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Beheading the Hydra:
Legal Positivism and Development

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Abstract

For the last sixty years, the concept of development has operated as a proxy for conversations about global inequalities. However its transformative logic ultimately implies that the West is the only legitimate source of models for social, economic and political organization. The understanding of law and legal systems is part of this broader tendency. A close study of the contemporary orthodoxy that promoting the 'rule of law' will bring about development reveals the way that developmental logic both secures a specific, positivistic conception of the rule of law, grounded in Western political theory and jurisprudence, and negates the possibility of other forms of normativity and regimes of legitimacy. Critiques which centre on the 'political' character of positive law are useful in pointing out the mythic character of institutional models, which empirically find no exemplars even within the 'developed' world. However such critiques ultimately avoid a consideration of the specific form which politics takes in positive legality, and the way developmentalism as a logic secures the ostensible universality of those Western forms of socio-legal ordering in the first place. Because of this, such interventions risk increasing, rather than reducing the sphere of intervention in Third World sovereignty legitimated by the concept of development.

Keywords:

Law, Development, Legal Positivism, Critical Legal Theory, Law and Development, Rule of Law, Third World, World Bank, Sovereignty.

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1. Introduction

Development is a story about human history in which a certain number of societies have, over time, achieved the most perfect forms of social, legal, political and economic organization which could reasonably have been achieved by now, but which other societies have not yet achieved.[1] According to this story, 'society' 'law' 'politics' and 'economics' in their ideal forms can be found in the knowledge, if not always the practice, of societies which have already achieved development and will slowly be achieved by the other societies. Experience has shown that this process can be hindered by many factors and that it is difficult to accelerate. However, there has grown a large industry devoted to discovering how this acceleration may be achieved and implementing its discoveries. In this story, development is the task of those who are still in the process of developing. The privileged too, have a role, for they must help those less fortunate by providing knowledge about the meaning of development and the means to try and accelerate the arrival of a state which time has already brought them and would eventually have brought to the less privileged too. But the pace of history is too slow to tolerate in this increasingly interconnected world,[2] and so in this story the developed societies must give to the developing societies many gifts of knowledge. Significant among those gifts is law.

The ideal(ised) version of law in the development story is the law of the legal positivist. Legal positivism as a jurisprudential endeavour is another narrative, about a certain body of rules made in a particular way. According to this story, these particular rules are the only rules which may rightly bear the name of 'law'. And this 'law' is the language in which legitimate authority is brokered in modern society. When certain scholars critique the premises of legal positivism in the context of development[3] they are usefully holding a mirror up to the societies claiming for themselves the exemplary position of the developed and saying, 'Look! In this respect, you do not meet your own ideal'. This can be a politically suggestive project which implicitly undercuts at least one aspect of development discourse.

But predictably the story is more complex than this, because in part, positive law as 'law'[4] draws its power from a constellation of concepts homologous with and including development.[5] In denying a divine source for itself and positing human beings as its authoritative source, positive law overtly rejects a transcendent referent. However, it implicitly accepts, indeed enlists, a series of transcendent referents which operate according to the same immanent logic, located within humanity, as it claims to. These referents variously and valiantly (yet discretely) step in to offer law a transcendent when it needs one to cohere but themselves turn to 'law' to cohere them when they need it. In other words, (positive) law secures an authoritative meaning for itself *as* law by being part of a network of terms which are each defined in part by reference to the other, but each of which asserts itself as self evidently true or 'universal'. A key example of this mutually securing transcendence is the concept of nation.[6] Development is another.[7] Taken together, this dynamic yet stable series of concepts each facilitates the claim to universality of the other, enabling a parochial vision of social, economic and political organisation to be put forth as universal. It secures that vision in a 'universal' position and erases the inevitable violence of that elevation. Given the dynamic stability of this web, I suggest that those who offer critiques of positivist conceptions of law in the context of development without exploring the dynamic of positive law's self-constitution and its relation to the concept of development fall into the trap of allowing some other ostensibly secularised yet transcendent ideal, such as 'civil society' or 'human rights,' to be privileged and to occupy the secret space at the heart of the development myth which may then continue unabated.[8] More troubling still is the possibility

suggested by contemporary shifts that such displacements may in fact facilitate the expansion of development's domain.[9]

In this article I wish to illustrate these claims by examining the contemporary turn to the rule of law as a development strategy and some critical responses to it. Arguably the instance of the rule of law as development strategy is a moment in which two things which normally resolve each other successfully only by their very denial of such an external resolution, come face to face. In the instance of the rule of law as a development strategy, both law and development are instrumentalised to justify the other while each denies that it relies conceptually on that other secularised transcendent referent to resolve itself. This manifests in what is seen to be a causal circularity - even a seemingly virtuous one (the rule of law promotes development and development promotes the rule of law). But in this showdown the conceptual circularity is inescapable. The 'failure' of the strategy is inevitable and the result can only be a revelation of the violence of the claim(s) to authority being made by each element of this mutually sustaining - and now visibly imperial - system of thought.[10]

To make my argument I will examine a series of texts of the World Bank in which it sets out its perception of the role of law in the development process, in order to analyse the Bank's understanding of what 'law' means and how it relates to development.[11] Although it does not express itself as embracing any particular philosophical conception of law,[12] arguably its understanding is a positivistic one, embedded within a broadly Weberian understanding of the relationship between law and modern capitalism.[13] In undertaking this exposition, I will draw out the salient features of positive-law-as-law for the purposes of my argument and show how these features find a homology in development.

