LAW, RIGHTS AND DEVELOPMENT

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This chapter provides an intellectual history of the field of "law and development," a loosely conceptualised field of inquiry which broadly speaking, focuses on the role of law in the development of states and societies. In its beginnings in the 1960s, the field was focused on the "modernisation" of societies through law. In the immediate post-Cold War period of the 1990s, its focus was on economic development and economic growth. The field in its current stage still maintains a predominant focus on economic development, though it is has been experiencing something of a turn towards using more comprehensive measures of human development, which focus on capabilities. This chapter is not so much about development of societies as a subject and of itself, but on the more specific question of the role of law in development of societies.

How one approaches law and development depends on one's conception of the ends of development. In this sense, law has an instrumental value. Its importance relates to achieving some goal other than rule of law as its own value. The first law and development thinkers were American legal scholars working at a time when modernisation theory was at its most prominent and in a post-American Legal Realist intellectual context in American legal scholarship in which law was seen as an instrument of social change. Their focus was on modernising societies, where law served as an instrument of change. The modernisation movement was prevalent from the 1950s and lapsed in the early 1970s. A second movement in law and development took hold in the immediate post-Cold War period, based in the neoliberalism of the so-called Washington Consensus. This second funded movement grounds itself in New Institutional Economics (NIE), a branch of economics pioneered by

Nobel Laureate Douglass North.[1] This second movement is a much more significant movement partly because of its acceptance and funding by the World Bank and other development institutions. Those who work in NIE are typically economists but it also includes a number of legal scholars. The legal scholars who work in the field are typically those who work in law and economics. Some legal scholars who work in law and development do not work in NIE and may best be characterised as working in comparative law. A turn seems to be taking hold, primarily in the United States, for legal scholars who work in law and development, towards the empirical, though the turn is nascent.[2] The economists who work in the field are typically those who are institutionally minded, who study the effects of institutions on economic growth. They may be classed as development economists, though not all development economists work in law and development or in NIE.

While NIE accounts are prominent in law and development, other accounts are or are becoming important, particularly as the world moves away from the Washington Consensus. Some development practitioners apply a human rights-based approach (RBA), but it is unclear whether this approach has had much influence in law and development.[3] A move can be seen towards understanding the role of institutions in development, from moral and political standpoints. The moral approach to the study and design of institutions tends to be

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[1] David M. Trubek & Alvaro Santos, "Introduction: The Third Movement in Law and Development Theory and the Emergence of a New Critical Practice," in David M. Trubek & Alvaro Santos eds., *The New Law and Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006): 1-18; John Ohnesorge, "Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience," *U. Pa. J. Int'l Econ. L.* 28 (2007): 219-308.

[2] There has been, of course, a good deal of empirical work by economists and quantitatively oriented political scientists on questions relating to the role of law and institutions more generally on economic development. The legal origins and law and finance literature, discussed below, are significant examples. Kevin Davis, a legal scholar, has argued that as for the future of law and development "it will and should involve becoming even more of a social science." Kevin Davis, "Law and Development as Social Science," in Symposium: The Future of Law and Development Part III, *Northwestern Univ. L. Rev. Colloquy* 104 (2009): 188-187. With mostly American legal scholars involved in law and development studies, the move towards interdisciplinarity and empirical work is to be expected.

[3] For influential explanations of rights based development, see Peter Uvin, *Human Rights and Development* (Bloomfield: Kumarian Press, 2004); Philip Alston & Mary Robinson eds., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005).

located in a capabilities account developed by Amartya Sen and Martha Nussbaum.[4] A political approach with strong ties to NIE is located in the work of political economists and scientists like Daron Acemoglu and James Robinson, who locate the most important variables in the development of states in political and civil rights for broad segments of a state's population.[5] Acemoglu's and Robinson's work has strong connections to modernisation theory, which, as explained above, for a while lapsed but is now seeing something of a resurgence.[6] The result is that we might be coming back to the first movement in law and development, though with vastly different methodologies and results. A number of other different accounts are at play in the law and development field, discussed below. The main difference between these accounts and those located in NIE is they focus beyond contract and property rights and other laws that relate directly to the functioning of markets.

At least two other subjects connect law to development. First, features of international economic law deal with development. Plenty of examples of such work can be found in the above chapters, particularly in the chapters by Lim, Garcia and Ciko, and Petersmann.[7] Second, a great deal of writing on a human right to development has been produced. A critique of this work can be found in part I of this chapter. The main aim of this chapter is to focus on work that deals with questions of *domestic* legal systems. From a legal context, this

[4] Nussbaum and Sen have written on capabilities in a number of places. *See, e.g,* Amartya Sen, *Development as Freedom* (New York: Random House, 1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge MA: Harvard University Press, 2011).

[5] Daron Acemoglu & James Robinson, *Economic Origins of Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2006); Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London: Profile, 2012).

[6] Shari Berman, "What to Read in Modernization Theory," *Foreign Affairs*, 12 Mar. 2009. <http://www.foreignaffairs.com/features/readinglists/what-to-read-on-modernization-theory>. How Acemoglu's and Robinson's work gets classified in terms of discipline depends on who is doing the classifying. Ultimately the classification does not matter and scholars work across disciplines.

[7] For an excellent set of papers, *see* Chantal Thomas & Joel P. Trachtman, *Developing Countries in the WTO Legal System* (Oxford: Oxford University Press, 2009). Two recent books are Isabella D. Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford: Hart, 2012); Sonia E. Rolland, *Development at the WTO* (Oxford: Oxford University Press, 2012). For an anthology of early work, *see* Antony Carty, *Law and Development* (New York: NYU Press, 1992).

is work more in the nature of comparative law than international law. It is about getting the institutions of the state right.

Two criticisms, one conceptual and the other normative, either have been or can be levelled against law and development. As for the conceptual critique, some may question whether a field of law and development exists. Brian Tamanaha is of the view that classifying law and development as a field is a "conceptual mistake that perpetuates confusion."[8] According to Tamanaha, "[n]o uniquely unifying basis exists upon which to construct a 'field'; there is no way to draw conceptual boundaries to delimit it." Tamanaha continues, "[l]aw and development work is more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding. Law and development activities are driven and shaped by the flow of money that supports it and by the agendas of the people who secure this funding."[9] These criticisms are far from fatal. In the first instance, it may be questionable to search for definitions of "fields." Questions about "what is X" tend to be quite difficult to answer and often rest on unexamined assumptions on the "nature" of things. A field or some other activity of inquiry or practice has its source in social practices and uses of a language. If sufficient numbers of people use the words "law and development" to mean a particular thing then whether a field exists is not a relevant question to ask. How we speak about "geography," "psychology," or "medicine" for example, do not have to meet some unknown stringent standard of "unification." These fields are constructed around the aim of their inquiry. For psychology, that usually means the study of the mind or mental states of persons. For geographers, it is about how humans interact with environment, physically and culturally. And for medicine it is about the diagnosis, treatment, and

[8] Brian Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development," *Cornell Int'l L. J.* 44 (2011): 209-247, 220.

[9] *Ibid.* David Trubek and Marc Galanter raised the same point in their critique of the first law and development movement. David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," *Wis. L. Rev.* 1974 (1974): 1062-1102, 1068-1069.

prevention of disease. That these fields include disparate areas of inquiry and practice does not make them any less a "field." Moreover, areas within these larger fields may also bear the same name. For example, it is perfectly appropriate to call cardiology a field even though it is part of the larger field of medicine. So too with law and development, which, when lawyers work in the field, is often seen as part of the field of comparative law.

