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## Part I Theoretical perspectives on development and law

### 1 Beyond law and development?

Sam Adelman and Abdul Paliwala

What relevance do development and law and development discourses have amid global economic and environmental crises marked by ecological and climate catastrophe, impoverishment, conflict, digitalisation and surveillance capitalism? This chapter discusses the history of law and development and its becalming in a world in which the failed tenets of neoliberalism continue to underpin mainstream, hegemonic conceptions such as sustainable development. It critically examines conventional discourse on development, postdevelopment and alternatives to development. We argue that existing concepts of law and development used in orthodox, reformist and even critical accounts tend to shift our collective gaze away from global injustices and the new imaginaries needed to address them, which have to be inspired by subaltern global South and feminist perspectives based on alternative conceptual frameworks of relationality, care, commons and new economics to meet contemporary challenges in a world of rising authoritarian populism, nationalism, xenophobia and democratic and legitimacy deficits.

#### 1 Introduction

‘Or alternatively, is it the case that development really did die, but there was no funeral and no burial ... and from the rotting corpse all kinds of pests are currently crawling?’ (Esteva et al., 2013: vi) We live in a period of multiple crises. Promises to alleviate poverty – for example in the Millennium Development Goals – remain distant while the gap between rich and poor within and between states continues to widen (Brian, 2015; Pogge, 2002). The postwar liberal international order based upon human rights, democracy and the rule of law is under sustained attack from authoritarian, nationalist and populist regimes in the global North and South.<sup>1</sup> Digitalisation is abused to implement surveillance societies by states and social media companies, while automation and artificial intelligence (AI) threaten millions of jobs worldwide (Lyon, 2001; Morozov, 2012; Zuboff, 2019; Ragnedda, 2017). Ecological destruction, global heating and biodiversity loss in the Sixth Great Extinction pose existential threats to all species (Kolbert, 2014; Chapter 3, this volume). These trends call into question the relevance of existing discourses on law and *development*<sup>2</sup> in the context of these crises. The title of this volume and its forthcoming companion imply a need to move beyond law and development, not least because of the profound challenges posed in the Anthropocene (Chapter 3, this volume). Law and development discourses have been subjected to thoroughgoing

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<sup>1</sup> The clearest statement is Vladimir Putin’s dismissal of liberalism (Barber, L. and Foy, H. Vladimir Putin: Liberalism Has ‘Outlived Its Purpose’. *Financial Times*. Available online at: <https://www.ft.com/content/2880c762-98c2-11e9-8cfb-30c211dcd229> (accessed 15 July 2019)). Putin favours ‘managed democracy’ along the lines of Viktor Orbán’s ‘illiberal democracy’. Presidents Bolsonaro and Trump display similar neo-fascist tendencies.

<sup>2</sup> We use ‘law and development’ to signify both development and law and development as appropriate.

critiques since they emerged in conjunction after the Second World War – most notably in David Trubek and Marc Galanter’s anguished ‘Scholars in Self-Estrangement’ (1974). Progressive critiques have focused on the depredations of growth, extraction, industrialisation and modernisation and the ways in which the Bretton Woods financial and economic institutions have sought to ameliorate the negative impacts of development through ‘human’ and ‘sustainable’ development, and the capabilities approach. These shifts have persistently failed to address the structural inequalities in the global framework resulting from colonisation of development by the development industry: the international financial institutions (IFIs)<sup>3</sup> and other global development institutions, non-governmental development organisations, aid agencies, transnational corporations, private lenders, and global markets (Korten, 2015). Progressive critics have challenged the idea of development itself and called for alternatives such as postdevelopment or alternatives *to* development.

This chapter considers the underlying problems in successive hegemonic development discourses and critically examines alternative forms *of* and alternatives *to* development and postdevelopment. We suggest that law and development concepts and discourses – orthodox, reformist or critical – create a risk of shifting our gaze away from concrete social injustices because they are preoccupied with models of development, institutions and economic and political factors such as growth and governance. For this reason, we argue that new imaginaries that focus on harms and injustices are required.

## **2 Four key themes**

Any new imaginary must engage with the interconnected, underlying concerns that have characterised successive dominant development discourses. First, there is a need to confront the historical political, economic and discursive domination of the global North forged under colonialism and imperialism. Despite the emergence of formally equal sovereign states following decolonisation, Northern domination was perpetuated through its control of international political and economic institutions and global markets (Hoogvelt, 2001) until coming under challenge from rising powers such as China and India towards the end of the 20th century. Second, there is a need to overturn teleological Eurocentric ideas of progress, the concomitant notion that Western modernity prefigures the future of the global South, and the fetishisation of economic growth at the expense of ecological sustainability. Third, private property and possessive individualism exercise a powerful hold on development discourses and

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<sup>3</sup> Primarily the IMF and the World Bank.

legal systems across the globe despite challenges from relational feminist and subaltern perspectives in the global South. Fourth, we need to explain and challenge the continuing hegemony of neoliberal globalisation since the last quarter of the 20th century despite the destruction it has wrought in North and South. Neoliberalism is symbolised by *homo economicus*: the putative profit-seeking, efficiency-maximising rational actor whose counterparts are the abstract legal subject (apotheosised in the corporate form) and the Anthropos capable of altering the geology of the planet. All these factors are under challenge, but they continue to frame development discourses incapable of resolving the multiple overlapping crises confronting humanity.

