Human Rights and Development

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I.   'Rights and Development' in Times of (Self-)Estrangement

In a recent rejoinder to 'Scholars in Self-Estrangement', David Trubek, one of the doyens of law and development studies, remarked that one of the (many) reasons for why the first iteration of the 'law and development' movement became self-estranged was that it had 'lost the support of the development agencies before it could build a sustainable base in the academy.'[1] Thus, at the time, neither the (development) policy community nor a critical mass of academics were, if for different reasons, willing to take up the baton of law in development. However, a good forty years on — at the time of Trubek´s rejoinder — this situation seems, on the face of it, to have changed dramatically, with one of the main drivers of that change, arguably, being human rights. For human rights now dominate significant parts of development discourse through what has come to be known as the rights-based approach to development (HRBA).[2] The latter has dominated international, regional and domestic development practice for a good two decades and has been an essential component of both big global milestone projects, the Millennium and the Sustainable Development Goas (MDHs and SDGs).[3] Indeed, the development policy community which Trubek deemed to have lost in the 1970s seems today not only to be supportive of ´law and development´ but through the HRBA has become one of its main driving forces.[4]

Likewise, an academic 'law and development' community has long since established itself in a small but stable niche in the global legal research agenda, servicing — and at least occasionally critiquing — the expansion of law in the development venture.[5] That anchorage in the academy emerged

[1] David M Trubek, 'Law and Development: Forty Years after "Scholars in Self-Estrangement"' (2016) 66 University of Toronto Law Journal 30. See also Yong-Shik Lee, 'A Comment on "Law and Development: Forty Years after 'Scholars in Self-Estrangement'" by David Trubek' (2019) 12 Law and Development Review 627.
[2] See Peter Uvin, *Human Rights and Development* (Lynn Rienner Publishers 2013) (hereafter Uvin, *Human Rights*).
[3] See Malcolm Langford, Andy Sumner and Alicia Ely Yamin (eds), *The Millennium Development Goals and Human Rights* (Cambridge University Press 2013); Markus Kaltenborn, *Social Rights and International Development: Global Legal Standards for the Post-2015 Development Agenda* (Springer 2015).
[4] See David Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future' in David M Trubek and Alvaro Santos (eds), *The New Law and Development: A Critical Appraisal* (Cambridge University Press 2006) 74.
[5] See Michael Trebilcock, 'Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies' (2016) 66 University of Toronto Law Journal 330.

roughly a decade after 'law and development's' first self-declared death and was to a significant measure driven by a 'turn to rights' in the context of the constitutional transitions that took place in Latin America, Sub-Saharan Africa, Central and Eastern Europe, and parts of Central and South Asia towards the end of and just after the Cold War.[6] In their wake, many constitutional and international lawyers have taken up the banner of global rule of law promotion in which rights, both domestic and international human rights, have played a leading — and often lucrative — role.[7] With the parallel shift to the HRBA in multilateral development programming and, more generally, to the (so called) New York consensus focussed, at least nominally, on the legally enforceable wellbeing of individuals and groups rather than on the political interests of states and their macroeconomic performance, rights have seemingly helped 'law and development' to come into its own, no longer self-estranged, but self-fulfilled if not quite self-satisfied.

However, despite their institutional entrenchment and disciplinary self-confidence, both human rights and development are now embroiled in the deep crisis of the broader context from which both have, more or less contemporaneously, sprung, namely the Western-dominated late modern world order that emerged after World War II on the backdrop of colonial and imperialist antecedents.[8] Indeed, both are increasingly singled out as prime symbols of that order and are blamed for being either ineffective against or positively implicated in the ills they are nominally meant to remedy. While critical clamour is rising all around, the grounds for critique are diverse and not always mutually compatible: for some, human rights and development are either inherently inadequate for today`s challenges (such as global climate change, endemic poverty, or pandemic disease), or are marred by elitist institutionalism and managerialist bias.[9] For others, they were never anything but ideological smokescreens meant to simultaneously advance the interests of the dominant hemisphere, class, race, and gender, as well as to conceal that advancement behind a narrative of progress.[10]

These growing doubts over the foundations, effectiveness, and relevance of 'rights and development' have now re-opened Trubek's gap between the academy — but also wider public and political opinion — and the 'rights and development' policy community. Each is increasingly locked into its own epistemic bubble, with the policy side having taken a technocratic turn towards evidence-based policy-making, quantification and metrics, while the academy and public opinion have partly gone post-factual (if in different ways and for different reasons).[11] This has led to a new estrangement which is fast turning into yet another self-estrangement as anyone now working in

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[6] See Roberto Gargarella, Theunis Roux and Pilar Domingo (eds), *Courts and Social Transformation in New Democracies* (Routledge 2006); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 American Journal of Comparative Law 527.

[7] See Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010).

[8] See, eg, Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 95; Luis Eslava, *Local Space, Global Life* (Cambridge University Press 2015).

[9] See, eg, David Kennedy, 'The International Human Rights Movement: Part of the Problem?' 3 European Human Rights Law Review (2001) 581

[10] See Susan Marks, 'Four Human Rights Myths' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Elgar 2013) 217; Nelson Maldonado-Torres, 'On the Coloniality of Human Rights' (2017) 114 *Revista Crítica de Ciências Sociais* 117.

[11] See Florian Hoffmann, 'Quite Enough (Still): Human Rights in (Times of) Crisis' in Nehal Butha, Florian Hoffmann, Sarah Knuckey, Frédéric Mégret and Margaret Satterthwaite (eds), *The Struggle for Human Rights: Essays in Honour of Philip Alston* (Oxford University Press 2021 forthcoming).

or on 'rights and development' finds herself squeezed between the rock of uncritical apology and the hard place of unapologetic critique.

