

Revolution or Regression? Retracing the Turn to Rights in ‘Law and Development’

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1. Taking Stock: The Law and Development Movement at (Roughly) Sixty-Five

A good ten years ago, a long-term observer of ‘law and development’ exclaimed that systematic interest in law and development was back on the agenda of academics and practitioners alike, reborn, as it were, after its untimely initial demise in the 1970s.¹ Since then, a sizeable literature has built up that both reflects and inspires new practices of law(s) of and in development and, at this juncture, the assertion that law is highly relevant to the development process has firmly entered the mainstream.² Indeed, law *as* development has become a mantra of development discourse now deeply entrenched in the programming of the multilateral financial institutions, international development agencies, and civil society organisations, so much so that rule of law promotion has, to an extent, become synonymous with development policy itself.³ Yet, behind

1. David Kennedy, ‘Laws and Developments’, in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century* (Routledge-Cavendish: London, 2003) 17–26.
2. The term ‘development’ is, of course, heavily charged and problematic itself; however, it will be employed as a working term in line with the general usage in the law and development literature; for a comprehensive overview of that literature, 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) 74–94; this builds on earlier work such as David M. Turbek, ‘Towards a Social Theory of Law: An Essay on the Study of Law and Development’, 82 *Yale Law Journal* (1972) 1–50 at 1; or Brian Z. Tamanaha, ‘The Lesson of Law and Development Studies’, 89 *American Journal of International Law* (1995) 470–493.
3. Tor Krever, ‘The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model’, 52 *Harvard International Law Journal* (2011) 288–319.

the celebratory chorus of legal scholars-turned-development experts who endorse law as a toolkit for nearly everything lurks considerable ambivalence about what law(s) and which development(s) are actually meant hereby. Many appear to endorse the rule of law merely as a necessary framework for the market economy, though some emphasise, instead, its inbuilt predisposition to be used for individual and collective empowerment, participation and accountability.⁴ Some see modern law as a necessary epiphenomenon of capitalism, while others insist on its (relative) autonomy.⁵ Some would query whether law's particular role in development has actually changed much over time, whereas others welcome its rise as a critical move against an earlier primacy of economics in development discourse.⁶ Yet, besides the question of which side of development 'the law' is seen, the question of which substantive law(s) it actually refers to has also grown ever more complex. Initially it was mostly private law codes that were considered relevant to a development process geared towards generating economic growth, then the focus shifted to (public) constitutional law as a framework for economic and political transition, and then to human rights and administrative law as (legal) forms by which the development process itself could be reframed.⁷ With this multiplication of legal fields (and experts), another question came up, namely from which disciplinary angle 'law and development' would be looked at. Many have focused on the international and transnational aspect of rule of law promotion and international lawyers, in particular, have shown a growing interest in 'development' as a corollary of the evolution of international law.⁸ However, it were, arguably, comparative scholars of both private law transplants and of (domestic) constitutional rights who have provided most of the

4. Kennedy, 'Laws and Developments', *supra* note 1, and Srirak Plipat, 'Developmentizing Human Rights: How Development NGOs Interpret and Implement a Human Rights-Based Approach to Development Policy', <d-scholarship.pitt.edu/6392/1/Srirak_Plipat_2006_dissertation_all_chapters.pdf> (visited May 2014).
5. Lan Cao, 'Law and Economic Development: A New Beginning?', 32 *The Texas International Law Journal* (1997) 545–545; David M. Trubek, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law', 1075 *University of Wisconsin Legal Studies Research Paper* (2008) 1–34.
6. Charles F. Sherman, 'Law and Development Today: The New Developmentalism', 10 *German Law Journal* (2009) 1257–1273, <www.germanlawjournal.com/pdfs/Vol10No09/PDF_Vol_10_No_09_1257-1273_Articles_Sherman.pdf> (visited May 2014).
7. Trubek, 'The "Rule of Law" in Development Assistance', *supra* note 2, at 84.
8. Luis Eslava and Sundhya Pahuja, 'Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law', 45 *Journal of Law and Politics in Africa, Asia and Latin America—Verfassung Und Recht in Übersee (VRÜ)* (2012) 195–221; see also and seminally, Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

empirical insights into how law interacts with development ‘on the ground’.⁹ Lastly, the ‘law and development’ debate is also cut across by an ethical divide between technocratic and political concerns, or, in other words, by a vision of law as a means to attain a predefined account of human welfare as against one of it as a field for political contestation about justice.¹⁰

By now, a growing body of critical scholarship has deciphered and exposed many of the paradoxes and the dark sides of the rule of law—and its promotion industry—, though even here, a strange ambivalence prevails about how the law’s contribution to the development complex can ultimately be valued.¹¹ Development practitioners, many of whom come from a background of economics and other social sciences, often critique rule of law promotion and its spinoffs, such as ‘good governance’ or ‘rights-based development’, as naïve and lacking in substance and as re-directing significant funding away from the canon of (allegedly) tried and tested interventions.¹² Critical legal scholars, in turn, are adamant about the entanglement of the standard rule of law portfolio with a Eurocentric and capitalist development paradigm, but are nonetheless reluctant to divest themselves entirely from the idea of law as a development driver.¹³ One response to these dilemmata from within the critical legal studies movement has been to rejoin the different strands and disciplinary perspectives of the debate on the level of structure, notably through a turn towards a broader perspective on the political economy of law *in* development.¹⁴ By contrast, the response adopted in the present argument—and, particularly, in sections four and five—is to take a closer look at the ways in which specific legal forms interact with local contexts and at the outcomes this interaction generates. This empirical—but not empiricist—strategy is not set up against the structural narrative as such, but

9. Trubek, ‘The “Rule of Law” in Development Assistance’, *supra* note 2.

10. Kerry Rittich, ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social’, 26 *The Michigan Journal of International Law* (2004) 199–243.

11. David Kennedy, ‘Law and Development Economics: Toward a New Alliance’, in David Kennedy and Joseph E. Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press, 2003) 19–70.

12. Summed up well in Peter Uvin, ‘On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise’, 17 *Praxis: The Fletcher Journal of Development Studies* (2002) 1–11.

13. Stephen Humphreys, ‘Prologue’, in Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2010) at xiii–xxvi.

14. David Kennedy, ‘Law and the Political Economy of the World’, 26 *Leiden Journal of International Law* (2013) 7–48.

it partially alters its plotline by adding to it the twist that the manifold usages of law ‘on the ground’ produce fundamentally unpredictable effects that irritate and, thereby, alter systemic logics. One phenomenon through which this can be observed is the turn to rights in development, and within it, the alleged constitutional rights ‘revolution’, which, later on, shall be examined as the latest twist in the unfolding ‘law and development’ saga. However, to this end, a brief tour de force of ‘law and development’ has to be first embarked upon.

