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Beyond the ‘Moments’ of Law and Development: Critical Reflections on the Contributions and Estrangements of Law and Development Scholarship in a Globalized Economy

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Abstract

This paper aims to review and assess the contributions and limitations of law and development as a field of legal scholarship in relation to the constitution of the international economy and global economic governance. It seeks to reflect on the theoretical and methodological contributions of law and development theory and practice on the development of international legal scholarship, particularly in the rapidly evolving field of international economic law. The intersections of economic theory, jurisprudence and legal theory and the institutional practice of development agencies and international economic organisations which are the focus of law and development scholarship provide a useful interdisciplinary prism through which developments in the regulatory framework of the global economy can be studied. Mapping the ways in which what Trubek and Santos² call the three overlapping spheres of law and development – economic theory, legal theory and institutional practices (of bilateral and international organisations) – enables us to chart, understand and, where necessary, contest, the shifts in development theory and policy and institutional practice that influence and shape legal reform and scholarship.

1. Introduction

Law and development (L&D) scholarship has been widely defined as the study of the relationship between law and legal institutions and social and economic development, broadly defined.³ As a field of knowledge, it can best be described less as a cohesive epistemological framework than a corpus of ideas and theories about the role of law in social, economic and political organisation. It is an arena of scholarship that is intimately bound up with institutional practice, predominantly that of bilateral and multilateral development agencies and international organisations and, also, increasingly, that of private actors, including philanthropists, civil society organisations and transnational corporations and other commercial entities.⁴

An integral aspect of law and development studies has been its intimate relationship with the global economy and the regulatory framework which governs it. Specifically, law has been

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² D. Trubek and A. Santos, ‘Introduction: The Third Moment in Law and Development and the Emergence of a New Critical Practice’, in D. Trubek and A. Santos (eds), *The New Law and Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

³ See L. Lizarazo-Rodríguez, *Mapping Law and Development*, 4 Indonesian Journal of International and Comparative Law, no. 4 (2017), 761-895; M. Trebilcock and M. M. Prado, *Advanced Introduction to Law and Development* (Cheltenham, UK and Northampton, US: Edward Elgar, 2014); Trubek and Santos (2006), *supra* note 2.

⁴ B. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 Cornell International Law Journal, no 2 (2011), 209-247: 210-218; Trubek and Santos (2006), *supra* note 2, p. 1.

varyingly enrolled as a tool to support or resist the rules and institutions of international economic architecture in the name of development. Correspondingly, ‘development’ as a construct has also been utilised as a means of legitimising, justifying or, indeed, rehabilitating the interventions of international economic law (IEL). A rapidly emerging arena of scholarship on law and development in recent years has been on the intersections between IEL and development. The emergence of this body of scholarship under the broad umbrella of law and development studies has important consequences for law and development’s place within wider legal scholarship, demonstrating the salience of a ‘law and development’ epistemology within the field of IEL.

This paper aims to review and reflect on the theoretical and methodological contributions of law and development theory and practice on scholarship in the rapidly evolving field of IEL. The intersections of social and economic theory, jurisprudence and legal theory and the institutional practice of development agencies and international economic organisations which are the focus of law and development scholarship provide a useful interdisciplinary prism through which developments in the regulatory framework of the global economy can be studied. Mapping the ways in which the multifaceted spheres of law and development overlap enables us to chart, understand and, where necessary, contest, the shifts in development theory and policy and institutional practice that influence and shape scholarship and praxis.

Importantly, law and development studies provide us with the substantive and methodological tools to challenge formalistic and universalising narratives of IEL and to examine the constitutive and reproductive role of law in the global economy. Contextual and critical approaches to law and development, in particular, enable us to problematise the scope, nature and content of contemporary IEL and develop broader and more holistic understandings of the relationship between law and the constitution of the global economy. The paper argues that these critical traditions of the law and development movement stand as vital counterpoints to conventional hegemonic accounts of IEL and have the potential to contribute significantly to the methodological and conceptual reorientation of the discipline.

Specifically, engagement with the critical strands of L&D studies can overcome the problem of what I call the ‘methodological otherness’ of IEL scholarship⁵ which continues to marginalise and exclude a heterogeneity of perspectives from its epistemological framework, including voices of precarity, vulnerability and inequality from different global and local constituencies.⁶ At the same time, emerging critical strands of IEL scholarship can also contribute towards the pluralisation of L&D scholarship itself. New forms of interrogating IEL and its contextualisation within law and society can move law and development studies away from its mainstream tendency towards essentialist and totalising interpretations of the relationship between law, the economy and society and instead seek to reclaim the field as a space for epistemic contestation and diversity. The resulting intersections between the two fields offer a rich corpus of epistemological and methodological innovations that can serve to pluralise not only the respective disciplines but legal scholarship more generally.

⁵ C. Tan, ‘Doing It Differently? The Case for Pluralising International Economic Law Scholarship’, Paper presented at the the Workshop on ‘The Neglected Methodologies of International Law: Empirical, Socio-Legal and Comparative’ (University of Leicester, 31 January 2018).

⁶ See N. Perrone and D. Schneiderman, ‘Critique of International Economic Law: Depoliticization, Inequality, Precarity’, in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2018).

The rest of this paper is organised as follows: the next section recounts the multi-layered histories of law and development as a field of study and the location of scholarship on the law of the global economy within this lineage. Section Three examines the methodological challenges facing the contemporary study of international economic law and its role as an academic discipline and legal practice. Section Four explores how law and development approaches can serve as useful tools to confront and reorient the formalism and orientalism of international legal scholarship on the global economy. Specifically, it considers the role of law and development as a field of praxis in relation to the regulatory framework of the global economy and considers its usefulness in capturing the expansion and growing complexity of global economic relations but also in interrogating and challenging the dominant narratives that shape the scholarship and practice of the rules, institutions and practices that structure the international economic architecture. The final section concludes.

2. Encountering Law and Development⁷ in the Global Economy

2.1 Chronicles of Law and Development

Law and development as a field of study is a complex and multi-disciplinary landscape with a rich and varied history as Lizararo-Rodriguez maps in her extensive survey of L&D literature.⁸ Rooted in the academy but often driven by and influencing international development policy and practice, the disciplinary contours of the law and development movement have thus been shaped not just by scholars working in the area but also by policymakers who apply these theories, and by those scholars who critically respond to both these epistemic and operational developments. This close interdisciplinary relationship has shaped not only legal scholars and practitioners' encounters with the global economy but also economists, development practitioners and government engagements with legal interventions, domestic and external. In many ways, law and development represents a reflexive praxis, with legal and economic theory engaged in interweaving dialogue and often dialectical conversation with institutional development policy and practice. This has resulted in an unsettled terrain of scholarship and practice that has encompassed a wide berth of disciplinary and methodological traditions which seek ultimately to understand (and critique) the relationship between law and the social, economic and political organisation of communities, states and markets (not necessarily in that order).⁹

Conventional narratives of law and development follow a standard chronological pattern, an epistemic periodisation that more or less pivots upon Trubek and Galanter's landmark critique of the nascent field¹⁰ and what Buchanan terms as its 'aftermath', a historical marker to frame the 'genealogy of the uses of law in relation to development assistance'.¹¹ This

⁷ This title is a play of words on the title of Escobar's pivotal work on the discursive and disciplinary regimes of 'development' as a socio-political construct (A. Escobar, *Encountering Development: The Making and Unmaking of the Third World*, (Princeton: Princeton University Press, 1995); see note 20).

⁸ Lizarazo-Rodríguez, (2017), *supra* note 3.

⁹ Some scholars have argued that this is a result of a coherent theory or theories delineating the conceptual parameters of the field (see for example, Y.S. Lee, *General Theory of Law and Development*, 3 Cornell International Law Journal, No 5, (2017) 361-414).

¹⁰ D.M. Trubek and M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisconsin Law Review (1974), 1062-1103.

¹¹ R. Buchanan, 'A Crisis and its Afterlife: Some Reflections on 'Scholars in Self-Estrangement'', in G. de Búrca, C. Kilpatrick and J. Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David Trubek* (Oxford: Hart, 2013), pp. 26-27. Wherever you stand on the periodisation of law and development studies,

chronological framing is encapsulated in Trubek and Santos' categorisation of L&D studies into three crucial epochal 'moments', described by the authors as 'period[s] in which law and development doctrine has crystalized into an orthodoxy that is relatively comprehensive and widely accepted'.¹² These 'moments' capture the widely recounted lineage of L&D orthodoxy that begin with the law and legal modernisation movement in late 1950s and 60s (the first moment), followed by the reformulation of law as a toolkit for the promotion of neoliberal markets in the 1980s (the second moment), and concludes with the revival of law and development in the 1990s as a compensatory means of redressing the legal instrumentalism of the first two epochs (the third moment).¹³ The unifying theme underlying these orthodox accounts is their mirroring of the shifts in the dominant western development paradigm and assumptions about the role of law in relation to these changes in economic theory and practice at key bilateral and multilateral institutions.