Yet, while the intellectual debate is locked between 'business as usual,' on one hand, and the decolonization of human rights, de-growth and post-development, on the other, 'rights and development' in the field remains at once alive and as complex, multi-faceted and ambivalent as reality itself. To showcase some of that complexity 'on the ground,' we will first outline the trajectory of 'rights and development' from its antecedents in the right to development and to today´s all-pervasive HRBA, in order to then briefly exemplify how it has played out in the politics of one Global Southern state, Brazil. To that end, we will briefly sketch the way the latter has approached multilateral development cooperation in the area of public health by creatively employing the 'right to health' during the first decade and a half of the new millennium.

II.   From the Margins to Mantra: The Emergence of 'Rights and Development'

While, as was hinted above, the human rights and development projects share the same intellectual and political origins, their coming together was not seen as self-evident for a long time.[12] In fact, they were long deemed to be 'temperamentally' incompatible: on one hand, rights are characterized by state-centrism, an adversarial counterposing of the state and individual victims, a focus on clear-cut legal obligations and their violation, an orientation towards national and international judiciaries, and an inherent claim to trump all other concerns; on the other hand, development in which the state is seenas an unloved if necessary partner and not an adversary and is, in any case, only one among several relevant stakeholders in a process which tends to be built on negotiated policies based on political compromise, with (overseas development) aid (ODA) being framed as a conditional grant rather than as an unconditional entitlement.[13]

Yet, human rights and development have their origin in the Western (liberal) progress narrative and it is, in light of today`s revisionist turn in the latter's historiography, unsurprising that the first foray into 'rights and development' occurred on behalf of those perceived to be on the receiving end of the development discourse, notably in the Global South and what was then an increasingly self-conscious Third World.[14] Hence, when, in 1972, the Senegalese jurist Keba M'baye brought together human rights and development in the concept of a 'right to development,' it was an attempt to semantically re-signify both concepts in defiance of their prevalent connotation as carrier vehicles of Western 'civilization' and domination. It was, thus, closely associated with the Non-Aligned Movement (NAM) and the New International Economic Order (NIEO) program that originated around the same time.[15] Its objective was to reframe, from a Global Southern perspective, the terms

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[12] See Uvin, *Human Rights* (n 2); Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2019) 11 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 118.

[13] See Stephen Marks, 'The Human Rights Framework for Development: Seven Approaches' in Arjun Sengupta, Achna Negi and Moshumi Basu (eds), *Reflections on the Right to Development* (Sage 2005) 23 (hereafter Marks, *The Human Rights Framework for Development*).

[14] See BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3.

[15] See John Linarelli, Margot E Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 78-109.

on which the world economy as a whole and ODA in particular were organized, with the language of human rights reappropriated to connote a right, held not by individuals or groups but by developing "states", to fair and equitable development, including a binding commitment to international solidarity and self-determination.[16]

The backdrop to this move were, of course, certain paradigm shifts in both human rights and development discourse that had been ocurring since the late 1960s — and that have to be seen in the broader context of the global intellectual and political convulsions of that period. In development circles, dependency theory was fast supplanting modernization theory and with it came the recognition that that the world economy operated on structurally unequal terms and was inherently staked against the states of the Global South. While at that moment the later insights of post- and decolonial thought had not yet taken hold, it became nonetheless clear, not least to a consolidating Third World movement, that 'development-as-modernization' was, essentially, a Western ruse to retain developing states dependent and economically exploitable even after decolonization.[17] As a response, the claim for not just political sovereignty, hard won by many developing states only a decade earlier, but also economic sovereignty, notably to one`s natural resources as well as to an equitable world economic system, was counterposed to Western development discourse, with the language of rights serving as a way to turn the West`s own rhetoric against itself.[18]

In parallel, there was also a shift in the way human rights were seen by both Western and developing states. During the main decolonization period in the early 1960s, anti-colonial movements had, at least in part and especially in a UN context, relied on human rights norms to protest against colonial abuse and racial discrimination, and to stake claims for self-determination and the equality of colonized peoples. Former colonial powers and their Western allies, in turn, had then strongly resisted this importation of rights language into both decolonization and development.[19] By the late 1960s and 1970s, however, positions shifted, with many Western states, including former colonial powers, discovering human rights as a potent tool to internationally 'supervise' the conduct of now independent Southern states and to increasingly condition ODA on the latter's 'rights performance' — even if such conditionalities where often merely rhetorical gestures where and when supervening economic interests were concerned. Southern states, in turn, became more circumspect of what they perceived as an anti-sovereigntist use of the international human rights regime, and it is as a response to this that the 'right to development' with its explicit focus on states and sovereignty was framed.[20]

While never uncontested, the 'right to development' gained a certain foothold in development discourse and has come to occupy a small and now somewhat side-lined but enduring niche in the

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[16] See Arjun Sengupta, Achna Nesi and Moshumi Basu, (eds), *Reflections on the Right to Development* (Sage 2005) (hereafter Sengupta, Nesi and Basu, *Right to Development*).

[17] See Balakrishnan Rajagopal, 'Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On' (2013) 23 Human Rights Quarterly 893. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 95; Michael Riegner, 'How Universal Are International Law and Development? Engaging with Postcolonial and Third World Scholarship from the Perspective of Its Other' (2012) 45 World Comparative Law (VRÜ) 232.

[18] Luis Eslava, 'The Developmental State: Dependency, Independency and the History of the South' in Philipp Dann and Jochen von Bernstorff (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP, 2019).

