

BRICS, a Multi-Centre “Legal Network”?

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Abstract

The paper analyzes the phenomenon of the BRICS group and its transformation into BRICs. From the first Summit, whose final declarations were mainly centered on economic, financial and commercial themes, the group attention has broadened its horizons, as to encompass health, agriculture, environment, international relations. The BRICS working method seems to suggest a new pattern of inter-state relations, based on peer-to-peer cooperation, experiences sharing and “soft” policy transfer. Given the difficult classification of this new “entity”, the author suggests considering it more as a network, where there is not a singular hegemony power, but where the relevance of the different countries varies according to the issue discussed in the Summit.

Keywords

BRICs, BRICS, Legal Network, Comparative Public Law, Constitutional Borrowing, Policy Transfer

1. Introduction

Understanding the BRICS¹ phenomenon from the legal angle is crucial. It is a subject rarely covered. Whilst in economic terms we are seeing an increase in the amount of work done (O’Neill, 2011; Jones, 2012; Nadkarni & Noonan, 2012; Inks, 2012; Goldstein, 2011; Borodina & Shvyrkov, 2010; Kobayashi-Hillary, 2010; Moore, 2010; Marr, 2010; Cassolato & Vitorino, 2009); the legal aspects of this new and unclear process cannot be neglected.

There is a strong link between the current economic situation and the decision that prompted Brazil, Russia, India, China and South Africa to establish closer ties. By the same token, the “freefall” of many advanced economies in recent years (Kupchan, 2012) and the emergence of major flaws in global financial institutions have accentuated the rise of these five nations (Huotari & Hanemann, 2014; Di Plinio, 2011), the wealth of which has soared (in 2012 it was put at 20% of the global GDP). Yet saying this phenomenon is down to mere “parallel interests”, it is an oversimplification. Their cooperation proves the desire to make the voice of this im-

¹In this paper, we use Jim O’Neill’s acronym “BRICs” to refer to Brasil, Russia, India and China. After South Africa joined the group of countries in 2011, the acronym changed to “BRICS”, which we also use in this paper.

portant part of the world (the BRICS countries represent over 40% of the world's population) (EUROSTAT, 2012). Therefore the paper will discuss the evolution of the BRICS phenomenon, showing how what once was an aspiration of “emerging economies” is now creating a “legal network”.

2. BRICs: From Acronym to Joint Action in the Inter-State Area

The BRICs acronym was introduced by Jim O’Neill (O’Neill, 2001), who far-sightedly predicted the economic potential of what were then four countries. In doing so, he suggested the path for the creation of this theoretical “consortium”. Accordingly, for some time BRIC only referred to an economic name. The lack of interest by some scholars lay in the perceived diversity of the group; it was felt that its members would never manage to fully cooperate. It was a view also held by those involved at the outset. “Between the BRIC countries, there is really little in common. Each of them has its own destiny, its own special character, and it will be much more difficult for them to agree among themselves than separately with Western countries” (Levy, 2009).

Contrary to predictions, and thanks to the collapse of the Euro-Atlantic paradigms, the reality of the BRICS is highly impressive in many respects:

“All four of the BRIC countries have exceeded the expectations I had of them back in 2001. Looking back, those earliest predictions, shocking to some at the time, now seem rather conservative. The aggregate GDP of the BRIC countries has close to quadrupled since 2001, from around 3\$ trillion to between \$11 and \$12 trillion. The world economy has doubled in size since 2001, and a third of that growth has come from the BRICs. Their combined GDP increase was more than twice that of the United States and it was equivalent to the creation of another new Japan plus one Germany, or five United Kingdom, in the space of a single decade” (O’Neill, 2011).

Since 2006, the year in which the Foreign Ministers of the BRICs founder countries (Brazil, Russia, India and China) first met alongside a session of the UN General Assembly, this new entity has grown considerably both in terms of its role and how it is viewed worldwide.