#### Northern domination

Colonisation denied sovereignty and self-determination in order to facilitate exploitation, expropriation and oppression. The conferment of formal sovereignty under postcolonialism was accompanied by different forms of subordination to Western hegemonic states, global markets and the international economic institutions, and the dogmas of neoliberal globalisation (Quijano, 2007; Anghie, 2005). Development discourses usually prescribe how states ought to develop while brushing over enduring constraints arising from their colonial or imperial histories. 'Sovereign' postcolonial states were made responsible for their development on terms dictated by the global North through skewed international law and the changing conditionalities of the WTO, IMF, the World Bank and a myriad other institutions controlled by the North. The ostensibly participatory language of the World Bank's erstwhile Poverty Reduction Strategy Papers and its current Country Partnership Frameworks or the OECD Paris Declaration on Aid Effectiveness (2005) camouflage their intimate disciplinary and biopolitical controls (Tan, 2011). Yet the very complexity of these disciplinary demands makes them practically difficult to implement and may enable authoritarian illiberal and corrupt regimes to obviate them (Craig and Porter, 2006: 158). McCourt's (2018) study of Sri Lanka and Cote d'Ivoire suggests that only lip-service is paid to countries' priorities. Furthermore, the IFI's fear of poor governance is used to limit state power by promoting direct engagement by civil society organisations in governance mechanisms (Eichenauer and Reisenberg, 2017). A different but equally problematic idea of development underpins China's development aid and its Belt and Road strategy. While it constitutes an enormously impressive counterbalance to Northern aid approaches, especially in not requiring conditionalities, it subordinates human rights and the rule of law and provides a template for authoritarian regimes from Zimbabwe to Sudan and Myanmar (Biukovic, 2014; Naim, 2007; Strange et al., 2017).

### Growth, progress, modernity and ecological catastrophe

Development conceived as progress through economic growth became a Western doxa when development was discovered after the Second World War and viewed as the only way to reduce poverty and promote social justice and nation-building (Escobar, 1995/2012: 24). Hegemonic ideas of progress and modernisation underpinned extractive, growth-driven development, which was extremely uneven and heedless of the negative impacts of environmental degradation on the material conditions required for all economic activity (Sachs, 2010; Raworth, 2017; Chapter 3, this volume). These flaws are replicated in the contemporary manifestation of developmental hegemony, the oxymoronic concept of sustainable development and the Sustainable Development Goals in 2015 (Adelman, 2018). As we argue below, the so-called Global Goals are old wine in new, green, neoliberal bottles when radical transformation is required to avert ecological catastrophe.

### Individualism versus relationality

From colonialism to neoliberalism, Western developmentalism has privileged possessive individualism in the form of the rational economic man or entrepreneur (Duffield, 2008). It has drawn negative contrasts with traditionalism, communitarianism, collectivism and socialism, which ineluctably lead to economic failure and explain the relative success of Northern countries (Inglehart and Oyserman, 2004). Furthermore, it emphasised connected notions of rigid rights of property and contract. In contrast, neoliberal dominance has been attacked by discourses inspired by gender justice, subalternism and indigenous cultural values which emphasise the ethics of relationality, interdependence and care (Held, 2006; Gudynas, 2013; Tronto, 1993). Relationality places emphasis on fluid shaping and re-shaping of human practices through reciprocal relations between and among individuals and groups rather than through rigid rights and identities (Bourdieu and Wacquant, 1992: 224–35). Care adds an ethical dimension to relationality by suggesting that people inter-relate with one another, and their environment in a complex ‘caring’ life-sustaining web to live as well as possible (Tronto, 2013: 103). A further dimension is added to this by group rights and activities in which durable cooperative institutions are organised and governed by the resource users themselves (Ostrom, 1990).

The contradictions intrinsic to development were reflected in the protection by Britain of women in the Raj against practices such as suttee immolation while entrenching patriarchal domination (Loomba, 1993). Since the 1980s, development initiatives have emphasised women’s rights but remain two-faced. Women’s rights and participation in society, politics and

the economy are promoted but their anchoring in neoliberal ideology means that there is no overall reduction in gender injustices. Southern women have opposed simple transplantations of Northern liberal feminism in asserting that the intersection between global and local patriarchal relations produces distinct forms of oppression in the global South. This chimes with feminist critiques of individualist socio-economic relations at the expense of alternative ethics of relationality and care (Robinson, 2011; Stewart, 2011).

A further challenge to Northern law and development discourses is directed at its wilful ignorance, orientalisation and misrepresentation of Southern subaltern voices characterised by Boaventura de Sousa Santos (2007) as 'abyssal thinking' and by Walter Dignolo (2012: ix) as 'monoculture of the mind'. Enrique Dussel (2003: 47) calls for a 'philosophy of liberation' as a counter-discourse, 'a critical philosophy born in the periphery (from the perspective of victims, the excluded), which has the intention of being relevant on a global scale'.

