

The Implementation Gap in Law and Development

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Overview

Part I Approaching the Implementation Gap

Part II Issues at the Global Center

Part III Issues in the Nation-State

Part IV Issues between the Global & Local

Part V Where to go from here

Part I Approaching the Implementation Gap

Defining the Implementation Gap

Two notions of an implementation gap

- A gap between global norms and national laws
 - “transplant effect” – Katarina Pistor

- A gap between national laws-on-the-book and laws-in-action
 - Cf. EBRD in its Legal Transition Surveys

This presentation treats both

In a globalizing world they are interdependent

The Sociological Perspective on the Implementation Gap

Central problem – ‘gap’ between law-on-the-books and law-in-action

- Empirical, not normative
 - Methodologically eclectic, not monistic
 - Interdisciplinary, not disciplinary
 - Definition of law: not on books but as experienced – the behavior of law
 - Comprehensive notion of law – hard law/soft law; formal norms/informal law, substantive law/legal institutions, written law/legal consciousness, legal organizations/legal culture
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Halliday Research

Topics:

- Globalization of insolvency regimes (i.e., law and markets)
- Globalization of political liberalism (i.e., law and basic legal freedoms, 1st generation rights)

Methods:

- Cross-sectional and time-series statistical analysis – all bankruptcy reforms from 1973-1998
 - Interviews & participant observation – IOs, IFIs, (WB, IMF, UNCITRAL, etc.)
 - National case studies – interviews with national reformers, practitioners
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Part II Implementation Issues that Stem from the Global Center