This group made its official appearance on 16 June 2009, at the first Summit of BRICs countries in Russia, at Yekaterinburg (*Joint Statement of the BRIC Countries’ Leaders, Yekaterinburg, 2009*). It was only an initial step, but the desire to provide a strong counterpoint (in a certain sense, almost a challenge) to the dominant role played by the USA and the dollar, was clear since the very beginning. “We are committed to advance the reform of international financial institutions, so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable and more diversified international monetary system” (*Joint Statement of the BRIC Countries’ Leaders, Yekaterinburg, 2009*).

Since then, the four countries have been meeting regularly once a year. They took turns to play host, and their first series of meetings drew to a close in Durban.

The interesting decision-making processes adopted by the BRICS countries to converge run in two main directions. The first involves the “coordination” between heads of State within the Summits themselves; the second operates at inter-ministerial level.

The official statements issued at the end of the Summits are not just the product of the talks held during the Summits themselves, but they are supported by heavy preparatory work carried out by groups with representatives from each of the ministries involved that take place before the Summit.

The work of the BRICS “sherpa” has increased considerably to the point that it now resembles a periodic consultation. The wide range of subjects tackled in these meetings promotes and indeed legitimises cooperation. This has the knock-on effect of reinforcing links between the partners, particularly with regard to trade links and financial and economic issues (Ahdieh, Lee, Ragavan, Noonan, & Francis, 2007).

Whilst these aspects are foreseeable, others are new and unexpected. They include technical and scientific sectors, from technological innovation to agricultural development and health (Martini & Sanches Wunsch, 2014) and environment protection. Accordingly, cooperation is actually strengthened in many sectors, sharing skills to promote development. Adopting a multitasking and circular approach, the varied nature of the states involved makes for a positive exchange of experiences. As the BRICS countries are very different from several perspective (economic structure, socio-political background, culture and traditions, etc.), the exchange of experiences gains in terms of richness of solutions, strategies and final outcomes.

An example of common public policies and coordinated actions can be the agricultural and food safety sector's policy. Since 2009 and following the joint statement on food safety adopted at the Yekaterinburg's (Russia) Summit, the BRICS countries have stated to exchange experiences, at both Heads of State and Ministers of Agriculture and Ministry's representatives levels. The development of specific agricultural policies had been defined during several meetings and in 2011 the first joint action plan was approved. One of the most interesting action has been the creation of a database on agricultural policies, concerning data on the production/commerce of products and agricultural technologies, which lays the basis for further cooperation and allows for a tighter "technical" exchanges (Sandrey, Vink, & Jensen, 2013; Brink, Orden, & Dattz, 2013).

The cooperation between ministries differs greatly from the inter-State work done at the top: where the last one attempts to influence global dynamics or governance reform, the former panders to the economic, political and cultural integration of BRICS countries. These interactions are still "under construction"; yet the output is significant:

"The BRICS countries have a remarkable opportunity to coordinate their economic policies and diplomatic strategies not only to enhance their position as a grouping in the international economic and financial system, but also to be a stabilization factor for the world economy as a whole. The BRICS should increasingly harmonize and coordinate their policies with a view to sustaining their growth momentum and capacity to weather global turbulence. The benefits of cooperation are immense not only for the BRICS but also for the global economy" (BRICS Report, 2012).

In the field of health protection and promotion, with BRICS countries facing similar challenges, the group decided to formalise Health Ministers meetings. After the first meeting in Beijing (July 2011), a second was held in New Delhi in January 2013 to define policies based on experiences within BRICS countries (GHsi, 2012). The issues involved access to public services, including medical technology and drugs, and cutting rising healthcare costs, particularly with reference to communicable diseases. Tackling these challenges in a more convenient, fair and sustainable way will promote economic development, as well as better healthcare and a stronger social cohesion.