2. Rewinding the Film: ‘Law And Development’ Up to the ‘Rights Revolution’

Law and development was born jointly with ‘development’ itself in the post-WW II period when a Weberian understanding of modernity—and the central role of legal formalisation in it—was applied to the world at large, or, rather, to those places which had not yet developed to meet the standards of what ‘the West’ would call modernity.¹⁵ Development, thus, encompassed three central (Weberian) elements, notably agency, change and value, which made it a process of induced movement towards a pre-defined state. The particular nature of that state remained variable and contingent upon the eyes of its respective beholders, it initially spanned a broad spectrum ranging from civilisation to either capitalism or socialism, though it was soon broken down to human welfare and, in particular, (national) wealth. Lack of it, both individually and collectively, defined development’s main object, namely poverty, and the process whereby it would be attained would be economic and social development described as (economic) growth. This then set the agenda both for development-as-modernisation and for modern—i.e. Western—law as instrumental to it. The drivers of development discourse at this stage were, of course, the growing host of international organisations tasked with different aspects of economic governance, with the Bretton Woods organisations and their combined agenda playing a particularly prominent role.¹⁶ Behind these lurked, arguably, the geopolitical interests of powerful states, with the latter, in turn, being partly driven and partly constrained by the competitive logic of the Cold War. Initially the focus of development would be on macroeconomic policy, with the rule of law merely in the background, but by the 1960s and

15. Chantal Thomas, ‘Re-Reading Weber in Law and Development: A Critical Intellectual History of Good Governance Reform’, 118 *Cornell Law Faculty Publications* (2008) 1–115.

16. Pahuja, *Decolonizing International Law*, *supra* note 8.

with not much to show as yet, development discourse spread out among academic disciplines and re-encountered in law its purported Weberian roots.¹⁷ What in retrospect would be called the first ‘law and development’ movement (Law and Development (1.0)) then set out to promote law’s instrumental relation to generating economic growth. On a substantive side, this implied introducing law(s) conducive to competitive market processes, on a procedural side it meant espousing the legal framework of liberal constitutional states. Overall it amounted to a massive project of legal transplantation, organised by Western governments and initially primarily by that of the United States through agencies such as USAID and the Ford Foundation.¹⁸ Some have argued that Law and Development 1.0 was already an anachronism when it started, for in development discourse, modernisation theory had, by the late 1960s, already begun to be supplanted by dependency theory, a consequence of widespread decolonisation, the concomitant self-awareness of the global South and its economic predicament, and of the generalized spirit of critical rethink that marked this period.¹⁹ On account of not rendering, or rendering the wrong, results on the ground, and under the theoretical impact of the structuralist undercurrents of the dependency model, ‘law and development’ notoriously self-critiqued itself out of existence for being, in essence, ethnocentric and naïve.²⁰ This coincided with the rise of ‘critical legal studies’ and the enterprise, ongoing to this day, of exposing liberal legalism as an epiphenomenon of the wider political economy in which law is seen simultaneously as a function of the structural forces at play and as a cosmetic device to conceal their operation. Hence, while overt legal interventionism had gone out of fashion by the 1980s, a transmuted version of ‘law and development’ emerged through the legal academy’s engagement with dependency theory,

17. David Trubek, ‘Law and Development’, in N. J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Pergamon: Oxford, 2001) 8443–8446.

18. See, for instance, Philip Alston, ‘Transplanting Foreign Norms: human rights and other international legal norms in Japan’, 10 *European Journal of International Law* (1999) 625–633; R. L. Ajani, ‘By chance and prestige: legal transplants in Russia and Eastern Europe’, 43 *American Journal of Comparative Law* (1995); more recently Laurel E. Miller (ed.), *Framing the State in Times of Transition—Case Studies in Constitution Making* (United States Institute for Peace: Washington D.C., 2010); On the role of these governments and agencies, see Scott Cummings and Louise Trubek ‘Globalizing Public Interest Law’, University of Wisconsin Law School, Legal Studies Research paper Series, Paper No. 1073 (2009).

19. Tamanaha, ‘The Lessons’, *supra* note 2; Kennedy, ‘Law and Development Economics’, *supra* note 11.

20. See, inter alia, David Trubek and Marc Galanter, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’, *Wisconsin Law Review* (1974) 1062–1102; and Tamanaha, ‘The Lessons’, *supra* note 2.

notably in form of the right to development. Conceived, originally, by the Senegalese jurist Keba M'baye in 1972, it was first articulated in the African Charter for Human and Peoples Rights adopted by the then Organization of African Unity (OAU) in 1981, and was subsequently brought to international prominence by the United Nations General Assembly's 1986 Declaration on the Right to Development (DRTD).²¹ Despite never being uncontested, it was reaffirmed in the 1993 Vienna Declaration and Program of Action, in the 2000 Millennium Declaration, and in the 2002 Durban Declaration and Program of Action.²² However, having gained currency in the debates around the 'New International Economic Order' (NIEO) in the 1970s, the right to development's primary objective was initially to strategically charge development discourse with the moral aura of rights language in order to change the terms on which the world economy and multilateral development aid were discussed.²³ It has since condensed into soft legality and has played a significant role in internationalising 'law and development' in the 1980s.²⁴ However, its specific function has primarily been that of a punchy metonymy for dependency theory's argument for the historical injustice inherent in the global economy.²⁵ As such it has helped anchor the language of (in)justice into development discourse, and, by purporting to reframe development in terms of international rights and obligations, it has inscribed the idea of a common (international) responsibility into the multilateral development agenda. It also shifted the emphasis of 'law and development' from a private to a public law logic, which has come to dominate the discourse ever since.

It began doing this as the direct precursor—one might call it Law and Development (1.5) of what would eventually become a second phase in the 'law and development' movement (Law and Development (2.0)), marked by the rise of the rule of law export industry that followed the democratic transitions of the 1980s and especially 1990s after the fall of the Berlin Wall. As with Law and Development (1.0), it were initially Western governments, which had quickly styled themselves into the echelons of a liberal—and liberal

21. A Res 41/128, 4 December 1986.

22. United Nations, *Durban Declaration and Plan of Action*, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Violence (2002), <www.un.org/en/durbanreview2009/ddpa.shtml> (visited May 2014).

23. *Realizing the Right to Development—Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, HR/PUB/12/4 (2013).

24. *Ibid.*

25. Thom Ringer, 'Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the Rule of Law and its Place in Development Theory and Practice', 10 *Yale Human Rights & Development Law Journal* (2007) 178–208.

legalist—‘new world order’, that strongly promoted the adoption of the basic frameworks of liberal democracy and market capitalism in the transition countries. As is well documented in an immense body of literature on the state- and constitution-(re)building experiments that took place during this period, the emphasis of rule of law promotion then shifted to institutional design, particular in and through new constitutions and an evolving body of constitutional jurisprudence.²⁶ The aim was to manage transition so as to lead to the fastest possible attainment of liberal democracy and a market economy, not so coincidentally the same objectives as those of mainstream development discourse. Indeed, during this period, transition came to be merged semantically with development, the only difference being that the former implied a much shorter time horizon and, cocomitantly, a much more condensed development process. Economically, the Washington consensus set the script for transitional reform, not just in substance but also in pace. And legal liberalism saw a second coming when mostly Western constitutional designers once again set up a massive legal transplantation industry, this time focusing on out-of-the-box models of (liberal) constitutionalism.²⁷

However, from this period onwards, the nexus between law *and* development would be subject to a host of parallel, if partly paradoxical conceptual innovations centered on the state as the necessary middle-term. The starting point was the mentioned shift of focus from private to public law or, at any rate, public legal institutions. Yet, while the focus on the state and state institutions was, thus, retained from the first ‘law and development’ movement, its successor shifted attention away from legislatures and executives to (constitutional) judiciaries and the judicial review process.²⁸ Although the constitution-builders of the 1990s had the implantation of Western-style liberal democracy in mind, their concern for strong judiciaries arbitrating a messy political transition process on the basis of globally recognized constitutional principles and fundamental rights already implied a growing distrust of politics, in general, and the state as (still) the primary space for political contestation, in particular. This corresponded, *grosso modo*, with a more differentiated view of the state—and state law—within (economic) development discourse. Hence, it was no longer the state as such that was seen as a potential impediment to economic growth, but legislative meddling and executive capture, which, however, could be balanced out by strong judiciaries and independent

26. Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2010).