Beyond these chronological 'moments', reflecting what Lizararo-Rodriguez terms a 'top-down approach' to law and development studies,¹⁴ reside a broader constellation of scholarship which seek to conceptualise, constitute and critique law within its broader social, economic and geopolitical contexts. This wider landscape include literature which have been varyingly termed as 'sociological', 'anthropological' or 'bottom-up' approaches to law and development and which has roots in colonial and postcolonial research into legal systems in developing countries.¹⁵

A key conceptual and methodological departure of this body of research from traditional legal scholarship is its recognition of the hybridity of normative orders that govern community relations and structure social, economic and political organisation.¹⁶ This analytical framework of legal pluralism has been deployed to study not only the co-existence of multiple legal orders within a given social field in developing countries but increasingly, also how these plural legal regimes and the societies and economies they regulate are shaped by formal and non-formal normative influences from the exterior, including interventions of international development agencies, so-called 'soft law' codes and standards and other external regulatory modalities.¹⁷

Trubek and Galanter's first assault on the movement, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' remains today a trenchant critique of the limitations of law and development as a field of scholarship and practice. (Trubek and Galanter, 1974, *supra*, note 10). Buchanan's piece examines the enduring legacy and salience of SISE to the field which she categorises as its 'aftermath', 'afterlife' – its continuing relevance to contemporary dilemmas of law and development beyond the instrumentalism of development assistance and 'hauntings' – its influence on the more 'critical' or 'skeptical' wing of law and development studies elaborated further below.

¹² Trubek and Santos (2006), *supra* note 2, p. 2.

¹³ *Ibid*, pp.1-15; Lee (2017), *supra* note 9, 415-471.

¹⁴ Lizarazo-Rodríguez (2017), *supra* note 3, 771.

¹⁵ *Ibid*, 798 – 814.

¹⁶ C. Sage and M. Woolcock, 'Legal Pluralism and Development Policy: Scholars and Practitioners in Dialogue', in B. Tamanaha, C. Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, (Cambridge: Cambridge University Press, 2012), pp. 1 – 4; S.E. Merry, 'Legal Pluralism and Legal Culture: Mapping the Terrain', in B. Tamanaha, C. Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, (Cambridge: Cambridge University Press, 2012), pp. 66-70.

¹⁷ S. de Moerloose, *The World Bank's Sustainable Development Approach and the Need for a Unified Field of Law and Development Studies in Argentina*, 8 *Law and Development Review*, no 2 (2015), 361-388; L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development*, (Cambridge: Cambridge University Press, 2015); Y. Ghai and J. Cotterrell, (eds) *Marginalized Communities and Access to Justice*, (Abingdon: Routledge, 2010); K. Jayasuriya, 'Institutional Hybrids and the Rule of Law as a Regulatory

Importantly, broadening the epistemic lens of L&D studies also pluralises its geographical, ideological and cultural frames of reference. It includes voices of scholars from the south and about the south, an often paradoxically neglectful omission in this field of scholarship. This heterodox tradition of law and development incorporates a longer historical trajectory and wider berth of study and critique about law and its relationship to social, economic and political organisation.¹⁸ It also encompasses work by scholars who may not necessarily self-identify as law and development specialists but have problematised the notion of ‘development’ as organising principles for both law and social, economic and (geo)political relations.¹⁹ Law and development here recognises the historical contingency and social construction of the concept of development,²⁰ It interrogates its relationship to law, both international and domestic, and other normative orderings.²¹ In a departure from the more institutional accounts of law and development which posit law in a positive relationship to social and economic development, these narratives problematises and challenges the very construct of development itself in its juxtaposition with law and legal institutions.

2.2 Law and its Global Development Intersections

The enlargement of law and development narratives to encompass a wider berth of socio-legal and anthropological research severs the flawed but intractable epistemological link between legal scholarship and institutional practice and moves the discipline on from a narrow instrumentalist approach to law and society and law and economic relations towards exploring the multiplicity of ways in which law intersects with communities and how this is facilitated or ruptured by external interventions. An increasing volume of work now focus on opening the ‘black box’ of international development agencies themselves, such as the World

Project’ in B. Tamanaha, C. Sage and M. Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, (Cambridge: Cambridge University Press, 2012); D. Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oxford: Portland, Or: Hart, 2007).

¹⁸ See for example, S. Adelman and A Paliwala, (eds), *Law and Crisis in the Third World*, (Hans Zell for the Centre of Modern African Studies and University of Warwick, 1993) 1-26; M. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 *Case Western Reserve Journal of International Law*, no 2 (1997) 169-261; L. Tshuma, *The Political Economy of the World Bank’s Legal Framework for Economic Development*, 8 *Social and Legal Studies*, no 1 (1999), 75-96.

¹⁹ A. Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 *New York University Journal of International Law and Politics*, no 3 (2001); M. Fakhri, *Sugar and the Making of International Trade Law*, (Cambridge: Cambridge University Press, 2014); J.T. 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.

²⁰ Critical traditions of law and development have drawn on Escobar’s conceptualisation of ‘development as a historically produced discourse’ that has ‘created an extremely efficient apparatus for producing knowledge about, and the exercise of power over, the Third World’ and in doing so, have enabled construction of an extensive regime of surveillance and discipline, including law and development policy, over the third world (see Anghie (2001), *supra* note 19; S. Pahuja, *Decolonising International; Law; Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); C. Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Abingdon: Routledge, 2011)).

²¹ D. Alessandrini, *Making the WTO ‘More Supportive of Development’? The Doha Round and the Political Rationality of the WTO’s Development Mission*, (1) *Law, Social Justice and Global Development* (2009), https://warwick.ac.uk/fac/soc/law/elj/lgd/2009_1/; D. Alessandrini, *WTO at a Crossroads: The Crisis of Multilateral Trade and the Political Economy of the Flexibility Debate*, 5 *Trade, Law and Development*, no 2 (2013) 256-285; Anghie (2001) *supra* note 19; L. Eslava (2015), *supra* note 17; B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, (Cambridge: Cambridge University Press 2003); Pahuja (2011), *supra* note 20 and Tan (2011), *supra* note 20.

Bank, and examining these international institutions as sites of global norm production²² as well as examining the international regulatory framework governing relationships between financiers, beneficiaries and affected communities of development projects and policies.²³ Other contributions in this vein focus on examining the complex interactions between international development institutions, development policy and practice and human rights, including exploring the legal and other normative obligations of development institutions under international and domestic human rights regimes²⁴ and examining the accountability mechanisms of such institutions for acts or omissions arising from their activities.²⁵

These broader epistemological approaches to L&D studies are not only interdisciplinary in theory and methods, they also challenge the instrumentalism of orthodox law and development scholarship in which law is treated as either a pathway towards an established orthodoxy of social and economic organisation or as a technical end in itself. In other words, L&D scholarship, in its expansive construction, provides a normative framework to studying and writing about law in its relationship to development within both its orthodox and critical traditions.

In this context, an important and rapidly emerging arena of L&D scholarship has been on the intersections between IEL and development. Here, the focus is on how international development agencies develop and circulate ideas about social and economic development and political organisation and how this discursive infrastructure both forms the disciplinary basis for and constitutes the regulatory framework for the global economy, whether its trade, investment, intellectual property or finance.²⁶ Increasingly, attention has turned to how

²² P. Dann, and M. Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order', Paper presented at the 2018 Law and Development Conference, (Berlin, Germany, July 2018) available at: <<http://lawanddevelopment.net/img/2018papers/dann.pdf>> accessed 10 September 2018; M. Riegner, *Governance Indicators in the Law of Development Finance: A Legal Analysis of the World Bank's Country Policy and Institutional Assessment*, 19 *Journal of International Economic Law*, no 1 (2016), 1-26; D. Szablowski (2007), *supra* note 17; C. Tan, 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law', in S. Schill, C. Tams and R. Hoffman (eds), *International Investment Law and Development: Bridging the Gap*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2015).

²³ D. Bradlow and D. Hunter, *International Financial Institutions and International Law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010); P. Dann, *The Law of International Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge: Cambridge University Press, 2013); A. La Chimia, *Tied Aid and Development Aid Procurement in the Framework of the EU and WTO Law: The Imperative for Change*, (Oxford and Portland, Oregon, Hart Publishing, 2013); A. Manji, *The International Development (Official Development Assistance Target) Act 2015: Legislative Spending Targets, Poverty Alleviation and Aid Scrutiny*, 79 *Modern Law Review*, no 4 (2016) 655-677; P. McAuslan, *The International Development Act 2002: Benign Imperialism or Missed Opportunity?*, 66 *Modern Law Review*, no 4 (2003), 563-603.

²⁴ M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, Hart Publishing, 2006); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish, 2001).

²⁵ Bradlow and Hunter (2010), *supra* note 23; A.N. Fourie, *World Bank Accountability in Theory and Practice*, (The Hague: Eleven International Publishing, 2016); M.M. Mbengue, and S. de Moerloose, *Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development* 10 *Law and Development Review*, no 2 (2017), 389-424.