Peter Fitzpatrick (1992) exposed the othering of non-European laws and customs through denial, denigration and the invention of the uncivilised, indolent native that underpinned the myth of civilised modern Western law, paradoxically through the denial of law to the savage, particularly property law, enabling European colonisers to expropriate their lands while placing the right to property at the centre of international law (Anghie, 2005). Law and development discourses have perpetuated these Northern epistemologies by insisting that the South must adopt Western institutions of law and justice as preconditions for development. Repeated failures have led to declarations of death of Northern development approaches, which nevertheless persist in zombie forms (Gudynas, 2013; Tamanaha, 2011).

In the colonies, the unfettered export of grain led to disasters such as the 16 million deaths in successive famines in India between 1875 and 1914 (Collingham, 2017). In the immediate postcolonial period, the shift from European colonialism to US imperialism and the strategic requirements of the Cold War combined to usher in the contemporary era of development. Initially, the main thrust was the reconstruction of war-ravaged Europe, followed by aid and investment flows to the erstwhile Third World to promote modernisation and industrialisation in the teeth of opposition from neoliberals such as Hayek who opposed import-substitution in favour of the neocolonial export-orientation of agricultural and mineral commodities by plantation owners and traditional producers (Plehwe, 2015). By the end of the 1970s neoliberalism had become the primary means of furthering Northern business and geo-strategic interests (ibid). The global South was forced to accede to market discipline and global regulation under the aegis of WTO, the IMF, and the conditionalities of structural adjustment programmes and subsequently ostensibly voluntary Poverty Reduction Strategies and new

Country Partnership Frameworks imposed by the IFIs. Braithwaite and Drahos (2000: 585) characterised global and local agents of neoliberalism as model missionaries, mercenaries, mongers, misers and modernisers. These have been prevalent in the technocratic ‘Rule of Experts’ (Mitchell, 2002) by economists, lawyers and social scientists. Neoliberalism is encouraged through training programmes and other inducements designed to normalise competitive individualism and market fundamentalism. Just as colonialism adapted to local conditions, neoliberalism has been sufficiently flexible to encapsulate developmental discourses ranging from structural adjustment to notions of good governance inspired by new institutional economics and supposedly participatory anti-poverty strategies (North, 1995; Faundez, 2014). Neoliberalism colonises concepts such as human and sustainable development, ‘development as freedom’ and appropriates human rights through trade-related, market friendly human rights (Baxi, 2006/2012; Baxi, 2009). Its antipathy to state-driven development has even infected non-statist modes of governance such as community-based self-reliance through which people are constructed as market actors and responsabilised for sustainable development and resilience to the linked threats of poverty and global heating (Duffield, 2008: 69).

### **3 Avatars of development and law**

#### Colonialism: the civilising mission<sup>4</sup>

British colonialism shifted from mercantilism to free trade with the repeal of the corn laws in 1846. Britain had maintained significant control of its colonies through the violence of slavery, indentured labour and migration within the empire. Slavery underpinned sugar production, Indians were encouraged to export cotton but prevented from exporting cloth, and Africans were encouraged to grow maize rather than traditional foodstuffs to serve British interests (Collingham, 2017). Imperial aims were cloaked under the civilising mission of colonialism and modernisation (Rist, 2008). As Victor Hugo put it, ‘Go forward, the nations! Grasp this land! Take it! From whom? From no one’ (ibid.: 51). Imperial avarice ‘grabbed hold of places and living people’ as its civilising mission ‘exerted its sway over minds in the name of universalism and humanity’ (ibid.: 67). They imposed cultural change and an inferior cultural identity incapable of producing the Homo economicus of neoliberalism (Jones, 1960). They also disrupted relations by emphasising male economic dominance and patriarchy (Stewart, 2011).

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<sup>4</sup> This section focuses on British colonialism. For a broader analysis, see Rist, 2008.

### The emergence of law and development

The idea of national development goes back at least as far as demands by Sun Yat-sen in China in 1919 and Haile Selassie in Ethiopia in 1923 for development assistance to the global South (McVety, 2018: 21, 25). However, in typical Eurocentric fashion, the transition from the civilising mission to development with the US's postwar domination is often attributed to President Truman's 1949 speech outlining 'a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas'.<sup>5</sup> Whereas Keynesianism in the form of the Marshall Plan was deemed acceptable for Europe, the Third World was subjected to the disciplinary mechanisms of the Bretton Woods institutions (Woods, 2006; Duffield, 2008). The Cold War gave the Third World limited room for manoeuvre and little incentive to promote democratic institutions as East and West favoured military juntas, civilian dictatorships and one-party states in a series of proxy conflicts. Northern postcolonial discourses promoted modernisation as the best strategy for economic growth along the lines of Rostow's Stages of Growth (1960).<sup>6</sup> Postcolonial states were encouraged to abandon 'backward traditions' and embrace entrepreneurial institutions for capital accumulation stimulated by foreign aid. The unfavourable outcomes that resulted led to critiques such as dependency theory and calls for a New International Economic Order.