27. See David Trubek, ‘Law and Development’, *supra* note 17.

28. Kennedy ‘Law and Development Economics’, *supra* note 11, at 44.

regulatory agencies. The rise of new institutional economics and the consequent ‘chasing’ of the neoliberal paradigm cemented this view of state law and institutions as a crucial device to enable market functionality and repair dysfunctions.²⁹ It entered the economic mainstream, and with it the programming of the international financial institutions, as of the mid- to late 1990s and has since crystallized into a ‘new developmentalism’ in which the state is again seen in a proactive role as an enabler of markets and, thus, purportedly of growth.³⁰

Yet, for the state to play this role, it has to be tightly disciplined and isolated from the sort of capture that ‘law and development’ identified as the primary obstacle to a functioning and (market) functional rule of law. Indeed, ‘new developmentalism’ can be seen as an attempt to re-balance the functional division of powers within the state in order to re-cast its very fabric along the lines of market functionality. It is, hence, the state itself that is the object and primary purpose of the state’s apparent re-empowerment in this phase. The programme for such discipline emerged in form of the good governance agenda that arose in conjunction with Law and Development (2.0). Its focus on such overarching principles as transparency, accountability, participation, inclusiveness, responsiveness, and, of course, the rule of law, was meant to provide at once an ideal type for the new developmental state and a regulatory corset for its policy making. Its terms exude a universalist appeal to the (Weberian) values underlying modern statehood in abstraction of geography and historical trajectory and, as such, they have been deemed more acceptable to developing state governments than the reductive focus on corruption or human rights violations.³¹ Good governance is also seen by the multilateral financial institutions as a key instrument for rule of law promotion that is itself neither legally formalised nor politically positioned. Hence, while the rise of good governance marks the shift away from macroeconomic structuralism to institutional design, it merely transcribes the neoliberal development paradigm into a different notation by helping to immunize the state against (re-)distributional politics.³²

29. *Ibid.*, at 38.

30. Trubek ‘Developmental States’, *supra* note 5; and Sherman ‘Law and Development Today’, *supra* note 6 at 1267.

31. Rittich ‘The Future of Law and Development’, *supra* note 10; Uvin, ‘On High Moral Ground’, *supra* note 12.

32. Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’, 5 *Buffalo Human Rights Law Review* (1999) 107–174.

3. Revolutionary Empowerment or Counter-Revolutionary Conditioning?—The Turn to Rights in Development

The proliferation of good governance has, in turn, gone hand in hand with the judicial empowerment brought on by the latest wave of rule of law promotion, the general objective of which has been to enact and safeguard liberal public sector management.³³ While the state, albeit in a technocratised form, has, thus, reemerged in the development narrative with the turn both to institutions and to good governance, this turn has, simultaneously, also led to a gradual shift of emphasis away from the state and towards individuals and groups as the objects of development. This individualisation feeds from elements of the constitutional turn of ‘law and development’, from the citizen-as-stakeholder-oriented logic of good governance principles, and, perhaps most importantly, from a third conceptual step in form of the capabilities approach to development, pioneered by Amartya Sen in the 1980s.³⁴ Coming from the methodologically individualistic social choice theory, Sen sought to fuse the economic and the political aspects of development by individualising human welfare as the set of capabilities for ‘achieving the kind of lives [people] have reason to value’.³⁵ This represented a shift of development’s center of gravity from needs to an expanded conception of individual freedom, with the corollary that it is individuals—not states, societies, or cultures—who take center stage as primary agents of development.³⁶ While critics of the capabilities approach have argued that in its focus on (rational) individual choice, it still carries a liberal(ist) bias, it proved to be highly influential in creating the people-centered focus that has dominated development discourse for the past twenty years and that has, amongst others, resulted in yet another transformation of development discourse, notably into the concept of human security and its humanitarian offspring, the ‘responsibility to protect’.³⁷ It also fed into a second major shift that occurred roughly at the same moment, notably the rise of the rights-based approach to development—or Law and Development (3.0)—, which shall be looked at in the following.

33. Uvin, ‘On High Moral Ground’, *supra* note 12.

34. Amartya Sen, *Development as Freedom* (Oxford University Press, 1999); see also Pahuja, *Decolonising International Law*, *supra* note 8.

35. Sen, *supra* note 34, at 291.

36. Sakiko Fukuda-Parr, ‘The Human Development Paradigm: Operationalizing Sen’s Ideas on Capabilities’, 9 *Feminist Economics* (2003) 301–17.

37. Hartley Dean, ‘Critiquing Capabilities: The Distractions of a Beguiling Concept’, 29 *Critical Social Policy* (2009) 261–278; for the ‘responsibility to protect’, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).

Prior to this new conceptual environment, the bringing together of human rights and development had not been easy, nor, indeed, was it particularly high on the international agenda. The reasons for this historical division were manifold, although two causes in particular stand out: the separation of international human rights into distinct civil and political, and economic, social, and cultural rights catalogues, on one hand, and the focus of development theory and practice on human welfare and objective needs, on the other hand.³⁸ The first cause had its roots in Cold War political dynamics, which led, contrary to the vision articulated in the Universal Declaration of Human Rights, to the drafting of two distinct treaties, and a consequent division of focus by both governmental and non-governmental actors.³⁹ This division was exacerbated by the fact that development theorists and practitioners did not generally view rights as a relevant concept for their problem field.⁴⁰ Hence, although, as would become clear in subsequent conceptual conjunctions, economic and social rights and development can be seen as two sides of the same coin, both circles did initially not mix or pool their resources. Behind these organisational divisions, there lay, of course, conceptual differences which informed the method and style with which the respective problem field was approached. Rights activism of either pedigree is generally focused on advocacy, i.e. on claiming what are held to be entitlements vis-à-vis those under obligation to provide them, which, from a traditional legal perspective, can only be governmental actors; such advocacy is, therefore, closely linked to enforcement institutions, most notably national courts or international judicial or quasi-judicial mechanisms, and it is premised on governments being amenable to being taken before such bodies, as well as on their compliance with the decisions rendered by the latter. Moreover, rights advocacy is necessarily based on concrete actors and situations, namely individuals or identifiable groups, and on allegations of specific violations. By contrast, in the traditional needs-based development paradigm, governments, whether donor or recipient, are, in principle, seen as partners and not as adversaries, the focus is on policies rather than on remedies and aid is ultimately seen as a grant or investment rather than as an entitlement to be claimed by right.

38. See Paul Nelson and Ellen Dorsey, 'At the Nexus of Human Rights and Development: new methods and strategies of global NGOs', 31 *World Development* (2003) 2013–2026; see also Stephen Marks, 'The Human Rights Framework for Development: seven approaches', François-Xavier Bagnoud Center for Health and Human Rights, Working Paper (2003).