In section two of the article, I will consider some of the more critical approaches to the rule of law as development strategy and argue that in their denunciation of positivism, such critiques tend to focus on the indeterminacy of law. This focus paradoxically leaves the specificity of the *form* of positive law unexamined. In turn, a crucial element of the legal positivist thesis thereby goes unchallenged, namely the dynamic of its claim to authority. As I will show, this claim is embedded in a development story of its own. These critiques tend also to leave unquestioned the notion of development *per se.* These twin blind spots lead these writers to shy away from identifying the imperial structure of knowledge in which law-as-development is embedded, and which it circularly helps to secure. Arguably, something like this approach and retreat was foreshadowed in the earlier 'Law and Development' movement which fell into abeyance in the 1970s. And it may be argued that despite the famous self-critique it engendered,[14] the failure at that time to question the notion of development *per se* and its relation to the dynamic of positive law, is in part what has facilitated the new and arguably more vigorous return of 'law and development' now.[15]

I will conclude by raising the possibility that interventions which do, justifiably, critique idealized (positivist) conceptions of the rule of law but leave development wounded but intact seem, as if beheading the Hydra,[16] to have had the perverse effect of expanding the domain of development, thereby intensifying intervention into the Third World[17] and rendering the Third World's putative sovereignty ever more porous.

2. The Rule of Law as Development Strategy

The rule of law has recently experienced a marked rise in popularity in the field of international relations. As several commentators have observed, after the end of the Cold

War and by the middle of the 1990s, the rule of law was being put forward as a panacea to the world's ills, from Russia to China, from Rwanda to Bosnia, its implementation came to be seen as a 'rising imperative of the era of globalisation' (Carothers, 1998). And if more widespread enthusiasm for it seems to have diminished somewhat since the inauguration of 'war on terror,' the (re)discovery and subsequent embrace of the rule of law by the development institutions, associated aid machinery and as a significant element of bi-lateral aid seems, if anything, to have tightened rather than slackened. One of the more significant institutions driving the move toward the rule of law was, and still is, the World Bank. The story of how it came to embrace the rule of law as a development strategy is a related but different question to the immediate concern of this article.[18] But for various and complex reasons, around the end of the 1980s the Bank took an interest in 'governance' and institutions (including law generally) and their role in the promotion of development.[19] Not long after this already significant shift, the rule of law was directly invoked for the first time as both cause and result of development in the 1997 issue of the World Development Report, the Bank's flagship publication.[20]

In a series of texts published in the mid 1990s, the moment of the Bank's self-avowed embrace of the rule of law, Ibrahim Shihata, General Counsel to the Bank, published a series of chapters, articles and papers outlining the Bank's strategy in this regard. In these papers, Shihata defines the 'rule of law' as 'understood generally to indicate that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.' He locates its origins in 12th and 13th century English laws to restrain the power of Monarchs and attributes its first known constitutionalisation to the Massachusetts Constitution of 1780 in which a separation of powers was established, directed at the idea that there be government of 'laws not men' (Shihata, I, 1997, p 1578, n 1). However, Shihata is alive to the Western bias which could be implied by this origin and is at pains to point out that 'the concept is known in other legal systems as well under appellations such as the "supremacy of law", although [it is] not always tied in other systems to the separation of powers principle' (Shihata, I, 1991, p 85, n 96). And he asserts that 'it has played a particularly important role in the evolution of natural law doctrine and in the Islamic legal system, among others' (Shihata, I, 1991, p 85, n 96). In its 'modern' incarnation, 'the "rule of law" translates into the principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws and other norms of lower order' (Shihata, I, 1997, p 1578).

Shihata then goes on to narrow down the ambit of the rule of law for the purposes of the World Bank, for which it means 'a system of law, which assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of rules can be resolved through binding decisions of an independent judicial or arbitral body, and e) there are known procedures for amending the rules when they no longer serve their purpose' (Shihata, I, 1991, p 85; 1997, p 1578). Ideally, laws should bear some relationship to 'genuine social needs' and 'result from some form of participation' because otherwise, they are 'unlikely to be sound or useful' (Shihata, I, 1997, p 1579). However failure to comply with this desideratum would not invalidate them, rather the *sine qua non* of 'law' is neither connection with nor responsiveness to social need but rather 'the enforcement of legal rules, regardless of content' for 'without [this characteristic] it is not law' (Shihata, I, 1997, p 1579). Indeed, the irrelevance of content to law's nature as "law" is clear, for 'the role of law may be

reactionary, progressive or neutral depending on the manner in which it is used, […and] the interests it aims to serve' (Shihata, I, 1997, p 1581).