The North's discovery of development was accompanied by the invention of technocratic sub-disciplines such as development economics and law and development which commonly argued that ending traditionalism required the replacement of colonially constructed customary law by modern Northern institutions, especially private property, freedom of contract and investor rights. The gap between law's putative aims, between law in statutes and law in action created authoritarian regimes and debased manifestations of rule of law under colonialism, and its inability to seamlessly modernise resulted in anguished analyses of its defects (Trubek and Galanter, 1974). Law and development were attacked from the left by dependency theorists and besieged from the right by neoliberalism, the latter prompting the emergence of a second law and development movement (Rittich, 2004).

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<sup>5</sup> Truman, H.S. *Inaugural Address*. 20 January 1949. Available online at: [http://www.trumanlibrary.org/whistlestop/50r\\_archive/inaugural20jan1949.htm](http://www.trumanlibrary.org/whistlestop/50r_archive/inaugural20jan1949.htm) (accessed 10 May 2019)). Esteva (2010).

<sup>6</sup> Soviet and Chinese strategies promoted state-centric development in this period with mixed results (Clarkson, 1978).



### Dependency theory

In the 1960s, mainstream development policies prioritised import substitution as the optimal path to industrialisation; import substitution was ironically blamed for the financial and debt crises of the 1970s even though Latin American output grew at an annual rate of 5.3 per cent during the decade and 2.2 per cent afterwards (Palma, 2003).<sup>7</sup> Dependency theorists argued that core metropolitan states systematically exploited peripheral countries for cheap labour and raw materials through the ‘development of underdevelopment’ (Cardoso and Faletto, 1979; Love, 1990).<sup>8</sup> They demonstrated how the incorporation of the Third World into the global political-economy took place on structurally unequal terms that endure to the present day in the tautological processes of developmentalism whose main aim is development detached from human wellbeing (Escobar, 1995/2012; Esteva, 2010). Walter Rodney (1972) famously described how Europe underdeveloped Africa. Dependency theory critiqued the underlying epistemological dependence of what later became the global South on Northern rationalities and called for a New International Economic Order to rebalance the global economy. Postcolonialism was accompanied by demands from former colonies for permanent sovereignty over natural resources, the right to self-determination and, more recently, the right to development.

Dependency theory led to a critique of legal instrumentalism and challenged the idea that successful development required the transplantation of Western law. It focused on the political economy of law and the ways in which Western legal institutions such as contract, property and investor rights perpetuated inequality and underdevelopment. Ghai et al. rejected existing law and development approaches in favour of political-economy analysis of ‘law, legal institutions and processes in their social, economic and political context’ (1987: xii). Such analyses described the ease with which transnational corporations avoided state attempts to control them (Bierstecker, 1987; Korten, 2015).

### The Washington consensus

The rise of neoliberalism undermined the influence of Keynesian approaches and dependency critiques as failures of development were attributed to the central role of inefficient states. The left considered the state to be over reliant on international capital while the right saw the main

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<sup>7</sup> From the 1980s onwards, neoliberalism was based upon the new dogma of export-oriented growth apparently exemplified by the emergence of the Tiger economies in Asia.

<sup>8</sup> World System Theory also critiqued relationships of dependency between the core and the periphery but discerned a greater degree of dynamism and room for manoeuvre in the latter. A prominent example is Wallerstein, 2004.

problem of development as collusion between the state and rent-seeking local elites (Toye, 2004: 31). Neoliberalism's proponents argued that law should be used to construct domestic markets and smooth the integration of developing countries into the global economy through reform of trade, taxation, intellectual property and financial flows (Chimni, 2004: 7).

The victory of the right was reflected in the so-called Washington consensus and its demands for small states, privatisation, liberalisation and deregulation. The role of the state should be limited to the maintenance of law and order and the provision of health and education. The Washington consensus moved through avatars ranging from structural adjustment to poverty reduction strategies rooted in market fundamentalism (Faundez, 2010; 2014). In reality, the state remained as essential as it had been in all forms of development throughout history, a truth rediscovered by the Bretton Woods institutions following the explosion of the global economy by finance capital in 2008.

Structural adjustment conditionalities weakened the bargaining position of Southern states in fora such as the WTO (Tan, 2011). Although the Multilateral Agreement on Investment was aborted in 1998 following widescale protests around the world, the countries of the global South were compelled to open their economies to foreign investment through bilateral investment treaties and other measures (Braithwaite and Drahos, 2000; Dezalay and Garth, 2002). Structural adjustment generated equally widespread resistance throughout the global South as the World Bank's spurious claims of success were exposed by growing poverty and inequality (World Bank 1994a; cf. Lall, 1995). International financial institutions viewed the problems of structural adjustment primarily as the consequence of governance failures, a shift that coincided with a renewed focus on institutions and governance in New Institutional Economics (North, 1995; Faundez, 2014).<sup>9</sup> The result was an instrumental emphasis on law and legal institutions as the bases for good governance (World Bank, 1994b; IMF, 1997; Faundez, 2010; 2014).