[19] See Samuel Moyn, *The Last Utopia* (Harvard University Press 2010) 84.

[20] See Sengupta, Negi and Basu, *Right to Development* (n 16).

human rights regime. First formally articulated in the African Charter for Human and Peoples Rights in 1981, it was brought to international prominence through the UN General Assembly's Declaration on the Right to Development in 1986 and was subsequently reaffirmed in a wide range of (non-binding) instruments such as the Vienna Declaration and Program of Action (1993), the Millennium Declaration (2000), and the Durban Declaration and Program of Action (2002). It has thus long outlasted the NIEO context in which it was conceived, but, arguably, at the price of a gradual and subtle shift from a 'right to development' to a broader and more diffuse semantic of 'rights in development.' It is, at any rate, in this guise that it has served as a stepping stone for the next conjunction of 'rights and development,' notably the move to the HRBA.

The latter emerged in the 1990s as a result of the confluence of several interrelated paradigm shifts. The most general such shift was, of course, the end of the Cold War which freed the international human rights regime from the constraints the power political haggling the two ideological blocks had previously imposed on it, so that human rights began to occupy a central position in the liberal progress (self-)narrative of a supposedly unipolar world.[21] That vision also trickled into development discourse in form of a move towards 'human development' focussed on individual wellbeing and especially (anti-)poverty, rather than state-level macroeconomic policy. Rights were seen as natural benchmarks for this wellbeing approach, an interpretation partly inspired by Amartya Sen's capabilities framework which seeks to fuse the economic and political aspects of development by individualizing human welfare as the set of capabilities for 'achieving the kind of lives [people] have reason to value.'[22] This, in turn, shifted the focus of development towards individuals and, thus, rendered human rights as one of its 'natural' indicators.[23] This new perspective clearly informed UNDP's first Human Development Report in 1990, which used the fulfilment of human rights directly as a benchmark for development progress and set the scene for a rights-based redescription of development.[24]

A further paradigm shift that underwrote the emergence of rights-based development was the re-discovery, in neoclassical economics, of the importance of institutions (and law) for development. It eventually led the multilateral finance institutions and other ODA donors to adopt a rule of law and human rights oriented 'good governance' agenda as the new mantra of development policy, to the point where the two have become nearly synonymous.[25] Critics of this 'good governance' turn had argued early on that the rule of law agenda was essentially a tool to streamline (neo-)liberal public sector reform into developing states with a view to replacing an interventionist (welfare-developmentalist) state paradigm with a minimalist and market-friendly regulatory state framework.[26] The latter is characterized by strong judiciaries that are meant to discipline potentially meddlesome

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[21] See, classically, Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992); Susan Marks, 'The End of History; Reflections on Some International Legal Theses' (1997) 8 European Journal of International Law 449.

[22] See Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 291.

[23] Sakiko Fukuda-Parr, 'The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities' (2003) 9 Feminist Economics 301.

[24] See United Nations Development Programme (UNDP), 'Human Development Report 1990' (1990) <http://hdr.undp.org/sites/default/files/reports/219/hdr_1990_en_complete_nostats.pdf>. See also Philip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005).

[25] See Chantal Thomas, 'Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform' (2008) Cornell Law Faculty Publications, Paper 118; James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107.

[26] See Navroz K Dubash and Bronwen Morgan, 'Understanding the Rise of the Regulatory State of the South' (2012) 6 Regulation and Governance 261.

executives and legislatures and to keep them from interfering with the regulatory state's intended role as a mere guarantor of market functionality. In this vision, development is to be driven by market (aka private sector) actors which, however, require public sector support, including in form of strong courts operating on the basis of entrenched constitutions that contain a core set of civil rights deemed necessary to guarantee 'free market exchange.'[27]

However, in a further twist to the story, the 'good governance' agenda with its emphasis on strong constitutional judiciaries ended up generating a number of unintended consequences which had the combined effect of reinforcing the rise of 'rights and development,' though from a rather different angle. For the aggressive promotion of the rule of law as an alternative to traditional forms of politics — or, indeed, as an anti-politics — also engendered a new belief in the potential of social transformation through law — and specifically through rights — on part of (some) civil society and political actors.[28] Hence, a new transformative constitutionalism emerged in many (especially post-transition) countries in the Global South with a view to judicializing social and econmomic policy on the basis of not just civil and political but especially economic and social rights.[29] As a result, many social policy areas, such as health, eductation, housing, water, sanitation, or food have seen a steep rise in domestic rights-based judicialization with increasingly significant budegtary effects and wider political repercussions.[30] Ironically, however, at least part of this domestic 'rights revolution' only emerged in response to earlier public sector reforms and their dismantling of traditonal welfare policies.

All of these factors have conjointly syntethized the HRBA paradigm which was formally inaugurated in 1997, when then UN Secretary-General Kofi Annan's 1997 report *Renewing the United Nations: A Programme for Reform* made the human rights mainstreaming agenda an official UN policy.[31] With its mandate that human rights had to be part of 'everything the UN does' it represented nothing short of a re-branding of the UN at a moment when, just like in the aftermath of World War II, the world was mesmerized by recent conflict and humanitarian calamity, in this case the dual fallout over Rwanda and Bosnia, which provided the impetus for an operational turn to human rights. It was to play out primarily in two of the UN's mandates, namely development and peace and security, with the Office of the High Commissioner for Human Rights (OHCHR), itself only created in 1994, and its activist (second) High Commissioner, former (and first woman) Irish president Mary Robinson,

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[27] See, eg, Ernst-Ulrich Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"' (2008) 19 European Journal of International Law 769.