From this elaboration we can see that Shihata conceives of law as a distinct social phenomenon which, underpinned by an independent judiciary, promises 'the possibility of effective control over arbitrary state action' and 'the degree of predictability allegedly desired by modern rational subjects' (Brown, B, and Maccormick, N, 1998). It is silent on the requirement of the formal equality of citizens, the third pillar of most characterisations of the 'rule of law', but embraces the other two habitually cited elements of a vision of 'government under the forms of law and law in the form of clearly identifiable rules' (Brown, B, and Maccormick, N, 1998). In itself, this vision of the rule of law is not exclusively positivist and could also be shared for example by those who believe law to be a product not of will, the hallmark of the positivist, but of reason, the modern inheritor of natural law (Brown, B and Maccormick, N, 1998). However, what marks Shihata's characterisation as one informed by legal positivism is its sharp segregation of law as both category and social phenomenon from everything else,[21] and the 'posited' or self-grounding nature of that separate existence.

This segregation manifests itself in several ways. It is evident in Shihata's description of 'the rule of law' which itself rests on some concept of 'law' *per se*, in existence before the engagement of its 'rule': recall that it begins with 'a system of law' (Shihata, I, 1991, p 85; 1997, p 1578) which exhibits various features precisely in order that this 'law' might 'rule'. Another distinction between 'law' and what is extraneous to it that we find in Shihata's texts is the familiar one made by positivists between 'law' and 'value'.[22] What the law is, so the positivist credo goes, has no bearing on what the law *should* be. Deciding upon whether or not something is 'law' depends on its pedigree, or a set of (legal) criteria by which its validity is determined, not upon any external notion of justice or right (Harris, J, 1997, p 122). Shihata embraces this principle overtly in the assertion extracted above that law is not necessarily a progressive force but 'may be reactionary, progressive or neutral depending on the manner in which it is used, […and] the interests it aims to serve' (Shihata, I, 1997, p 1581).

Besides positing a non-relation between law and the question of value, Shihata also distinguishes law from other spheres of activity and enquiry such as 'politics', 'society' or 'economics'. Economics, for example, is something for which law may be 'utilized' to effect a revival (Shihata, I, 1997, p 1581). Society is 'normally' 'reflected' in law (Shihata, I, 1997, p 1581), and politics, outside the remit of the Bank pursuant to its Articles of Agreement,[23] is not engaged by law reform and legal institution building which are understood to be purely 'technical' matters.[24] Law may be related to these domains, or instrumentalised to affect them, but they are each distinct before and presumably during, that relation or instrumental interplay. Each of these demarcations has significant consequences in and of themselves which, though not central, are related to my enquiry here. Just one example of this is the way in which a demarcated sphere of 'economics' facilitates the subordination of various issues to market logic.[25] However the most significant delineation for present purposes is between law 'properly so called' as Shihata would have it, and other forms of rules and ordering which might compete with (positive) law's claim to be 'law'. It is here we find law's identity in development and development's identity in law.

'In all societies,' Shihata recognizes, 'informal rules of custom and usage play an important role' (Shihata, I, 1997, p 1583) but these 'informal' rules are not 'law.' And even where

'informal rules receive greater compliance in practice' than formal law, there is no space for the possibility that these 'informal rules' might actually *be* that society's system of law, despite the fact that their normativity seems to be accepted and that they are rules with which people seem voluntarily to comply. Rather these rules are viewed as complementary to 'law', only useful until development brings that latter, superior version of ordering. These other forms of ordering are sometimes ecumenically granted the epithet 'law' but it is clear that according to Shihata, we cannot regard this as 'real' law. Similarly, those states which have plenty of laws discordant with Shihata's vision of law, have legal systems which are 'obsolete' (Shihata, I, 1997, p 1579) or 'flawed' (Shihata, I, 1997, p 1580) because they do not promote 'the broader processes of economic and social development' (Shihata, I, 1997, pp 1579 - 1580).

Here we start to see the circularity of definition by which a proper 'law' is one which promotes 'development' as a process. And development as an end-point is reached when institutions such as 'law' can be found.[26] As others have observed, this circularity is one way in which the prohibition - to which the Bank is subject - against intervention in the politics of a client state has been circumvented.[27] Indeed, it is not difficult to argue that both the manner of formation and content of a society's law are deeply political matters, intimately connected with the heart of most notions of democracy and self determination. But if the Bank's remit is to deal with economic development, and legal institutions touch upon that development, then by its own estimation, the Bank may also deal with those legal institutions. Shihata's conception of law thus legitimizes wide-reaching interventions into the sovereignty of those states subject to intervention.[28]