The underlying aims of internal economic liberalisation and opening the South to global trade and markets required the creation of institutions to facilitate capital accumulation, the eradication of corruption and the rule of law. Good governance appeared to require human rights and democracy even as it seemed to be good for global capital and local elites rather than those subject to conditionalities, national debt and market discipline. In an analysis of Article 10 of the World Bank's charter, which prohibits interference in domestic politics, Ibrahim

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<sup>9</sup> North is one of several Nobel economics laureates whose malign influence on development has been substantial. Others include Hayek and Friedman.

Shihata argued that the Bank considered human rights, particularly socio-economic rights, only when they affected unfettered economic activity (Shihata, 2000; Schlemmer-Shulte, 2001) and continued to lend to countries with weak human rights records. The result was a mushrooming of law and development projects on judicial and legal reform, corruption, land reform, and tax and economic legislation (Rittich, 2004; Tamanaha, 2011). In parallel with the IFIs, Northern aid agencies promoted human rights and constitutional reforms towards multi-party democracy. This brought new acknowledgements of failure and questioning of law and development by some believers in the project (Tamanaha, 2011).

The failure of neoliberal strategies led to a new focus on poverty and on local state and civil society participation in development that camouflaged the intensive disciplinary relationship between global institutions and developing countries. While global capitalism continued to be strengthened through the creation of domestic institutions such as stock markets, there has been renewed emphasis on incorporating the poor into the formal economy. For example, vast sums have fruitlessly been spent on land titling in attempts to commodify peasants' property to enable them to raise capital (De Soto, 2000; cf Cousins et al., 2005).<sup>10</sup>

#### Human development

The relentless focus on growth in mainstream development discourses led critics towards a model that prioritised human development. The most well-known example is Amartya Sen's iconic formulation of *Development as Freedom* and his promotion of human capabilities to be and do what people have reasons to value. Increasing individual capabilities requires political freedoms, economic and social opportunities, transparency, and protective security (Sen, 1999). Sen's approach was extended in Martha Nussbaum's (2000) work on flourishing and resonated with Mahbubul Haq's (1996) work on human development. The product of these interventions was the creation of the UN Human Development Index (HDI)<sup>11</sup> and subsequently the Millennium Development Goals (MDGs) in 2000.<sup>12</sup> The HDI has been supplemented by other indicators of democracy, the rule of law and transparency (Paliwala and Kamchedzera, 2013). Sen's work is an important corrective to economic simplicities which seeped into law and development theory. In particular, he is critical of the economic theorists'

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<sup>10</sup> Seemingly benevolent strategies such as microcredit systems have also come under criticism (Roodman, 2011).

<sup>11</sup> The HDI ranks countries' development on three criteria of longevity (life expectancy), knowledge (education) and standard of living, but while departing from growth fetishism, it does not reflect Sen's emphasis on political, social, transparency and security. UNDP. About Human Development. Available online at: <http://hdr.undp.org/en/humandev> (accessed 19 May 2019)).

<sup>12</sup> Further information about the Goals is available online at: <https://www.un.org/millenniumgoals> (accessed 3 June 2019)).

misunderstandings of law and the simplicities of 'law and economics'. He also critiques the transcendentalism of Rawls and others in their universal approach to social justice. His critique of rational choice theory that people may make their choices because of their 'commitment' rather than personal advantage comes close to an acknowledgement of relationality (Sen, 2009). Nevertheless, he is limited by his embedment in orthodox economics even when he looks out to the disciplines of law and ethics (Tully, 2013). He acknowledges that markets are imperfect, fail and need regulation, but fails to analyse the structures of colonialism imperialism and contemporary global capitalism which generate contemporary social injustices (Chimni, 2008). Equally significantly, there is an absence of sociological/anthropological dimension which would have enriched his otherwise enticing analysis (Tully, 2013). His work is an antidote to authoritarian statism, yet he is constrained within the limits of formal liberal democratic forms (Sen, 2011: 129).

While there was a greater emphasis on constitutional change, the rule of law and access to justice during the early 1990s, neoliberalism entrenched contract, property and investment rights as countries in the global South were integrated into a global economy defined by free trade under the aegis of the WTO. Rittich (2004: 243) problematises the dissonance between human development, the MDGs and the neoliberal conception of economic efficiency as 'speculative at best and suspect at worst'. This dissonance was reflected in conflicting positions taken at the World Bank between lawyers promoting good governance and neoliberal economists. The result was clear ascendancy of the latter with human development approaches being reduced to instrumental and indicatorological devices amenable to economists (Faundez, 2010; Sarfaty, 2009). An even harsher critique suggests that the hypocritical colonial civilising mission which justified colonial plunder is substituted by the new rule of law 'that justifies looting to the paradoxical point of being itself illegal' (Mattei and Nader, 2008: 3).

### Sustainable development

Almost all economic activity is environmentally destructive to a greater or lesser extent, but development models rooted in ideas of teleological progress, modernisation and endless growth have produced widespread ecological degradation and undermined the material conditions for any type of development in the Anthropocene (Sachs, 2010; Chapter 3, this volume). Sustainable development was introduced to mainstream development discourses with the Brundtland Commission's report to the 1987 World Conference on Environment and development (WCED, 1987); as ecological catastrophe has unfolded it has become the dominant conception of development.