[28] See David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 163; Ben Golder and Daniel McLoughlin (eds), *The Politics of Legality in a Neoliberal Age* (Routledge 2017); Daniel Bonilla, Constituionalism of the Global South (CUP, 2013).

[29] See, eg, Natalia Angel Cabo and Domingo L Parma, 'Latin American Social Constitutionalism: Courts and Popular Participation' in Helena Alviar Garcia, Karl Klare and Lucy A Williams, S*ocial and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015); Daniel Brinks and William Forbath, 'The Role of Courts and Constitutions in the New Politics of Welfare in Latin America' in Randall Peerenboom and Tom Ginsburg, *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge University Press 2014) 221.

[30] See Florian Hoffmann and Fernande Bentes, 'Accountability for Social and Economic Rights in Brazil' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); Alicia E Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011).

[31] 'Renewing the United Nations: A Programme for Reform, Report of the Secretary-General', UN Doc A/52/L.72/Rev.1 (19 December 1997). See also Florian Hoffmann, 'Revolution or Regression: Retracing the Turn to Rights in "Law and Development"' in Jarna Petman (ed), *Finnish Yearbook of International Law, Volume 23, 2012–2013* (Hart Publishing 2016) 45.

as well as some of the specialized agencies, most notably UNICEF, taking a lead role in its concretization.

However, despite a by now enormous quantity of especially policy-oriented literature on the HRBA and despite its ritually acclaimed status as the mantra of contemporary (sustainable) development policy, it remains somewhat hazy and its ubiquity seems inversely related to any consensus on its precise content and legal force.[32] Varun Gauri and Siri Gloppen, for one, distinguish four functions of the HRBA that are frequently (con)fused in HRBA-talk, notably what they term 'international legal precepts,' 'donor-regulations and conditionalities,' 'normative beliefs,' and 'constitutional rights.'[33] The first of these essentially (re)frames development as the process by which compliance with positivised international legal (human rights) norms is achieved, with these norms meant to fulfill a triple role as interpretation manuals for development goals, as regulatory frameworks for development planning and implementation, and as benchmarks for development outcomes.[34] Yet, even though international human rights standards occupy a prominent place in HRBA, international (legal) institutions –such as and especially the UN treaty bodies- have not played a significant role on this front. Their continuing lack of institutional capacity and enforcement authority means that they only play a small role in the the day-to-day running of HRBA programs, even though they have, arguably, provided development actors with additional advocacy tools to politically mobilize for greater international responsibility and for domestic policy change.[35]

However, on the international plain, it is rather as 'donor regulations and conditionalities' that HRBA has been most present. Here rights catalogues have been used to provide substance to abstract 'good governance' principles in the context of program design, implementation and assessment, and human rights norms are, thus, effectively converted into soft administrative guidelines for rights-based development governance.[36] Such a procedural interpretation of 'rights in development' is nominally geared to enhancing the agency of the recipients of ODA, primarily recipient states but also recipient communities and individuals. It performs a subtle semantic shift in development discourse, away from objective need and towards subjective want, often expressed as an increase in choice, the fulfilment of which is then understood as 'empowerment.' It is meant to increase the control of specific constituencies over their own development and it combines greater and more equitable access to socio-economic resources such as income, education, or health, with a subjective capacity to exercise choice over their specific allocation.[37] Importantly, such rights-based empowerment also implies the ability both to enforce accountability claims vis-à-vis different

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[32] See, eg, Dzodzi Tsikata, 'The Rights-based Approach to Development: Potential for Change or More of the Same?' (2004) 35 IDS Bulletin 130; Victor Abramovich, 'The Rights-Based Approach in Development Policies and Strategies' (April 2006) 88 CEPAL Review 33. See also Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU, and Germany* (Cambridge University Press 2013); Hans Otto Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development' (2000) 22 Human Rights Quarterly 734.
[33] Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy' (2012) 44 Polity 485 (hereafter Gauri and Gloppen, 'Human Rights-Based Approaches to Development').
[34] Examples include, again, UNDP's Human Development Index and guiding principles such as the *Guiding Principles on Extreme Poverty and Human Rights*, UN Doc A/HRC/21/39 (27 September 2012); or the *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/RES/17/4 (6 July 2011).
[35] Gauri and Gloppen, 'Human Rights-Based Approaches to Development' (n 33) 5.
[36] See, eg, UNDP, *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users' Guide* (March 2006) <http://www.undp-aciac.org/publications/other/undp/hr/humanrights-indicators-06e.pdf> accessed 20 June 2021.
[37] See Bina Pradhan, 'Measuring Empowerment: A Methodological Approach' (2003) 46 Development 51.

development stakeholders — particularly donor agencies and recipient governments — and to participate in development planning, a notion nominally — though not always factually — fulfilled in the shift to recipient-oriented planning procedures such as the World Bank's and the International Monetary Fund's Poverty Reduction Strategy Papers (PRSPs).[38] This reconstruction of good governance principles in terms of human rights within the HRBA context is, in turn, connected to a parallel turn to metrics and quantification in human rights monitoring.[39] This is where HRBA is meant to become, in Gauri and Gloppen`s terminology, a set of 'normative beliefs' that, in the cognitive space of policy-making, aspire to re-signify rights implementation as, essentially, indistinguishable from development.

