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“Tracking the Law and Development Continuum through Multiple Intersections”

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I. Introduction

Ideas expressed as law and development theories have sought to connect law and development by creating a framework within which the role of law in development may be better understood and perhaps even packaged as a kit to be recommended to governments as a way of advancing development. Over the years, thoughts on law and development have crystallised around various concepts such as economic growth, the rule of law, the empowerment of the poor and the growth of institutions. One thing that stands out clearly from these debates is that while there may be a measure of consensus around particular theses or propositions, unanimity among all thinkers, scholars and actors is not likely to follow, nor is it necessarily desirable. This paper draws out threads of thought that present various positions as facets of the law and development dynamic or else, progressive points on the multi-dimensional development continuum. In the first few sections, the paper summarises a number of themes at the forefront of law and development theorisation over the years. Reflections on these developments are made in the next segment, followed by a sample identikit highlighting some key dimensions of law and development thought that need to be further explored and given a place in the taxonomy of law and development scholarship.

II. The Progression of Law and Development

One classification of the Law and Development literature identified three overlapping categories, the first being the core literature which focuses on the nature of the law-development relationship in the context of the developing world.\(^1\) Second is the literature on law and society which, while not being confined to or focused on developing countries, may offer relevant insights, while the third category is comprised of work dealing with specific aspects of law in relation to particular development objectives.\(^2\) This category which is a mixed grill of sorts, provides data against which models presented by core theorists may be tested. For example a study of legal measures for livelihood protection in a particular labour sector might reinforce or rebut certain assumptions on how the goal of livelihood protection among the research subjects is best secured.\(^3\)

Another classification recognises two long-standing groups in law and development scholarship, namely, the law in development group who focus on how law can play an instrumental role in achieving development goals, and the law as development group who view legal reforms and the rule of law as an end in themselves.\(^4\) The first group is further

\(^1\) See Elliot M. Burg, “Law and Development: A Review of the Literature and a Critique of “Scholars in Self-Estrangement”, American Journal of Comparative Law Vol 25 No 3 (Summer 1977) pp 492-530. This work reviews literature by veteran law and development scholars such as Seidman, Friedman, Trubek, and Galanter.

\(^2\) Burg at 494.


\(^4\) Mariana Mota Prado, “What is Law and Development?” in Revista Argentina de Teoria Juridica, Vol II, October 2010 pp 1-20 at 3. These ideas were earlier expressed in David M Trubek and Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical
divisible into those that subscribe to strong state intervention, using law as an instrument –
law in the developmental state or legal engineering as von Benda-Beckmann put it5, and
those who believe law should only create enabling conditions for the invisible hand to work –
law in the neoliberal state.6

From government-centred economic models to people-centred approaches

With time came a shift in the earlier conceptualisation of law and development as the use of
law as an instrument for effective state intervention in the economy through the creation of
formal structures for macro-economic control as the first wave of law and development
activity and scholarship advocated.5 Gradually the notion of a pre-packaged economic
model and its assumed outcomes of growth in per capita real income gave way to other
indices such as the basic needs approach. The basic needs theory of law and development
advocates a highly decentralised planning process, based on the local community, involving
local participation and answering local problems.8 The basic needs approach developed
indicators of basic need to fill the gaps evident in the income growth model, with the
 corresponding policy then aimed both at increasing the provision of basic needs and per
capita real income.9 This was then advanced in the human development approach:

‘The Human Development Approach could be regarded as an extension of the “basic
needs” approach, moving from the indicators of “basic needs” in the space of
commodities to the indicators of human development in the space of such
achievements as life expectancy, infant survival and adult literacy, to supplement the
indicators of per capita real income.’10

Advancing the goals of the human development model necessarily calls into play, the
alternative development approach which focuses on the supporting framework that enables
people to access the provisions made by law and policy often through support groups that
help communities and collectives of people to access developmental initiatives and
interventions.11 This is more than merely consulting people. It is about supporting civil

6 Mota Prado at 19.
7 Trubek and Santos op. cit. pp 2-5.
8 Peter Muchlinski, ““Basic Needs” Theory and Development Law” in F Snyder and Peter Slinn (eds)
238.
pp 180-81.
10 Ibid. at 181.
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society to serve the disadvantaged and build their legal capacities – the legal empowerment of the poor.\textsuperscript{12}