"Most of BRICS countries face a number of similar public health challenges, including universal access to health services, access to health technologies, including medicines, increasing costs and the growing burden of both communicable and non-communicable diseases. We direct that the BRICS Health Ministers meetings, of which the first was held in Beijing in July 2011, should henceforth be institutionalized in order to address these common challenges in the most cost-effective, equitable and sustainable manner" (Delhi Declaration, 2012). This goal coincides with the Health Ministers decision to tackle non-communicable diseases (NCDs), given that 80% of deaths caused by these diseases occur in countries with a low-to-average income (BRICS Health Ministers' Communiqué, 2013).

So, if in Europe health is increasingly viewed as a cost to be kept under control, the BRICS countries are investing in global health as a source of further development and research. "From 2005 to 2010, Brazil's assistance spending grew each year by around 20.4%, India's by around 10.8%, China's by around 23.9%, and South Africa's by around 8%. Russia's assistance increased substantially early in the same period, before stabilizing at around US dollars 450 million per year" (GHsi, 2012). Needless to say, one could say these strategies may be perceived as "utilitarian" and aiming to promote each country's individual experiences and interests. Yet the increasingly important role these States are seeking to adopt is evident in the extent of their research and investment in global healthcare (GHsi, 2012).

The dynamic process started by Brazil, Russia, India, China and South Africa to establish common interests and measures (Yu, 2008) is absolutely different from the European integration process and from the USA Federal system (Matovska, Trajkoska, & Siljanovska, 2014). In the BRICS group the five nation States are the key-actors, whereas in the European context there is an ever-increasing "divestiture" (Auby, 2008) of the State in favour of the European Union (Rodhes, 1994), pushing the EU economy firmly towards the free market and restricting national intervention or protectionism policies.

So, how to define the BRICS phenomenon? It is no longer a Summit series, nor is it already an international organisation. It seems clear that the BRICS countries have relatively stable "legal flows" implemented through policy transferor (on occasion) fully-fledged constitutional borrowing (Friedman & Saunders, 2003; Tebbe & Tsai, 2010; Perju, 2012). BRICS countries are accordingly consolidating shared action models and public policies, and imitating solutions or constitutional instruments. Their relationships need to be analysed and made

public, making it possible to define a network which is evolving and increasingly resembling a fully-fledged legal network.

Convergence on common problems (such as sustainability, the environment, exploitation of raw materials etc.) needs to be analysed against the backdrop of the political background of each member state. This convergence does not involve each state aligning itself with the most developed economic model. Instead it is a flexible meeting point that fosters contact and comparison between independent political and juridical frameworks (Cooper & Farooq, 2013).

3. S for South Africa: The Turning Point for the Legal Network Construction

Thanks to this process of intense exchange, BRICS Heads of state and government share common positions in their Summits, which in turn set the course for the BRICS. This guarantees planning limited to certain fields only, but it has proven capable of affecting global governance.

In the first two Summits held in Russia and Brazil “many subjects were tackled over the course of the meetings, but few proposals were received, and still fewer decisions were actually taken”, whereas in the Summits in Sanya and Durban the approach was different, “anticipating perhaps a shift of a political nature” (Quercia, 2011). This is due to two crucial points. The first is outlined in the Final Declarations, with positions that go far beyond the economic-financial-commercial level, or avoiding use of the dollar as the currency for intra-BRICS transactions. New issues concerning international security (terrorism, wars in Libya and Syria, health and the environment protection), which previously had only been addressed in general terms, became strategic points (BRIC Summit of Heads of State and Government—Joint Statement, Brasília, 2010).

The second is the fully-fledged entry of South Africa as a new member of the BRICS (Sekine, 2011).

In 2010, just a few months after the close of the Summit in Brasilia, the foreign ministers who met in New York approved the proposal to extend an invitation to South Africa to join the BRICs group. The result was a new acronym strengthened with an upper-case S (Das, 2010; Nayyar, 2008).