However I would argue that this legitimization is not simply a cynical exercise in self justification, or even a straightforward depoliticisation (though it may also be those things). Rather the legitimisation taps into an implicit connection between a (positivist) conception of law and the notion of development. Through this connection, societies featuring legal systems which conform to Shihata's definition can be understood as 'normal' societies which do not require intervention to transform them. That is, the absence of a positivistic system of law justifies intervention to further development as process, but 'development' as an endpoint justifies the privileged place of positive law in something like the first place. And if a society demonstrates a reluctance to embrace such a legal system, then that reluctance further justifies the necessity to intervene to introduce one. In other words, 'normal' law reflects a 'normal' society. The recalcitrant society is endowed with a pathological quality, for the causal relation is 'normally' such that the society will make its own 'laws'. But if the laws of a society are not normal, it is an indication that the society itself is deficient and that intervention from outside is required to discipline society through the introduction of 'normal' laws. 'It is important to note,' Shihata writes, 'that law, though normally a reflection of the prevailing realities of a given society, can also be used as a proactive instrument to promote development and, thus, influence and change the very realities it is supposed to reflect' (Shihata, I, 1997, p 1581). Agency here in the notion of who is to wield the 'proactive instrument' is located not in 'society', which now becomes part of the 'reality' law is '*supposed* to reflect' (but in an 'abnormal' society cannot) but somewhere else, justified by the promotion of development and presumably to be exercised by agencies charged with that task.

This relation resonates strongly with H.L.A. Hart's conception of law. As many have noted, Hart's conception of law rapidly gained jurisprudential favour as the new positivist conception, dethroning Austin's command theory of law as an explication of how positive

law could command the right to be called 'law'.[29] It remains a highly influential response to that question today. According to Hart's theory, a legal system could claim the right to be called such when it demonstrated the 'two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must generally be obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials' (Hart, H, 1994, p 116). For many commentators, the key features of Hart's theory are the assumptions or observations he makes about rules, their 'internal' aspect, their 'external' aspect and why and to what extent they must be obeyed. However the significance of what J.W. Harris calls Hart's 'existence thesis' about law (Harris, J, 1997, p 122), whilst understood to be problematic and unclear (Harris, J, 1997, p 125), is thought to be moot because it is addressed to what are perceived to be 'peripheral questions - like whether primitive legal systems or public international law should, without qualification, be described as "law"' (Harris, J, 1997, p 121).

In contrast, I would suggest that the 'existence thesis' is revealing precisely because of its relegation of 'primitive legal systems' to the periphery combined with its self-foundation in that relegation. As Fitzpatrick has observed, the advance from primary to secondary rules is 'announced by Hart as his great discovery. It marks "the step from the pre-legal into the legal world" converting "the regime of primary rules into what is indisputably a legal system"; this is "a step forward as important to society as the invention of the wheel"' (Fitzpatrick, P, 2001, p 98, quoting Hart, H, 1994, p 41). 'Primitive communities' governed solely by primary obligations, and ill-equipped to deal with the exigencies of modern life give way, in the inexorable march of progress, to societies with modern laws comprised of primary *and* secondary rules. These are precisely the laws Hart observes in his own society and portrays in his exercise of 'descriptive sociology' (Hart, H, 1994). The step is one made in a universal history which relies on a notion of the evolution of societies from primitive to modern and which justifies the capture by law as described by Hart, of the name of law *per se*.

But as several scholars have observed, these 'primitive societies' upon which Hart ostensibly bases his enquiry do not exist. The anthropological 'evidence' on which he relies is wrong or non-existent and the 'primitive societies' lacking secondary rules, or those pre-moderns who introduce secondary rules on the basis of observable defects in the primary rules are nowhere to be found (Harris, J, 1997, pp 122 - 123; Fitzpatrick, P, 2001, pp 96 - 97; Davies, M, 2002, pp 94 - 95). What then are we to make of this absence? Can we do what many have done, which is to observe the defect and move on within the Hartian paradigm? Can we simply recognize that 'perhaps Hart's existence thesis is not developmental, and [that] he postulates only an imaginary situation in which secondary rules do not exist in order to point up their functions'? (Harris, J, 1997, p 123). May we treat the thesis as 'heuristic or diagnostic [… enabling] one to recognise legal systems when one finds them'? (Harris, J, 1997, p 123). Arguably the answer to this question must be no. If we simply treat Hart's 'primitive society' as an imaginary situation, and the question of whether other legal systems such as 'primitive legal systems' or the 'public international legal system' are legal systems as peripheral, then we are hiving off and erasing the moment at which 'law' makes a defining cut between its 'self' as law and its 'others' as non-law (as custom, for example) alongside a universal claim for that cut.[30] In this, we would simply accept the claim to universality of positive law as law, with no foundation at all.

This is effectively a reversal of Harris's heuristic, as instead of enabling us to 'recognise legal systems when we find them' such an acceptance causes us to find legal systems only when we recognise them. This negates the way in which positive law as a concept is itself impelled by a concept of development and is able to call itself 'law' because of development's 'truth'. And it explains why the approach of the World Bank to law is not, "I'll know it when I see it", but rather, 'I'll see it when I *know* it'. This subsumes different forms of social, political and economic organisation within the discourse of development and organises them into a scalar progression from 'under-developed' through developing, via 'emerging' and onto 'developed' in an hierarchy seemingly ratified by the progression of time itself. As Chatterjee has stated, 'this view succeeds not only in branding the resistances to it as archaic and backward, but also in securing for capital and modernity their ultimate triumph, regardless of what some people may hope…because time after all does not stand still' (Chatterjee, P, 2004, p 5).