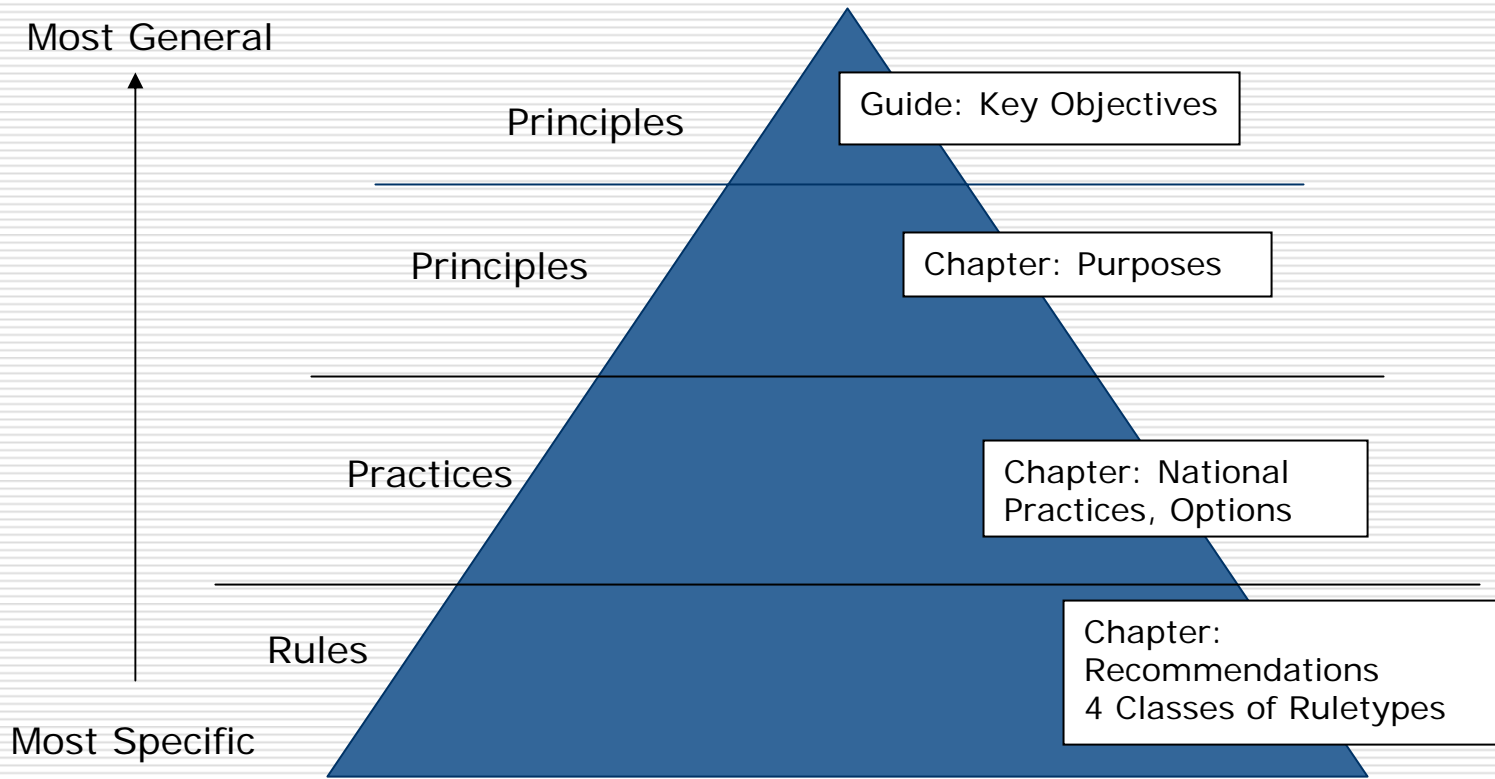
Hard Questions

1. Are global organizations considered legitimate?
 - De-legitimated by capture, financial interests, coercive practices (IMF, World Bank)
 - Legitimated by participation, procedure, effectiveness (UN)

 2. Do global organizations send confusing signals?
 - Competing norms may sow confusion, enable resistance

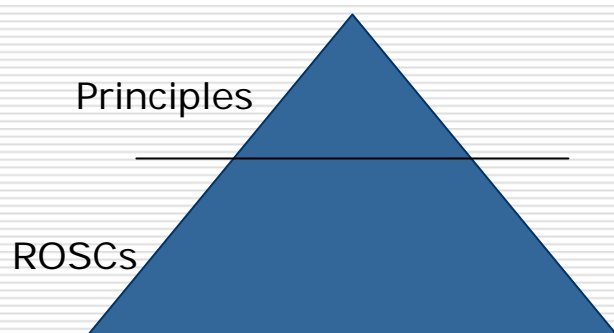
 3. Are global norms cast in a useable form for 180+ national variations?
 - Problematic norms – best practices, bright line rules
 - Constructive norms:
 - Principles (Braithwaite, ANU)
 - National alternatives (Pistor)
 - Contextually defined norms
 - Hierarchically organized at differing levels of specificity
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Example of Nested Norms: UNCITRAL Legislative Guide on Insolvency