The reality of progressive tiers of associational activity for development means, for example, that “the empowerment of organizations of rural workers may depend a great deal on the empowerment of other kinds of groups to help them.”\textsuperscript{13} Participation in a way that promotes fair and equitable distribution of benefits that result in the steady improvement of the well-being of all people is key to people-centred perspectives in law and development.\textsuperscript{14}

\textit{From human development to the rule of law}

The merits of the human development approach notwithstanding, the desire for a legal recipe for development and the obvious preference for certainty in legal provisions made it attractive to hinge development to the strengthening of the rule of law, with indicators such as democratic governance, free and fair elections, judicial independence and autonomy of key government institutions.\textsuperscript{15} Technical and financial support of development agencies crystallised around this theme particularly in the 1990s.\textsuperscript{16} Over time however, it became clear that the rule of law paradigm did not answer all the questions, in part because it was not a universally precise concept.\textsuperscript{17} Besides, as Kennedy observes, the rule of law paradigm must not be embraced as a substitute for “perplexing political and economic choices which have been at the centre of development policy-making for half a century” but must be seen as an arena to contest those choices.\textsuperscript{18}

Further, the rule of law framework was critiqued as having its basis on assumptions which were not verified, the impact of which had not been established, which had not asked important questions such as: “do legal system overhauls improve development or does development lead to legal change?”\textsuperscript{19} In addition, the rule of law approach maintained the usual top-down, state-centred development approaches which focus on state institutions and assume that the rule of law once achieved becomes the means toward ends such as economic growth, good governance and poverty alleviation.\textsuperscript{20} For these reasons, the rule of law


\textsuperscript{14} Sengupta op. cit. at 180.

\textsuperscript{15} See also Kennedy, ‘ “The Rule of Law,” Political Choices, and Development Common Sense’ in Trubek and Santos op. cit. pp 95 – 173 at 172.


\textsuperscript{17} Ibid.


\textsuperscript{19} Golub at 7-10.

\textsuperscript{20} Ibid.
orthodoxy was, in this view, adjudged “an unstable foundation on which to base the dominant paradigm for integrating law and development.”

“Sometimes, no doubt, increasingly formal rules would be a good idea. Sometimes less governmental discretion, sometimes more vigorous criminal enforcement, broader distribution of supply relationships, less local preference in contracting, all might be very helpful. But sometimes we would also expect the opposite….. the law is a terrain for this inquiry, not a substitution for it.”

Coming on the heels of this barrage of critiques, and perhaps in response to it, was the shift from the conception of the rule of law as a development policy tool to an understanding of it as a development policy objective.

**Institutions**

Institutions are identified as the third interwoven sphere in the law and development tri-sphere, the other two being law and economics. The centrality of institutions to development has been discussed more recently by Prado who observes importantly, that different kinds of institutions may be necessary at different levels of development and that “informal institutions may be more relevant at lower levels and formal institutions may only become relevant above a certain development threshold.”

The strengthening of institutional infrastructure is also identified as fundamental to effective self-administration of those institutions, which itself is a precursor to the protection of rights. This strengthening will involve evaluating existing institutional frameworks, cooperatively with stakeholders, clarifying points of relevance to the general populace. To date, the importance of maintaining, establishing, developing or growing effective institutions is a key emphasis of law and development scholarship.

**Informal Law in the development paradigm**

Normative systems that grow out of people’s lives in communities or pre-existing norms to which people subscribe are a pervasive phenomena which present key developmental paths,

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21 Ibid at 9.
24 Trubek and Santos, op. cit. at 4.
27 Ibid.
not to be ignored. If law and development is seen as a continually evolving field rather than a clearly defined, closed subject, current discourses in the field will of necessity have to consider the multiple faces of informal law, also described as unofficial law. The centrality of other normative systems to people’s lives has also gained recognition among development agencies. Golub refers to the expansion by USAID and DFID of their interpretation of the justice sector to include traditional dispute resolution mechanisms. Traditional jurisprudence reflected in various customary law systems have often required official pronouncements by state institutions, not for their existence, but often for their validity. Often the official versions of customary law that are recognised differ in key respects from what is practised, given the passage of time and the sources of official versions. The complexity of legal pluralism which exists in South Africa for example means that “… it often occurs that the state plays a subordinate role to the regulation exercised by an informal authority. In other words, the state’s laws are just another source of law among a plethora of semi-autonomous socio-legal fields that exert some normative authority on each individual.”

Bringing these complementary, supplemental and alternative development paths that characterise developing societies in particular into the law and development rubric will require the use of comparative law perspectives. In relation to Africa in particular, comparative law scholarship will reveal the layers and dimensions of plural normativity as a precursor to determining how these normative systems shape or influence the process of development.