3. Critical Law and Development

Many scholars, from varying perspectives, [31] have offered critiques of the Bank's turn to the rule of law as a development strategy. Such critiques are immensely important, pushing uncomfortably at the idealized self-presentation of the 'developed' world within development practices. In this section I wish to engage with two examples of this small but significant body of literature which draws out many of the limitations of the Bank's approach to the rule of law. The two examples I have chosen implicitly offer strong critiques of the premises of legal positivism, in their respective demonstrations of the indeterminacy and cross-contamination which make positive law and politics ultimately inseparable from each other. And, in different ways, they are each concerned with drawing out the consequences of that inseparability for the development project. However, I would suggest that in the essence of their depiction of law as political, law is also rendered epiphenomenal - law is just another terrain of politics, in many ways indistinguishable from every other terrain of politics. It is in this depiction that the positivist characterisation of positive law as 'law' paradoxically returns.

Additionally, both pieces, arguably, manifest the tendency, as highlighted by Chibundu, in which the study of 'law and development' legal theory tends to buy into or borrow from theories of economic and political development without enriching those theories with any currency of its own (Chibundu, M, 1997, p 171). I further these critiques by extending the demonstration of the inevitably political nature of law toward an analysis of the specific form of positive law and its foundational expulsion of everything else – including politics. Arguably, extending the enquiry in this manner illuminates the mutually sustaining nature of the (positive) law-development relation. It is this relation which causes those critiques that are inattentive to it to unwittingly contribute to the expansion of development's domain, permitting the extension of its universalizing dynamic in an ever more tentacular fashion. This calls for a critique of development itself to be brought to the 'law and development' debate.

One example of a paper which tackles the mutual imbrication of law and politics is a recent paper for the Carnegie Endowment's *Democracy and the Rule of Law Project* in which Frank Upham addresses himself to the rising number of initiatives linking good governance to sustainable development and poverty alleviation (Upham, F, 2002). As Upham astutely points out, a 'frequent donor favorite on the laundry list of "good governance" reforms

advocated for developing countries is rule of law reform. The new development model contends that sustainable growth is impossible without the rule of law: a set of uniformly enforced, established legal regimes that clearly lays out the rule of the game' (Upham, F, 2002, p 1). Upham's argument is a pointed one. 'Not only does the formalist rule of law as advocated by the World Bank … not exist in the developed world, but attempting to transplant a common template of institutions and legal rules into developing countries without attention to indigenous contexts harms preexisting mechanisms for dealing with issues such as property ownership and conflict resolution' (Upham, F, 2002, p 1). Upham's first target, and the one I will engage with, can be understood as the positivistic assertion of law's distinctness from politics.

The formalist 'rule of law', he argues, 'embodied in the mantra "the rule of law, not men"' (Upham, F, 2002, p 1) is a fiction, even in that most developed of countries, the United States.[32] Upham compellingly complicates 'the simple image of the rule of law that dominates current rhetoric in the law and development movement' with elaborations of United States based examples of three phenomena: causal inconsistencies between the demands of general economic growth and respect for private property rights (Upham, F, 2002, prologue), instances in which courts do not always faithfully apply legal rules (Upham, F, 2002, p 7), and 'the political nature of law and legal institutions' (Upham, F, 2002, p 7). These complications, he argues, and their repression from the story told by the rule of law advocates, leads to a denial of the necessarily and 'universally' political nature of the rule of law. He suggests that this denial leads law to be understood as excessively technocratic, fostering a 'transplant' model of legal development, a paradoxical demonisation of politics in the context of the ostensible promotion of democracy, and a denial of the political and social consequences of a 'seamless' allocation and enforcement of property and contractual rights (Upham, F, 2002, p 8). Ultimately, these shortcomings, if not addressed, will cause the law and development enterprise to fail, but would also be 'undesirable even from the largely economic perspective of the institutions that dominate the law and development movement' (Upham, F, 2002, p 8).

Upham's argument about the impossibility of separating law from politics is thus less about the politics of interpretation or the indeterminacy of legal reasoning, than about the institutional structure of the rule of law and its necessary embeddedness within institutionalised political structures. In this, he does not engage with the possibility *per se* of a segregated concept of law, indeed he implicitly accepts it (Upham, F, 2002, p 13). Rather, based on the experiences of the United States and Japan, he sees a 'formalist rule of law' as undesirable on the basis that it is unlikely to promote economic growth.[33] Similarly, attempting to introduce a formalist rule of law may also 'displace indigenous institutions' and place 'existing informal means of social order' at risk (Upham, F, 2002, p 32), ultimately bringing negative effects to the society being subjected to the development project.

Whilst Upham sincerely expresses the need for a 'genuine respect for, and detailed knowledge of the conditions of the receiving society' (Upham, F, 2002, p 33), the progress narrative of development continues to haunt his text. And that narrative continues to be circuitously secured by a transcendent concept of law, the absence of which not only proves that development is necessary but, in its now inescapably 'flawed' nature, demands that politics itself be 'developed' in order to compensate by providing the 'stability' and 'maturity' necessary for the legal system to function despite the mythic nature of the development institutions' version of the rule of law. This haunting is visible in several sites. We can see it, for instance, in Upham's concern that one of the dangers of legal transplants is

that it will displace 'indigenous institutions' and 'existing informal means of social order.' These 'local', 'informal' means of preserving social order are still defined by reference to a developed ideal. Indeed, they resonate strongly with Shihata's own characterisations of the informal regulatory mechanisms which exist before the arrival of law.