39. Notably the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, both adopted in 1966, entering into force in 1976.

40. Kate Manzo, 'Africa in the rise of Rights-Based Development', 34 *Geoforum* (2003) 437–456 at 446.

However, by the second half of the 1990s, the conceptual rift between human rights and development began to be bridged as a result of the conjunction of several of the shifts described above. On the rights side, the impetus came from the triumphalist renaissance of rights discourse after the end of the Cold War.⁴¹ Amongst others, this resulted in the re-emergence of the debate on development as a right and, more importantly, in the gradual transformation of economic and social rights from programmatic soft law to at least tentatively justiciable hard law.⁴² This led to a graduation of economic and social rights to not just formal but, increasingly, operational parity with civil and political rights and a concomitant rise in their prominence on the international advocacy agenda. On the development side, the mentioned conceptual shifts towards a focus on institutional frameworks and their impact on individual welfare, the stakeholder-oriented logic of good governance, as well as the capabilities approach's turn towards individual empowerment set the scene for a new openness towards rights as instruments for development.⁴³ On the basis of these simultaneous conceptual moves, Law and Development (2.0), with its focus on courts and fundamental rights, can be taken to have laid the foundations for the bridge between rights and development, while it were the international development and financial institutions that subsequently pushed ahead this bridge-building process. Led by then Secretary-General Kofi Annan in conjunction with then High Commissioner for Human Rights, Mary Robinson, the United Nations began 'mainstreaming' human rights into its activities in 1997, with a particular emphasis on the UN's development activities, and with the United Nations Development Program (UNDP) and the United Nations Children's Fund (UNICEF) being pioneering organisations in this respect; the former, in particular, in its 1990 Human Development Report, used the fulfilment of human rights directly as benchmarks for development.⁴⁴ Likewise, the World Bank and, to a lesser extent, the International Monetary Fund (IMF) have

41. Susan Marks, 'The End of History—Reflections on Some International Legal Theses', 8 *European Journal of International Law* (1997) 449–477.

42. Aoife Nolan, Bruce Porter, and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal', 15 *Center for Human Rights and Global Justice Working Paper* (2009).

43. Philip Alston and Mary Robinson, 'The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours', in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) 2–18.

44. See United Nations Development Programme (UNDP), *Human Development Report* (Oxford University Press, 1990); and Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy', 44 *Polity* (2012) 485–503.

taken rights language on board around the same period, with the focus being on five interrelated processes, namely social development, economic growth, democratic governance, an equity-oriented grass-roots approach, and an international institutional design aimed at maximising world-market benefits for developing countries.⁴⁵

Since then, the rights-based approach to development has had a stellar institutional career, becoming a dominant discourse in both development and human rights organisations. It is the subject of innumerable programmatic statements and operational guidelines within the development community and it is beginning to be applied by domestic policy-making and implementation agencies.⁴⁶ However, it has remained a controversial concept and reception with traditional development actors as well as in academic literature has been mixed. To the former, it initially represented not much more than an usurpation attempt by the human rights community over such home grown concepts as ‘pro-poor’ development.⁴⁷ Within academic development studies, some even went so far as to regard the logic of rights as inimical to development work on account of its inherent antagonism to the state and state institutions.⁴⁸

Considerable effort has since gone into clarifying the rights-based approach, though this has, for the most part, accompanied rather than preceded its operationalisation, so that it has remained a boat constructed while already at sea. Varun Gauri and Siri Gloppen provide a useful entry point by differentiating four ‘analytic components’ of rights based development which can be paraphrased as international legal precepts, donor-regulations and conditionalities, normative beliefs, and constitutional rights. Arguably, to most adherents of the rights-based approach in both the human rights and the development community, the first two of these components are the start

45. Fukuda-Parr, ‘The Human Development Paradigm’, *supra* note 36.

46. Lisa Vene Klasen and Valerie Miller, ‘Rights-Based Approaches and Beyond: Challenges of Linking Rights and Participation’, 235 IDS Working Paper (2004); Srirak Plipat, ‘Developmentizing Human Rights: How Development NGOs Interpret and Implement a Human Rights-Based Approach to Development Policy’, Doctoral Dissertation, University of Pittsburgh (2006); H.-O. Sano, ‘Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development’, 22 *Human Rights Quarterly* (2000) 734–752; and again, Uvin, ‘On High Moral Ground’, *supra* note 12.

47. Robert Archer, ‘The Strengths of Different Traditions: What Can Be Gained and What Might Be Lost through Adopting a Rights-Based Approach to pro-Poor Development’, 3 *Sur* (2006), <www.surjournal.org/eng/conteudos/artigos4/ing/artigo_archer.htm> (visited June 2014).

48. Uvin, ‘On High Moral Ground’, *supra* note 12; Krever, ‘The Legal Turn in Late Development Theory’, *supra* note 3.

and also the end point of rights based development. From this perspective, it essentially refers to the matching of development goals with international human rights obligations. Here, the shift to rights-based development means, essentially, a reframing of development as the process by which compliance with positivised international legal norms is achieved. International legal norms, most notably, though not exclusively, those laid down in the 'international bill of rights', are, hence, meant to assume the triple function of interpretation manuals for development goals, of regulatory frameworks for development processes, and of benchmarks for development outcomes.⁴⁹ There is, however, some divergence between human rights and development practitioners over whether these presumptively 'hard' legal norms merely represent a negative standard against which development policy must not contravene or whether they positively determine the substance and form of development. The mentioned rise of economic and social rights advocacy has certainly led to a more nuanced view on the (international) justiciability of 'second generation' rights, with, *inter alia*, the long negotiated adoption, by the UN Human Rights Council, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 marking a new phase.⁵⁰ However, despite the centrality of international human rights standards in rights-based development, international (legal) institutions have not played a significant role in the latter's unfolding. The continuing lack of institutional capacity and enforcement authority in the realm of social rights on part of international institutions have confined them, at best, to the role of avantgarde interpreters of test case situations far removed from

49. Examples include, again, the *Human Development Index* and the recent series of Guiding Principles, such as the *Guiding Principles on Extreme Poverty and Human Rights*, A/HRC/21/39, 27 September 2012; or the *Guiding Principles on Business and Human Rights*, A/HRC/RES/17/4, 6 July, 2011; see also Victor Abramovich, 'The Rights-Based Approach in Development Policies and Strategies', 88 *CEPAL Review* (2006) 33–48; Jennifer Chapman, 'Rights-Based Development: The Challenge of Change and Power', 27 *Global Poverty Research Group Working Paper Series* (2005); Shannon Kindornay, James Ron, and Charli Carpenter, 'Rights-Based Approaches to Development: Implications for NGOs', 34 *Human Rights Quarterly* (2012) 472–506.