III. Reflecting on the Law and Development discourse

In a sense, the conceptions of law and development highlighted in the previous section are not exclusive quantities but mutually reinforcing approaches. For example, virtually all the identified threads of the law and development discourse are captured in the assertion that “… the ‘basic needs’ approach is reformist in nature and argues that if development occurred within a politically accountable, pluralistic and decentralised form of state, a free market

30 Golub, op. cit. at 8.
31 Mamdani makes mention of dissenting voices whose version of the customary was not represented – see Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton New Jersey: Princeton University Press, 1996) p118.
33 Ibid. at 47-48.
economy could be controlled for the gain of the poor.”

The plurality theme is also evident in the assessment of the rule of law paradigm as more of a choice among alternative theories of development, than a categorical precondition to economic growth, because “much as we might wish it, there is no single ‘rule of law’ whose establishment will generate development.”

In fact, for those at the lower end of the development spectrum, where dysfunctionality or inefficiency of institutions is the norm, where the economy is distorted as a result of mismanagement and lack of accountability, where law is manipulated in favour of the powerful and where the same state office which labours ineffectively as a system of administration operates with soundless efficiency as a well-oiled machinery of extortion, there is little if any debate about what constitutes law and development as all the positions that have been put forward (economic growth, rule of law, legal empowerment of the poor, institution-building) and more are equally applicable. All materials are required if building or rebuilding is being done from scratch.

It seems that theorists outside of the developing world tend to have an umbrella view of developing countries and theorise in overarching ways that address generic characteristics of underdevelopment and identify features of a development framework. For instance, Trubek and Santos identify three overarching moments in law and development and distil five elements that are reflected in contemporary law and development thought. On the other hand, people in the developing world, be they scholars, practitioners, business people, or just residents, being surrounded constantly with evolving activities and ways of doing things as people struggle to survive, are more likely to identify and describe processes of development rather than define concepts. For example, the Labour Enterprise Project at the University of Cape Town’s Institute of Development and Labour Law has over the years carried out research identifying and tracking various forms of precarious employment and exploring the prospects of the realisation of decent work for vulnerable categories of workers located in these employment forms. This too should have its place in the discourse. Instead of expecting to define a uniform recipe for development, it needs to be understood as a continuum comprised of many varied elements, weaving through multiple intersections, not static and never closed.

Elements that shape the role of law in development will include at the very minimum, understanding what people view as development – this usually differs at different points on the continuum or spectrum. Other factors include how people access that thing they view as development, what norms shape and are shaped by various pursuits of development, what structures improve the actors’ access to their development, that is what makes it more reachable, realisable, feasible and what factors impede it. These and other elements are

35 Muchlinski, op. cit. at 241.
38 See for example the work of the Labour enterprise
useful in determining how existing law and if necessary, new law can support the developmental paths people have already tracked for themselves. These must then feed into the making or implementation of law in and for each context.

Kennedy describes the difficulty faced by the ruler in making distributive choices without accurate prediction or guarantees from politics and economics and how this makes a prescriptive rule of law with its identifiable elements – rights, constitutions, government capacity and judicial independence attractive but not necessarily effective.\textsuperscript{40} This suggests that uniformity – the appeal of ascertainable quantities with predictable outcomes will not necessarily address the core developmental needs of each and every society to which the uniform recipe is applied. In other words, each country, indeed each community or collective should be treated on its own merits. An entry point must be found, which will not necessarily be the same for all countries, regions, communities or cultures. Such an entry point may or may not cohere with one or more of the law and development theories and the fact that it is an entry point does not mean that it would be the middle and end points as well. For example, an entry point in one community could be the rule of law paradigm, while a legal empowerment of the poor approach advances it and vice versa in another community. The recognition of the multiplicity of realities and the understanding or at least observation of how development metamorphoses from the activities, values and responses of people in a way that eventually demands a change in the law opens up the space for a more sustained participation by developing world people in the law and development discourse.

IV. Law and Development through multiple intersections

The field of law and development presents with various facets as a subject of study and consequently, an appropriate classification model is needed to identify these multiple dimensions which are not closed in any event. Law and development has been approached from various perspectives. These include: as a framework for development programmes in development practice, as an interconnector of various legal specialisations, as a prescriptor for the making of development-friendly law and of course, as an academic discipline. These are discussed briefly in this segment.