What is different about Upham's story is that these local means of ensuring social order need to be preserved because they will ultimately ensure the success of the 'legal' order which must eventually come (Upham, F, 2002, p 32). Their preservation is crucial, essentially because the receiving society may not be ready - economically, socially, culturally - for the reception of a transplanted legal order. 'Unless the creators of the legal system get it exactly right,' writes Upham, 'unexpected consequences will occur. In a mature system, established institutions can deal with negative consequences. However, in countries with new legal systems, especially ones imposed or imported from abroad, pre-existing institutions often lack the experience, expertise, and most seriously, political legitimacy necessary to deal with unforeseen consequences of reform. Legal anarchy can result in a society that has a new, formal legal system but lacks the social capital, institutions and discipline to make use of it' (Upham, F, 2002, p 34). In other words, it would be a mistake to try to effect development through importing a formal legal system because a formal legal system is not the self-contained autonomous thing that rule-of-law myth peddlers such as the World Bank would have us believe. Societies need to be 'mature' and 'flexible' to make good use of the rule of law. Indeed, according to Upham, it could only ever be 'a goal of development efforts', 'not the means' (Upham, F, 2002, p 32). And it requires a 'mature' and 'established' political system to make sure it works, and to make sure the politics within it can be controlled and directed to the ends of achieving economic growth rather than any other ends.

The potentially destabilizing assertion that law in America is deeply political, essential to Upham's argument is subliminally counteracted by the familiar colonial imagery of the static darkness of the primitive which emerges to (re)consolidate the identity of 'law.' We learn that 'when the political interests and economic structures remain more or less unchanging, it may not be necessary to create an elaborate system of professional jurists' but at other times, when there is economic and technological change, one may need 'three to four years of formal legal education, maybe an LLM from Oxford or New York University, a year of articles with a firm, and a staff of court officers to apply stable rules to disputes occurring within stable societies. When norms, political interests, or markets change, specially trained and socialized judges, possessing a professional jargon and backed up by elaborate institutions, are needed...' not because they will enforce the law of the rule of law myth, but precisely because they will stabilize the impossibility of its quarantine from politics with 'the practical wisdom to recognize the need to change the rules and the political legitimacy to get away with doing so' (Upham, F, 2002, p 21). Thus what begins as an implicit critique of positivism becomes an acceptance of the positivistic possibility of a static, posited 'law' which, in the absence of judges possessed with practical wisdom (figures abundant in the United States) will be frozen and unresponsive, or worse, likely to 'thwart beneficial developments' which are defined as economic growth. This adaptative 'political' capacity therefore does not only not destroy 'the law' in America but becomes its lifeblood, as the intrinsically and necessarily politicized law is both given its capacity to respond and stabilized by the 'socialization [of] judges' which 'concentrate[s] [their views] at the middle of the political spectrum' and 'overcome[s] their personal preferences' (Upham, F, 2002, p 20).

So whilst Upham overtly rejects the vision of the rule of law as propounded by Shihata at the Bank on the basis that its apolitical characterisation is both wrong and potentially harmful, he would save 'law' for the developed world by relocating the essence of development in politics. This requires that politics and political institutions be negatively defined against dark others in order to maintain for those institutions the status of developed. Whilst Upham's own desire is avowedly to engender more respect for context and for the indigenous, informal arrangements of the developing countries, this respect is in fact limited to what must ultimately be understood as a temporary phase of difference which will eventually be overcome with development and maturity. And in the meantime, this 'respect and attention' arguably opens to the scrutiny of the development industry, much more of the client society's social, political and economic arrangements, subjecting them to the pedagogy of 'practical wisdom'.

A recent piece by David Kennedy also concentrates on 'rule of law' talk in development and the inextricability of law and politics, though with a somewhat different motivation (Kennedy, D, 2003). Where Upham sought to reveal the impossibility, indeed undesirability of realizing the 'rule of law' as propounded by development institutions and the rule-of-law aid industry, Kennedy's motivation is to counter the tendency of the turn to the rule of law as a development strategy seemingly to offer a technical, neutral and universal frame and so depoliticize the conversation. Like Upham, Kennedy would emphasise the political nature of law, and positively embrace it, suggesting that its recent (re)appearance in development policy creates an opportunity for the kind of 'sharp economic debate' (Upham, F, 2002, p 4) which has been sadly lacking in development policy since the rise of the neo-liberal Washington consensus. He compellingly argues that paying 'attention to the legal regime supporting the […] congealed ideological forms [which have dominated development policy] might heighten awareness of the choices involved in constructing either regime and help challenge the substitution of an ideological program for political choice' (Upham, F, 2002, p 4).