50. See the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/RES/63/117, 10 December 2008; see also the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158, 9 November 1995; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', A-52, 16 November, 1999; the African Charter on Human and Peoples Rights (CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June, 1981) already contains in its body the (social) rights to work (Art. 15), health (Art. 16) and education (Art. 17).

the groundwork of (rights-based) development.⁵¹ There is, however, some evidence that the greater prominence of the international social rights regime has given development actors advocacy tools to politically mobilise for greater international responsibility and for domestic policy change.⁵²

Instead, it is on the operational level, which Gauri and Gloppen refer to as ‘donor regulation and conditionalities’, that rights-based development has really found its primary staging ground. Here it has become fused with the conceptual cornerstones of the contemporary development paradigm, notably the core good governance principles of accountability, empowerment, participation, equality and non-discrimination. On this level, rights provide the specific substance for these principles in the context of programme design, implementation and assessment. They function, in other words, as a policy framework. As such, their antagonistic character is largely muted and, therefore, their legal sting partially drawn by their conversion into (soft) administrative guidelines.⁵³ Indeed, donors and recipients alike have mastered the new language of rights-based governance in their mutually reinforcing reporting obligations.⁵⁴ This tête-à-tête between rights and development works because rights are framed as integral to the achievement of good governance. As was seen, the latter is geared not to concrete objectives, but to enhancing the agency of the recipients of development (aid), most notably the ‘poor’. Rights language, thus, helps perform a subtle shift in development discourse away from objective need and towards subjective want—often expressed as an increase in choice- fulfilment of which is then deemed to result in ‘empowerment’. It is, at least nominally, about increasing the control of specific constituencies over their own circumstances,⁵⁵ and it combines greater and more equitable access to socio-economic resources such as income, education, or health, with a subjective capacity for choice.⁵⁶

51. Gauri and Gloppen, ‘Human Rights-Based Approaches to Development’, *supra* note 44, at 5.

52. Kindornay, Shannon Ron, and Carpenter. ‘Rights-Based Approaches to Development’, *supra* note 49.

53. Examples are, again, the *Guiding Principles on Extreme Poverty and Human Rights* or on *Business and Human Rights*, *supra* note 49.

54. See, for instance, United Nations Development Program (UNDP), *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users’ Guide*, (2006), or United Nations Development Program (UNDP), *Lessons Learned From Rights-Based Approaches in the Asia-Pacific Region* (2005); or Juliane Osterhaus and Folke Kayser, ‘The Human Rights-Based Approach in German Development Cooperation’, *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) (2009).

55. Bina Pradhan, ‘Measuring Empowerment: a methodological approach’, 46 *Development* (2003) 51–57 at 52.

56. *Ibid.*, at 54.

Empowerment, then, also implies the ability to claim both accountability in relation to all actors of the development process and participation in that process. The latter, in particular, potentially entails an active say in all stages of the development process, from the identification and prioritisation of needs to the planning, implementation and monitoring of programmes. This complex regime is safeguarded by claims, again articulated through rights, to equality and non-discrimination. In all, then, the reconstruction of good governance principles through rights language seems to provide an at once coherent and compelling narrative which appears to be compatible with contemporary development practice while containing the spark for a potentially revolutionary transformation of development agency.⁵⁷

Yet, can rights-based development live up to this promise as the primary regulatory framework for development cooperation? While the open controversy between the human rights and the development community that marked the early phase of rights-based development has largely subsided, many critical points remain salient. Early critiques of rights-based development focused on two aspects, in particular: firstly, that this allegedly new approach did not add any significant value to either the re-focusing of development on disempowered and disenfranchised, i.e. poor- constituencies, or to the addressing of the needs of these constituencies through empowerment tools within the global governance agenda.⁵⁸ Secondly, that, it represented nothing but a new type of aid conditionality, notably one which subsumed nearly all possible conditionalities under the comprehensive framework of international human rights, thereby creating a panoptical system of international surveillance over developing states which were, thus, reduced to mere duty bearers vis-à-vis individual and collective rights claimants.⁵⁹ Closely related to the latter critique is the more general point that, as already hinted, rights-based development is taken to be just the latest step in an essentially neo-liberal re-framing exercise which embroils the state in a paradoxical position. Rights-based development remains highly state-centric in its emphasis on state responsibilities, a necessary side-product of the focus on international human

57. Caroline Moser and Andy Norton, 'To Claim our Rights: livelihood security, human rights, and sustainable development', Overseas Development Institute (2001), <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1816.pdf> (visited June 2014).

58. Dzodzi Tsikata, 'The Rights-based Approach to Development: Potential for Change or More of the Same?', 35 *IDS Bulletin* (2004) 130–133; also, again, Uvin, 'On High Moral Ground', *supra* note 12.

59. Kate Manzo, 'Africa in the rise of rights-based development', 34 *Geoforum* (2003) 437–456 at 438; see also Gathii, 'Good Governance', *supra* note 32.

rights norms. States remain fundamentally responsible for both the creation of and compliance with international norms, with the trinitarian nature of their obligations, notably to respect, to protect, and to fulfil, ensuring that, indirectly, virtually all non-state actors continue to fall under their remit.⁶⁰ Hence, even though rights-based frameworks appear to address themselves to all stakeholders, it is ultimately states who have to ensure compliance, if only by underwriting a functioning rule of law as a necessary base condition for any rights regime. The ongoing transformation of a state from direct provider to regulator of public services within the paradigm of post-welfarist regulatory statehood changes the nature but not the scope of this responsibility.⁶¹ Indeed, market failure itself, through the consequences it generates, is considered to fall into the functional obligations of the state. This continuing state-centeredness on the demand side is, however, increasingly unmatchable by the state's capacity to supply public service levels in accordance with international minimum standards either through its own financial intervention or through (market) regulatory authority. The current phase of global finance capitalism has reduced both a state's fiscal and, as a result of its own public sector reforms, its policy space, a situation that, arguably, applies to both industrialised and developing countries, the predicament of which is increasingly converging.⁶² There is, hence, a clear mismatch between the demand for responsibility placed on a state by the logic of sovereignty and articulated through international law, and its factual capacity to supply this normative demand with material substance in (rights-based) development practice.

Yet, while an empirical state is thereby both overburdened and overdetermined, it is simultaneously sidelined by the promotion of good governance through rights. For these are, as was seen, essential instruments to discipline and constrain a state and its formal institutions in relation to individuals, groups and civil society in general. Empowerment and its derivatives accountability, participation and (formal) equality ultimately aim to make 'people' at least partially autonomous from state institutions and to capacitate them to appropriate to themselves their share of public goods. Through rights they endow development with the authority of global norms and thereby legitimate

60. See, generally, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Rittich 'The Future of Law and Development', *supra* note 10, at 217.

61. Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State', 100 National Europe Center Paper (2003), <digitalcollections.anu.edu.au/bitstream/1885/41716/3/scott1.pdf> (visited June 2014).

62. Navroz K. Dubash and Bronwen Morgan, 'Understanding the Rise of the Regulatory State of the South', 6 *Regulation & Governance* (2012) 261–281.

the bypassing of formal state institutions. As such, rights-based development has been critiqued as an oxidant of sovereignty, even if, in many instances, that sovereignty may merely enshrine the authoritarian undercurrents of modern statehood.⁶³ The point here is not that rights-based development would challenge the state but that it continues to treat the state as the key problem while simultaneously relying on it as the only viable framework for a solution.