Tamanaha is right to point out that development institutions fund work in developing and transitioning countries[10] to improve legal systems.[11] But while the various approaches to law and development all tell us something about the role of law, or institutions more generally, in the development of persons, states and societies, they often tell us little about how to effectively deploy the sorts of technical assistance that states actually need to produce measurable gains in economic or human development. Some of the older law and development literature informs us what *not* to do after mistakes were made, but this literature has been largely ignored by the international actors on the ground providing technical assistance on rule of law to developing and transitioning countries.[12]

The normative critique of law and development has not been levelled directly against the subject but comes out indirectly in accounts of global justice like those of Thomas Pogge.[13] Pogge claims that domestic institutions at most might contribute to the problem of global poverty, but the main culprit is the structure of international institutions, which benefit the rich at the expense of the poor. Pogge argues that people in rich countries owe a negative duty not to harm people in poor countries. This is a duty of justice, not one of humanitarian assistance. According to Pogge, rich countries impose the global economic order so that they

[10] I use "transitioning countries" to refer to the states that have transition economies, that is states moving from central planning to market orientation. *See* Gérard Roland, *Transition and Economics. Politics, Markets and Firms* (Cambridge MA: MIT Press, 2000).

[11] This work is now often characterised as technical assistance in strengthening rule of law.

[12] *See* David M. Trubek & Marc Galanter, "Scholars in Self-Estrangement," 1062-1101; John H. Merryman, "Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement." *American J. Comparative Law* 25 (1977): 457–83.

[13] The most influential relevant work is probably Thomas Pogge, *World Poverty and Human Rights: Cosmopolitanism Responsibilities and Reforms* (Cambridge: Polity 2002).

and their citizens reap the most benefits, whilst poor countries and their citizens are made worse off. An analysis influenced by Pogge's work would see law and development, particularly in its Washington Consensus mode, as ideological, as a set of ideas used by the rich to exploit the poor. The focus of much of law and development in the post-Cold War period has been on getting contract and property institutions right, to stimulate the economic growth of states, and not to worry too much about civil society, constitutions, human rights, or health care and education, unless these contribute to economic growth.[14] The idea here is that law and development is designed to help states fit into a global economic order in which trade and foreign investment is liberalised, so that multinational enterprises can have reliable legal systems in place in these countries to be able to exploit labour to produce cheap goods for people in rich countries. Developing states typically have weak governments with far different relationships with multinational enterprises than, say, the U.S. government has with these enterprises. And so endeavours by the World Bank and other aid bodies to improve the legal systems of poor countries serve as means to entrench unjust international institutions. Moves of law and development towards broader measures of human development and in the taking of human rights into account mitigate this criticism somewhat. What seems clear in this critical account is that law and development is not simply a technical exercise in understanding or improving legal systems. It is normative and deals with values.

This chapter does two things. First, it examines the idea of a human right to development.[15] In this discussion, it explores how a human right to development might be morally justified. It also deals with some of the significant conceptual difficulties a human

[14] *See, e.g.*, Richard A. Posner, "Creating a Legal Framework for Economic Development," *World Bank Research Observer* 13 (1998): 1–11.

[15] An extensive literature on the right to development exists. To cite an incomplete list: Daniel Aguirre, *The Human Right to Development in a Globalized World* (Hampshire: Ashgate, 2008); Margot E. Salmon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007); Bård A. Andreassen & Stephen P. Marks eds., *Development as a Human Right: Legal, Political, and Economic Dimensions* (Cambridge MA: Harvard School of Public Health, 2006); Alston & Robinson, *Human Rights and Development*; a collection of earlier articles in Anthony Carty ed., *Law and Development* (New York: NYU Press, 1992).

right to development faces, in both the law and in moral and political philosophy. Having said that, moral imperatives still apply in the global context but they might not be in the form of rights or a human right to development. Second, it surveys the intellectual history of law and development. It begins with modernisation theory, works its way into and beyond the Washington Consensus and onto the capabilities approach, and identifies some key areas in which law and development appears to be headed.

A major limitation on this chapter is that its coverage can only be selective. It covers only the basic and general movements in the field, mainly from the standpoint of method and the end of development. It can only briefly mention certain areas, such as the gender, law and development or the role of sustainable development, which are very important but which deserve substantial treatment on their own.[16]

I. *A Human Right to Development?*

The international instrument most associated with the human right to development is the Declaration of the Right to Development, adopted by the United Nations General Assembly on 4 December 1986.[17] Before the adoption of the Declaration, a number of other instruments had something to say about a human right to development.[18] Some commentators date the more influential mentions of the right to development to the Senegalese jurist Keba M'baye, who mentioned the right in his Inaugural Lecture to the International Institute of Human

[16] *See, e.g.*, Sylvia Chant ed., *The International Handbook of Gender and Poverty* (Cheltenham: Edward Elgar, 2010); Yves Le Bouthillier et al. eds., *Poverty Alleviation and Environmental Law* (Cheltenham: Edward Elgar, 2012); Paul Martin et al. eds., *Environmental Governance and Sustainability* (Cheltenham: Edward Elgar, 2012); Jamie Bendickson et al. eds., *Environmental Law and Sustainability After Rio* (Cheltanham: Edward Elgar, 2011).

[17] Declaration on the Right to Development, U.N. G.A. Res. A/RES/41/128, 4 Dec. 1986 (hereinafter "Declaration").

[18] These are summarised in Annex 2 to Laure-Héléne Piron, "The Right to Development: A Review of the Current State of the Debate for the Department of International Development," April 2002.

Rights in Strasbourg in 1972.[19] The African Charter on Human and People's Rights, a convention ratified on 27 June 1981 by the states which are members of the Organisation for African Unity, and which went into force on 21 October 1986, contains the right.[20] The right continues to be identified in various international instruments, including the 1993 Vienna Declaration and Programme of Action, the 2000 Millennium Declaration, and the Durban Declaration and Programme of Action.[21] The United Nations promotes the right. For example, on 12 July 2011, the UN Economic and Social Council issued a Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration of the Right to Development.[22]

The right to development has to be put in political context. Discussion of the right to development began in the 1960s and 1970s, when the redistribution agenda of the New International Economic Order (NIEO) was prominent. The Declaration refers to the NIEO when it says that states have both a right and a duty to implement development "in such a manner as to promote a new international economic order. . . ."[23] The NIEO originates in the work of the then Non-Aligned Movement that existed in the Cold War, which secured a UN General Assembly Declaration for the Establishment of a New International Economic Order, a Programme of Action for a NIEO, and a Charter of Economic Rights and Duties of States.[24] The United Nations Conference on Trade and Development (UNCTAD) was at the centre of

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[19] Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development," *California Western Int'l L. J.* 15 (1985): 473-509, 473-474.

[20] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, 27 June 1981, 21 I.L.M. 58 (1982). Article 22 of that Charter provides that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" and "States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

[21] *See* Stephen P. Marks, "Obligations to Implement the Right to Development: Philosophical, Political and Legal Rationales," in Bård A. Andreassen & Stephen P. Marks eds., *Development as a Human Right: Legal, Political, and Economic Dimensions* (Cambridge MA: Harvard School of Public Health, 2006).

[22] Committee on Economic, Social and Cultural Rights, "Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development," E/C.12/2011/2, 12 July 2011.

[23] Declaration, Article 2(3).

[24] Piron, 9.

the NIEO agenda and posited itself as an alternative to the then GATT as a source of influence on what the structure of the global economy should be. While the somewhat unarticulated moral claims underlying the NIEO are sound, some of the economics was not, and the NIEO as a movement is now not discussed and is moribund.[25]

The Declaration is probably the best place to understand what the content of the right to development might be, at least as it is understood by lawyers. Article 1 of the Declaration specifies the right as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."[26] The Declaration provides that the right "implies the full realisation of the right of peoples to self-determination. . . ."[27] The right goes beyond economic development. Rather, its object is development of the human person, stated in the Declaration in language complementary to them Nussbaum and Sen capabilities account. The Declaration provides that "the human person is the central subject development and should be the active participant and beneficiary of the right to development."[28] Human rights are to be respected and the Declaration seems to advocate a rights based approach to development, though the Declaration also refers to welfare improvements.[29]

In terms of what the Declaration calls "responsibilities," both individuals and states have them. The Declaration provides that "all human beings have a responsibility for development, individually and collectively."[30] It states that all human beings "should . . . promote and protect an appropriate political, social, and economic order for development."[31] States have

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[25] Former U.S. President Ronald Reagan characterised it as "dead" in 1981. Adam Sneyd, New International Economic Order (NIEO), http://www/globalautonomy.ca/global1/servlet/Glossarypdf?id=EV.
[26] Declaration, Article 1(1).
[27] Declaration, Article 1(2).
[28] Declaration, Article 2(1).
[29] Declaration Articles 2(2), 3(3), 6.
[30] Declaration Article 2(2).
[31] *Ibid*.