²⁶ See for example, L. Eslava, *Corporate Social Responsibility and Development: A Knot of Disempowerment* 2 *Sortuz*, *Onati Journal of Emergent Socio-Legal Studies* no 2 (2008), 43-71; S. Mathews, *Resistance is Futile: You Will be Assimilated*, 19 *Leiden Journal of International Law*, no 1 (2006), 259-274; D. Kennedy, 'The 'Rule of Law' Political Choices and Development Common Sense', in D. Trubek and A. Santos (eds), *The New Law and Development: A Critical Appraisal*, (Cambridge: Cambridge University Press, 2006); T. Krever, *The Legal Turn in Late Development Theory; the Rule of Law and the World Bank's Development Model*, 52 *Harvard International*

development discourse and theory influence the design of domestic regulatory regimes and/or how these regimes collide with legal and non-legal normative economic regimes from the exterior.²⁷

A significant strand of this scholarship has been on examining (and indeed, as discussed above, problematising) the construction of development and its use as an organising principle in IEL²⁸ as well as on the relationship between IEL and other international regimes that purport to advance the normative agenda that has traditionally underpinned law and development studies, such as international environmental law and international human rights law.²⁹ This parallels an increasing interest in the concept of sustainable development law that is said to be ‘found at the intersection of three principle fields of international law ... IEL, international law related to social development, especially human rights, and international environmental law’³⁰ and the incorporation of social and environmental concerns into traditional scholarship on IEL.³¹

The emergence of this body of scholarship has important consequences for law and development’s place within wider legal scholarship. It reflects not only the normative significance of the construct of development, in all its contested permutations, to legal and non-legal normative orders beyond the realm of the state but it also reflects actual and potential contributions L&D methodological approaches can make to the study of IEL. As discussed above, not all scholars drawing the nexus between IEL and development, broadly

Law Journal, no 1 (2011), 288-319; K. Rittich, ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social’, in D. Trubek and A. Santos (eds), *The New Law and Development: A Critical Appraisal*, (Cambridge: Cambridge University Press, 2006); Tan (2015), *supra* note 22.

²⁷ D. Ashiagbor, *Theorizing the Relationship Between Social Law and Markets in Regional Integration Projects*, Social and Legal Studies (2018) online first access, available at: <<http://journals.sagepub.com/doi/abs/10.1177/0964663918754373>> accessed 10 September 2018; J. Faundez and C. Tan, ‘Introduction’, to J. Faundez and C. Tan (eds), *International Economic Law, Globalization and Developing Countries* (Aldershot, Edward Elgar, 2010); Lee (2017), *supra* note 9; A. Ordor, *Tracking the Law and Development Continuum through Multiple Intersections*, 8 Law and Development Review, no 2 (2015), 333-360; A. Perry-Kessaris, *The Case for a Visualised Economic Sociology of Legal Development* 67 Current Legal Problems, no 1 (2014), 169-198; D. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1 Hague Journal of the Rule of Law, no 1 (2009), 28-32.

²⁸ J. Faundez, ‘IEL and Development: Before and After Neoliberalism’, in J. Faundez and C. Tan (eds), *IEL, Globalisation and Developing Countries*, (Aldershot: Edward Elgar, 2010); Pahuja (2011), *supra* note 20; Tan, (2011), *supra* note 20.

²⁹ L. Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law*, (Abingdon: Routledge, 2012); J. Harrison, *The Case for Investigative Legal Pluralism in International Economic Law Linkage Debates: A Strategy for Enhancing the Value of International Legal Discourse*, 2 London Review of International Law, no 1 (2014), 115-145; M. Salomon and C. Arnott, *Better Development Decision-Making: Applying Human Rights Law to Neoclassical Economics* 32 Nordic Journal of Human Rights, no 1 (2014), 44-74.

³⁰ M-C. Cordonnier Segger and Khalfan, A, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford, New York: Oxford University Press, 2004), p. 52.

³¹ C. Gammage, *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement* (Cheltenham, UK and Northampton, US: Edward Elgar, 2017); Y.S. Lee et al. (eds.), *Law and Development Perspective on International Trade Law* (New York: Cambridge University Press, 2011, reprint 2013); K. Nadakavukaren Schefer, ‘Poverty, Obligations and the International Economic System: What Are Our Duties to the Poor?’, in K. Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World’s Poor* (Cambridge: Cambridge University Press, 2013); S. Schill, C. Tams and R. Hoffman, ‘International Investment Law and Development: Friends or Fores?’, in R. Hofmann, S. Schill and C. Tams (eds), *International Investment Law and Development: Bridging the Gap*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2015).

defined, would necessarily consider themselves part of the broader epistemic field of law and development studies, but their contributions can and do map onto the discipline in theory and practice.

3. Challenging the Epistemologies of International Economic Law

3.1 The Problem of International Economic Law

A prominent feature in international legal scholarship over the past two decades has been the transformation of international economic law from a subset of public international law into a multi-layered, highly specialised field of academic study and legal practice. Within three decades, the scholarship on and practice of IEL have progressed rapidly from a sub-field of international law into a discrete and expanding arena of study of its own, covering a range of specialist expertise, including trade, investment, finance and intellectual property. This surge to prominence of IEL is reflected not only in the proliferation and efficacy of rules and institutions governing the global economy but also in the heightened influence, if not dominance, of these rules and institutions, over other areas of international law and the domestic realm of law and regulation.³²

The evolution of IEL in the past three decades can therefore be characterised by three notable features: the *expansion in the substantive areas* governed by international law, the *growth and diversification of international economic actors*, and the proliferation of *multiple sites of international economic governance*. These characteristics reflect both the heterogeneity of contemporary international economic engagements as well as the complex interplay of geopolitical and economic power that structure such legal, geopolitical and economic relations.³³

Orthodox methodologies of legal scholarship have been challenged by this expansion and growing complexity of IEL as a field of study. First, traditional approaches to international law have struggled to account for the plurality of normative orders, subjects and objects of contemporary IEL. A rigid adherence to doctrinal categories and normative hierarchies under formal international law fail to accommodate the diversity of normative orders of contemporary IEL and the shift that Picciotto terms as the movement from ‘hierarchy to polyarchy’ in the sites of global economic governance.³⁴ Here, formalist accounts of international law struggle to situate and locate normative authority within the plural regimes that constitute contemporary IEL, such as in the international financial system where cross-border financial flows are governed primarily by ‘soft law’ rules in the form of standards and codes³⁵. Rulemaking, or more precisely, norm creation, in IEL transcends the traditional

³² J. Faundez, ‘International Economic Law and Development: Before and After Neoliberalism’, in J. Faundez and C. Tan (eds), *IEL, Globalization and Developing Countries*, (Aldershot: Edward Elgar, 2010), p. 10; Faundez and Tan (2010), *supra* note 27, pp. 1-3; C. Tan ‘Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law’, in A. Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext*, (Abingdon: Routledge, 2013), pp. 19-22.

³³ Tan (2013), *supra* note 32.

³⁴ S. Picciotto, *Regulatory Networks and Global Governance*, Paper presented at the WG Hart Legal Workshop 2006, ‘The Retreat of the State: Challenges to Law and Lawyers’ Institute of Advanced Legal Studies, (University of London, 27 – 29 June 2006), 2.

³⁵ See C. Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge: Cambridge University Press, 2015).

dichotomies of international law, notably between the domestic and the international, between public and private, and between ‘hard’ and ‘soft’ law.³⁶

At the same time, this inability to capture the multiple sites of global economic governance is compounded by classical international law’s reliance on the notion of a national state and the primacy of territorial integrity and state sovereignty as its organising principles. This has resulted in an epistemological resistance to addressing ‘complex legal processes *beyond nations*’, both amongst traditional and comparative legal and socio-legal scholars on the global economy.³⁷ Specifically, contemporary studies on IEL cannot adequately capture the consequences of geopolitical and economic changes that have resulted in the so-called ‘decentering’ of the state from its regulatory and functional roles, both in terms of jurisdictional devolution, both downwards (to the local) or upwards (to the supranational) and through increasing outsourcing of the state’s prescriptive and enforcement functions to private entities or quasi-public regulatory authorities.³⁸ For example, again in the field of international finance where regulatory and policymaking takes place predominantly within transgovernmental and public-private regulatory networks.³⁹

A consequence of this tension between the formalism of epistemological approaches to IEL and the messiness of its actual practice is the field’s enduring endeavour to seek analytical coherence in the face of contestation from competing normative values and conflicting legal regimes. For Harrison, contemporary international law scholarship has been dominated by a continued search for methodological unity in an era of perceived regime fragmentation and this is manifested in the IEL sphere through the focus on the erasure of difference in normative form, content and outcomes.⁴⁰ This involves the deployment of legal techniques to resolve regime collisions between IEL and other spheres of international law, primarily international human rights law and international environmental law, by blunting, downplaying or displacing one set of norms (usually the latter) over another (usually the former).⁴¹ Moreover, it has been argued that this formalism and realism in IEL scholarship has been ‘continuously asserted as a strategy to sustain the authority and legitimacy of the IEL field’s identity and mission’.⁴²

³⁶ Tan (2013), *supra* note 32, p. 23; T. Halliday and G. Shaffer, ‘Transnational Legal Orders’, in T. Halliday and G. Shaffer (eds), *Transnational Legal Orders*, (Cambridge: Cambridge University Press, 2015).