Kennedy carefully and methodically reveals the way in which building a 'rule of law' cannot substitute for the difficult economic and political decisions which must come with 'development' and comments that law is 'interesting precisely as a distributional tool' (Kennedy, D, 2003, p 18). He argues that law, in its technical guise, has narrowed the ideological range (Kennedy, D, 2003, p 19) but that it need not, because 'one could focus on law in ways which sharpened attention to distributional choices and rendered more precise the consequences of different economic theories of development' (Kennedy, D, 2003, p19). He effectively points out that there is no regulatory baseline from which the market departs and indeed, following Karl Polanyi, that the market itself is built on the back of norms which can usefully be drawn into the foreground to reinvigorate political debate around development and its outcomes.[34] Development is not just a matter of 'growth' he argues, but 'which growth how?' (Kennedy, D, 2003, p 18). All of this is vital as a critique of the depoliticizing effect of the turn to law as development strategy. This is not the least because it is through a claim to law's 'technical' nature that the Bank has circumvented the prohibition in its Articles of Association on interference in the politics of client states[35] thereby reinforcing the incontestability of the specific laws and legal institutions being insisted upon by the Bank.

However in making the argument that law is political, Kennedy denies any specificity to the form of positive law and the peculiar nature of its claim to authority. 'Law is a terrain for the inquiry' about development, he writes, not a substitute for it. (Kennedy, D, 2003, p 26). But

the contours of that terrain remain unexplored. Besides its 'technical' aspect, we are not privy to Kennedy's thoughts about *why* positive or 'formal' law has been so successful in substituting itself for political choice, nor why an 'interest in "law and development" is often accompanied by an ambition to leach the politics from the development process' (Kennedy, D, 2003, p 18) nor even why it 'leverages a common ethical commitment' (Kennedy, D, 2003, p 26). But part of the reason behind the phenomenon he has so keenly observed is the way positive law makes a claim to authority precisely by asserting itself as distinct from politics, separate to economics and neutrally disengaged from all (other) things. In decrying the positivistic disavowal of law's politics and exalting law's virtues as a field of contestation, Kennedy is implicitly leaving intact the law/non-law distinction of the positivist and confining the political space of 'law' to a terrain already given coherence – and therefore limited – by the transcendent concept of development. And although development for Kennedy is itself a highly contested concept, engaging 'broad questions of political economy and social theory' (Kennedy, D, 2003, p 18), there is no question that development *per se* is the appropriate, indeed implicitly the only, frame in which questions of material and social well being may be discussed.

For Kennedy, the meaning of development is itself offered coherence by a notion of growth. Distributive choices must be effected in order to maximize growth. 'To count as "development policy"' he writes, 'a proposal needs to be rooted in an idea about how a distributional political choice will generate economic growth of whatever kind one considers likely to bring about "development"' (Kennedy, D, 2003, p 18). Again, for Kennedy unlike the development industry, this is political from its inception, '[t]here is politics … right at the start, in the distributive choices which underlie the aspiration for growth and development. … thinking about development as contestation about what should be distributed to and from whom in the service of economic growth and political vision' (Kennedy, D, 2003, p 18). The paradox of this brand of politics is that, like Upham's challenge to the mythic 'rule of law', it broadens the frame of what may legitimately be considered relevant to the development project. In Kennedy's rejection of 'growth plus' (Kennedy, D, 2003, p 26) as a way to understand the politics of development and his alternative embrace of 'what growth how' (Kennedy, D, 2003, p 26), the sphere of intervention in the client society is potentially enlarged. Thus if, as critical development scholars have persuasively argued, development's genealogy means that it cannot help but be embedded within a universal history, then this embrace of the politics which the (re)turn to law in development offers is arguably not only complicit with an imperial narrative of progress and advancement which posits some societies as having achieved its promise and others as still *en route* toward it, but in the context of the machinery of the development industry, is likely to increase the porosity of the putative sovereignty of much of the Third World.

4. Conclusion

In the context of contemporary development orthodoxies which assume that the 'rule of law' is both a necessary instrument and obvious outcome of the process of development, we can see an intensification of the transformative violence of the developmental project. Even a relatively cursory examination of the conception of law in the eyes of the World Bank, for example, reveals that forms of ordering which do not conform to the positivist definition of 'law' are likely to be swept aside, even if they are successful on their own terms in achieving the peaceful resolution of disputes, for example, or facilitating exchange and commerce, or dealing with anti-social behaviour in socially adapted ways. A slightly closer examination shows us that the positivist definition itself relies on a developmentalist conception of

history, in which positive law must be considered law 'properly so called' because of an ideologically-driven narrative of progress in which the present of Western nations represents the future of the Third World. Seeing this developmentalist logic in 'action', so to speak, helps us to understand that although it is used as such, 'development' is not a proxy for talking about world wide material well being and redressing global inequalities. Rather it is a specific discourse which creates the perceived necessity for the world to be (re)created in the image of the West. When the project of transformation fails, as it has decade after decade since the end of the Second World War, what is blamed is not the idea itself, but the insufficient extent of the transformation within the 'developing' society, and by extension, the insufficient reach of development institutions and policies into Third World sovereignty.

