew/cases/EWHC/Patents/2005/1589.html>.

words technical or technology is a dead-end. When we talk of specialist courts, we are talking with courts, tribunals, judicial authorities who exercise judicial power.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982) the US Supreme Court considered the constitutionality of the Bankruptcy Act and the judges held that Article III (of the US Constitution) commands who shall exercise judicial power, and if anything does not fit one of the three exceptions, it is unconstitutional.<sup>3</sup> Justice Brennan held that the bankruptcy courts' exercise of jurisdiction was unconstitutional as the special court did not have the judicial independence guaranteed to general courts under Article III of the US Constitution. This is my serious objection against accepting specialized IP courts against general courts.

The Leggatt report in the United Kingdom on tribunals also said that, "It should never be forgotten that the Tribunals exist for users and not the other way around.... Tribunals are an alternative to Court, not administrative processes."<sup>4</sup> Therefore, the confidence of users is very important.

In 2016, the New York Times reported that Hilary Clinton came down heavily on drug companies that charged prices disproportionately.<sup>5</sup> This forced Mylan to offer the introduction of a generic version. Recently we saw during the pandemic in India that it was not only the poor who could not afford vaccines or the drug Remdesivir or medical aids. We are also seeing new medicines for lethal diseases such as Hepatitis C and cancer come to markets at such exorbitant prices that even the richest countries in the world are having to find ways to ration them.

Now you come to the way some words are construed in the statutes. When I dealt with the compulsory license case in IPAB, we had to understand what affordability meant. The lawyer for Bayer said that affordability meant the price at which the manufacturer could afford to sell the drug, whereas we thought that it was the price at which the consumer could afford to buy. Now, the long experience in dealing with various issues in the general courts gives the vision and capacity to the general court to construe such terms. You may say: but you were at the IPAB at that time. But I would like to confess that it was my 10 years as a general court judge which gave me the tools to construe how to deal with certain words and understand the object of the act, the purpose of the legislation to come about, and employ meaning to the words there.

Whatever the nature of IP, it is always an instrument of public policy. IP is a right *in rem*, and not a right *in personam*. The exhaustive rights in IP enable the holder to acquire gains and prevent misappropriations. The limited monopoly that the patent creates is there because this protection is granted in the public interest. However, IP policy always has tension between private rights and public goods, and the regime must be balanced. Specialist court judges are less likely to have independent judicial authority, and are more likely to be subject to their appointing authority, unlike constitutional and general court judges.

We should also remember that patent economies distort the litigation costs, and therefore the huge costs involved in a patent litigation discourages challenges. And in this regard, the general court is more capable of factoring in the public interest which will safeguard those who are

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<sup>3</sup> See: <https://supreme.justia.com/cases/federal/us/458/50/>.

<sup>4</sup> See: <https://webarchive.nationalarchives.gov.uk/ukgwa/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>.

<sup>5</sup> Thomas Kaplan, "Hillary Clinton Unveils Plan to Address 'Excessive' Increases in Drug Prices", *The New York Times*, 2 September 2016. Available from <https://www.nytimes.com/2016/09/03/us/politics/hillary-clinton-epipen-mylan.html>.

invisible to the court because it is not just the adversity of the court that one has to think of, but the unseen millions who need the product that advances their health.

It is generally believed that the specialized IP courts may improve the quality of justice to IP rightsholders because it is timely and cost-effective. But this depends on which country we are talking about. It is not a one-size-fits-all. A particular country may not be able to afford to establish a court with the sufficient infrastructure, staff, registry, salaries to the authority very easily. And if those physical factors are not there, justice will suffer. For instance, in India, the vacancies in the tribunal have been very prolonged. There is no point to have a specialized IP court if a country cannot afford a specialized IP court. It would be better to have a specialized IP bench in a general court. That is less burdensome on the exchequer of every country.

As to the technical expertise I spoke of, the general court can always appoint amicus curiae experts to come and help. For example, during the Novartis case in India, the Supreme Court had asked Prof. Shamnad Basheer, an IP lawyer and academician, to assist them, and explain to be able to deal with the issue.

There is one other thought that occurs to me, which will affect the choice of specialized courts as a viable alternative. We could do a legal impact assessment or a legislative impact assessment of specialized IP courts. There should be an assessment of the value of the litigation that IP rights generate, how much it costs (infrastructure, salary, etc.) to have a specialized IP court. In India, any decision of a tribunal, not just an IP tribunal, is liable to be reviewed either by the high court (at the state level) or the Supreme Court, which means that the same matter goes to the general court. Hence, there should be an assessment of the cost of the litigation that ultimately goes to the general court. Based on such an assessment, I am fairly certain that the specialized IP court would be a drain in the exchequers which many developing countries may not be able to afford. Maybe someday in the distant future that might be a viable option, but right now considering the cost and because of the ineffective or inadequate infrastructure, timely justice is also not a realistic possibility.

More important than anything, more than the time, is the quality of justice that every litigant wants. For the quality of justice, the general court, which has a wider idea of the law and greater experience of the broader spectrum of jurisprudence, is more capable of dealing with IP rights or any of the rights for that matter, and should always be dealt with the assistance of an expert.

Hence, my opinion is that the general court is the better answer, especially for developing countries, and there is no uniform right answer. Thank you.

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