The adoption by the UN General Assembly of the Sustainable Development Goals (SDGs) as replacement for the MDGs in 2015 promises to reconcile endless growth, environmental protection and social justice, but the so-called Global Goals are old development wine in new greenwashed neoliberal bottles because they are designed to preclude the radical transformation required to stave off ecological catastrophe (Hickel, 2015; Carant, 2016). The Anthropocene forces us to rethink development and sustainability on a planetary scale (UNRISD, 2016; cf. McNeill, 2014; Colville, 2016; Chapters 2 and 3, this volume),<sup>13</sup> but planetary thinking is retarded by the persistence of sovereign-centric Westphalian rationality that prioritises collusion between states and global capital.

The SDGs contain 17 goals and 169 targets that envisage a win-win relationship between green capitalism and the environment (Gupta and Vegelin, 2016: 440; Adelman, 2018). Net responsibility for sustainability has been broadened to all countries, but it is voluntary for both governments and corporate actors. There are significant implications for law and development. For example, Goal 4 (gender inequality), Goal 10 (reducing inequality) and Goal 16 (promoting inclusive society and institutions) call for access to justice, good governance and constitutionalism.<sup>14</sup> This approach replicates the flaws of existing approaches to law and development which are unlikely to be remedied by the holistic approach of the SDGs in the absence of enforcement mechanisms and adequate funding. The SDGs are undermined by the contradictory belief that it is possible to grow our way to sustainability. Political ecologists have called for alternative models of development based upon degrowth (Hickel, 2019) or steady state economics (Daly, 2019) or alternatives to development such as *buen vivir* (Kothari et al., 2014; Adelman, 2018; Chapter 3, this volume; Chapter 5, this volume). In contrast, Aaron Bastani's (2019) luxury communist manifesto suggests that the underlying issue is not growth or degrowth but the need to transcend the unjust structures of neoliberal capitalism.

#### The developmental state

The rapid growth of the East Asian 'Tigers' and China in the second half of the 20th century challenged liberal and neoliberal notions of economic development. Whereas neoliberal ideology emphasised the role of markets and a small state, the East Asian approach was predicated upon the central role of the developmental state and industrial strategies as drivers

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<sup>13</sup> Welcome to the Anthropocene. Available online at: <http://www.anthropocene.info/great-acceleration.php> (accessed 15 May 2019)).

<sup>14</sup> Goal 16 has been translated by the UN India Office as requiring 'good governance' measure including ending violence, exploitation and corruption, promoting the rule of law and access to justice, combating corruption and promoting participation and transparency (India-UNDAF, 2018).

of development (Chang, 1994; Wade, 1990/2004; Haggard, 2018). In contrast to the new institutionalists, the character of the state and its bureaucracy, close regulation of business and labour, and the provision of education, health and housing, often by authoritarian governments, mattered more than civil and political market and property rights, checks on the executive, and the rule of law (Haggard, 2018). East Asian development was *sui generis*, context specific and adroit in responding to changing global and local circumstances, for example in relation to globalisation and free trade. Social change led to greater openness and democratisation in countries such as South Korea while China's unprecedented economic growth occurred under the direction of an authoritarian state. These different paths beg the question of whether they are models that are replicable elsewhere in the global South or the result of cultures, traditions and specific local circumstances (World Bank, 1993), although Ha-Joon Chang argues that Confucianism can and has been successfully adapted to promote development (Chang, 2003: 119; Stiglitz, 2001).

For Lee (2017), East Asia's success signifies the failure of the Washington consensus. He suggests that these models of development may require authoritarian rule, legal frameworks suitable for corporate entities such as South Korea's Chaebol, the suppression of labour, and the promotion of savings rather than democracy and the rule of law. Imported laws must be adapted to fit local conditions; the role of law and development is to ensure a culture of regulatory compliance and enhance the capacity and political will to implement laws and policies. Lee's approach does not rely on an abstract universal set of institutions characteristic of North-based law and development initiatives, and he criticises the capability approach's failure to consider local circumstances and historical priorities. He is less critical of the ends justifies the means mentality that underpins East Asian approaches and their emphasis on authoritarianism. For Lee, Senian capabilities and free markets must initially be subordinated to rapid economic growth to provide the space for the latter to prevail.

Lee's analysis is too crude. While developmental state theorists acknowledged that most East Asian states grew rapidly under authoritarian rule, their underlying focus was on the nature of industrial policies and the efficiency of bureaucracy and its relationships with local businesses (Chang, 2003; Haggard, 2018). Industrial policies in countries such as Japan, Korea and Taiwan have been accompanied by land, educational, technology and health reforms (Haggard, 2018). Unlike Lee, who considers that neoliberalism may replace active state involvement after achievement of rapid growth, the active state involvement in promoting industrial and trade policy continues in development states (Wade, 2018). A key underlying issue for the global South is therefore how to transcend the imbalances of power between the global South and

North including the Northern dominance of global institutions. Although the IFIs paid lip-service to the role of the state at the behest of China and Japan, they generally refused to acknowledge an active role for industrial policy (Wade, 2018), and their principles of law and development continued to favour the domination of Northern-based transnational corporations (Duffield, 2008; Wade, 2018; Korten, 2015).