"the right and the duty" to "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals," with an emphasis on "meaningful participation" and "fair distribution of benefits."[32] The Declaration further specifies that "states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."[33] States also have a "duty to cooperate" to ensure development and the elimination of obstacles to it.[34] They also have the "duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development."[35]

The right to development is known as a "group right," a right held by the group and not its members individually or severally.[36] Human rights lawyers have characterised the right to development as a "third generation" right, though that usage may have fallen into disuse.[37] First generation rights are civil and political. Second generation are economic, social and cultural. Third generation are those that do not fit these categories, such as the right to development, the right to self-determination, a right to a clean environment, and so on. Third generation rights are generally group rights.

It is widely accepted that the right to development is not a norm of international law to be applied generally to all states. To the extent that it is international law at all, it is a norm of treaty law as it is stated in the African Charter on Human and People's Rights, applicable to the states which are members of the Organisation for African Unity. The Declaration is a

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[32] Declaration Article 2(3).

[33] *Ibid.*

[34] Declaration Article 3(3). Also, Declaration Article 4(2), in a strange twist of passive voice says that "sustained action is required to promote rapid development of developing countries" and that "effective international cooperation is "essential" as a "complement" to the efforts of developing countries. *See also* Declaration Article 8.

[35] Declaration, Article 4(1).

[36] *See* Peter Jones, "Group Rights", *The Stanford Encyclopaedia of Philosophy (Winter 2008 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2008/entries/rights-group/>.

[37] Piron, 11. *See* James Crawford ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1992).

General Assembly resolution which does not have the status of international law and at most might be evidence of the *opinio juris* necessary for a norm to constitute customary international law, but not state practice.[38] The evidence that it might present is far from conclusive, however, particularly because a number of developed country governments have expressed the view that the right to development does not result in an international legal obligation.[39] Neither of the two elements of settled and consistent state practice and *opinio juris* (sense of legal obligation) are present.

It just might be that arguing that the right to development is law at all is impractical in the threshold sense that the norms it embodies could not even be characterised as legal in the way they are expressed and constructed. This sort of argument would preclude us from taking the step of evaluating the right to determine if it is customary international law at all. The right is typically not expressed in the language of law. It does not provide the adequate guidance of the behaviour of states and persons. For example, consider what the Declaration calls "responsibilities." It states responsibilities on such predicates as "appropriate political, social, and economic order for development,"[40] to "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals," to emphasise "meaningful participation" and "fair distribution of benefits"[41] and to create "national and international conditions favourable to the realization of the right to development."[42] I here rely upon what has become known as a thin conception of the rule of law here, one which Joseph Raz and John Rawls have formulated.[43] I certainly do

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[38] *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.,* Merits Judgment, *ICJ Reports* 1986, paras. 184, 188; *Legality on the Threat or Use of Nuclear Weapons,* Advisory Opinion, *ICJ Reports* 1996, para. 73.

[39] Piron, 13.

[40] Declaration Article 2(2).

[41] Declaration Article 2(3).

[42] *Ibid.*

[43] Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008): 20-21.

not suggest that rights, fairness, justice or well-being have no place in the law. Whether they come in to the discussion of rule of law is another subject beyond our scope here.

The right to development, or various components of it, might be characterised as what many international lawyers have termed "soft law."[44] The concept of soft law, whilst accepted by a good many international lawyers, is a contested concept.[45] To say that the right is influential but not binding may true. Whether or not this requires classification as soft law is an open question.

To say that the right to development is not international law does not mean that no human rights law deals with development. Here we see the problem of scope. If we conceptualise development broadly, as referring to development of the human person, it would be difficult to find any human right that would not fall within the scope of a right to development, or more accurately, a bundle of rights dealing with development. Looking at theories about development, such as those specifying development as aimed at capabilities, human flourishing, or freedom, these tell us that a number of rights connect very concretely to development. Even conceptualising the right to development narrowly, as focusing on material well-being, gets us little in the way of delimitation, as it could then be said that the right to development includes a number of economic and social rights. Possibly fatal to the idea of a right to development, it does no work if other rights are doing so.

Conventions and customary international law might not be the right place to start in the discussion of a right to development, or of any human right. Onora O'Neill has argued that

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[44] Felix Kirchmeier, "The Right to Development – Where do we stand?," Friedrich Ebert Stiftung, Dialogue on Globalization, Occasional Papers Geneva No. 23, 2006.

[45] Critics conceptualise law in binary terms. A norm either is law or it is not. Others see normativity or bindingness as a continuum, which, from a legal (but not moral) perspective, means that hard law is positive and binding while soft law is declarative and aspirational. For a survey but generally supportive account *see* Alan Boyle, "Soft Law in International Law-Making" in Malcolm D. Evans, *International Law* (Oxford: Oxford University Press, 3rd ed. 2010): 122-140; *see also* Gregory C. Shaffer & Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance," *Minnesota L. Rev*. 94 (2010: 706-799, 712-720.

looking only for human rights in documents is question begging.[46] Her argument brings out a host of questions having to do with whether rights are pre-institutional, in the form of human (or natural) rights in morality, or not. Rawls handled this question by arguing for a minimum content of natural law, Locke claimed a fuller specification, while Bentham has argued the only rights we have are those which are legally posited. This is a discussion far beyond the bounds of this chapter and I have identified only a few with views on the subject. Its significance here is that it leads to the question whether a right to development *should* be international law, if one accepts the idea that principles of political morality give law legitimacy or practical authority. Philosophers have also dealt with the question of what is a good starting point, rights or duties. Should we focus on a *right* to development or *duties* of justice or assistance owed to persons in poverty in developing countries? Notably, the Declaration specifies both rights and duties. What needs to happen, however, is a more specific identification of rights holders and duty bearers and how the duty bearers might be able to discharge their obligations for the right to be susceptible to implementation and enforcement. Other discussions of human rights and principles of justice, which do not focus on a right to development *per se*, such as those found in the chapters by Gillian Brock and Ernst Ulrich-Petersmann, seem to hold more promise.

II. *The Intellectual History of Law and Development*

Whilst the prior section of this chapter dealt with the question whether a human right to development exists in international law, this section deals with a question that is not international but comparative in character: what is the role of law in the development of persons, states and societies? So called "law and development" has been an area of inquiry that has evolved since its modest beginnings in the 1950s. The evolution of the study of law

[46] Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000): 99-100.

and development roughly corresponds with movements in theories about the development of countries more generally. What is perhaps more significant is that law and development as a field tends to follow the influential thinking of the day on development. For example, when modernisation theory was influential in political science, it was also influential in law and development studies. So too, as new institutional economics is influential, law and development leaned towards economics. No doubt the latter is also the result of the influence of law and economics in North American legal scholarship.

The discussion to follow of the various movements in law and development has to reflect what Trebilcock and Prado call the ends and means of development may differ depending on the particular approach.[47] These differences will be identified where appropriate in the discussion to follow.

This chapter partly follows the history of intellectual thought about law and development laid out by David Trubek, Marc Galanter and others, and adds areas these authors do not cover or emphasize, in particular rights based and capabilities approaches. As in every attempt to classify a body of work, the classifier's value judgements enter in, and the exercise is at least partly prescriptive. Law and development is a huge subject with amorphous borders, and no doubt I have left out significant scholars in the account to follow. The brief survey in this chapter is more one of concepts and theories than of the literature.