Why did Brazil, Russia, India and China choose South Africa as the fifth country of the network? Other emerging African countries (such as Nigeria) could have provided greater economic potential but not the same political stability and definitely not the same geopolitical appeal (O’Neil, 2011; Deegan, 2011).

The role played by South Africa in global geopolitics, both in relations between the North and South of the world and those within the Southern hemisphere, is increasingly important (Modi, 2011). Its GDP accounts for over one third of all Sub-Saharan Africa, in spite of the fact that its territory covers just 4% of the continent. Approximately four-fifths of the African continent’s businesses are South African. On a regional level, South Africa’s hegemony is even more pronounced: 80% of Southern Africa’s GDP is produced in South Africa, and it is the leading importer and exporter to and from neighbouring countries. The Johannesburg stock exchange is the continent’s top financial marketplace, and ranks thirteenth worldwide (DBSA, 2012). This aspect undoubtedly counted a great deal, given the financial developments we will be looking at shortly. South Africa is also a member of the WTO and the European Union is the country’s most important trade partner, as approximately 40% of imports and exports come from or are headed for Europe. While not perfectly balanced yet, in 2010 trade relations between the EU and South Africa have been far less one-sided than those of any other Africa, Caribbean and Pacific country (Fioramonti, 2010).

From the geopolitical angle, South Africa importance is well known. A founder member of the United Nations in 1945, in 1974 it was suspended from the General Assembly due to its policy of apartheid, it then fully reinstated in 1994 after the democratic transition. Between 2007 and 2008, a proposal made by the African Union resulted in South Africa becoming a non-permanent member of the United Nations Security Council, and in 2011 it was re-elected. Having re-entered the Commonwealth, which it had abandoned in 1961, during the democratic transition South Africa then formally joined the Non-Aligned Movement in 1994, of which it was coordinator from 1998 to 2003 (Worden, 2007). It belongs to the Cairns Group defending the interests of exporting agricultural goods economies. Since the fifth WTO ministerial meeting of Cancun, it has played a steering role in the G-20, representing developing African countries. Thus, the entrance of South Africa in the group is not a simple “enlargement”. It represents a step ahead in the evolution of the BRIC experiment. It might well continue in a political direction largely dictated by Beijing, of which the other three main emerging powers are commodity suppliers (Russia and India also have a sizeable trade deficit). The opening up to Africa, a continent with which China has established important political and energy-related interests in recent years and which also offers room for development to India and Brazil, might represent a geopolitical reference point. It might also pro-

vide the practical means by which the BRICS countries can move from being indistinct to constructing concrete agendas, not just regarding global governance but also African issues.

What we argue, is that the “enlargement” has changed the nature of the initial alliance, firstly largely characterized by economic and commercial themes, and progressively assuming a stronger political perspective and this transformation has prompted the group to take “political” decisions. South Africa it is an economically small country (compared with the other BRICS countries), but it is a door into Africa is ensured, with the added value of “guaranteeing the BRICS clan a more planetary dimension, encompassing the African continent” (Orrù, 2012).

The recent Durban Summit underscored an interesting example of a proposal for global reform of the international monetary system to counter the hegemony of the West. No definitive agreement was reached, but the possibility of a new development Bank based in the BRICS, as an alternative to the International Monetary Fund (IMF) (Hagan, 2010; Carreau & Juillard, 2010) in Washington was discussed. The most interesting aspect of this proposal lies in the fact that it voices the malcontent of many States (far more than just the BRICS ones) lamenting their lack of influence in various contexts. In the past States used to accept common goals by submitting to obligations. At present they are often subjected to assessment procedures and potential penalties, issued by entities that lack democratic legitimisation, and even by private entities. The “rating agencies” (Bussani, 2010; Pianesi, 2011; Nori, 2012; Pinelli, 2012) are the most clear example of this. For the BRICS countries then, the possibility of creating a new international monetary system no longer based on the International Monetary Fund, with its distinctly American trait, responds to another of the major issues opened by the global rights framework under construction and is an important issue in their agenda in both economic and financial terms, and in geopolitical and strategic one.