Besides being implicated in this fundamental paradox in relation to the role of a state, rights-based development has also been charged with being premised on a tautological linkage of rights and good governance. As Peter Uvin has pointed out, 'working out the relationship between development and human rights requires more than simply stating that one automatically implies, equals, or subsumes the other'.⁶⁴ A related critique concerns another paradox inherent in rights-based development, namely that between universal human rights, on one hand, and empowerment and its derivatives, on the other. Conceptually, this paradox has its roots in one of the core questions of political theory, notably how to relate rights with democracy, or, a fixed, *a priori* determination of the human being's essential characteristics with a mechanism by which those same human beings are meant to make relatively unconstrained choices about their personal circumstances. How, in other words, can a mandatory reference to one universal set of human rights be reconciled with its simultaneous premise to foster local individual and collective empowerment? Is there room for local variations? And how can a rights-based framework distinguish between freely-chosen 'inefficiencies' and those that result from local power-relations, lack of adequate information, and flawed decision-making mechanisms? How much top-down imposition is still compatible with local empowerment?

These questions can ultimately only be answered by looking at how rights-based development has played out in practice. Yet, although the new paradigm has implied a large-scale restructuring of programming frameworks, there is as yet only insufficient evidence of its impact and efficacy 'on the ground'.⁶⁵ What is clear is that it has placed rights discourse at the centre of

63. David Kennedy, 'International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101–125.

64. Uvin, 'On High Moral Ground', *supra* note 12, at 3.

65. See 'The Impact of Rights-based Approaches to Development—Evaluation, Learning Process—Bangladesh, Malawi, and Peru', UK Interagency Group on Human Rights Based Approaches (2007), <www.crin.org/docs/Inter_Agency_rba.pdf> (visited June 2014); Hans Peter Schmitz, 'A Human Rights-Based Approach (HRBA) in Practice: Evaluating NGO Development Efforts', 44 *Polity* (2012) 523–541; and again Kindornay, Shannon Ron, and Carpenter, 'Rights-Based Approaches to Development', *supra* note 49.

the development policy-making process and that it has, indeed, become a dominant regulatory and conditionality framework, not least in conjunction with the overall shift towards (good) governance. However, to what extent this has actually empowered local communities and re-configured development agency, or even just led to tangible improvements in aid effectiveness remains an open question. Its eventual answer will, in equal measure, depend on the extent to which donors will have been willing to surrender control over both the objectives and the implementation of development to its stakeholders, and to what extent these stakeholders are able and willing to use rights to articulate alternative pathways. What is certain is that such empowerment will continue to require the institutional setting of a state from the vagaries from which it is, however, simultaneously meant to emancipate. Is rights-based development, hence, merely a paradox of wishful thinking or, indeed, as Uvin puts it, essentially ‘fluff and power’?⁶⁶

4. Another Plot: A ‘Rights Revolution’ by the (Domestic) Back Door?

While Uvin’s statement might be a tempting critical conclusion apt to characterise rights-based development, along with most of other rights discourse, simply as ‘part of the problem’, it would fall short of the real life the concept has taken on.⁶⁷ That course has to do with the two other aspects of rights-based development that Gauri and Gloppen identify notably normative belief and constitutional litigation.⁶⁸ For beyond the confines of the ‘aid industry’, the idea of rights-based development has proliferated into wider civil society and has been picked up by a wide range of advocacy groups and grass-roots activists as a form of ‘social accountability’ for development processes.⁶⁹ Increasingly, stakeholders on the ground are adopting a rights optic to analyse local-level situations and articulate the resulting demands in terms of rights

66. Uvin, ‘On High Moral Ground’, *supra* note 12, at 10.

67. Kennedy, ‘International Human Rights Movement’, *supra* note 63; and David Kennedy, ‘The International Human Rights Regime: Still Part of the Problem’, in Ole Windahl Pedersen (ed.), *Examining Critical Perspectives on Human Rights* (Cambridge University Press, 2013) 19–34.

68. Gauri and Gloppen, ‘Human Rights-Based Approaches to Development’, *supra* note 44, at 11 and 15.

69. Siri Gloppen, ‘Public Interest Litigation, Social Rights and Social Policy’, in Anis A. Dani and Arjan de Haan (eds), *Inclusive States. Social Policy and Structural Inequalities* (World Bank: Washington D.C., 2008) 343–367.

claims. This does not, of course, mean that rights-consciousness would have become ubiquitous, nor that there would be formalised mechanisms in place everywhere through which such accountability demands could be fed into the relevant systems. But the specific interaction between activists and local constituencies has in some places crystallized into sustained political pressure or, indeed, systematic legal mobilisation ‘from below’. This latter phenomenon, which emerged out in the field rather than having been designed on the drawing table of development policy, may represent the rights-based approach’s real potential. As it is premised on a reasonably functioning rule of law and, within it, on the existence of legally enforceable rights catalogues, most commonly in form of constitutional bills of rights, it has been restricted to those (developing) countries to whom this applies.⁷⁰ In many of these, an impressive surge in fundamental rights litigation on development-related issues can be observed since at least the late 1990s. Hence, in a wide-range of low- and middle-income countries including, *inter alia*, the BRICS states Brazil, India and South Africa, but also Argentina, Colombia, Costa Rica or Venezuela, an exponential rise in individual and class-action type litigation on basic public goods such as education, housing, food, water and sanitation, or health has taken place.⁷¹ This has led some to speak of a domestic ‘rights revolution’ that, however, is, for the most part, the product of a spontaneous legal evolution that has neither been centrally (or rationally) planned nor is entirely predictable in its effects.

A case in point is health rights litigation, which in many studies features as the initial catalyst for the ‘rights revolution’ and which, in turn, was mostly kicked off by well-organised HIV/AIDS NGOs pursuing highly targeted litigation strategies.⁷² As critics have pointed out, this legal mobilisation did not emerge out of the blue but as a result of a convergence of interests and actors, including middle-class HIV/AIDS patients, the pharmaceutical industry, a socially reformist judiciary and intra-state political conflicts, all embedded

70. Varun Gauri and Daniel M. Brinks, ‘Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights’, 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).

71. See, in particular, Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Cambridge University Press, 1998); and these recent empirical studies: Gauri and Brinks, *Courting Social Justice*, *supra* note 70; Alicia Ely Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2013).

72. Florian Hoffmann and Fernando Bentes, ‘Accountability for Social and Economic Rights in Brazil’, in Gauri and Brinks, *Courting Social Justice*, *supra* note 70.

within a transnational flow of information and resources.⁷³ Yet, neither sophisticated legal liberalism nor the broader political economy of public interest litigation provide enough causal leads to fully explain why this ‘rights revolution’ happened and even less so what effects it has had. Indeed, besides the difficulty of clearly pinpointing its effects, it is even less straightforward to clearly assess them. The reason for this is that, following again Gauri and Gloppen, there are at least four variables involved in each case or set of cases that influence its trajectory and outcome. The first is access to justice which goes well beyond the mere presence of an independent judiciary but involves everything from the physical and personnel infrastructure of a legal system to the legal culture of both prospective litigants and the judiciary. Secondly, the amenability of the legal system to receive and process rights-based interventions into social policy, an aspect which involves the hazy process of doctrinal change as well as the shifting demarcation between the legal and political system. Thirdly, the elasticity of the political system in terms of legal interventions, or, in other words, the degree to which political actors and institutions are willing and capable to change broader policy in response to targeted litigation. And lastly, the fourth variable is, the enforcement capacity of litigants and, generally, the enforceability of judicial decisions. It is through highly variant combinations of these four factors that the overall outcome of social rights litigation is shaped.