A. *Law and Development and Modernisation Theory*

Modernization theory, employed principally by political scientists and political economists, is formed around the core claim that economic development links casually to social and political change, usually in the form of liberal democracies.[48] It was at its height of

[47] Michael J. Trebilcock & Mariana Mota Prado, *What Makes Countries Poor? Institutional Determinants of Development* (Cheltenham: Edward Elgar, 2011): 1-40.
[48] Berman, 1.

prominence in the late 1950s and into the 1960s. Among the most important of articles on the subject is Seymour Martin Lipset's "Some Social Requisites of Democracy," first published in 1959, in which Lipset claims, "the more well-to-do a nation, the greater the chances it will sustain democracy."[49] The idea here is that if we can get a state on the path towards economic development, profound social changes will result which together tend to result in the flourishing of democracy in the form of a liberal state.[50] Modernization theory is more nuanced and developed than these short descriptions and its findings have been criticized, mainly on the point of the link between modernisation resulting in liberal democratic political order.[51] As explained below, the critique of modernization theory shares similarities with the critique of the first law and development movement that closely associates with it. The theory has had something of a resurgence in recent years, in the work of Adam Przeworski, Michael Alvarez, Jose Antonio Cheibub, and Fernando Limongi,[52] Daron Acemoglu and James Robinson,[53] Ronald Inglehart and Christian Weizel,[54] and Charles Boix.[55]

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[49] Seymour Martin Lipset, "Some Social Requisites to Democracy," *American Political Science Review* 53 (1959): 69-105.

[50] Berman, 1.

[51] For one of its most influential critics, *see* Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 2011); Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968).

Dependency theorists, mainly a group of Latin American scholars and mainly economists, also mounted a significant challenge to modernisation theorists. One of their central claims was that developing countries are in a relationship of dependency on developed countries and that this relationship increases economic inequality in developing countries and makes their citizens worse off. There was a significant class aspect to this claim, as elites in developing countries either control the export sectors in their country or benefit from relationships with multinational firms who come to their countries to mine, manufacture or sell goods to these elites. Dependency theory a form of historical materialism, focuses on the structure of economic functions of production and consumption in a society. The dependency theorist found that law and legal institutions in developing countries reflect the interests of elites. Dependency theory tended not to focus on reform of law and legal institutions. Rather to a dependency theorist, political change was required, and only with fundamental change at the level of politics could legal change be brought about. For a brief survey see Kevin Davis & Michael Trebilcock, "What Role do Legal Institutions Play in Development?," 20 Oct. 1999, prepared for the International Monetary Fund Conference on Second Generation Reforms, 8-9 Nov. 1999.

[52] Adam Przeworski, Michael E. Alvarez, Jose Antonio Cheibub, & Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge: Cambridge University Press, 2000).

[53] Acemoglu & Robinson.

[54] Ronald Inglehart & Christian Weizel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* (Cambridge: Cambridge University Press, 2005).

[55]Carles Boix, *Democracy and Redistribution* (Cambridge: Cambridge University Press, 2003).

When modernization theory first came to prominence in political science, it was at that time that law and development first took root as an area of inquiry and as consulting on law reform and legal education in developing countries. Its rise tracked quite closely with the rise of modernization theory in political science. Given the Cold War at the time, the work focused primarily on countries in sub-Saharan Africa and Latin America, in the then called "Third World."[56] The area was almost exclusively limited to a small number of legal scholars in the United States and Europe.

The first law and development movement was an assemblage of legal scholars and lawyers who were funded by development agencies, foundations, and universities to provide development assistance to developing countries. It was largely influenced by modernisation theory. A functioning, modern legal system was seen to be essential for a modern, then industrial, economy.[57] The focus on this first movement, however, was on more than economic development. A modern legal system was seen as essential for political and social development, with the idea being that a modern legal system would help to catalyse a move towards liberal democracy in which pluralism would flourish and rule of law would curtail arbitrary state action and help to bring about social change.[58] This is what David Trubek and Marc Galanter have labelled "liberal legality."[59] As Trubek and Galanter explain:

> "Law" was seen as both a necessary element in "development" and a useful instrument to achieve it. "Law" thus was "potent" and because legal development would foster social development and improve human welfare it was also "good." Law implied impersonal governance through universal rules, and governance through law would lead to more inclusive and more equal treatment of all citizens. Accordingly, the development of legal institutions was seen as a way of increasing equality and widening participation. Law was seen as a technique for curbing arbitrary government action, and as a means of both protecting individual freedom and ensuring greater government

[56] There was a *Third World Legal Studies* journal published from 1983 to 2002 at Valparaiso University School of Law. It was the official publication of the International Third World Legal Studies Association.

[57] David Trubek, "The 'Rule of Law' in Development Assistance: Past, Present and Future," in Trubek & Santos, 75.

[58] Trubek & Galanter, 1073-1074.

[59] *Ibid.*, 1070-1080.

> responsiveness. Legal development would enlarge the sphere of liberty and simultaneously guarantee that governments would act in accordance with the wishes of the citizens. Moreover, law was also associated with rational, instrumental action to secure greater material well-being and other development goals. Law was one of the tools that could be used by planners consciously seeking to enhance human welfare. If law became more effective, the planners' powers would grow."[60]

Liberal legality had a distinctively American character, one borne out American Legal Realism and its focus on the law as an instrument of social change, and on lawyers as social engineers and problem solvers for society. Law in the first law and development movement was vigorously instrumentalist. It was a means to the ends of political development and social evolution. American Legal Realism had a profound effect on the way the law is understood in the United States. It was borne of a time when significant change was happening in the United States, at the beginnings of the New Deal era. Legal Realism was partly a response to classical legal thought, which saw law as an autonomous normative order, in which law and judicial decision making was divorced from a consideration of the effects of the law in society. The classicists, or legal formalists as the legal realists characterised them, saw law as something that had to stay true to its form and its internal content. To these lawyers, law and justice are separate domains and it is not up to the judge to consider the fairness or burdens a particular law or legal judgment might impose on people. The concern of the legal realist was that law so understood backed powerful interests and ideologies that support their social structure. Legal Realism indeed saw at in its early period significant changes in the composition of the U.S. Supreme Court by President Franklin Delano Roosevelt to break the lock up of the Supreme Court, which sought to overturn New Deal legislation as unconstitutional. Legal Realism is the intellectual lineage for the way many American lawyers think of the law. American lawyers and law professors tend to uncritically accept that

[60] *Ibid.*, 1073-73 (footnotes omitted).

litigation is a tool to bring about social change and to promulgate new policy with far-reaching social effects beyond the parties to the litigation.

In his critique of the first law and development movement, John Henry Merryman explains that the image of the U.S. law school graduated, as promoted by American law schools, is as "self-conscious expert in bringing about progressive social change."[61] Merrryman continues:

> The unusual prominence of lawyers and of law in the social transformations that have taken place in the U.S. since World War II is a product of this intellectual environment. Law is widely perceived as the proper medium for social reform. The civil rights or public interest lawyer is the protagonist of a drama which is variously perceived as "achieving social justice through law," "reforming the system," righting the wrongs of society," and the like.[62]

Merryman critiques this vision as parochial. He explains that "It is important to understand that this view of lawyers as social engineers (or as omnicompetent problem solvers) is peculiarly a U.S. view," though it has "penetrated to some extent into Canada and Australia." He continues:

> [I]n most of the world, including the developing world, lawyers are perceived, and perceive themselves, quite differently. The law and development movement, primarily a U.S phenomenon, has incorporated a view of the role and competence of lawyers that is unfamiliar to and inconsistent with the legal cultures of most developing societies.[63]

The first law and development movement laid great emphasis and put great effort into reforming legal education. The focus was on moulding law schools in developing countries into an American (or perhaps North American) model of legal education. In a robustly Legal Realist approach, the aim was to free developing country lawyers from their "formalist fretters."[64] The significance of this has to be understood in the context that American legal education differs greatly from how the rest of the world does legal education. Law and

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[61] Merryman, 465-66.
[62] *Ibid.*, 466, footnotes omitted.
[63] *Ibid.*,466.
[64] Ohnesorge, 237-36-239.

development scholars promoted a thoroughly instrumentalist approach in their projects in legal education.[65] Their approach was quite alien to many in the developed world and would be even in Europe, where law schools separate the academic and the vocational and the first law degree has more liberal than professional aspirations.[66]

A way to understand how law and development scholars might think and connect to modernisation theory is to look a one article written at the height of the movement, about the adoption by Ethiopia of a civil code. Legal transplantation, the idea that the law of a developed country could be transplanted to a developing country, was a powerful idea in the first law and development movement. A substantial literature in comparative law has grown around the idea and critique of legal transplants.[67] The 1960s literature on legal transplants is telling. René David, writing about Ethiopia's efforts to transplant a European civil code, explains in way that connects law and development very concretely to modernisation:

> Ethiopia cannot wait 300 or more years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a "ready made" system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations (with an understood reservation for a subsequent adaptation, to specific Ethiopian needs, of the *corpus juris* thus received).[68]

In what seems clearly aligned to modernisation theory, David says that while for developed countries, one would expect a code to accord with local customs, not so with developing countries. As David explains,"[t]his position is not that of the Ethiopians, nor of other countries comparable to Ethiopia, which are looking toward a total renewal of the basis of

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[65] Trubek & Galanter, 1075.

