

## Key Note Speech 1

# Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?

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**Abstract:** Many in the field of development studies have embraced the method of horizontal learning among peer developing countries as a useful tool to identify practices that might help solve development problems. While this “scan globally, reinvent locally” approach has been tried in the field of law and development, features of the legal field in general, and aspects of the field in the Global South in particular, make it hard to use this approach in legal studies. The essay explains the reasons why horizontal learning among peer developing countries could contribute to the study of law in development, describes some tentative experiments with the method in legal studies, examines the barriers to using this approach, and suggests ways to foster more horizontal cooperation and learning.

This essay explains a new method for the field of law and development. Called “scan globally, reform locally”, this method relies on horizontal cooperation among similarly situated developing countries. It has been used in other fields of development studies and could be useful for law and development scholars. The essay explains the reasons why horizontal learning

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among peer developing countries could contribute to the study of law in development, describes some tentative experiments with the method in legal studies, examines the barriers to using this approach, and suggests ways to foster more horizontal cooperation and learning.<sup>1)</sup>

### *1) Law and Development Doctrine in the 20<sup>th</sup> 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. Organized programs of legal reform for developmental goals started about 50 years ago and the organized study of these relationships began slightly later.<sup>2)</sup> The experiences of development agencies and academic research led to the creation of what Trubek and Santos have called “law and development doctrine”<sup>3)</sup> : a set of ideas 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”, 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.

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1) An earlier essay on horizontal learning was published in the *Jindal Global Law Review*. Since then I have had an opportunity further to reflect on experiments with this method, barriers to its realization, and strategies to overcome them. I presented these ideas at a conference at Nagoya University in February 2014: I benefited from the discussions at the conference and especially the comments by Hassane Cissé of the World Bank. I have learned a lot about global networking in law and development through my affiliation with CGLAD, the São Paulo-based Conference on Global Law and Development. Louise Trubek read this version and made many useful suggestions.

2) See generally, David Trubek “Law and Development” in N. J. Smelser and Paul B. Baltes (editors) 2001 *International Encyclopedia of the Social & Behavioral Sciences*. Pergamon, Oxford. p. 8443. See also an updated version of this survey: David Trubek, “Law and Development 50 Years On”, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2161899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161899)

3) This concept is discussed in David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006)

In the first phase the doctrine was guided by modernization theory which conceived of development as a gradual move from “tradition” to modernity and equated modernity with the current state of the advanced industrial nations. Since in the modernization 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 20th Century came to a close, disillusion with state-led development and modernization theory helped usher in a new form of law and development doctrine.

Called by some “neo-liberal” law and development, this approach stressed the importance of markets for development and placed primary emphasis on legal reforms designed to facilitate market transactions. It included laws enabling the privatization 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, doctrine was driven by an overriding narrative, this time one that stressed the importance of law in markets. And, like its predecessor, neo-liberal law and development doctrine pointed towards the institutions of advanced countries as the models to be emulated. But there were profound differences. The earlier approach championed government as the primary agent of development, stressed the need to import public law and regulatory regimes from the advanced countries, and looked for ways to ensure that bench and bar would facilitate government action. On the other hand, the later version stressed the importance of strengthening private law regimes through transplantation or otherwise, looked to the law to constrain the state, and saw the judiciary not as

allies of an interventionist state but as guardians of the neo-liberal temple against state intervention.

## 2) *Scan Globally; Reinvent Locally: The Turn to Networks and Horizontal Learning by Comparison and Benchmarking.*

As the 21<sup>st</sup> Century began, law and development scholars and some development agencies moved away from either version of this doctrine. There is skepticism both about meta-narratives and transplants. There is a turn toward more pragmatic approaches. Scholars like Sabel, Stiglitz and Rodrik have come to see development as a step by step process that involves experimentation and bootstrapping.<sup>4)</sup> Legal scholars have recognized that reform should be evidenced-based and projects take account of the distinct nature of national legal cultures and institutions. They have questioned purely ideological commitments to either the state or the market: they prefer to find out what works, not what fits some theory. They have witnessed the failure of many legal transplants to flourish in the uncongenial soil of national legal cultures and have become 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 but it has also created a crisis for the field. If there is no single theory or narrative to guide efforts, it is harder to detect flaws in national legal systems or 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 reform.

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4) For a discussion of this approach see, Trubek, D.M, Coutinho, D., Shapiro, M. (2013) “Toward a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions”, *The World Bank Legal Review* V. 4, 2013

Since older tools and methodologies have failed, new ones must be developed. In response to this need, ideas for a “new” law and development are emerging. The present author and others have called for a new approach grounded on careful empirical study of local conditions and on learning through horizontal transnational comparison by networks of national experts. The approach would draw on newer and more pragmatic trends in development studies. 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 epitomized by Stiglitz’ pithy phrase: “*scan globally, reinvent locally*”.<sup>5)</sup>

There are two approaches to achieving 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.