³⁷ E. Darian-Smith, *Law and Societies in Global Contexts*, (Cambridge: Cambridge University Press, 2013), pp. 7-10.

³⁸ Darian-Smith (2013), *supra* note 37, pp. 5-10; also Picciotto (2006), *supra* note 34, p. 2; Tan (2013), *supra* note 32, p. 23.

³⁹ See Brummer, *supra* note 35.

⁴⁰ Harrison (2014), *supra* note 29; also V. Kumar, *Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South*, (Völkerrechtsblog, 27 July 2017), available at: <<http://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched/>>, accessed 10 September 2018.

⁴¹ Harrison argues that this ‘unity/fragmentation’ dominance in international legal scholarship has given rise to the deployment of three strategic techniques that seek to overcome these inter-regime conflicts – hierarchical (‘the identification of rules by one set of legal norms [that] can be prioritised over another’); displacement (‘claims as to the irrelevance of inapplicability of legal norms in a particular context’) and interpretative (‘the removal of a potential or claimed conflict’ through findings of interpretative coherence between competing norms) (Harrison (2014), *supra* note 29, 124-134).

⁴² R. L. Sakr, *Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law*, LSE Legal Studies Working Paper No 9/2018, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194660> 16 accessed 10 September 2018.

Even where methodological space enables consideration of multiple sites and forms of regulation and governance of the global economy, there remains a preoccupation with understanding how *formal* legal norms are ‘being created and diffused globally in different legal domains’ that transcend the nation state.⁴³ For example, the emerging ‘transnational legal order’ (TLO) approach to IEL that seeks to overcome the aforementioned traditional dichotomies still ‘accords with what can be viewed as a positivist conception at some stage of legal ordering’ and distinguishes ‘legal’ norms from ‘other forms of social ordering’ through the former’s embeddedness in ‘formal texts’ such as ‘written rules, standards, model codes or judicial judgments’.⁴⁴

3.2 Methodological Othering and Epistemological Silences

The stubborn adherence to formalism in traditional legal scholarship can constrain readings of IEL beyond what Frerichs in Perry-Kessaris describe as its ‘*text*’ or ‘the written rules and doctrines or what can be considered black letter law’ to explore its ‘*context*’ – the social, economic and political environment in which the ‘legal text’ operate and, importantly, the ‘*subtext*’ – the ‘moral’ or the normative value of the legal text that may or may not depend on the aforementioned context in which the law operates.⁴⁵ This creates the commonly problematised socio-legal gap between ‘law in the books’ and ‘law in action’. This inability (and often reluctance) of traditional IEL scholars to go beyond the ‘legal text and its normative meanings’ towards an analysis of the ‘practice and behaviour’ that underpin global lawmaking in the economic sphere can constrain our understanding of how law operates in practice, how law is formed and what social, economic and geopolitical dynamics underpin international economic law.⁴⁶

The disinclination to consider ‘analytically’, ‘empirically’ and ‘normatively’ concepts and relationships, facts and methods and values and interests⁴⁷ outside the realm of legal doctrine and jurisprudence have wider ramifications beyond the incompleteness of scholarship. The confinement of IEL within a traditional doctrinal approach discounts law’s culturally productive role and its constitutive power in shaping and sustaining dominant patterns of production and consumption and hegemonic forms of social, economic and political organisation. As Kennedy argues, law not only regulates the ‘basic elements of global economic and political life’, notably ‘capital, labor, credit, money and liquidity’ and the ‘power and right’ that accompany them, it also creates them and organises them in ways that ‘would alter the distribution of power and wealth and the trajectory of the society’.⁴⁸

Accordingly, in translating economic policy into practice, international economic law not only provides the normative framework for transnational economic activity, it also serves as a narrative of the contests and conflicts underlying international economic relations.

⁴³ Halliday and Shaffer (2015), *supra* note 36, p. 4.

⁴⁴ *Ibid*, pp. 11-15.

⁴⁵ A. Perry-Kessaris, ‘What Does it Mean to Take a Socio-Legal Approach to International Economic Law?’, in A. Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext* (Abingdon: Routledge, 2013), p.7.

⁴⁶ T. Halliday and S. Block-Lieb, ‘Global Duellists: The Recursive Politics of Text in International Trade Law’, in A. Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context and Subtext* (Abingdon: Routledge, 2013), pp. 77-79.

⁴⁷ Perry-Kessaris (2013), *supra* note 45, pp. 4-5.

⁴⁸ D. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton and Oxford: Princeton University Press, 2016), p. 11.

International economic rules and institutions are more than just disparate systems of ordering but instead ‘constitute part of what can be called the legal culture of capitalism’ that expresses preferences about how social, economic and political life should be organised.⁴⁹ In the contemporary landscape of IEL, these distributive outcomes favour not only those who influence and/or control the rulemaking and adjudication processes of the global economy but also those who establish the ground rules for producing knowledge about these processes. In other words, the epistemologies of IEL are deeply implicated in the production of international economic rules and their regulatory outcomes, legitimating exercises of power by dominant constituencies through ‘knowledge practices’ that rationalise, explain and interpret the values and interests of those that control the production of law and regulatory regimes.⁵⁰

Functionalist international legal scholarship, like the instrumentalism of the first wave of L&D scholarship, can post a totalising and ahistorical view of the regulatory framework of the global economy. While such scholarship may, in many cases, recognise that IEL is often shaped by overt political expediencies or negotiated settlements among political constituencies and other actors in international law, it often fails to conceive of these regulatory frameworks as historically contingent and embedded within constellations of exclusionary social, economic and political discourses, narratives and framings that it posits as the ‘other’, counterpoints to the normalising rationale of IEL as a neutral regulator of social, economic and political relations and independent arbiter of disputes.⁵¹

All this serve as forms of what Sakr terms as the ‘boundary drawing’ of IEL, ‘a process of relational contestation undertaken by distinct professions engaged in policy-and law-making’ to demarcate the contours of an exclusive domain of expertise, in this case, IEL, as applied to ‘a broad range of programmes, rules, regimes, ideas and methods’.⁵² Coupled with historical story-telling or periodisation as a disciplinary technique to ‘control the movement of meanings across time’, Sakr argues that the establishment of epistemological boundaries within IEL scholarship have resulted in the formation of expertise and authority within the field so as to deem certain epistemologies authoritative and others less so.⁵³ In this manner, orthodox approaches to IEL form part of ‘ideological-institutional complex’⁵⁴ of global governance that can and do sustain and perpetuate global economic and geopolitical asymmetries and social hierarchies.

Conventional IEL scholarship thus suffers from what I call a ‘methodological othering’, a technique that excludes, marginalises and discounts as inferior approaches to the discipline that do not fit within its normative framework of analysis.⁵⁵ Here, the universalising tendencies of contemporary IEL scholarship, like all dominant epistemologies, develop internal systems of classification and set internal rules of practice and methods that allow

⁴⁹ Perrone and Schneiderman (2018), *supra* note 6, p. 1.

⁵⁰ Kennedy (2016), *supra* note 48, p. 8.

⁵¹ See A. Orford, *International Law and its Others* (Cambridge: Cambridge University Press, 2006).

⁵² Sakr (2018), *supra* note 42, 5.

⁵³ *Ibid*, 15-16.

⁵⁴ These ideational sites include both the legal academy and its practice that operate through ‘a dynamic relation’ with ‘formal institutions’ of international law and ‘the actions of both state actors and non-governmental organisations’ (Pahuja (2011), *supra* note 20, p. 10).

⁵⁵ Tan (2018), *supra* note 5.

certain forms of knowledge to be selected and included and for others to be excluded and discounted.⁵⁶

Specifically, the production of legal knowledge has always been suffused with geopolitical power dynamics and rooted in the imperial project, serving as ‘an ideological and conceptual’ platform through which the west constructed the inferiority of the east and to justify continued social, political and cultural dominance of the west over the third world or global south.⁵⁷ Legal orientalism – the process through which the study of non-western legal systems and social orders is mediated through its opposition to the west⁵⁸ – has historically formed the bedrock of Anglo-European jurisprudence, including some the so-called ‘sociological’ approaches to law and development studies discussed in section 2.2.⁵⁹ IEL, organised in the image of the west, forms part of the broader ‘civilising mission’ of international law that seeks to legitimise and maintain western conquest and control over, among other things, the natural resources and cultural reproduction of the third world.⁶⁰

Orthodox scholarship on IEL discounts or downplays this ‘epistemological privilege’ of western knowledge⁶¹ that have continued to structure the production of knowledge about law’s place within the global economy. It contributes towards the ‘sociology of absences’, a construct developed by Santos to describe the deliberate exclusion and marginalisation of particular experiences and conditions that do not conform to the ‘scientific’ rationalities of modern epistemologies, an intentional silencing of ‘alternative knowledges’ that he terms an ‘epistemicide’.⁶² In the realm of international and transnational law, this is demonstrated through the ‘active non-production of the Global South – as an object or as a subject – of the global legal order’.⁶³ Consequently, the third world as a constituency is excluded from the infrastructure of knowledge inasmuch as they are marginalised from the institutional and regulatory architecture of the global economy.