[66] Merryman, 478.

[67] This literature is far too vast to deal with in this chapter. They sometimes stick but the conditions have to be right. For a canonical account, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens GA: University of Georgia Press, 1993).

[68] René David, "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries," *Tulane Law Review* 37 (1963): 187-204, 188 (citation omitted).

their society."[69] Later, he argues to account for limited custom "only to the extent that they correspond to a profound sentiment of the Ethiopian people, and conform to that which is felt by them as being just."[70] His justification: "Ethiopia has suffered to the present from a vice inherent in the customary law, which is the uncertainty of customs giving rise in too numerous circumstances to the arbitrariness of the chief of the village or of the judge: an arbitrariness particularly formidable in a time of transformation where new questions are presented to which ancient customs provide no response."[71]

David's arguments today seem naïve. It is now well accepted that codes imposed from the top down in the fashion so described risk failure.[72] Mechanical transplantations alone do not automatically produce legal systems. Incorporating customs are now well accepted as a means for achieving 'buy in" of the population of a country into legal reform. A law which is not accepted by major social groups risks being perceived as illegitimate to the population it is intended to serve, an alien intrusion to which few will likely devote allegiance. The animating presupposition underlying David's analysis is the notion that abstract rules decide concrete cases. The new codes were too often captured by local elites and used in ways to aggravate inequality or arbitrariness in public decision making.[73]

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[69] *Ibid.*, 193.
[70] *Ibid.*, 194.
[71] *Ibid.*, 203.
[72] The conditions for success of legal transplants are not well known and a good deal of disagreement exists on the subject. *See* Hideki Kanda & Curtis J. Milhaupt, "Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law," (March 24, 2003). Columbia Law and Economics Working Paper No. 219. Available at SSRN: http://ssrn.com/abstract=391821 or http://dx.doi.org/10.2139/ssrn.391821. A substantial literature in New Institutional Economics has made significant findings and is broadly complementary to the arguments set forth above. *See* Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, "The Transplant Effect," *Am. J. Comp. L.* 51 (2003): 163-203; Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, "Economic Development, Legality, and the Transplant Effect," *European Economic Review* 47 (2003): 165-195. It seems clear, however, that transplantation into a developing country that does not have a functioning legal system to begin with requires quite a bit of the laying of groundwork for acceptance by both the population and legal professionals. What may sought to be transplanted is the very notion of rule of law itself. Jane Stromseth, David Wippman & Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Intervention* (Cambridge: Cambridge University Press, 2006): 74-76. *See also* Trubek, 78.
[73] Trubek, 78-79.

The first law and development movement was short lived and went into serious decline by the early 1970s. As explained above, it suffered from an overly optimistic parochialism or perhaps blind faith in the capacity to reform legal systems in developing countries and the effects that reform would have across society and government. Perhaps the critique that has been the most prescient is that of Merryman's. His was a critique of methodology, that the law and development movement did not use the tools of the social sciences and the humanities.[74] In more recent research on law and development, we see more developed methodological toolkit.

B. *The Washington Consensus and New Institutional Economics*

Economics has had a longstanding engagement with questions of development, principally with a focus on economic growth. In the history of economic thought, however, mainstream economic theories have tended to view the state and its institutions, including the law, as exogenous to their models. If they were to advocate government intervention, as a Keynesian economist might do, the law was exogenous to policy. Chicago School and neoclassical economics did not advocate government intervention and only saw law as a way to protect property and exchange rights and to maintain a very thin conception of rule of law based principally on negative economic liberty and private law. Hayek's approach to economics departed from the Chicago School in some respects, in particular with its focus on incomplete information, uncertainty and the limits of human knowledge, but still placed great emphasis on economic liberty and noninterventionism and shared a similar conception of the law with the neoclassicists.[75] The Chicago School and Hayek were major influences on the so-called Washington Consensus, which advocated a massive shrinkage of government in

[74] Merryman, 473-483.

[75] *See* Chantal Thomas, "Law and Neoclassical Economic Theory in Theory and Practice: Toward an Institutionalist Critique of Institutionalism," *Cornell L. Rev.* 96 (2011): 967-1024, 974-976.

developing countries, macroeconomic stabilisation, reducing or eliminating budget deficits, liberalising trade and foreign investment, privatisation, and deregulation.[76] The Washington Consensus saw a limited role of the state to facilitate market exchange through clear specification of property rights and enforcement of these rights by a professionalised and independent judiciary.

New Institutional Economics (NIE) differs from neoclassical microeconomics by incorporating the analysis of institutions into economics.[77] As it is explained by Nobel Laureate Douglass North, of the founding generation of NIE, "in contrast to the many earlier attempts to overturn or replace neo-classical theory, the new institutional economics builds on, modifies, and extends neo-classical theory to permit it to come to grips and deal with an entire ranges of issues heretofore beyond its ken."[78] Nobel Laureate Ronald Coase's seminal articles, "The Problem of Social Cost"[79] and "The Nature of the Firm"[80] connected institutions and exchange together in powerful way. "The Problem of Social Cost" could also be seen as the start of modern law and economics. The Coase Theorem provides that when transaction costs are zero, institutions do not matter, transacting parties will bargain to an efficient result. Of course, transaction costs are almost never zero and are in fact often substantial. A substantial part of the national income of a given country is allocated to

[76] *Ibid.*

[77] Douglass C. North, "The New Institutional Economics and Development," *ideas.repec.org/p/wpa/wuwpeh/9309002.htm* (Sept. 1993). It is called "new" to distinguish it from the "old" institutional economics of the early twentieth century. Ronald Coase, "The New Institutional Economics," *AEA Papers and Proceedings* 88 (1998): 72-74.

[78] North, "The New Institutional Economics and Development," 1. North's major works include Douglass C. North, *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2010); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); Douglass C. North, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England* (Cambridge University Press, 1989); Douglass C. North, *Structure and Change in Economic History* (New York: Norton, 1982); Douglass C. North & Robert P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: Cambridge University Press, 1976).

[79] Ronald Coase, "The Problem of Social Cost," *J. Law & Econ.* 3 (1960): 1-44.

[80] Ronald Coase, "The Nature of the Firm," *Economica* 4 (1937): 386-405.

transacting.[81] The neoclassical outcome of efficient markets occurs only when transaction costs are zero, a very rare case and certainly not a general one.

How does NIE connect to law and development? NIE became very popular with development institutions such as the World Bank, which has advocated policy prescriptions based on NIE. As Trubek explains, "[t]oday the enterprise of law reform in developing and transition countries is big business, far eclipsing even the wildest dreams of the L&D pioneers."[82] The emphasis of development institutions like the World Bank went from "hard" infrastructure of project lending for roads, dams, and buildings and policy based lending aimed at getting macroeconomics right, to "soft" infrastructure focusing on technical assistance in rule of law and more generally on "governance." Bilateral agencies such as USAID also moved towards focusing aid on rule of law. If one were to look at working papers coming out of the World Bank, the regional development banks, and bilateral aid agencies on law and development, one will see the substantial influence of NIE. A significant literature in NIE focuses on the determinants of economic development.[83] The "law and economics" of development is today the dominant way of doing law and development inquiry.