Two further contexts complexify the picture of 'rights and development' beyond the confines of the core development policy community and its center of gravity in the UN system and global CSOs; one is linked to domestic law, the other to domestic politics, and both primarily play out in the Global South. One involves Gauri and Gloppen`s category of 'constitutional rights,' and it implies the increasing mobilization of strategic and public interest litigation in domestic courts to influence social and economic policy. It has been, as mentioned earlier, as much a consequence of the fallout from neoliberal public sector reform in many Global South states as it has been driven by a rights-oriented civil society activism premised on transformative constitutionalism — with its overall effects having been no less ambivalent —and no less controversially debated than those of the other instantiantions of 'rights and development.'[40] The other context in which rights have been used in development in the Global South has been in the realm of multilateral development cooperation, where rights language has been mobilized by Global South states to contest and re-frame the terms of international cooperation, for, as we shall see, a variety of motives and with, again, mixed results.

III.   Rights as (Development) Politics: The Structural Cooperation in Health Initiative in Brazil

One such Global South state is Brazil. Brazil has played with the latter version of 'rights and development' in form of the (so called) 'structural cooperation in health' (*cooperação estruturante em saúde*) initiative, through which it has sought a more horizontal cooperation with countries from the Global South during the previous 'Lula/Dilma' governments. It has done so without direct reference to either the HRBA or to the right to development, but has, instead, employed the deep political legitimacy of public health in general and the right to health, in particular, to launch an ambitious South-South cooperation program meant to cross-cut traditional — and traditionally asymmetric — North-South relations.

In fact, the literature does not even distinguish the 'structural cooperation in health' initiative from South-South cooperation, the genus of international development cooperation. The idea that health is a right and that cooperation between states is an important tool to achieve it are

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[38] See Ricardo Gottschalk, 'The Effectiveness of IMF/World Bank-Funded Poverty Reduction Strategy Papers' in Yusuf Bangura (ed), *Developmental Pathways to Poverty Reduction* (Springer 2015) 74.

[39] See Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry, *Governance by Indicators: Global Power through Classification and Rankings* (Oxford University Press 2012); Alexander Cooley and Jack Snyder (eds), *Ranking the World* (Cambridge University Press 2015).

[40] See Doutje Lettinga and Lars van Troost (eds), *Can Human Rights Bring Social Justice?* (Amnesty International Netherlands 2015).

foundational elements of the 1946 World Health Organisation Constitution (WHO), which states that the 'enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being' and that the 'health of all peoples … is dependent upon the fullest co-operation of individuals and States.'[41] It was from this vantage point that the right to health was proliferated into a wide array of treaties, domestic constitutions and public policies during the second half of the twentieth century. The triangle health, human rights and development became particularly apparent in 1978 at the International Conference on Primary Health Care led by the WHO and UNICEF and which resulted in the Declaration of Alma-Ata. It incorporated a critical understanding of development by highlighting its social over the traditional economic dimension.[42] In particular, it proposed that primary health care, defined as the 'first level of contact of individuals, the family and community with the national health system' is essential to the economic and social development of every country and 'to the reduction of the gap between the health status of the developing and developed countries.' The 'whole world community' must, therefore, 'channel increased technical and financial support to it, particularly in developing countries.'[43] These principles have since become the common thread in the work of development-conscious rights advocacy in the UN context. One example of this is the work of the UN Special Rapporteurs for the Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, which was established in 2002 and whose mandate holders have consistently contended that the right to health and effective health systems were fundamental building blocks of 'sustainable development, poverty reduction and economic prosperity.'[44]

Yet, how has this framework actually played out in the (so called) developing world? In essence, the functionality of the right to health and development has depended on at least three legal variables: political orientation, development patterns and institutional action. In Brazil, it was, despite some previous efforts, only really as of 2003, under the presidency of Lula, that Brazil began to actively seek a more horizontal and technical cooperation with other developing countries, a project labelled by the then president as the 'diplomacy of generosity.'[45] At the time, health had been identified as one of the most important and strategic foreign policy initiatives for consolidating Brazil's position, or, rather, its 're-entry' at the international level.[46] The gist behind what came to be known as the 'structural cooperation in health' initiative seems to have been the aspiration to connect development with state capacity. It is a form of 'capacity building for development' defined as 'the process by which individuals, organizations, institutions and societies develop skills (individually or collectively) to perform functions, solve problems, establish and achieve goals.'[47]

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[41] *Constitution of the World Health Organization* (entered into force 7 April 1948) 14 UNTS 185, Preamble.

[42] See Fernando A Pires-Alves and Marcos Cueto, 'A Década de Alma-Ata: A Crise do Desenvolvimento e a Saúde Internacional' (2017) 7 Ciência e Saúde Coletiva 22.

[43] Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR (6–12 September 1978) VI, III <https://www.who.int/publications/almaata_declaration_en.pdf> accessed 20 June 2021.

[44] Human Rights Council, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt', UN Doc A/HRC/7/11, 7th sess, Agenda Item 3 (31 January 2008) [12].

[45] See Paulo Roberto de Almeida, 'Never before Seen in Brazil: Luis Inacio Lula da Silva's Grand Diplomacy' (2010) 53 Revista Brasileira Política Internacional 160, 161 (hereafter Roberto de Almeida, 'Never before Seen in Brazil').

[46] Célia Maria de Almeida and others, 'A Concepção Brasileira de Cooperação Sul-Sul Estruturante em Saúde' (2010) 4 RECIIS 24 (hereafter Almeida, 'A Concepção Brasileira').

[47] Paulo M Buss and others, 'A Saúde Pública no Brasil e a Cooperação Internacional' (2011) 2 Revista Brasileira de Ciência e Tecnologia e Sociedade 219.

