ICJ CONFERENCE ON DEVELOPMENT AND THE RULE OF LAW:
What Kind of Development And What Kind of Law?

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Goals, Processes and Indicators of Development Project

1. Introduction

When two extremely rich, complex and above all
evolving concepts, such as "development" and "the rule of
law" are to be related to each other the agenda of inquiry
is in a sense given in advance: first, have a quick look
at either of them, second, try to relate them to each other.
A special warning against this kind of intellectual exer-
cise should be issued. Both concepts are evolving in a
historical context and will continue to do so. Consequently,
there is a limit to how much can be obtained from a concep-
tual, logically oriented analysis. A typology of "develop-
ment" concepts and "rule of law" concepts may be construct-
ed and they may all be related to each other in the search
for compatibilities and contradictions. This is useful,
but the fact that both of them are parts of a concrete his-
torical process must not be lost sight of. There may be
some kind of overriding compatibility due to belongingness
to the same historical process; there may be some kind of
built-in contradiction stemming from exactly that process.

As an example take the three sets of human rights:
civil and political rights (CPR); economic, social and cul-
tural rights (ESCR) and the recent solidarity rights (SR).
No doubt the first set is related to the interests of a
bourgeoisie fighting its way out of feudal constraints, the
second set is related to the interests of the working class
and other groups marginalized and exploited, hurt and hit,

by the emergence of that class as a dominant class, and
the third set is related to the same kind of problems at the
international level, an effort to overcome the contradictions
created by international capitalism, private and state. And
the development concepts may be made to read like chapters
in any book on recent history: the first set of concepts is
"blue" development, economic growth spearheaded by an entre-
preneurial class unfettered by state control or initiative;
the second set of concepts is a reaction to this, "red" de-
velopment, economic growth controlled and initiated by a
state bureaucracy, codified in a plan; and the third set of
concepts is a reaction to both of the former, "green" devel-
opment, based more on the autonomy of the local level and
the virtues of the smaller economic cycles. Much of the
current development debate is concerned with whether one
has to suffer the contradictions of the blue to become red
and the contradictions of either and both, stemming from the
circumstance that they both lead to big systems, in order
to become green. As many poor, "third" world countries
still are to a large extent green, could they possibly be
better off strengthening that aspect, building on top of it
only a relatively weak blue and red sector? And could the
rich, "first" and "second" - blue and red - countries do
better building down their entrepreneurial and bureaucratic
giants, at the same time strengthening old and new types of
local communities? The sympathies of the author are in this
general direction.

2. Some words on "development".

        The brief excursion in to the history of develop-
ment/development of history just made brings out the two key
dimensions in development theory and practice, viz.,

level: is it predominantly <u>macro-oriented</u>, towards build-
ing strong countries (with strong entrepreneurial
and/or bureaucratic classes) and a new international
order accommodating the changes in power and privil-
eges among countries?

<u>or</u>

is it predominantly <u>micro-oriented</u>, towards build-
ing strong human beings and strong local communi-
ties (or basic autonomous units in general) in which
human beings can unfold themselves <u>a l'hauteur de
l'homme</u>?

aspect: is it predominantly <u>one-dimensional</u>, and in that
case particularly focussing on economic dimensions,
   on social structure, institution-building, ecolo-
gical dimensions, cultural aspects, and so on?

<u>or</u>

is there an attempt to be <u>multi-dimensional</u>, even
"holistic", taking the"totality"as the focus of
development, ecompassing all dimensions?

This gives us four styles of development; and

there can be little doubt that so far we have seen most of

the macro-oriented, one-dimensiomal combinations. There

are two basic models, the liberal/capitalist and the marx-

ist/socialist, both focussing on the economic dimension

in the blue and red varieties, respectively - one often

leading to growth without control, the other to control with-

out growth. The crisis of these two models is what is known

today as the "development crisis". Exacerbating the situa-

tion is the fact that the superpowers, the US and the SU,

demand from their client states that they by and large ad-

here to the blue and red development models respectively. If

not, they are branded as security risks.