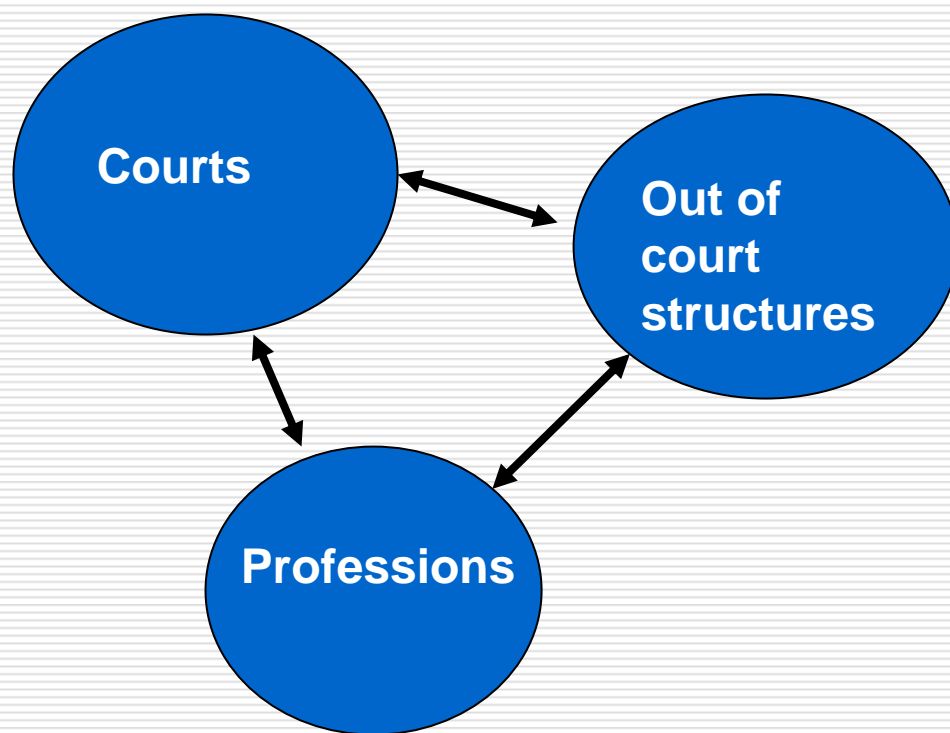


Example: Systemic Approach to Insolvency Systems – World Bank Principles

Substantive Law

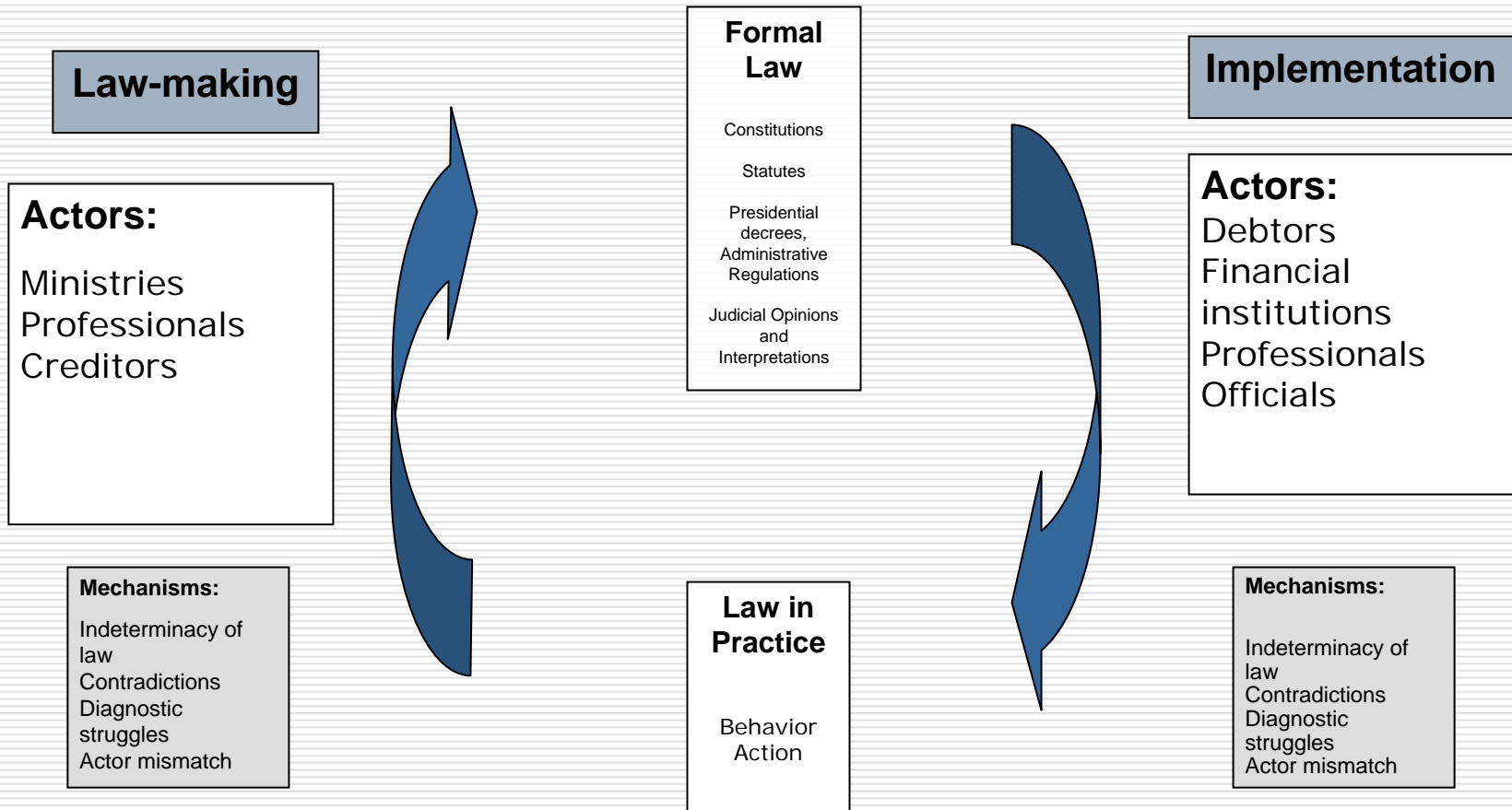


Institutions



Part III The National Implementation Gap

Theoretical Framework for National Lawmaking: The Recursivity of Law



Pathology 1: Actor Mismatch

- Gap between actors in practice and actors in lawmaking

- Subjects of law excluded/ignored
- Practitioners excluded/ignored

- Results

- Passage of formal law
- Defiance in implementation

- Indonesia

- Main conglomerates excluded
- Ethnic issue avoided

- Korea

- Bankruptcy: Foreign banks excluded from lawmaking

- China

- Insolvency: Private business ignored
 - Criminal Procedure: Lawyers marginalized
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Pathology 2: Diagnostic Struggles

Parties-in-interest fight over how to define the problem

Diagnostic capacities & instruments vary

Results:

- Those actors with greatest resources may get their diagnosis accepted
- Partial or biased diagnosis
- Skews policymaking
- Feeds resistance in implementation

□ **Indonesia**

- IFIs – weakness of law, courts
- Heads of Chinese conglomerates – law used to expropriate Chinese assets
- Nationalists –

□ **Korea**

- IMF, MOFE, economists' diagnosis – inefficient law, courts
- Lawyers, judges, academic diagnosis – inefficient creditors, poor corporate governance

□ **China**

- From market side, problem is priority of creditors
 - From politics side, problem is danger of social unrest
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Pathology 3: Contradictions

- ❑ Contradictions are built into reforms – trying to reconcile competing interests
 - ❑ Ideological: competing concepts of state, market, society
 - ❑ Structural: competing agencies
 - ❑ Result – instability within law, legal institutions
- ❑ Korea:
Administrative state
v.
Law-moderated market
 - ❑ China:
socialist market economy v.
socialist market economy

Firms as rational economic actors v.
firms as social safety nets
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Pathology 4: Indeterminacy of Law

To resolve contradictions & manage competing interests:

- lawmakers draft ambiguous, inconsistent formal law
- lawmakers defer decisions on implementing agencies
