Scan Globally, Reform Locally: The Horizontal Learning Method in Law and Development

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This article calls for a new method in the field of law and development. Entitled 'Scan globally, Reform Locally,' what it seeks to do is to rely on horizontal co-operation among developing countries and close comparative analyses of the similar and overlapping experiences that mark these countries by experts in these countries using a bottom-top approach. It outlines the rationale for the use of this method and assesses its current state of this kind of work in the field of legal studies.

This essay explains a new method for the field of law and development. T

A. LAW AND DEVELOPMENT DOCTRINE IN THE TWENTIETH CENTURY: GLOBAL MODELS AND LEGAL TRANSPLANTS

"Law and development" is a term used to describe a set of ideas and practices guiding reform of legal institutions in developing and transition countries. Organised programmes of legal reform for developmental goals started about 50 years ago and the organized study of these relationships began slightly later.1 The experiences of development agencies and academic research led to the creation of what Trubek and Santos have called "law and development doctrine."2 a set of ideas

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designed to guide reform efforts.

Less than a theory and more than a cookbook, law and development doctrine has gone through several phases. While these separate 'moments' of doctrine stressed different reasons for reform and pointed to different areas for legal change, they shared two common traits. In both cases, doctrine was guided by a 'meta-narrative.' It was an overarching theoretical framework that sought both, to explain the need for change and chart the direction it should take in all developing countries. In both cases, law and development doctrine pointed to the need to import legal institutions from advanced industrial societies.

In the first phase, the doctrine was guided by modernisation theory which conceived of development as a gradual move from 'tradition' to modernity and equated modernity with the current state of advanced industrial nations. Since in the modernisation narrative, the institutions of advanced societies, including their legal institutions, were the goal of development, 'law and development' projects included efforts to transplant legal institutions from advanced countries. Also, because economic development theory at the time stressed the need for a strong role for the state in the economy, law and development emphasized the role of law in strengthening the state and the legal apparatus of state intervention in the economy.

As the twentieth century came to a close, disillusion with state-led development and modernisation theory helped usher in a new form of law and development doctrine. Called 'neoliberal’ law and development, this approach stressed upon the importance of markets for development and placed primary emphasis on legal reforms designed to facilitate market transactions. It included laws enabling the privatisation of state-owned enterprises, the dismantling of regulatory regimes (introduced in the earlier phase), and introduction of legal institutions that would foster and protect market transactions. These reforms, like those of the earlier era, often involved ‘transplanting’ rules and institutions from advanced market economy legal systems to developing countries.

Once again, this doctrine too was driven by an overriding narrative which stressed the importance of law in the markets. And like its predecessor neoliberal law and development doctrine pointed towards institutions of in advanced countries as models to be emulated. But there were profound differences between the two approaches. The earlier approach championed government as the primary agent of development. It stressed upon the need to import public law and regulatory regimes from advanced countries and looked for ways to ensure that bench and bar would facilitate government action. On the other hand, the later
version of neoliberal law and development theory stressed the importance of strengthening private law regimes though transplantation or otherwise. It perceived law as a tool to constrain the state and saw the judiciary not as an ally of an interventionist state but as a guardian of the neoliberal temple against state intervention.

B: SCAN GLOBALLY; REINVENT LOCALLY:
THE TURN TO NETWORKS AND HORIZONTAL LEARNING BY COMPARISON AND BENCHMARKING.

As the twenty-first century began, law and development scholars and some development agencies started to move away from either versions of this doctrine. There were scepticisms both about meta-narratives and transplants. There was a turn toward more pragmatic approaches. People came to perceive development as a step by step process that involved experimentation and boot-strapping – a process which would be self-sustaining without requiring interventions. They recognised that reform should be evidence based and projects must take account of the distinct nature of national legal cultures and institutions. Therefore they started questioning purely ideological commitments to either the state or the market. These scholars preferred to find out what works best in practicality not what merely fits in some theory. Since they witnessed the failure of many legal transplants to flourish in the unconsensual soil of national legal cultures, they became disillusioned with the idea that developing countries must copy the institutions of the US, Europe or Japan.

This ‘pragmatic’ turn in law and development thinking has liberated law and development scholars and reformers from obsolete dogmas. However, it has also created a crisis in the field. If there is no single theory or narrative to guide the efforts, it is harder to detect flaws in national legal systems and thereby prescribe reforms. If the choice between legal institutions that promote the market and those that empower the state is a pragmatic one and depends on local conditions, there is no ready made recipe to employ. And if copying the institutions of advanced societies doesn’t work, it is harder to come up with models to guide this reform.

Since older tools and methodologies have failed, new ones must be developed. In response to this need, ideas for a ‘new’ law and development theory are emerging. There are calls for a new approach grounded in careful empirical study of local conditions and on learning through horizontal transnational comparisons by networks of national experts. The approach would draw on newer and more pragmatic trends in
Development Studies, more generally. The pragmatic turn in Development Studies assumes that it is possible to produce valid knowledge about conditions in one country in a form that can be used by experts in other similarly situated nations. These trends are epitomised by Joseph Stiglitz’s pithy phrase: ‘scan globally, reinvent locally.’

There are two approaches to achieve these goals: indicators and networks. There is a growing use of quantitative indicators measuring national conditions in law, correlating these conditions with growth rates or other development statistics and ranking nations by the degree to which they have ‘growth-friendly’ laws and legal processes. The World Bank’s ‘Doing Business’ indicators which include law variables and rank countries on the extent their legal institutions correlate with economic growth is a leading example.