At the other extreme, then, is the multi-dimen-

sional, micro-oriented approach, often called community

development. It is characterized in most thinking and prac-

tice by a high level of local self-reliance, short economic

cycles, informal/green economies, direct democracy, much par-

ticipation, and much emphasis on human growth, personal devel-
opment. Many such communities, however, tend to focus on only
one such aspect and hence become very imbalanced; and many
countries, of course, focus not only on the economy but also
on very much else (often called social development) and then
become more balanced - giving us the last two combinations.

Which is the "correct" style of development? One
possible answer to this would be to say "all of them", the
answer preferred by the present author (but as the current
processes are so overwhelmingly of the macro-oriented, one-
dimensional type in the current historical situation a strong
emphasis on the opposite type is needed - not a green, but a
greener approach). Real quality of life can probably best
be experienced and obtained at the micro level, but the
macro level is a rather strong reality and can both facili-
tate and impede this quality of life. And however much we
may praise holism, total thinking and total practice tend
either to lead to inaction (it all becomes too complicated
to make any first move) or to totalitarianism (it all has
to be changed at once according to total schemes). The
latter may not be so dangerous if only one small community
is involved, but as a blue-print for a whole country or for
all communities it becomes very dangerous. Hence starting
in one corner, with one aspect, even introducing contradic-
tions between the "old" and the "new" to get a dialectic go-
ing - with much richer totalities in mind, may not be the
worst approach.

The basic needs approach is important in all
of this: it is a protest movement, do not forget the micro
level, in all the efforts to build strong countries do not

forget the more basic purpose of building strong human beings!
The developmentalists of the blue and red varieties tried to
co-opt this protest movement by making it one-dimensional- fo-
cussing on the material needs most clearly related to their eco-
nomic growth and institution-building only, and have so far
been partly succesful in this. Precisely because of their suc-
cess, eg in UN organizations dominated by the blue and the red,
micro level development is seen as even more important, but it
has to cater to all kinds of human needs - material and non-
material.   No doubt, if the green movement with its anarchist
overtones of "small is beautiful" (mindless of the extent to
which some big may be necessary) were really succesful there
would be scope for a protest movement in favor of some more
macro-oriented approaches.   Today that movement is more than
sufficiently "succesful", and entrenched.

Thus, development is seen as a complex dialectic
between the micro and macro levels and between the one-dimen-
sional and the more holistic approaches.   Where do the human
rights as a particular type of "rule of law" fit into all of
this?

3.   Some words on "human rights".

Basic human rights share with basic human needs a
concern for everybody, not only for the needs of the strong
and the rights of the privileged.   Precisely for that reason
the focus should be on the most needy and on those whose basic
human rights have been most infracted.   In principle these are
approaches from the bottom up - an indispensable corrective
to the top-heaviness and self-serving nature of so much of
what elites put forward as "development".   Human rights, then,
differ from human needs in being institutionalized in a parti-

cular way. One may perhaps seen them as evolving from a much
larger sociological category of mutual rights and obligations,
the normative material weaving together any human group, de-
fining in sets of expectations (often crystallized as roles,
or norm-sets, and as statuses or role-sets) what are the rights
and duties of everybody. There are senders who expect these
norms to be complied with, there are receivers whose duty it
is to comply with the norms, there are the objects, those whom
the norm is about (and this may be the sender and/or the re-
ceiver, not necessarily third parties), and there is the con-
tent of the norm. A norm is an S,R,O,C quadruple - what form
does that take for the case of a human right? Briefly stated:

In a human right

the norm-sender is the UN General Assembly

the norm-receiver(débiteur) who is dutybound to implement the
                 norm, is the government

the norm-object (creencier) is the holder of the right,
                 "everybody", the citizen, the human being

the norm-content (objet précis) is the sunstantive content
                 of the norm

Thus, in the particular type of institutionalization of norms
characteristic of human rights the object is separated from
the sender and the receiver. It is not "I expect you to do
this to me and in return I shal do that to you" but "I expect
you to do this (positively or negatively defined) to a third
party".