- lawmakers allow agencies to compete with each other

Results:

- Breeds uncertainty in application
- Opens up opportunities for resistance
- Grounds for power struggles among implementers

- Everywhere – generic problem
 - Indonesia
 - Vagueness of concepts
 - Faulty grafting onto outmoded substantive law
 - Institutional failure
 - Korea
 - Inflexibility of bright line rule
 - Non-use of pre-package innovation
 - China
 - Ambiguous discretionary powers in drafting
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Part IV The Implementation Gap between the Center and Periphery

Problem 1

Actor Mismatch

- At global center, actors with legitimacy don't have power (cf. UN, professionals, experts); actors with power (cf. IFIs, development banks) have limited legitimacy

 - Systematic bias in policy making – global organizations have selective affinities with national actors
 - Cf. IFIs with Ministries of Finance, banks, international professional firms, *not* industry, labor (Cf. Korea, 1997)

 - Those lawmaking sites more congenial for global institutions may be less legitimate domestically
 - Cf. preference of IFIs for executive/administrative reforms rather than legislative lawmaking
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Problem 2

Mis-Diagnosis

Actor mismatch leads to diagnostic problems:

- IFIs talk to domestic actors most like them (cf. Indonesia, Korea)
- IFIs get perspectives of capital or metropolitan elites, not regional centers, country, villages (cf. insolvency reforms in East Asia)
- Ideology can lead analysis, i.e., diagnosis finds what ideology predicts

IFIs often have inadequate diagnostic capacities

- Limited staff resources (few people, many countries)
- Limited funds to do scientifically defensible research
- Preference for commensurating diagnostic technologies – leads to systematic bias in design and findings
- Biased sampling of informants (creditors ask creditors, seldom debtors, managers, workers)

IFIs may appear to manipulate methodologies to get preferred results

Cf. Goldman on: hiring compliant evaluators, limited terms of reference, strict or impractical time constraints, omission of inconvenient data

Problem 3

Contradictions

Contradictions at the global center:

- **Ideological:** IFIs often viewed as internally inconsistent
 - E.g., alleviating poverty v. intensifying poverty or widening inequality
 - E.g., articulating “global standards,” “best practices” v. exporting U.S. models or First World firms
- **Structural:**
 - Conflicts among themselves at the center, on the ground (cf. Indonesia, 1998)

Contradictions between global center and periphery:

- Press self-determination on nations while undermining their sovereignty
 - Fundamental policy differences – eg, varieties of capitalism
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Problem 4 Indeterminacy

Conflicts among international organizations:

- Global institutions propagate conflicting standards or diverse options
- Global IFIs claim universality; regional IFIs claim local specificity

Conundrum for global organizations:

- Too tight and rigid a global framework, less adaptable to national circumstances, more likely to provoke resistance
- Too vague or non-directive the global norms, more likely outcomes of confusion, deliberate evasion

Systematic ideological conflicts between global and national ideologies:

- Contested planks of Washington (or Post-Washington) Consensus, e.g., on scope of privatization; on limits of government safety nets

Nation-states mistakenly or deliberately mix and match transnational models with contradictory results

Ambiguity results from inadequate translation of foreign or global concepts

“Weak” States have Effective Weapons for Resisting “Strong” IFIs

- ❑ *Refuse outright*
 - ❑ *Avoid contingent aid*
 - ❑ *Fragment the powerful*
 - ❑ *Play the ‘culture hand’*
 - ❑ *Engage in symbolic compliance*
 - ❑ *Substitute a solution*
 - ❑ *Delay and stall*
 - ❑ *Segment reforms*
 - ❑ *Build in backdoors, exclusions and escape routes*
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Part V How to Close the Implementation Gap?

Design Issues

Successful implementation is more likely when:

1.1 Global norms are perceived to be legitimate

- Representation
- Participation
- Effectiveness

1.2 Global norms are designed in hierarchies of principles/specificity and with significant options for national choice

Cf. Insolvency: Substantive law: UNCITRAL Legislative Guide on Insolvency (Approved June 2004)

Cf. Insolvency Institutions: WB Principles on Institutions – judiciary, professions, out-of-court approaches

1.3 Global norms tolerate alternative global models & significant national variation

- Eg. In types of markets, varieties of capitalism
- Eg. In relative priorities of rights (i.e., 1st v. 2nd & 3rd generation)

1.4 Globally-informed design elements can be adapted to a country's distinctive attributes

- Local paradigms (e.g., of law & development)
 - National path development (i.e., inertial institutional development)
 - National institutional capacities (i.e., what is feasible)
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Lawmaking Issues

Successful implementation is more likely when:

2.1 Parties in implementation are parties to lawmaking

- Cf. insolvency reforms – exclusion of actors
- Excluded parties have veto power in practice

2.2 Success is more probable when reforms build upon recombinations of domestic options, when available

- Process of translation
- Process of bricolage

2.3 The scope of changes are calibrated to:

- the strength of political will
- the level of domestic and foreign resources committed to institution-building

2.4 The degree of reform embeddedness in other institutions is taken into account

Implementation Issues

Successful implementation is more likely when:

3.1 Influential constituencies within the country want reform

- Practitioners
- Powerful economic or moral actors
- Civil society groups

3.2 Reforms can be framed symbolically to make a reform program legitimate

- Moral entrepreneurs
- Symbolic bricolage

3.3 Mechanisms are in place for continuous regulation – monitoring, diagnosis

- Move away from state-centered command-and-control regulation
 - Move towards participatory regulation, “smart regulation”
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Implications for International Organizations

- **Continue to improve sophistication of national diagnoses**
 - Behavioral focus, law-in-action
 - Multidisciplinary approach – 1st rate scholarly standards

 - **Develop pluralistic global norms and models**
 - Higher-order principles complemented by precise alternatives amenable to adaptation
 - Offer clusters of systemic options (e.g., varieties of legal systems), not one “universal” model

 - **Elaborate critical institutional configurations in nation-states to which global models can be adapted**
 - Attributes of financial systems, political systems, social and cultural systems, and legal systems

 - **Expand genuine consultation & cooperation, reduce directive or coercive relationships**

 - **Advance realistic expectations**
 - Judiciaries – and changing the balance of power in the nation-state
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Thank You