#### Postdevelopment and alternatives to development

The idea of development is criticised by postdevelopment theorists as a hegemonic project 'to remake the world in America's image' (Esteva et al., 2013: 3; Klein and Morreo, 2019). Does the 'post' prefix challenge the practices of development or the concept itself (Chapter 2, this volume)? The literature suggests both on the basis that theory and practice are inextricable (Escobar, 1995/2012, 2016; Esteva, 2010; Sachs, 2010). The idea of postdevelopment highlights a radical disenchantment with exploitative, extractive and environmentally destructive development models based upon endless growth and market fundamentalism. It is a much-needed critique that clearly adumbrates the failings of development but is less clear about what should replace it and how to escape the development/postdevelopment binary. Furthermore, while postdevelopment approaches correctly emphasise the cleavages between Northern and Southern perspectives, there is relative ignoring of the injustices perpetrated by global South actors against each other.

In contrast, there is a growing argument for alternatives to the intrinsically flawed idea of development. The central problem is compound cumulative growth as the central ideology of developmentalism, a major cause of the climate crisis and ecological destruction. Amongst the alternatives promoted are degrowth and steady-state economics (Hickel, 2019; Daly, 2019). Esteva, Babones and Babcicky's 'radical manifesto' (Esteva et al., 2013) argues that overconsumption by the global North leads to environmental destruction and impoverishment, for which development aid is a sticking plaster: 'If rich people in the North want to help poor people in the global South, they can best do so by taking less rather than giving more' (Esteva et al., 2013: 93). Some of the most coherent alternatives to development are based upon Andean cosmovisions underpinned by onto-epistemologies diametrically opposed to possessive individualism, communitarianism and harmonious relationships between humans and nature (Kothari et al., 2014; Gudynas, 2013; Chapter 5, this volume; Chapter 3, this volume). Conceptions such as *buen vivir* (good living) do not recognise the notion of linear progress from underdevelopment to development. Instead the holistic focus is on relationality between humans, other species and the environment. There is an

emphasis on pluriculturalism and co-existence between communities, inseparability of all life's elements (material, social, spiritual), opposition to the concept of perpetual accumulation, return to use values and movement even beyond the concept of value. *Buen vivir*, in short, proposes a civilizational change.

(Kothari et al., 2014: 367)

The Indian based ideas of Ecological Swaraj link with ideas such as *buen vivir* in their emphasis on the rights of the earth, respect for other species, social justice and equity, and the involvement of every person in decision making (Kothari et al., 2014: 368).

There is a need for exploration of relevant legal strategies to link with development strategies required by these alternative approaches. The Constitutions of Ecuador and Bolivia already give some recognition to these cosmovisions (Chapter 5, this volume). Broader legal translation of these alternatives require radical transformations of trade, investment and debt laws to protect against ecological destruction, institutional change and a paradigm shift in legal theory to overturn the ways in which legal systems naturalise credit, debt, interest and rent, all of which require endless compound growth (Chapter 3, this volume). Legal cultures must undergo fundamental change to tilt the balance away from contract, property and other trade-related, market friendly human rights (Baxi, 2006/2012) towards human and ecological wellbeing, and away from individualism towards relationality, collective and environmental rights.

The end of law and development?

Yet, orthodox approaches to law and development are existentially threatened from different directions. China's developmental model and its Belt and Road strategy challenges Northern domination of aid while subordinating human rights and the rule of law and offering an authoritarian template for regimes from Zimbabwe to Sudan and Myanmar (Brautigam, 2011; Naim, 2007; Strange et al., 2017; Gehring et al., 2018). Chinese aid does not come with the conditionalities of Northern states and the IFIs, but its focus is no less imperialist than Northern models. Gehring et al.'s (2018) study suggests that while such an approach does not promote internal civil conflicts, it clearly facilitates oppression by authoritarian rulers (Gehring et al., 2018). Rule by law is the authoritarian alternative to the rule of law.

Trump's America first strategy threatens the liberal international order over which the US presided following the Second World War (Koh, 2017; Crane and Maguire, 2017). The soft power that cloaked the violence of US and European imperialism is being replaced in the case of US by climate denial, protectionism, racism, and indifference to corruption, inequality,



human rights violations, authoritarian rule and general lack of concern about the global South apart from restricting migration and promoting US trade interests.

Dominant global powers increasingly use bilateral trade and investment agreements as vehicles to bypass a multilateral international order in which the global South had relatively more leeway (Morosini and Sanchez Badin, 2017). The neo-imperial geostrategies unfold in the midst of linked global economic and environmental crises which promote authoritarian rule, magnify impoverishment and inequality, drive forced migration to escape exclusion and oppression, and create new geographies of global social injustices in which the global North and South exist cheek by jowl in Johannesburg, Mumbai and New Orleans.