In the context of this generative engine of the development machinery which constantly brings more and more of life within the 'developing' world within its disciplinary sway, I am wary of critiques of the project which simply point to the politics of law without an attention to the particular form of positive law. Although motivated by a desire to hold the 'developed' world to account for the idealized representation of its own institutions, such critiques arguably provide a locale for the expansion of the transformative logic of development rather than a space of resistance in which conversations about poverty, global inequality and material well being can take place on more genuinely political, contested and, ultimately, less imperial terms.

Endnotes

[1] On this view of the concept of development and its capture of the conversation about human well-being, see Escobar (1995); Esteva (1992); Beard (2006).
[2] An early example of the idea that once a state opts to embark down the path of modernization, it is not feasible or practical to wait for modern institutions to emerge within indigenous culture, see David (1963). See also, Faundez (1997a, p 3).
[3] This could also be argued in relation to the critics of the precursors to development, which, according to Jennifer Beard, finds its genesis in early Christian theology and the formation of Western identity through the chain of binary distinctions more commonly associated with development. See Beard (2006).
[4] I am drawing a distinction here between positive 'law' *per se*, that is the social phenomenon of positive rules which obviously do exist and which are generally known as 'laws', and the story (legal positivism) which enables them to be so called and in which they not only exist but claim the sole right to bear the title 'law'.
[5] And its precursors; see Beard (2006).
[6] Another is nation. See for example Fitzpatrick (2001).
[7] Other examples which it could be argued work this way include 'civil society' and 'human rights'.
[8] On the related theme of 'Trade-related, market-friendly human rights', see Baxi (2006a, ch 8).
[9] An argument not dissimilar to this idea in which international law has been shaped in large measure by resistance to it is contained in Rajagopal (2003).
[10] On the 'failure' of the project see Carothers (2003).
[11] I am limiting my exploration to the Bank in this paper both for reasons of space and because the Bank is a significant purveyor of knowledge about development and an important player in 'rule of law' aid projects, however this analysis could also be extended to other participants in the 'rule of law' industry.
[12] Thomas Carothers argues that the absence of a clear elaboration, indeed even an implicit understanding, of the nature of the 'rule of law' is a problem which besets the whole rule of law aid field. See generally, Carothers (2003).
[13] Shihata himself acknowledges his own intellectual debt to Weber in his explanation of the connection 'between "rational law" and economic development especially in the industrialization of Western Countries.' See Shihata (1991, p 87 n 99 citing Weber (1968)). See also Perry (1999, p 19).
[14] The death knell of the law and development movement is almost invariably said to have been struck by David Trubeck and Marc Galanter, two leading figures in the early law and development movement in their famous article, 'Scholars in Self Estrangement'. Trubeck and Galanter (1974).
[15] Unfortunately I have not the space here to engage in a comparative reading of the 'old' law and development movement and the new. For a thoughtful example of such an undertaking, see Chibundu (1997).
[16] The Hydra was a monster of the Lernean Marshes in Argolis. It had nine heads and Hercules was sent to kill it. As soon as he struck off one of its heads, two shot up in its place.
[17] On the question of naming the Third World, see Baxi (2006b).
[18] This question is part of my current research.
[19] On this turn, see for example Perry (1999).

[20] For example, then Bank President James Wolfensohn remarks in the foreword, '[a]s this Report shows, understanding the role the state plays […] for example, its ability to enforce the rule of law […] will be essential to making the state contribute more effectively to development.' This marked a new departure for the Bank. Wolfensohn (1997, p iii).
[21] J.W. Harris, for example, suggests that 'common to positivist writers in general is the thesis that there are in legal systems criteria by reference to which 'laws' can be distinguished from other things.' Harris (1997, p 121).
[22] For just one of the myriad authorities, see Davies (2002, pp 102 - 104).
[23] The Bank's Articles contain two explicit expressions of its ostensibly non-political character. The first is Article III, Section 5(b) which provides that the Bank 'shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.' The second is Article IV, Section 10, which expressly prohibits the Bank from engaging in political activity. Articles of Agreement of the International Bank for Reconstruction and Development, *United Nations Treaty Series* 2 (1947).
[24] Shihata (1991, p78). On this point, see also, Kennedy (2003, p 17).
[25] See generally, Pahuja (2007).
[26] On this point, see Carothers (1998).
[27] See, for example, Marquette (2004); Anghie (2004); Rittich (2006).
[28] On this self-authorised expansion see Rittich (2006).
[29] See for example Fitzpatrick (2001, p 98).
[30] See Pahuja (2005).
[31] For reasons of space, I am engaging with only two specific texts here, but examples of other texts which engage critically with the (re)turn to law by the development institutions include: Chibundu (1997), Trubeck and Santos (2006), Hatchard and Perry-Kesaris (2003), Faundez (1997b).
[32] Upham is a noted Japanese comparativist. The other example he gives in the paper is Japan which he uses to show that one may eschew legal formalism and still achieve economic growth – whether, despite or because of that non-embrace.
[33] See for example, Upham (2002, p 32).
[34] Polanyi is mentioned rather than cited by Kennedy, but on this question see Polanyi (2001).
[35] Articles of Agreement of the International Bank for Reconstruction and Development, *United Nations Treaty Series* 2 (1947). See also Anghie (2004).

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