Fostering state capacity for development was also justified by its potential comparative advantages in relation to the cooperation traditionally practiced by developed countries. It broke with the traditional unidirectional model of (North-South) knowledge and technology transfer as it proposed a form of cooperation based on the capacities and resources previously available in each country.[48] Instead of passive aid recipient countries, structural cooperation aimed to empower 'partners' to become proactive agents on the public health front. Instead of specific and limited interventions, the idea was to achieve sustainable national health systems, which would not be hostage to periodic turns of regressive politics.[49]

One of the reasons the Lula government chose health as the core component of its (South-South) structural cooperation was the special historical status of the right to health, which was incorporated into the 1988 (re-democratization) constitution on the backdrop of a long-standing public health movement (*Movimento Sanitarista*) that had been campaigning on public health issues since the 1970s. The 1988 constitution also interlinked the right to health with the establishment of a Unified Health System (*Sistema Único de Saúde* — SUS) which has won international acclaim for managing to provide adequate health care for a population of over 200 million through a universally accessible yet decentrally-organised system.[50]

A second motivation for focussing on the right to health goes back to the response given to the HIV/AIDS epidemic in the 1990s, when Brazil fought and, by many accounts, won a battle against multinational pharmaceutical companies, the United States, and the World Trade Organization to provide free antiretroviral drugs to everyone in need of them. The cost of this ambitious national policy was considerably reduced because Brazil had developed the national capacity to produce non-patented HIV drugs through a publicly owned manufacturer. Such national production, together with the threat to issue compulsory licenses under WTO rules, positioned Brazil to better negotiate the prices of patented drugs with multinational pharmaceutical corporations.[51] These programs were considered so successful that they ended up inspiring 'a focus on sharing its experience with other countries on the development path.'[52]

One consequence of these initiatives was that Brazil was able to deepen its institutional experience on the right to health, involving both the universalisation of health care and the implementation of technical health policies such as in the case of the fight against HIV/AIDS. It brought this to bear, in particular, on the creation of what was then a fairly radical institutional departure in South-South cooperation, namely the South American Health Council as part of the Union of South American

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[48] Almeida, 'A Concepção Brasileira' (n 46) 28.

[49] See Luiz Eduardo Fonseca and Paulo Buss, 'Diplomacia e Cooperação em Saúde: Uma Perspectiva da Fiocruz' in João Almino and Sérgio Eduardo Moreira Lima (eds), *30 Anos da ABC: Visões da Cooperação Técnica Internacional Brasileira* (FUNAG 2017) 234.

[50] See Deisy Ventura, 'Public Health and Brazilian Foreign Policy' (2013) 10 SUR 95, 98 (hereafter Ventura, 'Public Health'). See also Katherine E Bliss, Paulo Buss and Felix Rosenberg, 'New Approaches to Global Health Cooperation: Perspectives from Brazil' (September 2012) Center for Strategic and International Studies 1, 3 <https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/120927_Bliss_NewApproachesBrazil_Web.pdf> (hereafter Bliss, Buss and Rosenberg, 'New Approaches to Global Health Cooperation'); Marcia C Castro and others, 'Brazil's Unified Health System: The First 30 Years and Prospects for the Future' (2019) 10195 Lancet 394.

[51] André Mello e Souza, 'Saúde Pública, Patentes e Atores Não Estatais: A Política Externa do Brasil Ante a Epidemia de AIDS' in Carlos Milani and Letícia Pinheiro (eds), *Política Externa Brasileira: As Práticas da Política e a Política das Práticas* (FGV 2012) 206.

[52] Bliss, Buss and Rosenberg, 'New Approaches to Global Health Cooperation' (n 50) 3.

Nations (UNASUR Health).[53] It brought together the twelve South American member states in a shared agenda including the development of universal health systems (modelled the Brazilian model), universal access to medicines, the creation of a South American Surveillance and Health Event Control and the implementation of inter-sectoral measures to address the social determinants of health.[54] UNASUR Health created horizontal spaces for health development solutions where 'medicines, vaccines and diagnostic reagents' were conceptualised as 'regional public goods.' The framing as public goods would tip the balance towards the health demands of the region and not to the commercial interests of 'big pharma.'[55] Further measures in this context also included the creation of an Institute for Health Governance (ISAGS) that supported the implementation of national policies on primary care and universal access in Colombia, Peru, and Bolivia,[56] a forum established for permanent cooperation and technical support among Latin American and Caribbean countries through which, inter alia, the Brazilian experience with prevention and treatment of HIV/AIDS was shared,[57] as well as a Strategic Health Cooperation Plan (PECS) within the scope of the Community of Portuguese Speaking Countries (CPLP). In the latter context, the first pharmaceutical plant in Mozambique (*Sociedade Moçambicana de Medicamentos* — SMM) was established in 2008, financed and managed by the *Instituto de Tecnologia em Fármacos* (Farmanguinhos), part of Brazil's chief public health institute Fiocruz and premised on the participatory adaptation of technical procedures to the Mozambican context.[58]

However, a recent study on these PECS concluded that while the agreements are successful in excluding notions of 'indebtedness' and 'conditionalities,' which are typical of North-South cooperation, African countries are still portrayed as passive aid recipients in terms of knowledge transfer (the 'one-way path'). As such the agreements could be described as 'formally horizontal,' but 'substantially vertical.' A second conclusion is that these agreements lack well thought-out accountability mechanisms not only in relation to monitoring and assessment for the benefit of the donor country but also, and crucially, for stakeholders in the recipient countries who do not have full access to the agreements.[59]

As an initiative within the broader ambit of 'rights and development,' the structural cooperation in health initiative is, thus, as multi-facetted as other HRBA projects: on the one hand and by Gauri