Framework for development programmes

Reviewing the three moments of law and development, Trubek and Santos identify key parameters that have emerged from previous development programmes carried out in various parts of the world around which a new law and development mainstream has emerged. These elements which have come to constitute a “comprehensive development framework” are described as follows:

“The new attention to the limits of markets, the effort to define development as freedom not just growth, the stress on the local, the interest in participation, and the

\textsuperscript{40} Kennedy (2003) at 19 and Kennedy (2006) at 172.
focus on poverty reduction have helped set in motion new thinking about law and have ushered in a new Moment in law and development doctrine.41

This new mainstream recognises that one size does not fit all, thus opening up the space to local conditions and national diversities, views legal institutions as part of development and law reform as an end in itself whether or not it can be tied directly to growth.42

Interconnecting Legal Specialisations

It is of course not in question that all fields of law contribute to development – not only to the development of the law in a technical sense, but to the development of society, directly or indirectly, sometimes passively or potentially, but increasingly more actively and purposefully. The ambit of various mainstream areas of law is widening to include issues arising out of developmental contexts, whether the terminology used is emerging markets, sustainable development or corporate social responsibility. Indeed issues such as corporate governance in commercial law, community participation in constitution-making, beneficiation in extractive industries and local policing in criminal justice are an indication of a law and development paradigm in these pertinent areas.

In its engagement with mainstream fields of law therefore, law and development analysis would be of significant value as a diagnostic tool, identifying ways in which a body of law on a particular subject may be applied, amended or interpreted to further the ends of development.

Prescriptor for development-friendly law

Critical to the role of law in development is the procedure by which laws are made as well as the process by which its content is constituted to meet the desired goals. The importance of infusing law and policy with the right content as well as with measures to make them effective in practice is central to the regulating by objective model (RBO) which “seeks to incorporate into one frame, a variety of fundamental and realisable goals of government or related entity.”43 Given that inherent linkages exist between productive processes within a socio-economic environment particularly in transitional economies with underdeveloped regulatory models and complex market systems, there needs to be a process of co-operation between governments and authentic stakeholders to ensure that policies and laws meet societal expectations.44 The RBO model employs a multi-stakeholder process, through which it works to identify or build consensus on effective strategies for the realisation of fundamental goals of government, civil society and the business community, using sector-specific legal instruments as benchmarks in a given economic environment.45

41 Trubek and Santos at 7.
42 Ibid.
43 Obutte at 264.
44 Ibid. at 266.
45 Ibid. at 265.
Ensuring technical soundness of laws requires, among other things, recognising that the right to development is both a collective and an individual right as well as identifying the appropriate duty bearers in respect of each composite part of this right.\textsuperscript{46}

\textit{Academic Discipline}

What is to be taught as law and development and how it is to be taught are two key issues which will determine how future students, scholars and practitioners of law and development advance the field in the future. Framing law and development pedagogy requires an approach that is wide enough to accommodate the past, the present and the future of law and development thought and all the dimensions of these. This is reflected in the recent work of Trebilcock and Prado who, in addition to providing definitions and theories of development, engage with the legal environment for development, including the rule of law, the state, internal governance structures and international economic frameworks.\textsuperscript{47} Various factors affecting development outcomes such as gender, ethnicity, corruption are also discussed as are development vehicles such as state-owned enterprises and public-private partnerships.\textsuperscript{48} Apart from demonstrating the interdisciplinary connectedness of law and development, this buffet of law and development issues presents students with a choice of numerous key areas of specialisation.

\textbf{V. Conclusion}

The law and development discourse has come through various phases. Critically, there is a recognition of the existence of an immense diversity of developmental contexts which present challenges to law and development approaches previously conceived as uniformly applicable. A wider and more inclusive development framework has emerged from the law and development mainstream. Much as this may capture broad parameters of the field, the details of what translates to actual developmental steps will necessarily be filled in by those who are primary participants and beneficiaries of development processes.

Various approaches are adopted for the study of law and development and a sample of these were discussed to emphasise the need for some form of disaggregation or sub-categorisation in law and development studies. Given that development may mean different things to different people at different times, perhaps what should be sought is a framework or frameworks for the study of law and development constituted of elements that are at the


\textsuperscript{47} Michael J. Trebilcock and Mariana Mota Prado, Advanced Introduction to Law and Development (Edward Elgar Advanced Introductions, 2014).

\textsuperscript{48} Ibid.
minimum, flexible, elastic, adjustable and realistic enough to cater to what people and governments in a particular precinct and at a particular time require of it.

References


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