This would give the network the chance to finance member countries’ long-term economic projects, investments that the private sector might find difficult to back. In short, a BRICS bank might provide a constant flow of capital for long-term infrastructural projects, particularly amongst the group’s countries, and perhaps even to support further initiatives to consolidate commercial and financial relations. In this respect, South Africa might again come to play a key role owing to its sizeable capacity in terms of trade, financial and economic policies, and the ability to construct infrastructures both inside and outside its borders.

4. Comparative Analysis and the BRICS Countries

The five BRICS countries have very different political set-ups. In the attempt to an initial classification, we identify two countries as authoritarian regimes (China and Russia) and the remaining three (Brazil, India and South Africa) as nations in transition towards consolidated forms of democracy. Yet such a classification seems too simplistic. A recent study (Ferrari, 2010), whose roots date back to the late ‘90s (Mattei 1997; Mattei, Monateri, 1997; Husa, 2004), suggests to identify three macro-families: Rule of Professional law, Rule of political law and Rule of traditional law. Following this approach, Brazil and Russia would belong to the Rule of political law family, with India and South Africa to the Rule of professional law family, but with political hegemony and tradition still featuring heavily, and China would be in between political and traditional rule families. Thus, the distance in legal terms between these systems is considerable, although not vast, but there are several common elements.

The BRICS case shows how planetary geopolitical relationships are changing, and it highlights the need to reflect on how we analyse the phenomena involved, as we have to adopt critical approaches taking economic (Di Plinio, 2011), institutional and social considerations into account (Fukuyama, 2012). The need for such an inclusive and multidisciplinary approach becomes even clearer when the analysis focuses on the legal sphere of BRICS countries. Two are the approaches research has adopted up to present: the market-focused (Reitz, 2009; Milhaupt, 2009) and/or the rights-focused (Glenn, 2010) one. The first binds the legal system and market rules together in a way that favours economic objectives using legal transplant (Watson, 1974; Watson, 1993; Edwards, 2007); the second adopts policy transfer logic which—along with the market—does not overlook social interests. These two approaches, however, end up overlapping; they are embedded in a “Western” vision which can dangerously blur the panorama, whilst the

“The aspect of the BRICS phenomenon as a self-standing legal system not based on constitutional identities or common legal tradition, nor on express legal forms, is totally neglected; in fact, it is supported by ‘legal flows’ and mutual interactions of policy transfer and constitutional borrowing, that allow it to be a possible

alternative to the models of regionalization tested in the western world” (Carducci & Bruno, 2014).

Attempting to analyse the BRICS using the method of analogies and differences alone is therefore insufficient (Monateri, 2012; Nicita & Benedettini, 2012). By the same token, it would be a mistake to overlook the “inconsistencies”, almost forgetting important parts of a situation that remains mobile, hindered and unresolved.

Following the rights based analytical approach, in each of the BRICS countries, basic rights, even when included in their Constitutions, are protected with blatant inconsistency. In these immense geopolitical entities, basic victories in terms of rights enforcement are a long way off from being fully implemented. Just to mention the case of education, where very high illiteracy rates are still a plea in several BRICS countries, or healthcare, where the fragile nature of health entitlement results in high child mortality rates, not to mention employment protection and in some cases the complete absence of any regulations to protect workers. Even in liberal first generation rights, one of the basic modern victories such as the freedom of thought is not fully and completely guaranteed. Civil freedom and political rights are therefore still partly denied in some of these countries. The *Freedom House charts* 2013 show impressive differences in exercising political rights (PR) and civil liberties (CL) among BRICS.

If we analyse poverty in Brazil, Russia, India and China, in spite of the brilliant economic performance, “676 million poor constitute more than half of poor people worldwide” (Goldstein, 2011); and adding the South African case the picture will definitely not improve.