An illustration is the case of health rights litigation in Brazil.⁷⁴ Since approximately 2002, there has been an exponential increase in successful individual access to medicines and treatment actions. Parallely, a highly independent-minded and proactive public prosecution service has used its administrative review powers as well as the threat of litigation to review and revise public health care management on municipal and state levels, and a network of public defenders, the public equivalent of pro bono advocates, has significantly expanded access to (health care-related) justice for those eighty percent of

73. Octavio Luiz Motta Ferraz, ‘Harming the Poor through Social Rights Litigation: Lessons from Brazil’, 89 *Texas Law Review* (2010) 1643–1686; Ran Hirschl, ‘The New Constitutionalism and the Judicialization of Pure Politics Worldwide’, 75 *Fordham Law Review* (2006) 721–754; Vanice Regina L. do Valle, ‘Judicialization of Socio-Economic Rights in Brazil: The Subversion of an Egalitarian Discourse’ (2012), <ssrn.com/abstract=2031719 2009> (visited May 2014).

74. The following section draws on material in Hoffmann and Bentes, ‘Accountability for Social and Economic Rights’, *supra* note 70; Ferraz, ‘Harming the Poor’, *supra* note 73; and Octavio Luiz Motta Ferraz, ‘Brazil—Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health’, in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2013) 76–103.

Brazilians who exclusively rely on the country's public Unified Health System (*Sistema Unico de Saude* [SUS]). The promise of the country's 1988 constitution, with its extensive bill of rights, including the right to public health (care), seemed, thus, to begin to be fulfilled not by the legislature nor the executive, but by the courts. What is more, the driving force of this judicialisation of health care seemed to come straight from civil society, starting with the ever increasing number of citizens across all social strata demanding the free dispensation of medicines and treatments as a constitutional entitlement and up to the thoroughly professionalised and highly effective HIV/AIDS movement systematically pushing litigation aimed at continuously updating 'highly active antiretroviral therapy' (HAART) dispensed by the Brazilian HIV/AIDS programme.⁷⁵

However, upon a closer look, the effects of this particular rights revolution are puzzlingly ambivalent. While providing a remedy to a growing number of individuals in need of medical care otherwise unavailable to or unaffordable for them, the aggregate effect of litigation has also distorted the rationale of public health care management and has generated unintended and undesired consequences. Among these are, besides the mounting budgetary impact of judicially imposed health care costs, the partial conversion of public health care providers into mere administrators of judicial injunctions and the accompanying queue-jumping effects, the possible capture of health care litigation by a middle-class seeking to complement insufficient private coverage, and the increased indirect influence of the pharmaceutical industry in the judicial restructuring of specific health care fields.⁷⁶ The reasons for these supposedly negative effects are manifold. One aspect certainly has to do with a corporatist legal culture in which judges and prosecutors operate in relative isolation from policy-makers, seeing themselves as guardians of constitutional values rather than being encumbered by means-testing or complex cost-benefit analyses. This results in a judicial activism that, in aggregate, generates at least partly dysfunctional input into the public health system while subtly re-configuring the balance of powers between executive agencies and courts. In addition,

75. Amy Nunn, *The Politics and History of AIDS Treatment in Brazil* (Springer: New York, 2009); Jane Galvão, 'Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Public Health', 95 *American Journal of Public Health* (2005) 1110–1116; Varun Gauri and Evan S. Lieberman, 'Boundary Institutions and HIV/AIDS Policy in Brazil and South Africa', 41 *Studies in Comparative International Development* (2006) 47–73; Rosalyn S. Park, 'The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients', 11 *Minnesota Journal of Global Trade* (2002) 125–154.

76. Hoffmann and Bentes, 'Accountability', *supra* note 70, at 140; and Ferraz, 'Harming the Poor', *supra* note 73.

the regulatory framework within which private health care providers operate has meant that the latter's principal clientele, namely the middle-class, has increasingly turned to the public system in order to complement their own partially insufficient coverage by means of litigation. Lastly, there is a significant enforcement gap, so that judicial remedies do not always lead to the actual provision of health care to litigant patients and tend to further involve the judicial machine.

The courts and (constitutional) rights are deeply entangled in this paradoxical system. Rights, insofar as they provide the basis for litigation, play a fourfold role. Firstly, they are inclusion devices by which clients-patients-citizens excluded from aspects of public or private health care (en)force their inclusion. Secondly, in some instances, they transcend inclusion and become instruments by which specific policies are framed or re-framed. Thirdly, they are also meant to enact formal and material justice, and it is this function that is often cited by activist judges as justification for ignoring policy constraints. Lastly and fourthly, insofar as rights are also used in litigation against private health care providers, they serve as structuration devices for health care business models. It is the courts—and, in some instances, quasi-judicial institutions—that enable this functionality; they link public health care administration with client-citizen-patients and intermediate their interaction. Yet, what the Brazilian case amply demonstrates is that this functional matrix operated by the courts is neither prescribed by the constitution nor is it pursued as a transparent strategy by any of the involved stakeholders, be they judges and prosecutors, client-citizen-patients, or health care administrators. Rather, it is the result of decentralised operational logics and processes which, in aggregate, result in a continuous string of unintended consequences. These imply non-linear outcomes that, consequently, are difficult to assess by a single standard. Puzzlement and critique have, thus, accompanied these domestic 'rights revolutions'. While successful (social) rights litigation does (re-)distribute public goods to individual litigants and thereby, arguably, represents a tangible empowerment, aggregate effects can be negative. There is, for instance and as hinted earlier, evidence in the Brazilian case that litigation is 'captured' by middle-class litigants enjoying greater factual access to justice and that, hence, the 'rights revolution' might effectively be re-distributing public funds and public goods from the poor to the non-poor. In addition, court-driven counter-majoritarian decision-making on the implementation of social policy is seen as lacking both legitimacy and functional rationality, as activist courts impinge into policy domains far beyond their expertise and accountability. One consequence—in Brazil and other places—has been administrative backlash and

a questioning of the role judicially enforceable fundamental rights can play in pro-poor development.⁷⁷

5. A Revolution in Development or a Regress to (Neo-)Liberal Legalism?

Does this zooming into the real life of rights in development, hence, impel one to somberly conclude that not only did the 'rights revolution' falter but also that 'law and development' has reached yet another potentially lethal impasse? To answer these questions, one needs to zoom out again to behold the broader contemporary picture. It has been aptly summed up by David Kennedy who concludes his comprehensive review of 'law and development' by stating that

'attention to the rule of law offers an opportunity to focus on the political choices and economic assumptions embedded in development policy-making. Unfortunately, however, those most enthusiastic about the rule of law as a development strategy have treated it as a recipe or ready-made rather than as a terrain for contestation and strategy.'⁷⁸

This short declaration contains all the terms of the debate, notably substance versus form, top-down versus bottom-up, structure versus agency, politics versus anti-politics. It justly apportions blame for the methodological short-sightedness that accompanies the professionalization—and concomitant professional interest—of 'law and development', but it also remains open and non-committal as to underlying causes and desired effects. It also clearly refrains from dismissing law as a relevant factor of and in development and, thus, as an object of study and of (political) action. Indeed, Kennedy embeds this statement in a concluding section in which he articulates an opportunity for 'law and development' as an analytical framework to prolong its lease on life through 'critical and heterogeneous ideas'.⁷⁹ This does not sound like a revolutionary agenda, but neither like a reactionary one. Rights-based development, being 'law and development's' current incarnation, might as well be given the benefit of such ambivalence.