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[53] This is a period of decline and transformation for regional integration. Recently, Brazil has officially withdrawn from the Union of South American Nations (UNASUR) — an organisation initially inspired by the European Union — in order to join the Forum for the Progress and Development of South America (PROSUR), with the idea being to have a lighter organisation with a more streamlined decision-making process: see PROSUR <https://foroprosur.org/sobre-prosur/> and the website of the Brazilian Ministry of Foreign Affairs <http://www.itamaraty.gov.br/en/politica-externa/integracao-regional/6348-prosur> accessed 20 June 2021. See also Andrea Bianculli, Andrea Ribeiro Hoffmann and Beatriz Nascimento, 'Institutional Overlap and Access to Medicines in MERCOSUR and UNASUR (2008–2018). Cooperation before the Collapse?' (2021) 1 Global Public Health 1.

[54] Almeida, 'A Concepção Brasileira' (n 46) 28; Paulo Buss and José Roberto Ferreira, 'Cooperação e Integração Regional em Saúde na América do Sul: A Contribuição da UNASUL Saúde' (2011) 16 Ciência e Saúde Coletiva 2704.

[55] Ibid, 2705.

[56] Pia Riggirozzi, 'Regionalism, Activism, and Rights: New Opportunities for Health Diplomacy in South America' (2015) 41 Review of International Studies 422.

[57] Thaísa GS Lima and Rodrigo Pires de Campos, 'O perfil dos Projetos de Cooperação Técnica Brasileira em Aids No Mundo: Explorando Potenciais Hipóteses de Estudo' (2010) 4 RECIIS 115.

[58] Ventura, 'Public Health' (n 50) 103; Samuel AG da Silva and others, 'Transfer of Knowledge in International Cooperation: The Farmanguinhos – SMM Case' (2017) 51 Revista Saude Pública 5, 5–6.

[59] See Marco Aurélio A Torronteguy, 'O Papel da Cooperação Internacional Para a Efetivação de Direitos Humanos: O Brasil, os Países Africanos de Língua Oficial Portuguesa e o Direito à Saúde' (2010) 4 RECIIS 60.

and Gloppen's analytical lens, it purports to export 'donor regulations and conditionalities' with a Southern edge, with a view to thereby strengthening the global right to health against the dominance of the Northern ´pharmaceutical-industrial complex´. Importantly, in the view of its proponents, it is, thus, (self-)consciously distinct from traditional North-South cooperation both in terms of its overall objectives and of the importance it attaches to recipient countries' interests.[60] Not only that, this type of exchange is usually justified by "reasons of principle:" the aim is to develop capacity-building for developing countries, to challenge important global health actors such as pharmaceutical corporations, to strengthen national health systems and to focus the implementation of national health policies on individuals and groups.[61]

On the other hand, the fact that "pragmatic reasons" are also behind this venture highlights the political and strategic function of rights in the context of development. Hence, the strategic cooperation in health initiative also represented an attempt on part of the Brazilian government to transcend its position as an emerging economy and to turn itself into a country that could actually 'call the shots' on the forefront of international diplomacy (at least at the regional level).[62] Ultimately, it is difficult to ascertain which component prevails, whether it was driven by a logic of rights or of development, or some ulterior motive, or, indeed, all of these. It still means, though, that 'rights and development' are the framework within which it has emerged.

Although the jury is still out on the long-term effects of this sort of policy on recipients countries, the fact is that it has 'irritated' development cooperation on a structural level.[63] The main reason for this is that the appropriation, on part of a Global South recipient country, of a rights-based approach to health governance can be seen as an attempt to put forward an alternative "grammar" of development assistance: from standardised to context-specific policy interventions; from 'recipients' to 'partners;' from 'aid' to 'cooperation.'[64] This might not amount to a tectonic shift in development discourse, but important questions, such as "who" should decide and "how" to implement, started being answered differently, or at least through distinct lenses.

It is, in any case, clear that the structural cooperation in health adds a new perspective to the field of ODA. Whether this type of cooperation has produced palpable health improvements in states with which Brazil cooperates, and whether it still remains a plausible and realistic account of Brazilian international relations are disputed points; as with the HRBA in general, it is difficult to assess its impact without a larger body of qualitative empirical research on the practical consequences of the cooperation for the recipient countries.[65] In general, Stephen Marks and Alice Han have contended that the right to health can only be realised through the development agenda if three prerequisites are met: firstly, an understanding of development as an instrument to achieve

[60] See José Roberto Ferreira and others, 'International Cooperation in Health: The Case of Fiocruz' (2016) 23 História, Ciências, Saúde: Manguinhos 5, 28 (hereafter Ferreira and others, 'International Cooperation in Health'). See also Paulo M Buss and others, 'A Saúde Pública No Brasil e a Cooperação Internacional' (2011) 2 Revista Brasileira de Ciência e Tecnologia e Sociedade 219.

[61] For an overview, see Almeida, 'A Concepção Brasileira' (n 46).

[62] See Roberto de Almeida, 'Never before Seen in Brazil' (n 45).

[63] See Ventura, 'Public Health' (n 50).

[64] See Ferreira and others, 'International Cooperation in Health' (n 60) 6–7.

[65] Ventura, 'Public Health' (n 50) 106.

