Through A Glass Darkly: Some Thoughts on International Economic Law Research and Scholarship from a Non-Legal Background

By:

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Introduction

My approach to international economic law research and scholarship is informed by my interdisciplinary training. Coming from a non-legal background, I research and write on international economic law, particularly intellectual property (IP) law and policy, international trade and global governance regimes from a historical and socio-legal perspective that is conceptually and methodologically informed by empirical and critical approaches. As a result, my work not only focuses on the constitutive power of international economic law, norms and practices to affect social relations and everyday life, especially in

the developing world where this impact is felt more starkly but it is also attentive to how various actors (both state and non-state) and local culture interact with international economic law.

In my book, I explore the complex relationship of IP and access to medicines within the limiting space of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) by interrogating pharmaceutical patent law-making in Brazil, India and Nigeria. The book also pays particular attention to how the local politics between the postcolonial state, non-state actors, and transnational capital, as well as the factions within postcolonial states are involved in the game of recalibration of global IP norms and discourses. In the course of researching and writing this book, I carefully employed the following theoretical and methodological approaches:

Critical Legal Theory (CLT):

This school of thought criticises and challenges liberal legalism, which is foundational to legal positivism and associated with contemporary capitalist democracies and international law project. Critical legal theory is grounded in the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions, biases and hierarchies inherent in a social organization. This is because the law supports the interests of those who create the law. As such, the claim made by orthodox legal scholarship about the ability of the law to objectively resolve the conflict between individuals and social interests through the application of rules within a framework of procedural justice is flawed. Thus, for critical legal scholars, the law is not fundamentally just neither can it be divorced from politics because the law supports a power dynamic which favours the privileged and disadvantages the underprivileged. The CLT, as employed in my book, provides the lens to understand the social contexts, politics, and law (un)making of international IP law, especially its marriage with global trade regime. Specifically, I employed CLT to reflect and better understand the shifts in the cultural and political values of patent law since its emergence in the city state of Venice in 1421, in England in 1499, its imposition on the colonies as well as its modern mutations. Adopting a critical legal theory in reaction to the aforementioned issue, my research (a) employs a critical reading of the access

to medicines (A2M) discourse at TRIPS and other spaces, (b) maps the daily prosaic operations of international IP laws in domestic forums through extensive analysis of Brazilian, Indian and Nigeria IP laws, (c) Investigate the motives, influences and actions of local participants in local forums – be they private sector groups, civil society organizations or the judiciary – in successfully articulating and impelling counter-hegemonic discourse of global intellectual property rules locally. As a result, the findings from the use of CLT makes sense of the economic power interests and relationships that influence patent law-making, practices, and consciousness.

Within the CLT movement, my research builds on the works of Third World Approaches to International Law theory (commonly known as TWAIL). TWAIL is an intellectual movement devoted to providing an alternative narrative of international law that has developed to perpetuate the domination and subordination of the Third World. Here, TWAIL provides the lens for a historiographical mapping of patent law regime from the local to global phase as well as its emergence and canopy application in countries of the global south. It also provides a useful framework for challenging the construction and history of international patent regime, whilst also highlighting the transformations and reforms happening in the local forums to make international patent regime reflective of needs of individual states. In this regard, TWAIL becomes an important tool in understanding the responses and interactions between different interests, discourses and politics within the countries under study towards the global patent framework in general and the TRIPS Agreement in particular. This materialist approach to TWAIL, as employed in my book, pays particular attention to legal reimagining and remaking ongoing in the local forums in the global south as part of the everyday life of international [IP] law.

Empirical approaches:

To better understand the complex social dynamics, and to pay closer attention to the interactions of the various actors involved in knowledge production and patent law (un)making in the countries under study required going into the field to interact with these actors. This involved in particular multi-sited ethnography – visiting multiple sites of observations (in this case, Brazil, India and Nigeria)

for close observation and following ‘people, stories, metaphors, or objects, as they themselves travel from place to place.’ The allure of this method of research is not just the freedom of multiple geographical locations but of methodological tools (e.g. a ‘site’ could be an archive), which provides the researcher with numerous sites of observation that captures different dimensions of the same phenomenon. The data collected was via quiet observation during meetings, access to archival materials and semi-structured interviews with key informants such as C-suite pharmaceutical company executives, activists, government officials, judges and representative of patient groups. Key informant interviews were the main vehicle for obtaining in-depth knowledge of actors especially in policymaking circles and in understanding the social ties across the state-society interface. Though exhausting and costly in terms of resources, multi-sited ethnography was used because it allows for the ‘objective the study of social phenomena that cannot be accounted for by focusing on a single site.’ From my own experience, going into the ‘field’ transformed my understanding and perception of the impact of TRIPS on medicines access. I soon learned how much more complex the issues are while interviews turned into history lessons on failures of state government. I learned of the power and influence of philanthropic donor actors in constructing debates on medicines access at the grassroot level; how the term ‘access’ wields different meaning to stakeholders in the different countries and how this meaning is interpreted into law and policy. My assumptions and expectations were upended by my experience in the field, which has had a transformative impact on my scholarship.

Socio-legal theory:

This theoretical approach asks questions about the relationship between law and society. According to a socio-legal approach, analysis of law is directly linked to the analysis of the social situation to which the law applies. It is concerned with social variation and historical change, and puts into the perspective the role the law plays in the creation, maintenance and/or change of the social situation. In other words, it argues for the need to study the context which the law is made, operates and has effect, as well as a continuous examination and re-examination of the ‘dynamics’ of law. In the field of international IP law, socio-legal theory provides a useful tool in understanding

how IP is deeply-embedded within society, how it impacts culture, how it affects livelihoods and lives, and how it operates within a particular legal culture. In my work, the application of socio-legal theory underscored the importance of empirically-informed analyses of pharmaceutical patent law practices. In taking top-down and bottom-up approach in terms of how law is made and received, socio-legal theory provides a better understanding of effect of international patent law on a society (e.g. how patents limits access to essential medicines as a result of monopolies and data exclusivity, the politics of compulsory license), the roles of groups, states and individuals in implementing, translating and resisting international patent law. And in this age of rapid globalisation and hyper-connectivity, socio-legal theory provides a frame to see how the local, national, international and transnational are linked, and they ways they inform and affect each other.

Conclusion

Of course, there is no single 'correct' approach to legal scholarship. The beauty of international economic law research and study lies in the availability of diverse theories and methods of other non-legal disciplines that can be carefully deployed to effectively engage in debates arising in today's complex social, political and economic environment. In my work, the combination of multi-pronged methodological approaches proffers a useful tool in unpacking and interrogating growing global South resistance against dominant Euro-American IP rules. Bringing together insights from critical theory, history, empiricism and socio-legal theory, my work focuses on the myriad ways international IP law and policies dynamically shape our everyday interactions, as well as how these laws are being resisted and recalibrated. The application of these assortment of methodologies, informed majorly by non-legal background, offers an excellent tool in understanding the globalization and legal re-ordering of global patent law in the global South.

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