This essentialising and universalising tendency of IEL scholarship can and does impoverish the field at the same time as it silences voices that seek to challenge dominant perspectives. Among other practices, dominant narratives of IEL establish historical frames of reference that pivot analysis of IEL around the epochal shifts of modernity represented, in this case, by the foundations of the postwar Bretton Woods architecture, seen as the centrepiece of contemporary IEL scholarship. This forms what Fakhri describes as both: a) a narrow epistemic ‘temporality’ not only ignores and/or erases the legacies of slavery and colonialism that formed and continues to structure a central part of the relationship between European

⁵⁶ L. Tuhiwai-Smith, *Decolonising Methodologies: Research and Indigenous Peoples*, 2nd ed, (London and New York: Zed Books, 2012) p. 31; See also Darian-Smith (2013), *supra* note 34, pp. 97-98.

⁵⁷ Darian-Smith (2013), *supra* note 37, pp. 48-49; M. Mutua, *What is TWAIL?*, 94 *American Society of International Law: Proceedings of the Annual Meeting* (2000), 31-38.

⁵⁸ Drawing heavily from Said’s treatise (see E. Said, *Orientalism* (London: Penguin, 1995)), legal orientalism unmasks how non-western or ‘oriental’ laws, viewed through the ‘western gaze’, became ‘essentialised, homogenised, exoticised, distanced, contrasted and made to look primitive and backward by the standards of European law’ (C.G.S. Tan, *On Law and Orientalism*, 7 *Journal of Comparative Law*, no 2 (2012), 5-17: 5-6).

⁵⁹ See Darian-Smith (2013), *supra* note 37, pp. 48-49; T. Ruskola, *The World According to Orientalism*, 7 *Journal of Comparative Law*, no 2 (2012), 5-17; T. Ruskola, *Legal Orientalism*, 101 *Michigan Law Review*, no 1 (2002), 179-234.

⁶⁰ A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2005); Mutua (2000), *supra* note 57.

⁶¹ B.D.S. Santos, *Epistemologies of the South: Justice Against Epistemicide*, (Abingdon: Routledge, 2014) p. 152

⁶² *Ibid*: p. 153

⁶³ Kumar (2018), *supra* note 40.

nations and the rest of the world (whether you term them the third world or the global south), and b) a limited ‘spatiality’ that discounts lawmaking spaces and institutions not controlled by the west.⁶⁴

At the same time, orthodox constructions of IEL also serve to delineate the scope of study, drawing the aforementioned disciplinary boundaries charted by Sakr,⁶⁵ narrowing the epistemological remit of IEL to legal orders pertaining to trade, investment, finance, and intellectual property but not necessarily environment, labour, climate change, or human rights (unless framed as a normative or juridical construct to be enrolled in legal or political claims over the distribution of economic resources and/or dispersal of social, economic or ecological risks).⁶⁶ These boundaries also further determine whose voices and perspectives count as valid fields of study and account, privileging Eurocentric, state-centric and elite-centric perspectives of how IEL is *formed and applied* but not necessarily how such legal and regulatory norms are *encountered* through engagement with the practices of the ‘everyday’⁶⁷ or what Rajagopal has termed international law ‘from below’.⁶⁸

4. Reorienting Scholarship on Law and the Global Economy

4.1 Reframing the Lens of IEL

In this complex landscape of the global economy, the doctrines of law and development offer constructive tools to a) more comprehensively map and evaluate the role of law – international, transnational, national and local – and other normative orders and their impact on and contributions to the development process, particularly but not exclusively, in developing countries; and b) to analyse how legal/ regulatory and non-legal normative orderings intersect with the broader framework of society, economy, political systems and ecology at global and domestic levels. Importantly, law and development approaches,

⁶⁴ Fakhri makes his observations in relation to the regulatory architecture of the sugar trade in relation to the General Agreement of Tariffs and Trade (GATT) being the ‘historical centrepiece’ for ‘modern international trade law’ while discounting the relevance of other multilateral trading arrangements, such as the United Nations Conference on Trade and Development (UNCTA) and the international commodities agreements (ICAs) (Fakhri (2014), *supra* note 17, p. 11). His observations however can be applied to the consideration of IEL more generally. See also Sakr (2018), *supra* note 38.

⁶⁵ Sakr (2018), *supra* note 42.

⁶⁶ Harrison (2014), *supra* note 29; Perrone and Schneiderman (2018), *supra* note 6; Sakr (2018), *supra* note 42. See also Y.S. Lee, *Reclaiming Development in the World Trading System* (2d ed., Cambridge University Press, 2016).

⁶⁷ The epistemology of the ‘everyday’ refers to attempts by scholars of political science, international relations and, in a handful of cases, international law to understand how the real-life experiences and practices of people on the ground contribute towards social, political, economic and cultural change at local, national and international levels. This approach is seen as an antidote to the elite-focused studies on the regulatory architecture of the international political economy (see for example, Eslava (2015), *supra* note 17; J. Elias and L. Rethel (eds), *The Everyday Political Economy of Southeast Asia* (Cambridge: Cambridge University Press, 2016); L. Seabrooke and J. Hobson, *The Case for an Everyday International Political Economy*, (Copenhagen Business School Working Paper No 26, 2006) available at: <<http://openarchive.cbs.dk/bitstream/handle/10398/7912/WP%20CBP%202006-26.pdf?sequence=1>> accessed 10 September 2018; and the International Political Economy of Everyday Life (I-PEEL) digital resource, available at: <<http://i-peel.org/>> accessed 10 September 2018.

⁶⁸ Rajagopal (2003), *supra* note 21; see also Eslava (2015), *supra* note 17; L. Eslava and S. Pahuja, *Beyond the (Post)Colonial: TWAAIL and the Everyday Life of International Law*, 45 *Law and Politics in Africa, Asia and Latin America*, no 2 (2012) 195-221.

especially in their critical articulations, can provide an epistemological framework and the methodological techniques to critique and problematise the organising rationale and governing principles of IEL while reclaiming the social, political and epistemological landscape of IEL.

At its very basic, law and development scholarship diversify the frames of reference for locating the multiplicity of normative regimes that structure the contemporary global economy. As discussed in section 2, a characteristic of law and development studies is its plural understanding of law that is not confined to the nation state or formally constituted rules or institutions. The use of the time-honoured methodological tool of socio-legal legal scholars – legal pluralism – has enabled law and development scholars to overcome the limitations of doctrinal categories and normative hierarchies set by formalist legal scholarship in order to map and understand the range of normative orders that structure and regulate global societies and economies. The concept of coexisting state and non-state legal orders without a necessary hierarchy and operating semi-autonomously from each other and yet possessing the same disciplinary power over the behaviour of their subjects of regulation can be similarly applied to international law, specifically IEL. The notion of ‘global legal pluralism’ is increasingly being used to describe this diversity of international economic normative regimes and understand the relationship between formal international law, constituted through official inter-state dialogue and negotiations and informal law or ‘soft law’, constituted through transgovernmental and private processes.⁶⁹

Approaching IEL through the plurality of its legal orders exposes and interrogates the emergent organising logic of the global economy that transcends the boundaries of the nation state and establishes what Sasken terms ‘new jurisdictional geographies’ that cut across traditional binaries of global/local, public/private, and formal/informal.⁷⁰ It also provides a mode of critiquing the essentialism of IEL scholarship by turning its gaze towards ‘those sites and subjects that have traditionally been positioned at the receiving end of international law’⁷¹ and challenging the Eurocentrism and legal orientalism of IEL as an academic discipline and in practice.

Beyond reclaiming the discussion of law beyond the transplantation of European state law, more recent L&D scholars have also adopted a legally pluralistic methodology to the study of international development organisations and international economic institutions. There is now a growing sub-field of legal scholars examining the regulatory interactions of state and non-state actors within what can be best described as the international architecture of development cooperation, including examining the role played by bilateral and multilateral development organisations and international financial institutions in shaping, mediating and influencing developing countries’ engagement with the global economy.⁷² These explorations

⁶⁹ See P.S. Berman, *From International Law to Law and Globalization*, 43 Columbia Journal of Transnational Law, no 2 (2005) 485-556; Halliday and Shaffer (2015), *supra* note 36; Tan (2013), *supra* note 32.

⁷⁰ S. Sasken, *Neither Global nor National: Novel Assemblages of Territory, Authority and Rights*, 1 Ethics and Global Politics, no 1-2 (2008), 61-79.

⁷¹ Eslava and Pahuja (2012), *supra* note 68, 2.

⁷² D. Aziz, *Global Public-Private Partnerships in International Law*, 2 Asian Journal of International Law, no 2 (2012) 339-374; Bradlow and Hunter (2010), *supra* note 23; Dann (2013), *supra* note 23; Dann and Riegner (2018), *supra* note 22; Moerloose (2015), *supra* note 17; Fourie (2016), *supra* note 25; Krever (2011), *supra* note 26; J. Okonjo, *Ideas and Technological Practices as Regulatory Actants: The Ideological and Performative Reproduction of Regulatory Neoliberalism in Global Financial Markets*, Unpublished PhD Manuscript, on file with the author (2018); Riegner (2016), *supra* note 22; Tan (2015), *supra* note 22; Tan (2011), *supra* note 20; C.

view the plethora of standards, codes, conditionalities, administrative procedures and best practice guidelines as valid and important regulatory and disciplinary processes that structure the relationship between states, states and international organisations and states and non-state actors, including communities in receipt of development resources and interventions.