While indicators can be a useful tool for law and development scholars, some of the current use of them raises serious questions. Some have questioned whether there is an implicit policy bias in some indicators and worry about their influence. Because aid agencies and foreign investors may use these indicators as guides to where to make investments, 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

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5) Joseph Stiglitz, “Scan Globally, Reinvent Locally: Knowledge Infrastructure and the Localization of Knowledge” in *Banking on Knowledge: The Genesis of the Global Development Network* (2000)

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 criticized. There are serious concerns about some of the indicators that have been selected by international organizations and major concerns about the quality of the data used.<sup>6)</sup>

Perhaps a more promising approach than reliance on top-down indicators constructed by international bodies would be one based on horizontal learning through development networks. This approach involves detailed comparisons of parallel experiences in similarly situated developing countries by experts from these countries. Rather than look to advanced country models or follow universal prescriptions from international bodies, this method relies on a bottom-up, demand-driven approach in which the developing countries 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.<sup>7)</sup> They may use some form of indicators but these would be created by the country-based teams and used to facilitate comparisons.

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 organized comparison and what useful lessons can be taken from other's experiences. As Stiglitz states:

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6) For a critical appraisal of one of the World Bank's rankings, see Davis and Kruse, "Taking the Measure of Law: The Case of the Doing Business Project" 32 *Law and Social Inquiry* No. 4 (2007) For a comprehensive and critical survey of the use of indicators in global governance, see Davis, Fisher, Kingsbury and Merry, eds, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford 2012)

7) See, e.g. Third high level forum for aid effectiveness, "ACCRA Agenda for Action" <http://www.undp.org/mdtf/docs/Accra-Agenda-for-Action.pdf>; IADB, "Bienes Públicos Regionales: Promoviendo soluciones innovadoras en América Latina y el Caribe", (2009) <http://www.iadb.org/intal/intalcdi/PE/2009/03531es.pdf>

“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”<sup>8)</sup>.

Networked horizontal learning among peer nations is being used by several development agencies in various areas.<sup>9)</sup> 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 the 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 BRICS experts in areas like taxation<sup>10)</sup> and innovation policy.<sup>11)</sup>

Recently, the BRICS nations made this method official. They have developed an official academic network that brings together think tanks in all five countries. The BRICS Academic Forum meets annually to discuss shared concerns and exchange experiences. The Forum met recently in Rio de Janeiro and agreed to concentrate on five main areas: economic growth and development; peace and security; social justice, sustainable development and quality of life; political and economic governance; and data sharing on

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8) See, e.g. Joseph Stiglitz, “Scan Globally Reinvent Locally. Knowledge Infrastructure and the Localization of Knowledge” in *Banking on Knowledge, The Genesis of the Global Development Network*, (2000)

9) For a discussion of one such network, see Diane Stone, “The ‘Knowledge Bank’ and the Global Development Network”, *Global Governance* Vol. 9 (2003)

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

11) 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, go to the project website: [http://brics.redesist.ie.ufjf.br/index\\_EV.php](http://brics.redesist.ie.ufjf.br/index_EV.php)

knowledge and innovation.<sup>12)</sup>

### 3) *South-South Horizontal Networking and Learning in Law*

While this kind of horizontal networking is widely used in many areas of development studies and has now been formally adopted by the BRICS nations, it is just beginning to be used in law. It turns out that there are many obstacles to the adoption of horizontal learning in legal studies.

#### a) *Early Experiments*

An early experiment was the November, 2010 conference on *Law and Development: A Dialogue among the BRICs* held at the FGV Law School in São Paulo (FGV Law-SP). This conference brought together experts on law and development from Brazil, Russia, India and China to explore areas of common concern. The project was supported by the Brazilian Ministry of Development and the Tinker Foundation of New York. It was organized by FGV Law-SP with assistance from the Global Legal Studies Center at the University of Wisconsin-Madison. A volume of the papers from this conference edited by Mario Schapiro and myself has been published in Brazil.<sup>13)</sup>

The theory behind this project drew on the horizontal learning concept. We thought that despite their great differences in size, history, and legal traditions, the BRICS shared a commitment to a kind of state-led development that differed from models currently championed by many international development agencies. We thought that if these countries shared a commitment to a new approach and a new kind of developmental state, they should have common interests in developing new roles for law.

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12) For information on the Forum go to <http://www.ipea.gov.br/forumbrics/en/>

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

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, competition, 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 scene in light of their respective national experiences.