A way to understand how NIE competes with alternative accounts on investigating the causes of economic growth is to briefly survey a discussion about whether geography or property rights and the rule of law causally link to economic growth. Two candidates to explain the causes of the differences in wealth between poor and rich countries are geography and institutions. Daron Acemoglu explains those who accept the "geography hypothesis," contend that the "geography, climate, and ecology of a society shape both its technology and

[81] North, "The New Institutional Economics and Development," 2.
[82] Trubek, 81.
[83] A representative text is Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington DC: Brookings, 2006).

the incentives of its inhabitants."[84] The geography hypothesis offers a non-institutional explanation of the determinants of economic growth, finding the causes to be natural, not institutional. The "institutions hypothesis," according to Acemoglu, is that societies with "good institutions that encourage investment in machinery, human capital, and better technologies"[85] achieve better levels of economic prosperity. According to Acemoglu:

> Good institutions have three characteristics: enforcement of property rights for a broad cross-section of society, so that a variety of individuals have incentives to invest and take part in economic life; constraints on the actions of elites, politicians, and other powerful groups, so that these people cannot expropriate the incomes and investments of others or create a highly uneven playing field; and some degree of equal opportunity for broad segments of society, so that individuals can make investments, especially in human capital, and participate in productive economic activities.[86]

Acemoglu's theory is historical. He claims that historical evidence suggests that the prosperity of a society depends on the colonization strategy employed by European colonizers. In some cases, Europeans established extractive institutions, such as in the Belgian colonisation of the Congo, British slave plantations in the Caribbean and forced systems of labour by the Spanish in Latin America. Extractive institutions of the kind established in these societies fail to result in good institutions being established.[87] In contrast, in other cases, Europeans established settler societies which copied and in some cases improved European institutions which protect property rights and constrain elites. The notable examples include Australia, Canada, New Zealand and the United States.[88] Acemoglu's later work focuses more directly on civil and political rights and participatory democratic institutions.[89] Dani Rodrik and Arvind Subramanian make a different claim about institutions but still maintain that institutions matter to economic development. In fact,

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[84] Daron Acemoglu, "Root Causes: A Historical Approach to Assessing the Role of Institutions in Economic Development," *Finance and Development*, June 2003, 27-30.
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*; *see* Acemoglu & Robinson.
[88] *Ibid.*
[89] *See* Acemoglu & Robinson.

according to Rodrik and Subramanian, the evidence is robust. Their regression analysis came to what they call "sharp and striking results" that "the quality of institutions overrides everything else."[90] Rodrik and Subramanian seem to define institutions more broadly than most and include a good bit of what lawyers call public law, law regulating economic sectors, financial markets and banking and laws which provide social protection, engage in redistribution and manage conflict. This is all to be contrasted with the work of Jeffrey Sachs, who argues that it is much more than institutions that matter for economic prosperity and that geography and resource endowments play a significant role.[91] The three views reflected in here are but examples of the sorts of debates that go on about the relevance of institutions to economic development.

Some of the more recent and influential work in NIE is in legal origins theory. The main work in NIE tells us that law matters. Legal origins theory tells us that legal origins matter.[92] Put perhaps too simply, the empirical research on legal origins finds that the common law is better than the civil law for economic growth. The legal origins research is relatively recent phenomenon, starting with a publication on law and minority shareholder protection in 1997.[93] It nevertheless has resulted in a large number of widely cited articles.[94] It has also been widely influential on governments as well as on foreign investors, in a World Bank publication known as the *Doing Business* reports, which publish cross-country comparisons and rankings of the attractiveness of legal systems for doing business.[95] Widely criticised, the

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[90] Dani Rodrik & Arvind Subramanian, "The Primacy of Institutions (and what this does and does not mean)," *Finance and Development*, June 2003, 31-34.

[91] Jeffrey D. Sachs, "Institutions Matter but not for Everything: The Role of Geography and Resource Endowments in Development Shouldn't be Underestimated," *Finance and Development*, June 2003, 38-41.

[92] Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law, *Am. J. Comp. L.* 57 (2009) 765-795, 769.

[93] Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, "The Economic Consequences of Legal Origins," *J. Econ. Lit.* 46 (2008): 285-332.

[94] For a collection of the significant research on legal origins, *see* Simon Deakin & Katharina Pistor, *Legal Origins Theory* (Cheltenham: Edward Elgar, 2012).

[95] *See* http://www.doingbusiness.org/reports/.

Doing Business reports nevertheless have the highest circulations of any World Bank publication.[96]

Legal origins theory has developed from the work of a relatively small number of economists, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny.[97] They have gained some notoriety as a result of their research, and their research is often labelled by the initials of their surnames, LLSV or LLS.[98] Whilst others do research in legal origins, LLSV remain the core influential figures. Their work started with a narrow focus on protections of minority shareholders in various legal systems, and was initially known as the "law and finance" literature.[99] Their work has since expanded to a number of legal areas, including government ownership of banks, barriers to entry regulation, regulation of labour markets, government ownership of media, formalism of judicial procedures and judicial independence.[100] In all of these cases, the findings are that the civil law is associated with more substantial government ownership, more formalism in judicial procedures, and less judicial independence.[101]

Legal origins theory has come under considerable attack. Some of the criticism was accepted by LLS but they maintain the essentials of their findings. They reject criticisms that legal origins are proxies for some other factor such as culture, politics or history. They have expanded their conception of legal origins considerably and define legal origin as "the style of social control of economic life."[102] They argue, subject to caveats in the literature, that the common law "stands for the strategy of social control that seeks to support private market

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[96] Michaels, 766.
[97] Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer surveys the field as of 2008.
[98] Michaels, 768.
[99] *See* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance, J. Pol. Econ.* 106 (1998): 1113-1155; Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, "Legal Determinants of External Finance," *J. Finance* 52 (1997): 1131-1150.
[100] Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, 286.
[101] *Ibid.*
[102] *Ibid.*

outcomes," whilst the civil law "seeks to replace such outcomes with state-desired allocations."[103]

The NIE literature on law and development is extensive. More could be covered, such as the innovative empirical studies on legal transplants.[104] The empirical work being done is adding new insights to a number of areas. Hernando de Soto's accessible work on the informal sector and the unofficial economy could be said to connect a number of strands of both modernisation theory and NIE.[105]

The NIE approach to law and development has a number of shortcomings. Its focus tends to be on a very thin idea of the law as a facilitator of market exchange. Its concern is mainly about rule of law to promote economic prosperity. It specifies a minimalist state that is essentially open for business for multinationals. This conception of the law is, after all, all that is needed for economic growth. It is broadly consistent with neoliberal agenda of the Washington Consensus. Rodrik and Acemoglu have attempted to broaden notions of institutions. Rodrik writes of the need for "institutions for social insurance" and Acemoglu seems to presume a certain kind if minimal distribution in the sense that law has to serve the interests of a broad segment of people to be effective. Economists do not have the means to specify the actual rules and institutions that are needed. Nor do they have anything to say about distribution or distributive justice other than in understanding its costs and how it might be in conflict with efficiency. Their focus is also a thin notion of development, that of economic development or economic growth. A focus on economic growth has the real potential to mask concerns about aggregation, inequality, marginalisation and social exclusion of minorities, and the entrenchment of power within elites. These concerns help us to see the role for normative political theory and political philosophy, the work for which

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[103] *Ibid.*

[104] *See* n. 74 above.

[105] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic, 2003) Hernando de Soto, *The Other Path* (New York: Basic, 2002).

may be seen as coming prior to economics, at least from an intellectual standpoint. While economics tells us about the effects of institutions on behaviour and material well-being, it cannot tell us why we should accept an institution as a just scheme of social cooperation.

Finally, while law and development in its NIE version differs from the old law and development influenced by modernisation theory, both approaches share a robust instrumentalism when it comes to the law. Their ends and means differ, but they share a commitment to legal instrumentalism.[106]

C. Capabilities and Human Rights Based Approaches

As explained above, economic approaches to law and development tend to focus on how law is an instrument for promoting economic growth. In examining economic growth through the lens of development, the traditional measure becomes GDP per capita. To use the terminology of Sen in his monumental work, *Development as Freedom*, this is a question of what are the ends of development.[107] An NIE scholar would be interested in explaining or predicting how a set of particular legal reforms or institutions might affect the economic growth rate of a country. A number of limits have been identified with such a measure. It engages in aggregation, which does not inform us of disproportionate burdens that might be put on particular groups, most notably vulnerable groups or historically aggrieved minorities or other groups. It does not tells us anything about inequality, either generally in a society or more particularly about inequalities relating to minorities, women and other groups. GDP per capita provides a thin measure of well-being.