Mapping this increasingly diverse terrain of intersections between emergent forms of law and governance in the global economy correspondingly necessitates greater methodological diversity. As a field of study formed in the intersections between ‘economics, law and institutions’,⁷³ law and development studies is by nature interdisciplinary and, as a corollary, contextual in its approach to the role of law in society. Law and development scholars, in both orthodox and critical traditions, problematise law’s shifting relationship with economic theory and practice and its role in relation to the organisation and governance of states, communities and the economy inasmuch as they also try to unpack the normative ideas, policies and institutional practice of development as an economic, social and geopolitical concept.⁷⁴

The embedding of law within the prevailing economic or social paradigm at any given historical point (see discussion on the epochal periodisation of law and development studies in section 2) places law and legal institutions in a dynamic dialectical relationship with law and economic or social theory.⁷⁵ As a methodology, it challenges the formalism of conventional legal scholarship by moving beyond a concern with legal rules, interpretative practice and reflective jurisprudence towards understanding the drivers of law and legal reform and their effect on the ground, whether as a pathway to normative social ideals – for example, economic development, social cohesion, human security, gender empowerment, community justice, ecological sustainability or human rights – or as a social ideal in its own right. A L&D approach to the study of IEL thus addresses the socio-economic and political dynamics underlying the rules and institutions of the global economy and seek to understand the relationship between IEL and legal institutions and their impact on developing countries and communities within them as well as on these countries’ relationship with the exterior.

One strand of this scholarship offers an instrumental (and sometimes empirical) assessment of the role of law in the context of economic development and what Trebilcock and Prado term as ‘economic prospects’ in developing countries.⁷⁶ Although not necessarily challenging the premise of the ‘ideational infrastructure’⁷⁷ that underpins the construction of IEL (see discussion in section 4.2 below), some IEL scholarship in this vein attempt to draw on economic theories (for example of trade or investment) to distil an understanding of the

Tan, ‘Regulation and Resource Dependency: The Legal and Political Aspects of Structural Adjustment Programmes’, in D. Bradlow and D. Hunter, (eds), *International Financial Institutions and International Law*, (Kluwer Law International, 2010). See discussion in section 2.2.

⁷³ D Trubek and Santos (2006), *supra* note 2, p. 4

⁷⁴ See K. Davis and M. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 *The American Journal of Comparative Law*, no 4 (2008), 895-946.

⁷⁵ See M Trebilcock and Prado (2014), *supra* note 3, pp. 183-213 pp. 45-48; Trubek and Santos (2006), *supra* note 2, pp. 10-18

⁷⁶ Trebilcock and Prado (2014), *supra* note 3, pp. 183-213; see also Lee (2017), *supra* note 9; C.J. Milhaupt and K. Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World*, (Chicago: University of Chicago Press, 2008)

⁷⁷ I borrow this term from Okonjo’s unpublished manuscript describing the complex web of legal, institutional and performative technologies and practices that govern the regulation of international financial markets (Okonjo (2018), *supra* note 72).

aforementioned expansive reforms of IEL deliver on the substantive promises of economic growth and prosperity for developing countries.⁷⁸

Other international economic lawyers have drawn on comparative legal methodologies to address and understand the evolution of and use of ‘development’ as a construct in IEL and, increasingly to understand the tensions and conflicts that arise when international regimes collide. Here, ‘development’ is enrolled varyingly as a guiding principle, a standard of action, a commitment device or a descriptor to evaluate both the doctrines and implicit public values that underlie IEL, in multiple regulatory arenas of the global economy, including investment law⁷⁹; sovereign debt governance⁸⁰ and trade law⁸¹ ‘Development’ is also often a proxy for incorporating non-economic values and interests that is insufficiently captured with the traditional ontological lens of IEL, such as poverty;⁸² environment;⁸³ labour;⁸⁴ and human rights.⁸⁵ Much of this scholarship is focused on understanding how development and its associated constructs is treated in global economic lawmaking and adjudication of international economic disputes.

Approaches borrowed from law and development studies broaden the range of sources drawn from by scholars to form a more pluralist understanding of IEL and support normative claims made as a consequence of this shift. As IEL scholars move away from a formalist approach to conceptualising law and regulatory relations in the global economy, there is also an imperative to move beyond doctrinal research methods that underpin doctrinal legal research.

In their attempts to bridge the gap between the aforementioned ‘law in the books’ and ‘law in action’ (see section 3.1), empirical legal scholars have deployed socio-legal approaches to understanding the context and subtext of IEL and, in doing so, contributed towards a broader understanding of lawmaking and adjudication in both international, regional and national

⁷⁸ See M. Trebilcock, *Advanced Introduction to International Trade Law*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2015) in relation to international trade law; T. Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 *International Review of Law and Economics* (2005), 107-123; A. Guzman, *Why Do LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *Virginia Journal of International Law* (1998), 640-688 and; J. Yackee, *Credible Commitment and the Rule of (International) Law: Do BITS Promote Foreign Direct Investment*, 42 *Law and Society Review*, no 4 (2008), 805-832, on international investment law.

⁷⁹ Cotula (2012), *supra* note 29; I. Feitchner, ‘International (Investment) Law and Distribution of Conflicts over Natural Resources’, in S. Schill, C. Tams and R. Hoffman (eds), *International Investment Law and Development: Bridging the Gap*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2015); Schill, Tams and Hoffman (2015), *supra* note 31.

⁸⁰ W. Mansell and K. Openshaw, *Suturing the Open Veins of Ecuador: Debt, Default and Democracy*, 2 *Law and Development Review*, no 1 (2009), 151-191; Y. Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law*, Cheltenham, UK and Northampton, US: Edward Elgar, 2012).

⁸¹ Alessandrini (2009), *supra* note 21; Alessandrini, (2013), *supra* note 21; Gammage (2017), *supra* note 31.

⁸² Nadakavukaren Schefer (2013), *supra* note 31.

⁸³ G. Messenger, *Sustainable Development and the Commodities Challenge: The Eventual ‘Greening’ of the World Trade Organisation?*, 9 *Trade, Law and Development*, no 2 (2017), 21-53.

⁸⁴ J. Harrison, L. Campling, B. Richardson, and A. Smith, *Working Beyond the Border? A New Research Agenda for the Evaluation of Labour Standards in EU Trade Agreements*, 155 *International Labour Review*, no 3 (2015), 357-382.

⁸⁵ L. Bartels, *Human Rights Conditionality in the EU’s International Agreements*, (Oxford: Oxford University Press, 2005); B. Choudhury, *Public Services and International Trade Liberalization: Human Rights and Gender Implications*, (Cambridge: Cambridge University Press, 2012); D. Desierto, *Public Policy in International Economic Law: The IESCR in Trade, Finance and Investment*, (Oxford: Oxford University Press, 2015).

arenas.⁸⁶ Much of this work has been drawn from the methodological expertise of legal anthropologists and comparative legal scholars, including L&D scholars, who have sought to develop ways of unearthing and understanding ‘the meanings and practices’ of the spaces where norms of social ordering are negotiated, applied and contested ‘whether in villages or the corridors of international tribunals’.⁸⁷ This includes examining the institutional arenas in which these rules of trade, investment or financial law are created, such as the International Monetary Fund (IMF), World Bank or the World Trade Organisation (WTO)), ‘to see how they create rules and impose pressure to support them’ and how these rules are shaped not by internal rules of logic but by ‘political and economic contexts’.⁸⁸

But L&D studies go beyond the ‘influential elite-centric’ forms of empirical scholarship that are predominantly represented in the emerging socio-legal research on IEL.⁸⁹ By its very nature, law and development research remain primarily focused on how international legal rules operate on the ground, including how these rules are impact on and are accepted and/or resisted by the constituencies to whom they are applied. At its most instrumentalist, this involves technical assessments of donor-funded legal reform projects, using social science methods to evaluate the efficacy of such initiatives in developing countries, including whether these reforms have induced or shaped economic or social changes in recipient communities.⁹⁰ Although often narrow in scope and focused primarily on identifying ‘enablers or obstacles to transnational projects’ rather than more comprehensive analyses of regulatory localities and actors subject to regulatory change, these assessments do prioritise a more ‘bottom-up’ approach to researching the impact of externally induced legal and judicial reform, including the use of participatory evaluations to gain insights from stakeholders affected by such changes.⁹¹

More broadly however, law and development as a field of scholarship has presented a body of ethnographically-grounded research on the impact of global economic law and governance on local regulatory regimes and communities⁹² as well as on law reform as a pathway to

⁸⁶ J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); S. Block-Lieb and T. Halliday, *Global Lawmakers International Organizations in the Crafting of World Markets*, (Cambridge: Cambridge University Press, 2017); Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Abingdon: Routledge, 1996); T. Halliday and B. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 *American Journal of Sociology*, no 4 (2006) 1135-1202; Harrison et al (2015), *supra* note 84; M. Satorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*, (Oxford and Portland, Oregon, Hart Publishing, 2018).