Digital technologies herald further disruptions that deepen authoritarianism and surveillance capitalism while reducing employment and increasing the numbers of people for which capitalism has no need. As Bridle (2018: 116) suggests, AI robotics are ‘reducing workers to meat algorithms, useful only for their ability to move and follow orders, makes them easier to hire, fire and abuse’. The global digital divide is reconfigured by AI, robotics and a small number of global digital monopolies apparently able to escape democratic regulation and sovereign jurisdiction, at least in the North (Morozov, 2012; Paliwala, 2013). Whereas development initiatives have sought to ameliorate the global digital divide (WSIS, 2005; Paliwala, 2007), digitalisation threatens to exacerbate existing injustices (Ragnedda, 2017).

#### **4 New imaginaries: beyond development to social justice**

Development and law have not eliminated impoverishment and gender, ethnic and other forms of discrimination that deepen other injustices. Development theory has failed to overturn the dominance of neoliberal, extractive, growth-driven development that drives the climate and environmental crises. The postwar rhetoric of development as modernity and progress camouflaged the entrenchment of underdevelopment and injustice in much of the global South, which intensified with neoliberalism. It failed to eliminate injustices because it was rooted in injustice. One of the lessons of scholars in self-estrangement is that law does not provide simple, unproblematic nostrums for the depredations of development because it is not designed to do so. The form of law that underpins ‘good’ governance privileges individualism and private property. Katharina Pistor (2019) suggests a very broad range of legal instruments and practices as the Code of Capital which sustains neoliberal capitalism, a code which needs to be deconstructed in the interest of justice. Law is therefore important, not least as a site of struggle for global and local equality and justice. International environmental law may be full of soft norms and principles that are difficult to enforce such as the precautionary approach and

polluter pays principle, but histories of struggle suggest we should take it seriously as a strategy against injustice.

Modifiers such as 'human', 'alternative', 'sustainable' development or 'capabilities' have sought to attenuate the underlying logic of mainstream Northern models but paid insufficient attention to the structural causes of underdevelopment, inequality and injustice, enabling states and international development institutions to express fealty to these less hard-edged discourses. Similarly, the postdevelopment critique, which is locked in the binary discourse of under/development, does not adequately address local causes of injustice or proffer an alternative imaginary.

The causes of injustice are multiple and overlapping. For example, global heating undermines developmental gains and deepens poverty, which weakens resilience to climate, political, economic and social crises. Overarching development discourses which insist that the true path to development lies through export-oriented trade, good governance or other dogmas have too often treated social injustices as unfortunate by-products. A new imaginary based upon a bottom up approach that seeks to deal with specific harms and injustices may be more productive because it highlights the quotidian realities of human suffering arising from war, racism, patriarchy, migration, economic stresses, digitalisation and the climate crisis. [Caouette and Kapoor \(2016\)](#) demonstrate how these realities lead to struggles by peasants, farmworkers, migrant women and indigenous peoples against neoliberal globalisation, the powerful and the very idea of development, an issue explored in greater detail in the forthcoming companion volume to this work. As we write, events in Chile, Hong Kong and elsewhere confirm the potency of resistance. These instances highlight the importance of continuous collective struggle by social movements that engage locally and also transcend Westphalian boundaries ([Rajagopal, 2005](#); [Sarangi, 2002](#); [Caouette and Kapoor, 2016](#)).

Moving beyond development demands a paradigm change that overturns economic orthodoxies. The climate crisis cannot be solved by its main cause: capitalism, even reformed, green capitalism, not least because it is unlikely that greenhouse gas emissions can be completely decoupled from economic activity ([Hickel and Kallis, 2019](#)). The existential threat confronting us requires a fundamental transformation in production and consumption. [Maja Göpel \(2016\)](#) proposes decoupling production from unsustainable and uncaring approaches to humans, nature and animals and decoupling satisfaction of human needs from the obsession with growth in a manner that subordinates economic needs to human and environmental interests in ways that human development approaches have failed to do. [Kate Raworth's](#)

‘doughnut economics’ goes further is seeking to keep humanity within planetary boundaries while meeting human needs. The doughnut represents the:

regenerative and distributive economy which constitutes the just and safe space for humanity’ as the basis for good management of the global household. The inner hole border constitutes the social constraints such as the human needs for food, energy, health, housing, education, income and work, gender justice, social equity, peace and justice which cannot be transcended. Beyond the outer ring is the ecological ceiling such as atmospheric, oceanic and land surface pollution, water resource depletion and climate change.

(Raworth, 2017: 44)

Raworth seeks to escape the shackles of neoclassical economics and growth but her holistic vision views the SDGs as exemplars of a new economics (ibid.: 45) rather than rebundled green capitalism.

In conclusion, we need to reassess the utility of the concepts of ‘development’ and ‘law and development’ to the tasks of promoting human and planetary wellbeing in the Anthropocene because it is not possible to decolonise the idea of development. New imaginaries of law and development as law in global (in)justice offer ways to urgently construct sustainable economies underpinned by legal systems that provide solutions to the excrescences of mal-development in collective, holistic, harmonious and relational discourses.

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