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[106] Michaels, 786.

[107] Amartya Sen, *Development as Freedom*. This is also an important theme in Michael Trebilcock & Prado. Sen's later work more generally dealing with his theory of justice sets forth the capabilities approach more generally more generally. Amartya Sen, *The Idea of Justice* (Cambridge MA: Harvard University Press, 2009): 225-290. *Development as Freedom* also builds on Sen's prior work, in particular Amartya Sen, *Commodities and Capabilities* (Oxford: Oxford University Press, 1999); Amartya Sen, *Inequality Reexamined* (Cambridge MA: Harvard University Press, 1992), and Amartya Sen, *Choice, Welfare & Measurement* (Cambridge MA: Harvard University Press, 1982).

Each of these limits has been addressed in related ways in the development literature. Human rights-based accounts of development deal with the problem of aggregation, though they do more than that. As Peter Uvin explains, the rights based approach to development "draws the attention away from aggregates and averages – from GNPs, average growth rates, numbers of the poor and malnourished - toward individual claims conferring rights and duties."[108] The human rights based approach to dealing with questions of development is distinct from the right to development, discussed above, but it did not start out that way.[109] After the Cold War, development banks and aid agencies began to incorporate human rights into their mandates.[110] In the 1990s, human rights became part of the "good governance" agenda promoted by the World Bank and other institutions.[111] This good governance agenda could be said to link to law and development. Peter Uvin has criticised these moves as as "rhetorical repackaging" and as stretched to cover subjects not meant to be the subject of human rights. To quote Uvin's critique:

> [P]olicies that were once justified by their potential to improve investor confidence are now justified for their human-rights potential, at least in brochures destined for the human rights community. Nothing else, however, changes. It takes more than a few ideological leaps to see how strengthening financial systems is a human-rights activity. One feels sure that the framers of the University Declaration and the two Covenants were not thinking of shoring up banking-reserve requirements, improving accounting standards, or current-account liberalization when they were building the human-rights edifice.[112]

These criticisms may be too harsh. Some institutions have taken proactive and substantive agendas to promote governance, in particular forms of governance based on democratic accountability.[113]

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[108] Uvin, *Human Rights and Development*, 130.

[109] Peter Uvin, "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development," *Development in Practice* 17 (2007): 597-606, 598-599.

[110] *Ibid.*, 599.

[111] *Ibid.*, 600.

[112] *Ibid.*

[113] Christina Biebesheimer, "The Impact of Human Rights Principles on Justice Reform in the Inter-American Development Bank," *in* Alston & Robinson, 269-296.

Depending on one's point of view, rights-based accounts of development benefitted, were supplanted or at least became less influential with the rise of the capabilities account, also sometimes known as the human development approach.[114] The approach has its intellectual history in the work of Aristotle, Adam Smith and Karl Marx and its contemporary proponents are economist Amartya Sen and philosopher Martha Nussbaum.[115] The capabilities account is a theory about development that accepts two claims: first, that freedom to achieve well-being is a moral imperative, and two, that such freedom should be understood in terms of people's capabilities.[116] Capabilities are people's opportunities "to do and be what they have reason to value."[117] Nussbaum describes the capabilities approach as:

> an approach to comparative quality-of-life assessment and to theorizing about basic social justice. It holds that the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, "What is each person able to do and to be?" In other words, the approach takes *each person as an end*, asking not just about the total or average of well-being but about opportunities available to each person. It is *focused on choice or freedom*, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action. . . .[118]

Development in the capabilities account is about expanding human freedoms.[119] It is a thicker account of development than the standard economic measures. Economic growth is a means to an end and not an end in itself. It is a means to the development of human freedom.[120] According to Sen, development "requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic

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[114] Martha C. Nussbaum, *Creating Capabilities*,17.

[115] Ingrid Robeyns, "The Capability Approach", *The Stanford Encyclopedia of Philosophy (Summer 2011 Edition)*, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/sum2011/entries/capability-approach. *See* n. 107 above for Sen's writings. For Nussbaum, *see* Nussbaum, *Creating Capabilities*, Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, and Species Membership* (Cambridge MA: Harvard University Press, 2006); Martha C. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000); Martha C. Nussbaum & Jonathan Glover, *Women, Culture, and Development: A Study of Human Capabilities (Wider Studies in Development Economics)* (Oxford: Oxford University Press, 1996).

[116] Robeyns.

[117] *Ibid.*

[118] Nussbaum, *Creating Capabilities*,18.

[119] Sen, *Development as Freedom*, 3.

[120] *Ibid.*

social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states."[121] Note that freedom includes economic and social well-being as well as civil and political rights. So, economic arguments that progress on political and civil rights can be delayed to improve on some purely economic indicators will not do.[122] It is doubtful that such arguments withstand evidence in new institutional economic accounts of development either.

The definition or list of capabilities has changed over time. Sen refers to "functionings," the "various things a person may value doing or being" in his formulation of capabilities.[123] He continues: "A person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles."[124] The capabilities approach is liberal in that it supports the pluralistic ends that people have.[125] In her recent work, Nussbaum offers perhaps a more comprehensive list than Sen of just what capabilities leading to human freedom are. She identifies ten "central capabilities:" (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) concern for and relationships with other species; (9) play; and (10) control over one's political and material environment.[126] Social scientists have developed empirically verifiable measures. The United Nations Development Programme (UNDP Human Development Index (HDI) is the most influential. It includes variables for life expectancy, adult literacy, school enrollment, and health, and adjustments for inequality.[127] In 1995, UNDP introduced two

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[121] *Ibid*.
[122] *See* Posner, "Creating a Legal Framework."
[123] *Sen, Development as Freedom*, 75.
[124] *Ibid*.
[125] *See, e.g.*, Nussbaum, *Creating Capabilities* ("The approach is resolutely pluralist about value. . . .").
[126] *Ibid.*, 33-34.
[127] *See* http://hdr.undp.org/en/statistics/hdi/.

new measures, the Gender Development Index and the Gender Empowerment Measure, which deal with gender inequality.[128]

The capabilities approach has an uneasy relationship with human rights based approaches to development. The capabilities approach arose partly due to deficiencies perceived in a human rights approach. Sen identifies three critiques. First, the "legitimacy critique" of human rights is the concern that rights do not exist pre-politically.[129] Disagreement persists as to the status of human rights and whether they require claims justiciable in a legal system. Second, there is the "coherence critique," which relates to the lack of a link of some rights to identifiable persons with duties to provide them.[130] This is an argument about so-called "imperfect duties" that goes at least back to Kant.[131] Third, the "cultural critique" which has to do with the fact of pluralism and arguments that human rights might not be universal.[132] Human rights may indeed be universal, but the concern here is more about politics than truth. Nussbaum takes a more sanguine view of the relationship between capabilities and human rights, arguing that the approached are "closely allied" and share common ground.[133]

Capabilities approaches are to be distinguished from Rawlsian theories of justice and equality. The primary locus of this debate is on Rawls's notion of social primary goods as being the subject of his theory of justice. Capability theorists contend that Rawls offers too thin a conception of the good. This is a longstanding debate covered elsewhere.[134] The focus of this chapter is on theories of development relating to law and development. To date, Rawls's theory of justice tends to sit in the background of development discussions and has not developed into an approach that is operationalized at the level of development practice or

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[128] http://hdr.undp.org/en/statistics/indices/gdi_gem/.
[129] Sen, *Development as Freedom*, 228-230.
[130] *Ibid.*, 230-231.
[131] *See* O'Neill, *Bounds of Justice*, 97-111.
[132] Sen, *Development as Freedom*, 231-32.
[133] Nussbaum, *Creating Capabilities*, 62-65.
[134] *See e.g.*, Harry Brighouse & Ingrid Robeyns, *Measuring Justice: Primary Goods and Capabilities* (Cambridge: Cambridge University Press, 2010).

policy to an appreciable extent. This is not a criticism of Rawls's theory, probably the most important work in political philosophy of the twentieth century. Rawls's theory of justice has a different and more fundamental aim.