⁸⁷ S. E. Merry, *Anthropology and International Law*, 35 *Annual Review of Anthropology* (2006), 99-116: 106.

⁸⁸ *Ibid*; also Halliday and Shaffer (2015), *supra* note 36.

⁸⁹ F. Hoffman, *Knowledge Production in Comparative Constitutional Law: Alterity-Contingency-Hybridity*, (Völkerrechtsblog, 31 July 2017) available at: <<https://voelkerrechtsblog.org/knowledge-production-in-comparative-constitutional-law/>> accessed 10 September 2018.

⁹⁰ See J. Gillespie and P. Nicholson, ‘Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development’, in J. Gillespie and P. Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge: Cambridge University Press, 2012); K. Pistor, *The Standardization of Law and Its Effect on Developing Economies* 50 *The American Journal of Comparative Law*, no 1 (2002), 97-130.

⁹¹ Gillespie and Nicholson (2012), *supra* note 90, pp. 3-5.

⁹² Eslava (2015), *supra* note 17; J. Gillespie, ‘Relocating Global Legal Scripts in Local Networks of Meaning’, in J. Gillespie and P. Nicholson, (eds), *Law and Development and the Global Discourses of Legal Transfers*, (Cambridge: Cambridge University Press, 2012); C. Ochoa, ‘Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands’, in C. Tan and J. Faundez (eds), *Natural Resources and Sustainable Development: International Economic Law Perspectives*, (Cheltenham, UK and Northampton, US: Edward Elgar, 2017); D. Rangnekar, *Remaking Place: The Social Construction of a Geographical Indication for Feni*, 43

economic development⁹³. These forms of research and analysis, often the product of extensive fieldwork at multiple sites of legal orderings ‘enables a far deeper understanding of how the various facets of international law actually work’ peeling back the historical and structural origins of international law.⁹⁴ Legal ethnography is therefore a form of exposure, revealing ‘the variations in the way [IEL] operates in many locations’.⁹⁵ In this manner, a law and development approach to the empirical study of IEL contributes towards a broader understanding not only of how law is made but how it is *encountered* by communities on the ground, including how international trade, investment and finance law intersects with local norms and social, political and legal cultures and how these intersections impact on constituencies in developing countries.

4.2 Law and Development as Critical Praxis

An important exercise in the mapping of contemporary IEL is examining the link between IEL and the forms of social, economic and political organisation it structures and the relationships that it creates and sanctions through its regimes of *regulation* and *legitimation*. IEL has played a significant role in facilitating the globalization of economic relations by providing the regulatory framework for global integration and the restructuring of social, economic and geopolitical governance discussed in the previous section. At the same time, the rules and institutional practices of the global economy has also been instrumental in validating these regulatory and institutional changes by sanctioning its normative narratives. In other words, law is not only about changing behaviour but also shaping perceptions. Legal knowledge and ideas promulgated through institutions of global economic governance, including the IMF, World Bank and the WTO, affect not only the regulatory trajectories of these institutions but also the social, economic and political cultures and behaviours of state and non-state actors subject to their jurisdiction and influence.

The theory and practice of IEL achieves this through its aforementioned culturally productive role, in its function as a system of symbols and signification that creates and attaches meaning to actors, forces and practices, normalising or delegitimising actions, policies, social and economic trajectories and rationales that influence and undergrid transactions and relationships in the global economy.⁹⁶ Tarullo, for example, perceives of IEL as ‘a set of myths’ – legal texts that ‘communicate ‘facts about the world even as they purport to regulate it’, the effect of which ‘is to sanctify one way of knowing events in the world’.⁹⁷ Law generally, and IEL particularly, can be viewed as sites of struggle and distributive contestation over economic resources and political power.⁹⁸

Environment and Planning A: Economy and Space, no 9 (2011), 2043-2059; S. Sekalala, *Who Gets to Sit at the Table? Interrogating the Failure of Participatory Approaches within a Right to Health Framework*, 21 International Journal of Human Rights, no 7 (2017), 976-1001; Szablowski (2007), *supra* note 17. See further discussion in the following section.

⁹³ K. Davis and M. Trebilcock, *Legal Reforms and Development*, 22 Third World Quarterly, no 1 (2001), 21-36; S. Ghebremusse, *Good Governance and Development in Botswana: The Democracy Conundrum*, 11 Law and Development Review, no 8 (2018) 913-938.

⁹⁴ Merry, (2006), *supra* note 87, p. 106.

⁹⁵ *Ibid.*

⁹⁶ Darian-Smith (2013), *supra* note 37, p. 60.

⁹⁷ D.K. Tarullo, *Logic, Myth and the International Economic Order*, 26 Harvard International Law Journal, no 2 (1985), 547-548.

⁹⁸ Darian-Smith (2013), *supra* note 37; Kennedy (2016), *supra* note 48.

Transformations in the regulatory structure of the global economy and the patterns of production and consumption that they support are deeply embedded within local, national and global hierarchies of wealth, political power and structural societal asymmetries of race, class and gender, and the outcomes of power struggles and local contests that reflect and reproduce these organisational forces and structures. Law and development scholarship have intersected with the study of IEL in considering these contests and outcomes within a deeply embedded social field. Ashiagbor⁹⁹ and Perry-Kessaris¹⁰⁰ both use the lens of economic sociology to understand law's role in the construction of markets and the dynamics of political and economic power that organises the frameworks of regional integration projects and trade policies in developing countries¹⁰¹ or systematises understandings of market-based legal development and reform.¹⁰² Others, such as Gillespie,¹⁰³ have utilised theories of social constructionism to understand the motivations of 'hybrid and non-state actors' responses to legal changes, including understanding the social and cultural factors influencing recipients of commercial law reform projects to 'change their regulatory preferences and support such global scripts'.¹⁰⁴

Orthodox methodologies to the study of law and the global economy struggle to conceive of law that is embedded within a broader framework of economic and social relations nor of law as the aforementioned '(multi)cultural artefact' and its role as a tool of *discursive* and *productive* as well as *coercive* power that is 'both constituting and being constituted by' a range of social, political and economic relations and cultural and institutional practice.¹⁰⁵ This perspective of law 'rejects law's claim to autonomy and its tendency toward self-referentiality'.¹⁰⁶ Contextual and critical traditions of law and development draw upon these understandings of law as part of a broader 'ideological-institutional complex'¹⁰⁷ that structure law and society, in this case, international law. Pahuja,¹⁰⁸ Eslava¹⁰⁹ and other scholars engaged in critical readings of international law challenge the idea of law's neutrality and problematise the use of 'development' as an organising concept for legal reform and institutional change. These approaches counter the instrumentalist tradition of law and development scholarship that posit a functionalist technical approach to examining law's role in global and local economies.

Within this tradition, L&D scholars, as well as scholars under the umbrella of third world approaches to international law (TWAIL), have forwarded trenchant critiques of how 'development' as a construct and relatedly, concepts of 'rule of law' and 'good governance' have been enrolled as legal and political techniques to legitimise interventions in colonial and postcolonial states.¹¹⁰ Here, the treatment of 'development as a discourse instead of a theory

⁹⁹ Ashiagbor (2018), *supra* note 27.

¹⁰⁰ Perry-Kessaris (2014), *supra* note 27.

¹⁰¹ Ashiagbor (2018), *supra* note 27.

¹⁰² Perry-Kessaris (2014), *supra* note 27.

¹⁰³ Gillespie (2012), *supra* note 92.

¹⁰⁴ *Ibid.*

¹⁰⁵ Darian-Smith (2013), *supra* note 37, pp. 40 & 60.

¹⁰⁶ *Ibid* pp. 60-61

¹⁰⁷ Pahuja (2011), *supra* note 20, p. 10

¹⁰⁸ *Ibid.*

¹⁰⁹ Eslava (2015), *supra* note 17; Eslava (2008), *supra* note 26.

¹¹⁰ Anghie (2001), *supra* note 19; Eslava (2015), *supra* note 17; Eslava (2008), *supra* note 26; Gathii (1999), *supra* note 19; Pahuja (2011), *supra* note 20; Tan (2011), *supra* note 20.

or a fact' is considered 'both a methodological decision and a critical stance',¹¹¹ one that posits the notion of development as a theoretical and institutional technique to classify knowledge and circulate ideas about the nature and form of social and economic organisation that privilege the dominant actors within the global economy.