The São Paulo event shows the promise of horizontal learning but also demonstrates 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. The participants found the exposure to other systems useful. But we didn't have sufficient time to do detailed comparisons or identify "best practices" that might be shared.

Further, although efforts were made to continue the dialogue, they were at best partially successful. Two years after the São Paulo event, FGV Law-SP and the Jindal Global Law School in India held a follow-up event. Although this meeting allowed continuation of the discussion in a couple of fields, the number of topics surveyed was limited, the other BRICS countries did not participate, and no further events were planned.<sup>14)</sup> If the goal of this 2 year experiment was to produce scholarship that might influence policy making in BRICS countries, it cannot be counted as much of a success.

#### *b) Barriers*

These and other early efforts at horizontal learning in law have shown that the barriers to use of this method in the field of legal studies are substantial.

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14) One reason that it was hard to maintain the momentum built up in 2010 was that the agencies that had financed the 2010 meeting lost interest in legal studies. The 2010 meeting was supported by the Brazilian Ministry of Development and the US-based Tinker Foundation. When the time came for the follow-up in India, the Ministry had changed hands and direction and the Foundation had shifted its priorities.

They include:

*General weakness of the legal academy in the South:* Overall, law schools in the Global South are poorly funded and lack resources to support research. They tend to focus on the teaching mission with an emphasis on legal doctrine. In some countries, including some BRICS, there are few full time law professors.

*The limited number of scholars in the Global South who use a law and development approach:* Horizontal learning is a method to study the relationship between law and various aspects of development. It only makes sense to people who have already begun to explore the relationship between legal institutions and development outcomes in their own country. It requires an awareness of other disciplines and a capacity for empirical research. But this kind of legal consciousness is not widespread in the BRICS or elsewhere in the Global South where legal scholarship still tends to focus on internal analysis of legal doctrine, not on empirically grounded assessment of legal impact. If legal scholars are not interested in studying how law affects outcomes in their *own* country, it is hard to imagine why they would care about its' effects in other places whether North or South.

*Limited institutionalization in the South of law and development as a field:* While the number of scholars in the South committed to law and development is limited, they do exist. But where they do, they often lack domestic support. Law schools may tolerate this kind of work but they rarely provide active support. There are very few organized L&D research centers, few national or regional networks that would bring L&D scholars in one country together, few publications devoted to this type of scholarship.

*The embeddedness of legal traditions and complexity of comparison:* Horizontal learning adds another dimension of complexity to the study of law and development. In addition to requiring an understanding of law's relations to

policy and a capacity to explore the law and development nexus empirically, horizontal learners must deal with the specificity of other legal traditions and institutions: these are often deeply embedded in local contexts which must be understood before their relevance to other countries can be determined.

*The high cost of comparative studies in law and development:* By the standards of legal scholarship in the Global South, any kind of law and development scholarship is expensive. To assess the relationship between legal institutions and development outcomes, scholars must get out of their offices and conduct empirical research of one type or another. This may require collaboration with scholars in other disciplines. If it is costly to study these questions in your own country, comparing your system with others in places that can be thousands of miles away and where a different language is spoken, is even more costly.

*Short term orientation of legal scholarship:* There are pressures on legal scholars everywhere to produce relatively authoritative studies on a regular basis. Whether these studies are doctrinal or interdisciplinary, scholars seek projects that will yield predictable results in a relatively short time. But horizontal collaboration requires a long-term commitment to a process that may not yield positive results.

*Continued attraction of legal institutions from the North:* Despite decades of experience with the limitations of transplants for North to South, the appeal of importing institutions from the North continues. While developing world scholars may feel that the legal systems of peer countries are too embedded to yield easy solutions for their local problems, many seem to think that this does not apply if the laws come from more “advanced” countries. For many, copying developed country law is way to show that a country is modernizing. For others, it is a way to harmonize domestic law with transnational norms thus reducing barriers to investment and exchange.

*Continued appeal of neo-liberal approaches:* Horizontal collaboration would seem more attractive if scholars and policy makers felt that some developing countries were creating heterodox approaches that might not be built into advanced country legal systems. That was one idea that underpinned our efforts to create horizontal learning among the BRICS. But the power of the still dominant neo-liberal discourse makes it hard for people even to see the existence of heterodox approaches, let alone decide they are worth close study.

*The hierarchical structure of global legal networks:* The scholars in the Global South who have adopted a “law and development” approach often are participants in global legal academic networks. These networks may be topical (e.g. IP, trade, human rights, poverty alleviation & law) and/or methodological (e.g. law and economics, critical studies) but in either case they tend to be dominated by scholars and institutions in the North. Institutions in the North have resources not available in much of the South. Many of the L&D scholars in the South studied in the North and look to their mentors in the North for continued support. They may sense career advantages to spending time in the North but may see little career advantage in studying the legal institutions of other developing countries.