Much more can be said about the capabilities approach to development. The question relevant to this chapter is its influence on law and development and technical assistance in rule of law projects funded by development agencies and development banks. There has been some movement in this area, but it appears to be in early stages.[135] Research by Peter Boettke and J. Robert Subrik suggests that capabilities are correlated to GDP and that countries protecting a thin approach to rule of law, basically property and contract rights and the basic conditions for market exchange, promote economic growth, which in turn promotes capabilities.[136] This research is an outlier and subject to further study. The University of Chicago held a conference in April 2010 on the connection of law and social policy to capabilities.[137] The Human Development and Capability Association maintains a thematic group on capabilities and law.[138] There is much promise in the development of rule of law assistance at the ground level and also research that deals seriously with capabilities.

D. *Other Approaches*

A number of other approaches to development are relevant to law and development. As explained in the Introduction, a detailed discussion of these approaches is beyond the scope of this chapter.

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[135] *See* Maggi Carfield, "Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index," *Washington University Law Quarterly* 83 (2005): 339-360.

[136] Peter Boettke & J. Robert Subrick, "Rule of Law, Development, and Human Capabilities," *Supreme Court Economic Review* 10 (2002): 109-126.

[137] *See* http://www.law.uchicago.edu/creatingcapabilities.

[138] http://www.capabilityapproach.com/Thematic.php?grpcode=thematic16&sid=dd91d5c5023b8ea2f40858a3b2aeec61

Feminist approaches to development stand alone or are included in a broader discussion of gender and development. As stated in the prior section, the capabilities account deals with issues relating to women, mainly through Nussbaum's influential work.[139]

Gender and development has been an area of inquiry and action for several decades. The third Millennium Development Goal is "Promote Gender Equality and Empower Women."[140] A substantial body of empirical research continues to focus on the link between gender equality, poverty reduction and economic growth.[141] Development banks and aid agencies have devoted considerable attention to gender and development.[142] A substantial and growing literature continues to be produced on gender and development.[143]

The relationship of gender and development to law and development occurs along several lines. As a threshold matter, feminists have debated whether to engage in participating in rule of law assistance. The concern is that legal systems are dominated by men and maintained by educated male elites and that the system cannot possibly deal with the needs of women.[144] The prevailing view now seems to be to engage so that the concerns of women are taken into

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[139] *See* n. 115 above.

[140] http://www.unmillenniumproject.org/goals/gti.htm#goal3.

[141] For one survey, *see* Andrew Morrison, Dhushyanth Raju & Nistha Sinha, "Gender Equality, Poverty and Economic Growth, World Bank Policy Research Paper 4349 (Sept. 2007).

[142] The World Bank has published World Development Report 2012: Gender Equality an Development (Washington DC: World Bank Publications, 2011); *see* the World Bank's Gender Equality and Development website at http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/EXTWDR2012/0,,menuPK:7778074~pagePK:7778278~piPK:7778320~theSitePK:7778063~contentMDK:22851055,00.html; *see also* the UNDP's Human Development Reports at http://hdr.undp.org/en/reports/. The 1995 Report is "Gender and Development."

[143] *See. e.g.*, Nalini Visvanathan et al. eds., *The Women, Gender and Development Reader* (London: Zed 2nd ed., 2011); Janet Henshall Momsen, *Gender and Development* (Oxford: Routledge 2nd ed., 2010); Jane S. Jaquette & Gale Summerfield eds., *Women and Gender Equity in Development Theory and Practice: Institutions, Resources, and Mobilization* (Durham NC: Duke University Press, 2006); Andrea Cornwall, Elizabeth Harrison & Ann Whitehead, *Feminisims in Development: Contradictions, Contestations and Challenges* (London: Zed 2006); Lourdes Beneria, Gunselli Berik & Maria Floro, *Gender Development and Globalization: Economics as if All People Mattered* (Oxford: Routledge, 2003); Marianne H. Marchand & Jane L. Parpart eds., *Feminism, Postmodernism, Development* (Oxford: Routledge 1999); Naila Kabeer, *Reversed Realities: Gender Hierarchies in Development* (London: Verso, 1994); Caroline O. N. Moser, *Gender Planning and Development: Theory, Practice and Training* (Oxford: Routledge, 1993). The field has its own journal, *Gender and Development*, published by Routledge.

[144] Kevin Davis & Michael Trebilcock, "What Role Do Legal Institutions Play in Development?," (22 Oct. 1999), IMF Conference on Second Generation Reforms, 8-9 Nov. 1999, at 27; Ann Stewart, "The Dilemmas of Law in Women's Development," *in* Sammy Adelman & Abdul Paliwala, *Law and Crisis in the Third World* (London: Hans Zell, 1993): 219-242.

account.[145] Feminists have thus engaged in a wide range of law reform projects relating to both domestic and international law.[146] A good deal of the focus has been on discriminatory aspects of family law, property law, employment law, criminal law, and human rights law.[147]

Sustainable development is another huge subject in development.[148] Its borders appear to be amorphous. While the World Bank's 2012 Development Report was on Gender Equality and Development, in 2010, it was on Development and Climate Change.[149] A sustainable development practitioner aims to minimize the impact of human activity on the environment.[150] Her area of concern is in taking sustainability into account in economic decision making. Environmental concerns have a number of implications for a wide range of public policy in any country.[151] The basic point here is that in any rule of law assistance effort, environmental impact should be taken into account.[152] In addition, developing countries require sound environmental law and policy. The debates surrounding the cost and equity to developing countries to engage in environmental protection at a relatively early stage of their economic development is beyond the scope of this chapter.

Conclusion

In *Law of Peoples*, Rawls stated his belief "that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral

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[145] Davis & Trebilcock, 27.
[146] *Ibid.*, 28.
[147] *Ibid.*; *see. e.g.*, Sammy Adelman, "The International Labour Code and the Exploitation of Female Workers in Export-Processing Zones," *in* Adelman & Paliwala, 195-218; Annel Hellum, "Gender and Legal Change in Zimbabwe: Childless Women and Divorce from a Socio-Cultural and Historical Perspective, *in* Adelman & Paliwela, 243-269; Abdul Paliwala, "Family Transformation and Family Law: Some African Developments in Financial Support on Relationship Breakdown," *in* Adelman & Paliwela, 270-300.
[148] The literature is substantial and continues to grow. *See, e.g.*, Simon Dresner, *The Principles of Sustainability* ((Oxford: Routledge 2nd ed., 2008); John Blewitt, *Understanding Sustainable Development* (Oxford: Routledge, 2008).
[149] World Bank Development Report 2010: Development and Climate Change (Washington DC: World Bank Publications 2009).
[150] Davis & Trebilcock, 30-31.
[151] *Ibid.*, 31.
[152] *Ibid.*

traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues."[153] In essential respects, law and development deals with these concerns. A legal system is part of the basic structure of society. Getting institutional design right is a very difficult task. As we have seen above, the initial question of the ends of development, and hence the ends of law reform in developing countries, is the subject of substantial debate. Even if we were to agree on that, how to get institutions to do what we want them to do is still a significant unknown in law and development. One of the major advantages of the field is its substantial interdisciplinarity, with philosophers, economists, political scientists, legal scholars and social theorists involved in the discussion, as well as development practitioners who work in the field. What makes countries successful and what are the conditions for the people who live in them to have a decent life is probably one of the most substantial of global challenges faced today. Based on the theory and evidence to-date, it seems clear that law will play a substantial role in dealing with those challenges. In the language of new institutional economics, institutions matter.[154]

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[153] John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 2001): 108.

[154] The origins of this phrase are probably in the work of Douglass C. North. *See* 'Institutions Matter," (28 March 1994 draft), http://ideas.repec.org/p/wpa/wuwpeh/9411004.html.

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