'human well-being' instead of an end in itself.[66] Secondly, a substantive normative understanding of the right to health, one that is able to operationalise a binding legal order of public policies and practices and to create effective accountability relationships.[67] Constructing an accountable relationship is to empower a previously disempowered actor. In this relationship, the 'right-holders' would have a credible claim on the 'duty-bearers,' that is, the ability of demanding the latter to furnish an account for their conduct. And thirdly, the absence of the 'existential threat' for global health governance posed by nationalists and populist politicians in different countries.[68]

Oftentimes, however, theories are overthrown by practice and at the current conjuncture, at least two of these prerequisites are seriously threatened. Despite the enormous potential to activate the 'virtuous circle' of right to health and structural cooperation, the COVID-19 pandemic was managed with high doses of 'vaccine nationalism.'[69] The race for vaccines brought out the worst in diplomatic relations between countries and it weakened the political and institutional conditions for 'achieving worldwide vaccination at the scale needed to end the pandemic' effectively.[70]

As for Brazil, the government and underlying political vision that underwrote the structural cooperation in health was, of course, brought down and eventually replaced by a far-right populist one long before the pandemic. Once the latter came upon the country and the world, this new government found itself in a self-made double-bind: with South-South cooperation in health largely dismantled yet domestic vaccine purchasing and production capacity hampered by a mix of COVID negationism, criminal mismanagement on the federal level, and neoliberal public (health) sector reforms. As a result, and in cruel irony, Brazil is considered to have had one of the world's worst responses to the pandemic.[71]

IV.   Where to from Here?: 'Rights and Development' in a Complex World

As the above case study well illustrates, for all the deep discursive space occupied by 'rights and development' in the different forms of the HRBA, its reality in development praxis has been ambivalent. Contested from the beginning from within the development policy space as no more

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[66] Stephen P Marks and Alice Han, 'Health and Human Rights through Development: The Right to Development, Rights-Based Approach to Development, and Sustainable Development Goals' in Lawrence O Gostin and Benjamin Mason Meier (eds), *Foundations of Global Health and Human Rights* (Oxford University Press 2020) 330.

[67] Ibid, 331.

[68] Ibid, 346.

[69] David P Findler, 'Vaccine Nationalism Politics' (2020) 369 Science 749.

[70] Tedros A Ghebreyesus, 'Vaccine Nationalism Harms Everyone and Protects No One' (*Foreign Policy*, 2 February 2021) <https://foreignpolicy.com/2021/02/02/vaccine-nationalism-harms-everyone-and-protects-no-one/> accessed 20 June 2021.

[71] See Lowy Institute <https://interactives.lowyinstitute.org/features/covid-performance/> for a critical review of Bolsonaro's management of the pandemic. See also recent Lancet editorial: 'COVID-19 in Brazil: 'So What?' (*The Lancet*, 9 May 2020) <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31095-3/fulltext> accessed 20 June 2021; Andrea Ribeiro Hoffmann, Cooperação Regional Na Área da saúde, Mercosul e a Pandemia COVID-19 (*Fomerco*, 2 February 2021); Gabriela Lotta and others, 'Who Is Responsible for Brazil's COVID-19 Catastrophe?' (*London School of Economics*, 13 November 2020) <https://blogs.lse.ac.uk/latamcaribbean/2020/11/13/who-is-responsible-for-brazils-covid-19-catastrophe/>. For an overview, see Deisy Ventura, Fernando Aith and Danielle Rached, 'The Emergency of the New Coronavirus and the "Quarantine Law" in Brazil' (2020) 12 Revista de Direito e Práxis 1; Deisy Ventura, Danielle Rached and others, 'A Rights-Based Approach to Public Health Emergencies: The Case of the "More Rights, Less Zika" Campaign in Brazil' (October 2020) Global Public Health 1.

than a rebranding of earlier pro-poor approaches and an institutional-discursive takeover attempt on part of the human rights community, its precise impact is as yet in the process of being mapped out and will be controversially debated for some time to come.[72] In part, this is because diverse and partly incompatible objectives are associated with the HRBA, from merely providing a person-centered measurement for development progress to the full-scale democratization of the development project.[73] As a result, methods and standards for impact measurement are heterogeneous and occasionally incompatible with one another, and a zoomed-out vision of 'rights and development' has so far been elusive.

These internal contradictions of the HRBA have now been aggravated by the more fundamental debate on the intellectual credibility and political consequences of its constituent parts, notably human rights and development, which have come under ever louder attack from academia, parts of civil society and increasingly also governments. Limitations of space do not permit to reference the complex contours of these ongoing debates here, but their common denominator is, arguably, the contention that, contrary to their stated purpose, both development and human rights are essentially seen to serve as handmaidens of the very 'system' they are nominally meant to temper.[74] Yet, despite this ongoing debate, both continue not only to function within their respective institutional infrastructures but remain important reference points for many — perhaps most — people across the globe when it comes to articulating and framing demands for justice, equality and shared human wellbeing. What this means on the ground and whether it has overall progressive, regressive, or simply indeterminate consequences depends on each concrete case. Like 'law and development' in general, the turn to rights is no panacea for development, and both are no panacea for the ills of the modernity that has produced them, but 'rights and development' certainly broaden the space for counterhegemonic agency and participatory experimentalism.

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[72] See Shannon Kindornay, James Ron and Charli Carpenter, 'Rights-Based Approaches to Development: Implications for Human Rights' (2012) 34 Human Rights Quarterly 472.

[73] See Wouter Vandenhole and Paul Gready, 'Failures and Successes of Human Rights-Based Approaches to Development: Towards a Change Perspective' (2014) 32 Nordic Journal of Human Rights 291.

[74] See, inter (many) alia, Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Elise Klein and Carlos Eduardo Morreo (eds), *Postdevelopment in Practice: Alternatives, Economies, Ontologies* (Routledge 2019).