*Lack of interest in the development agencies in horizontal learning:* Although development agencies have accepted the value of horizontal learning in other fields, and some may pay lip service to this approach in law, the great bulk of agency support in the legal field is still wedded to the project of transplanting laws from advanced countries.

*c) What is to be done: Breaking Barriers, Thinking Outside the Box*

In the face of these barriers, one might be tempted to give up on the idea of horizontal learning in the field of law and development. Given this daunting list of obstacles, it is no wonder that the early experiments by FGV and Jindal did not yield all the results hoped for. And if two law schools like FGV Law-SP and Jindal, which are interdisciplinary, globally linked, law and development-

oriented, and relatively well-funded, cannot sustain a small horizontal learning project, who can?

There is no question that the challenge of horizontal learning in law is daunting. Features of the legal field in general, and in the Global South in particular, make it harder to do this kind of work in legal studies than in many other disciplines. But there are some promising developments that give hope to those interested in this approach. The internet has made it much easier for legal scholars in the South to communicate with one another and more information is being exchanged on a South-South basis. There are a few South-South academic exchanges. Some legal networks based in the North seem to be less hierarchical and more inclusive: for example, the annual Workshops run by the Harvard Institute for Global Law and Policy at Doha bring together scholars from all over the world in a relatively open format. The Brazil-based Conference on Global Law and Development (CGLAD) is continuing the efforts at networking BRICS legal scholars that started at FGV Law-SP in 2010. CGLAD will hold a major conference on law and development research in the Global South this year at FGV with support from the University of Toronto and Canada's International Development Research Center: this event will bring together legal experts from the BRICS with other scholars from the North and South.

While these developments suggest that conditions for horizontal learning in law and development may be improving, it is clear that a new approach is needed if we are to realize the potential of this method. We cannot rely on law schools in the Global South to carry out this mission by themselves. Even the best of them are not set up to support the kind of sustained comparative study the method requires. While law schools may play a role in a future system of horizontal learning, other institutions and sources of support will also be needed to make this work.

One thing that could help is to link Global South legal scholars with others in

their country interested in empirical study of development issues. By becoming part of national interdisciplinary development studies networks, legal scholars can join the overall dialogue about national development strategy and policy thus learning how best to align their work with those of others with similar interests. This will also help position them to join global networks.

In addition to this kind of domestic interdisciplinary networking, measures can be taken to deepen interaction among legal scholars in the Global South. The L&D community in any country, even large countries like the BRICS, may be small. But if we could link the people in several countries together we could create a relatively large pool of experts. And if these experts could exchange ideas and read each other's work they could create the kind of meta-knowledge base needed for the design of specialized horizontal legal networks as well forge the personal contacts needed to identify people to staff such networks. These kinds of linkages could be created using technology including a specialized website.

Another initiative would be to find ways legal scholars in the South can join *existing* global networks engaged in various forms of horizontal learning. There are a number of such networks already in being: for example, every year the BRICS academic forum brings together scholars from the five countries to discuss common interests: why not try to add legal issues to these encounters? Developments in Brazil show how this might be done. The official Brazilian BRICS think-tank is IPEA, the Institute for Applied Economic Research. IPEA has created networks of domestic development researchers that include legal scholars: IPEA could build on this experience and propose adding legal topics and legal scholars in future BRICS fora.

This agenda would be materially advanced if there were a few specialized law and development centers in key countries of the Global South. We have learned that law schools have too many agendas, and too few resources, to effectively serve as powerful centers of law and development research. To

overcome this problem it might be desirable to create semi-autonomous law and development centers aligned with law schools but with a separate mission and independent sources of support. Such centers might be part of development think-tanks like IPEA, or free standing.

Finally, we should try to create networks that look directly at specific law and development issues like finance, trade, intellectual property, social inclusion, etc. Such networks are needed to fully realize the promise of horizontal learning. These networks would draw on the research in law schools and specialized national centers, bring together lawyers and other scholars from a group of peer countries, and focus on specific topics with a view to generating policy ideas based on comparative and empirical study.

This is an ambitious agenda but not an impossible one. To fulfill it, legal scholars in the Global South need to accept the value of this method, and seek to move along the lines suggested above. If they do, they will need help from many places. Law Schools in the South can encourage this kind of work even if they cannot fully support it. Domestic research and development agencies could provide needed financial support if they can be convinced that these efforts are worthwhile. Domestic think-tanks might add legal issues to their agendas and legal scholars to their staffs. Legal scholars in the Global North with area expertise could participate in specialized horizontal networks and law schools in the North could facilitate networking and support participation by their professors. Finally, international financial institutions could champion this approach and provide the resources necessary to create domestic centers and construct global networks.