The message from these league tables is that the institutions of the faster growing developing countries offer models to be emulated by the laggards who should be looking to their peers for reform ideas. Because aid agencies and foreign investors may use these indicators as guides as to where to make investments, they exercise a subtle pressure on developing countries. As a result, scholars and officials in some developing countries have raised questions about this top-down methodology and have questioned the validity of the measures and the robustness of the correlations that lie behind the league tables. To be sure, properly constructed, indicators could be powerful tools for development. But the process of developing valid indicators and demonstrating that differences in legal institutions really account for differences in economic growth (or other measures of development) is a complex one and many existing efforts have been roundly criticised. There are serious concerns about some of the indicators selected by international organisations and the quality of the data used by them.

Perhaps a more promising approach is horizontal learning through development networks. This involves detailed comparisons of parallel experiences in similarly situated developing countries by experts from these countries. Rather than looking at advanced country models or following universal prescriptions from international bodies, this method relies on a bottom-up, demand-driven approach. Through such an

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approach, the developing countries could themselves identify the issues they wish to deal with, select the peer nations they think they can learn from, and engage directly with peer experts in these nations. By networking local experts with their peers in similarly situated nations, this process ensures that reform decisions are being made by people with the contextual knowledge necessary to know what insights can be learned from organised comparison and what useful lessons can be taken from others' experiences. As Stiglitz states:

Local researchers, combining the learning derived from local conditions (including the knowledge of local political and social structures) with the learning derived from global experiences) provide the best prospects for deriving broad based support and are effective.

Networked horizontal learning among peer nations is being used by several development agencies in various areas. The kind of ‘South-South’ learning that it promotes has proven productive in many fields. As this method depends on the comparison of similarly situated nations, it is no surprise that BRICS have emerged as a logical base for such networked horizontal mutual learning. While these five nations have many differences, their similarities are sufficient to offer prospects for sustained learning. For that reason, projects have been developed to network BRIC experts in areas like taxation and innovation policy.

C. SOUTH-SOUTH HORIZONTAL NETWORKING AND LEARNING IN LAW

While this kind of horizontal networking is widely used in many areas of Development Studies, it is just beginning to be used in law. An early experiment was the conference on Law and Development: A Dialogue among the BRICS held at the FGV Law School in São Paulo, Brazil in November,

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6 Stiglitz, supra note 3.


8 The Brazilian Agency for Industrial Development (ABDI) has sponsored a horizontal network of BRIC tax policy experts.

9 Experts in Brazil, Russia, India, China and South Africa are engaged in what they call a "horizontal" process of mutual learning about national innovation systems and development. This project, called BRICS rests on the assumption that the five countries all seek to encourage innovation and all have encountered similar problems so that they can learn by drawing on each other's experience. For more information on BRICS, visit the project website: http://brics.redesist.ie.ufrj.br/index_EN.php
2010. This conference brought together experts on law and development from Brazil, Russia, India and China to explore areas of common concern. A volume of the papers from this conference edited by Mario Schapiro and myself has been published in Brazil.\textsuperscript{10}

The format for the São Paulo event was based on papers by Brazilian experts in fields like the role of courts, intellectual property, social law and policy, trade and foreign investment law. These papers described legal institutions and developmental challenges. Experts on Russian, Chinese and Indian law in these fields commented on the Brazilian scenario in light of their own national experiences.

The São Paulo event showed the promise of horizontal learning but also demonstrated the challenges this method faces in the field of law. The conference showed that it was possible for legal experts from four countries to learn about each others' systems and exchange ideas. But it did not lead to the kind of sustained and continuous dialogue among experts from the participating countries that the horizontal learning method requires. That would have required a series of meetings by all the participants over time. While the discussions in São Paulo were intense and papers useful, it was not possible to continue the dialogue on all the topics and among all the countries involved.

Although we have not been able to fully carry out the programme of horizontal collaboration among the BRICS, the recent Jindal event\textsuperscript{11} represented an effort to keep the project going. The organisers from Jindal and FGV managed to bring together experts from two of the BRICS to continue the discussion that begun in São Paulo on some of the topics. But it was not possible to include all the topics and all the counties represented at the 2010 event or to move far from individual country studies. Nor have we been able to reach the final goal of horizontal learning which is the development of reform trajectories for each country that are informed by horizontal learning from the others.

There are many reasons why we have not been able to fully realise the promise of the horizontal learning in law. This kind of project requires sustained interaction among country experts who are willing to spend time to understand each other's systems. Results are uncertain and it takes a long time for the payoff to materialise. To make such a system work, law schools and other research institutions must make this kind of knowledge a priority. They must provide adequate support for scholars

\textsuperscript{10} The conference was held before South Africa joined BRICS. Papers from this event were published in Direito e Desenvolvimento: Um Diálogo entre os BRICs (Schapiro and Trubek, eds., Saraiva 2011).

\textsuperscript{11} International Conference on "Managing Growth in BRICS Countries" held from 6-8 December, 2012 at O. P. Jindal Global University.
who engage in it and reward the results they produce.

To make the method work in the way that it should, we will have to change the culture of the legal academy and find external sources for the resources needed to support the endeavour. I do not think that many legal educators in the BRICS yet accept the idea that it is more important to learn from each other than to study developments in the Global North. Even those who believe in horizontal learning find it difficult to provide the full level of support needed. It is not easy for law schools anywhere to sustain research that requires a very long incubation period with uncertain payoffs. It is especially difficult for schools in the Global South whose resources are limited. Even globally linked and reasonably well-funded schools like Jindal and FGV lack the resources fully to sustain this kind of long term-multi-country dialogue.

If we are to move ahead, we need to convince governments and development agencies that this kind of work is important. We need to maintain the South-South network and demonstrate the value of this kind of collaboration. For that reason, the global law and development community owes a debt of gratitude to Jindal and FGV for keeping the flame of horizontal learning burning and to the participants in this symposium for advancing the cause of South-South collaboration.