There is, however, a grounded hope that the processes engendered within the BRICS group, ensuring policy transfers/trigger processes that improve life quality, thanks to food safety programmes, health policies (Sun, Boing, Silveira, Bertoldi, Ziganshina, Khaziakhmetovaand, Khamidulina, Chokshi, McGee, & Suleman, 2014) and environmental sustainability, will produce a significant poverty reduction in the countries involved.

The force with which events are occurring within the BRICS is probably the result of the approach adopted. It has not set up a radical group whose goal is to revolutionise or overturn global governance; instead a legal network has been created. Having identified a need for reform, it tackles the status quo in a gradual way and on several fronts. The process has been sketched out from a virtuous angle, although the distances to be covered to achieve progressive implementation targets remain considerable.

But can these distances be ever bridged? “The BRICS can play an increasingly important role in helping to improve the health and well-being of the world’s poorest countries” (GHsi, 2012).

The strategy is based on the implementation of suitable government policies. The Rostow model (Rostow, 1960) based on an optimistic vision of capitalism and the free market has been abandoned, and the issue now is to decide whether, it is better to have a weak executive open to pluralist motions, or a strong one “with an iron fist” capable of leading the economic change caused by globalisation.

5. Concluding Remarks

The five BRICS countries have given a different, albeit still shapeless form to the new century. They are doing so reforming not just trade and economics, but even the law. Acknowledging this fact does not mean that we are glorifying the process underway, but it is necessary to understand the possible evolutions in terms of State law, in countries that differ greatly in geographical and legislative terms. The BRICS countries are beginning to share objectives, but do not necessarily want to use the same instruments.

As already mentioned, there are convergences that affect each country legal system. But, if the EU requires new member states to strongly review their constitutional and legal systems, the BRICS group has been using what may be described as soft policy transfer.

This form of “dialogue” between the BRICS countries today involves “legal flows”, the results of which cannot be termed “transplants” but are instead a form of “legal borrowing” (Scheppelle, 2003; Frankenberg, 2010). They are the result of the decisions taken in the inter-governmental sessions. From the transposition of models there is a shift towards procedures, with a direct, and positive, impact on the overall legal system. In this way, the foundations for solid legal “bridges” between different systems are laid (Tebbe & Tsai, 2010; Tsai & Tebbe, 2011).

This is the reason why research largely focuses on studying the models of these legislative systems and examining the “legal flows” (Tebbe & Tsai, 2010) that represent globalisation, encompassing the need for comparison and relations between systems, even in the case where these legal systems are strongly different. It is a new vision in an increasingly global world, where, paradoxically there is an increasing importance of nation-

States and State-centred policies. Individually speaking, the BRICS countries willingly forego their exclusiveness (and separateness) by sharing common policies. The EU member states are moving from the modern to post-modern era, owing to the paring down of State law (Auby, 2008) in favor of new players located outside the States themselves. It involves empowering new organisations that are not always inter-State in nature. They include multinational companies, NGOs, public-private hybrid institutions, or global extra-national systems that have gained independence from the States themselves and remain outside suitable forms of transparency and control (even with regard to decision-making processes) and side-step accountability criteria (Grant & Kehoane, 2005). This is not the case of the BRICS group.

Within the BRICS countries, in fact, the State intervenes in economics, and it “is legitimised by the Constitutions of the individual States themselves, (and) guarantees diversified ‘State capitalism’ which controls the internal markets and pursues cohesion governed ‘from above’” (Carducci, 2013). If the process we are witnessing in the BRICS countries continues as outlined, the legal system will have to embark on two-directional engagement with globalisation of Anglo-Saxon or Western origins, and a different version of Asian inspiration (Mundell, 2007).

More research will tell us whether we are facing a new concept of a multi-centre inter-State order. In particular, working on the legal and constitutional frame of this legal network seems fascinating and promising. And it will contribute to understanding if the BRICS are a mirage or reality (Armijo, 2007).

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