On the downside, one might argue, the fact that it has not (yet) delivered the fundamental transformations of multilateral aid and domestic social

77. Ferraz, 'Harming the Poor', *supra* note 73.

78. Kennedy, 'Law and Development Economics', *supra* note 11, at 19.

79. *Ibid.*, at 63.

welfare it envisions raises the suspicion of inbuilt structural bias, or, simply put, of an ideological agenda. The tenets of the latter are easily traced to the plot of (neo)liberal hegemony; as has been shown earlier, the rights-based paradigm can be seen as going hand in hand with a wider good governance agenda meant to make the state safe for a globalised market economy. It aims to re-shape public administration into an instrument of technocratic governance and democracy into a strictly controlled mechanism for interest mediation. Rights, in this scenario, function as tools to keep politics at bay by fragmenting collective action and by re-orienting policy-making to process rather than to outcomes. As Ferraz has pointed out in his critique of the judicialisation of social policy in Brazil, the domestic ‘rights revolutions’ may actually direct attention away from the protracted questions of social justice and redistributive politics that lurk behind development on both the global and the domestic level.⁸⁰ From this perspective, the ‘turn to rights’ in development is neither politically neutral nor merely procedural; it re-allocates institutional power and resources to legal professionals and human rights experts and to those conversant with their idiom—which the genuine ‘poor’ are frequently not.⁸¹ On his account, the politics of rights-based development has, thus, been a ‘politics of politics denied’?⁸²

Adherents of Law and Development (3.0) would, of course, contest this reading and point to some potential upsides. Critics of the critics have largely sought to rebuff the ‘fluff and power’ critique by turning to empirics. Hence, where the latter see the impact glass half empty, the former see it as half full; they argue that rights-based programming and domestic litigation have produced significant effects both in terms of individual empowerment and remedy and in terms of forcing upon traditional development discourse and practice logic of accountability, transparency and, to an extent, participation.⁸³ As one of the critics has himself pointed out, the ‘turn to rights’ initially represented the possibility of ‘claims for absolute, non-negotiable rules to limit bureaucratic discretion (...) in a world whose complexity has created the danger of unfettered relativism and bureaucratic abuse’.⁸⁴ What is more, the

80. Ferraz, ‘Harming the Poor’, *supra* note 73.

81. Martti Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’, 1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2010) 47–58; and Kennedy, ‘International Human Rights Movement’, *supra* note 63.

82. Kennedy, ‘Law and Development Economics’, *supra* note 11, at 70.

83. Malcolm Langford, ‘Domestic Adjudication and Social and Economic Rights: A Socio-Legal Review’, 6 *Sur* (2009) 98–133.

84. Koskenniemi, ‘Human Rights Mainstreaming’, *supra* note 81, at 48.

insertion of rights as both an analytical framework and (enforceable) claims vis-à-vis development policy has produced wider ripples in the political landscape; it has introduced what could be termed 'human rights'isms' into the syntax and grammar of development policy-making. The net effects of such linguistic hybridisation is, of course, by no means uniform or uniformly positive, but it does produce additional expressive spaces which, arguably, were not there before and which can and have been used for emancipatory and, indeed, 'progressive' purposes.⁸⁵ Lastly, the critics' critics point to the empirical facticity of rights discourse in relation to imagined alternative strategies. Is the prevalence of rights in development necessarily the result of a more or less conscious hegemonic project or could it also be the outcome of successful experimentation in the face of policy deadlock?⁸⁶ Were alternative strategies of mass political mobilisation, of cross-societal dialogue, or, indeed, of a colloquial (international) law as the locus of non-violent political action really available, were they really sidelined or suppressed by the rights industry? Perhaps, rights simply occupied discursive spaces and went into action like a virus, infecting and modifying its host but itself also being subject to immune reactions in a complex cycle that produces divergent outcomes. If so, it would then be down to the question of whether viruses evolve spontaneously or as a result of some compelling environmental necessity—a question not answerable in the ambit of this paper.

In the end, it is submitted, whether the critics or the critics' critics have it remains to be seen. Rights-based development, as, indeed, 'law and development' and, generally, the 'ideology of the rule of law' are clearly part of a wider transformation of the very concept of development.⁸⁷ The rise of what David Trubek has called the 'new developmental state' implies a merger between the conditions and functionings of the regulatory state of the (so called) industrialised world with the developmental state of the development world.⁸⁸ Development, thus, takes place in an environment in which traditional state-based government no longer enjoys a monopoly but is

85. Hugo Slim, 'A Response to Peter Uvin—Making Moral Low Ground: Rights as the Struggle for Justice and the Abolition of Development', 17 *Praxis* (2002) 1–5.

86. Charles Sabel and William Simon, 'Destabilization Rights: How public law litigation succeeds', 117 *Harvard Law Review* (2004) 1016–1101 at 1019.

87. Koskeniemi, 'Human Rights Mainstreaming', *supra* note 81, at 47.

88. Trubek 'Developmental States', *supra* note 5; see also Dubash and Morgan, 'Understanding the Rise', *supra* note 20; and David Levi-Faur, 'States Making & Market Building for the Global South: The Developmental vs. the Regulatory State', 44 *Jerusalem Papers in Regulation & Governance* (2012), <regulation.huji.ac.il/papers/jp44.pdf> (visited May 2014).

complemented by international, transnational, private, and hybrid regulatory regimes. As a result, stakeholders, including individuals, governments, private enterprises and organised civil society, are faced with a plurality of regulatory demands that are only partially transparent and accountable or amenable to participation and review. The servicing of markets does provide something of an overarching functional logic for such ‘governance’, and rights do play a role in keeping counter-hegemonic political projects at bay. Yet, the, perhaps, central characteristic of rights discourse is its inherently transgressive character and the unpredictability of the outcomes it produces. Rights can always be used for and against, to create the substantive path dependencies the critics bemoan and to counteract them. For the hidden utopia of rights in development is not the empowerment of human rights experts, judges, or the global aid industry, but a radical turning upside down of epistemic and political agency. It is hidden not because it would be concealed from all but a rarefied revolutionary avant-garde but because it is impossible to predict the precise moments and locations of its occurrence. For the instances of authentic empowerment, when Sen’s ‘freedom’ momentarily frees itself from the constraints of (neo)liberalism and becomes an exercise in substantive [S]elf-determination, only emerge between the rigid lines of political economy and out of complex and non-linear interactions that resist schematisation. Hence, it is, indeed, the oft-critiqued indeterminacy of law itself that enables emancipatory action, even if this can only ever be part of a broader political militancy for global justice.⁸⁹ Rights as the privileged discourse for the articulation of claims to an ever expanding individual and collective identity and against (perceived) oppressions thereof remain important wedges that keep spaces for wider political contestation open, not least, as has been seen, in relation to that widest of fields, development.

89. Hence, China Miéville’s thesis that ‘the’ law is too structurally biased to be useful for emancipatory purposes is here not adhered to; nor is, however, the progressive legalist assertion that it is a universal language game amenable to being used for ‘progressive’ purposes without further considerations of the users’ politics; for the former, see China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill: Leiden, 2004); for the latter, inter alia, Martti Koskenniemi ‘The Politics of International Law—20 Years Later’, 20 *European Journal of International Law* (2009) 7–19.