This body of scholarship powerfully argues that the positioning of the developmental status and legal systems of developing countries against the normative ideal of European law, economy and society serve to legitimise the entry of and disciplinary engagement of western states, via development agencies and other international organisations into third world states under the guise of progress or rehabilitation.¹¹² Specifically, it not only challenges the ethnocentrism of law and legal reform projects (a'la the first wave of law and development praxis) and ruptures the 'civilising' narratives of legal orientalism structuring international law more generally and IEL in particular (see discussion in section 3(b)), it also cautions against the contemporary reappropriation of orientalist techniques to rehabilitate the shortcomings of IEL.¹¹³ Gathii, for example, has argued that the World Bank's good governance agenda introduced in the third 'moment' of law and development reforms serves as a means of reconciling incipient demands for human rights approach to development with the 'conservative economic commitments of neo-liberal economic reforms', thereby constituting a form of 'counter insurgency' that can undermine more transformative reforms in international law.¹¹⁴ Elsewhere, I have also argued that the location of good governance and the rule of law as constructs within the temporal and policy space in which they emerged as legitimising narratives for economic adjustment in developing countries not only blunt their use as tools for reforming international investment law, they can serve to inhibit more meaningful change.¹¹⁵

Critical traditions of law and development scholarship thus necessarily counters the instrumentalist approaches of traditional law and development scholarship by not only problematising the 'law' but also deconstructing the term 'development'. These epistemological traditions can reflect a critical praxis for the law and development movement by a) exposing the underlying power dynamics and paradoxical social and economic asymmetries the structure the relationship between law and the global economy and law reform and economic development; and b) mobilise resistance against the entrenchment of global asymmetries via legal and institutional reforms of law and development. Scholarship that accords primacy to voices and experiences from the south as it speaks about the role and impact of law, including IEL, within developing countries can redress the 'methodological otherness' that characterises conventional studies on the global economy. These critical traditions are grounded in the agency of southern actors within the international economic architecture, viewing southern states and communities as *subjects* and not *objects* of international development interventions.

An important constituent of L&D scholarship therefore, as discussed in the previous section, is its focus on the everyday realities of law's functions on the ground, seeking to understand

¹¹¹ Eslava (2008), *supra* note 26.

¹¹² Anghie (2005), *supra* note 60; Pahuja (2011), *supra* note 20.

¹¹³ Gathii (1999), *supra* note 19; T Krever (2011), *supra* note 26; S. Pahuja, *Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide* 13 *Leiden Journal of International Law*, no 4 (2000), 749-813; Tan (2015), *supra* note 22.

¹¹⁴ Gathii (1999), *supra* note 19, pp. 107-110.

¹¹⁵ Tan (2015), *supra* note 22.

how international law and legal change brought about by external actors and institutions is experienced by state and non-state actors in developing countries. This scholarship constitutes part of what Merry terms the ‘anthropology of international law’ which includes both the ‘studying up’ at the international and metropolitan sites of IELmaking and the political and economic contexts that structure them (see section 4(a)) as well as understanding how the ‘knowledge practices of law’ circulate transnationally and how they intersect with multiple systems of law at the national and local levels.¹¹⁶ Capturing how some forms of law is successfully globalized – Santos describes this as a form of ‘globalized localism’¹¹⁷ – as well as how local conditions are altered by transnational law – ‘localized globalism’ – is critically important to understanding how IEL operates and how it might ‘create, express or reconstruct’ structural conflicts within the current global economy.¹¹⁸

There is a diverse range of ethnographic research have been conducted by law and development scholars on how IEL is encountered and experienced *in-situ*, including Eslava’s ground-breaking research on the everyday operations of international law and its intersections with the development project in Bogotá;¹¹⁹ Ochoa’s interdisciplinary and multi-modal work on community conflicts with foreign investment regimes in the Colombian highlands;¹²⁰ Rangnekar’s complex explorations of the impact of intellectual property protection of geographical indications in Goa;¹²¹ Sekalala’s research into participatory decision-making in global health projects in Uganda;¹²² and Szablowski’s insightful exploration of World Bank mining reforms in Peru.¹²³

This body of work which delves expansively and intimately ‘into the everyday life of international [economic] law’¹²⁴ not only provides us with a rich tapestry of knowledge about how IEL intersects with its constituencies on the ground, it also challenges the epistemology of IEL which starts at the elite or metropolitan centre and works hierarchically downwards to the ‘others’.¹²⁵ In doing so, these ethnographic practices of law and development scholarship engages in a fundamentally political act, whether by design or accident. As Eslava and Pahuja argue, ‘[c]hronicling the international as it unfolds in people’s everyday lives, gives the political international lawyer – and those fluent in languages other than international law – a map to chart a course of resistance, to revolt and to strategise against the effects of the regulatory proliferation of international law’.¹²⁶ Law and development scholars in this vein situate the process of legal change – whether endogenous or externally constructed – within the communities where such changes are keenly felt, socially, culturally, economically and ecologically.

¹¹⁶ Merry, (2006), *supra* note 87, p.108.

¹¹⁷ According to Santos, historical conditions of the western-dominated capitalist world system means that there can be no ‘genuine globalization’ and what is generally referred to as a globalization is instead ‘the successful globalization of a given localism’ (B.D.S. Santos, *Toward a New Legal Common Sense*, 2nd ed, (London and Edinburgh: Butterworths Lexis Nexis, 2002) p. 178). He argues that what is designated as globalization consists of a web of ‘globalized localisms’ – ‘the process by which a given local phenomenon is successfully globalized’ – or ‘localized globalisms’ – the local manifestations of global or transnational imperatives (179).

¹¹⁸ *Ibid*, p. 179

¹¹⁹ Eslava (2015), *supra* note 17.

¹²⁰ Ochoa (2017), *supra* note 92.

¹²¹ Rangnekar (2011), *supra* note 92.

¹²² Sekalala (2017), *supra* note 92.

¹²³ Szablowski (2007), *supra* note 17.

¹²⁴ Eslava and Pahuja (2012), *supra* note 68, p. 25.

¹²⁵ *Ibid*; also Hoffman (2017), *supra* note 89.

¹²⁶ Eslava and Pahuja (2012), *supra* note 68, p. 32.

These critical traditions can and do challenge the essentialist positions of prevailing IEL scholarship and mainstream approaches of law and development movement that centres on particular constructions of Euro-American legalism and conceptualisations of law, justice and rights¹²⁷ and reclaim the infrastructure of knowledge, systems of classification and ‘regimes of truth’ about the third world¹²⁸ that have historically structured economic and geopolitical relations between the north and south and legitimised normative intrusions into developing countries. They can and do serve as a critical praxis ‘to decolonize the dominant and homogeneous forms of Western legal knowledge and present alternative and complimentary systems of knowing and existing beyond the Global North’.¹²⁹ Critical traditions of law and development contribute towards a broader body of work that recognises and signals to the global south as multiple sites of knowledge production in their own right and not merely as an ‘other’ or adjunct to knowledge produced in the north.¹³⁰ Challenging the dominant epistemologies of IEL speaks to a new critical praxis in IEL scholarship.

5. Conclusion

IEL, through a law and development lens, can move international scholarship on the global economy beyond the doctrinal and provide a richer understanding of IEL as both a source of *regulation* and *legitimation* of contemporary and dominant patterns of economic production, consumption and circulation. Law and development approaches recognise the dynamic and constitutive relationship law establishes with economic activity and can provide an alternative systemisation of discourses and knowledge about legal, social, economic and political organisation and cultural formations that are empowering and which resist attempts to foreclose radical reform of asymmetrical relations within the global economy, including problematic patterns of production and consumption.

Law and development scholarship, by its very nature, challenges the Eurocentrism and colonial legacy of knowledge production of scholarship on IEL by providing a broader platform for academic engagement in fundamental issues that affect the global south. Development for many scholars in the south is not a theoretical construct but one that represents their lived everyday lives. Law and development as a field of study accords scholars a platform for addressing real concerns about their everyday lives¹³¹ in all its theoretical and operational permutations. Importantly, a new praxis of law and development has emerged in which scholarship and practice are intersecting beyond the intercessions of western-dominated bilateral and multilateral institutions, such as the US Agency for International Development (USAID) and World Bank, and instead to institutions that represent the broader constituency of the south, such as the Commonwealth Secretariat and the intergovernmental think-tank, the South Centre.

However, to serve effectively as useful conceptual and methodological techniques for the pluralising of IEL, law and development as a field of scholarship must itself resist its own totalising discourses, instrumentalist praxis and the tendency towards epochal linearity which

¹²⁷ Darian-Smith (2013), *supra* note 37, p. 6.

¹²⁸ Tuhiwai-Smith, (2012), *supra* note 56, p. 33.

¹²⁹ Darian-Smith (2013), *supra* note 37, p 108.

¹³⁰ S. Xavier, *Learning from Below: Theorising Global Governance through Ethnographies and Critical Reflections from the Global South* 33 Windsor Yearbook of Access to Justice, no 3 (2016), 229-255.

¹³¹ See for example, the *Law and Development Review* Special Issue on Law and Development in Africa: <https://www.degruyter.com/view/j/ldr.2018.11.issue-2/issue-files/ldr.2018.11.issue-2.xml>

characterise the theoretical, substantive and applied constituents of the discipline. It must also guard against the appropriation of knowledge from the south and the formation of new epistemological barriers that can stymie the emergence of southern voices in the field of IEL as well as in law and development studies. Law and development scholars must ourselves critically reflect on our positions and our work in a reflexive vein to consider how we contribute to or depart from the dominant narratives that narrow the epistemological windows of our own discipline and the broader discipline of IEL. Only by recapturing law and development as a site for contestation can we appreciate its value and contributions to the pluralisation of legal scholarship generally and the study of IEL in particular.

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