It is easily seen that such a concept suffers from
two immediate weaknesses. First, it is not really based on
mutuality, or at least not explicitly. The citizen has only
rights, the government has only duties, and the UN General
Assembly is only a source of norm production. That should

make one suspicious: what are the duties of the citizens in
return for these rights? What are the rights of the governments
in return for these duties? And what does the General Assembly
(of governments) expect to get in return from the right and duty
to be a source of norm production? Obviously the citizen
should see the government as a major source of righting wrongs,
and the government will see itself as one that has the right
to be the état providence. And the General Assembly becomes
some kind of super providence; as a bare minimum.

But this leads to the same problem as is known from
criminal law: the victim recedes into the background, the crime
becomes a relation between the state and the defendant, alienat-
ing what started as a direct relationship. Similarly a human
rights infraction becomes a relation between the defendant
government and the organs of the General Assembly, particular-
ly the Human Rights Commission, maybe also, in a sense, the
ICJ, when it evolves further. In the tradition of criminal
law a major function of this alienation is to protect the de-
fendant against the "arbitrary" wrath of the offended, the
victim - particularly when/if the victim rallies together his/
her friends and start exercising justice more directly. Could
it be that the human rights tradition has a similar function,
not only of protecting the victim, against the governments, but
also of protecting governments against the accumulated, collec-
tive wrath of victims in open mutiny, revolt? Could it be that
governments would prefer an arrangement 'among gentlemen', with
some expression of moral disapproval on a "today me, tomorrow
you" basis, fragmenting to the point of individualization the
victims, substituting resolutions for revolutions? Like in cri-
minal law, in this kind of intergovernmental criminal law the
compensation given to the victims is weak or non-existing, leav-

ing him/her not even with a certificate to the effect that s/he
was right, only that the offender was wrong and should be punish-
ed, somehow.

Second, there is little doubt that the human rights
tradition is more consonant with top-heavy, blue-red development
and less with development based on small, basic and autonomous
units where the primordial human rights tradition, the mutual
rights and obligations, would fit better. Thus, there is an
implicit stand taken: the human rights tradition is a macro
approach aiming at coming to the rescue at the micro level, and
in so doing increasing the legitimacy of an incipient world
government/parliament system, with the UNGA as the legislative
and a court and a number of executive organs. As rights multi-
ply so would, or should, the machineries to make them really
justiciable: detection and reporting processes, adjudication
processes, sanction processes, review processes. The more
macro the system the more complex the machineries to make the
rulers accountable to their subjects; the more complex the ma-
chineries, the more macro the system.

None of this should be seen as more than warnings:
as long as the basic human rights work in the interests of the
most deprived the tradition is invaluable even if it has cer-
tain limits to growth of which, at present, we know relatively
little. But it raises the question: could something between
the codified, top-heavy rule of law and the uncodified, bottom
level mutual rights and obligations be more compatible with
green development, and hence something in the present phase
of human history to be encouraged? More explicit, more codi-
fied, but also more left to local processes of accountability,
breaking the age old division of labor (by now) that the more
terrible the crime, the"higher" the level of the court till one

ends up at the intergovernmental level, thereby sanctifying those levels? Of course, there is a very good reason for this: if in the phase of human history where nation-state building and international architecture were the orders of the day most big crimes were committed by big governments and big corporations , then one needed something on top of either for adjudication - today particularly important in the field of solidarity rights. But this leaves the lower levels without a say, they are often sidetracked from the very beginning, and institution-building is not done at that level, at least not so much as at the "higher" levels. What we are looking for is the consistent translation of human rights thinking into municipal law, but then empha- sizing the general thrust of the argument, the basic needs en- titlement, rather than the universality found, for instance, in the four components of the International Bill of Human Rights. Particular human rights, made specific to local culture and historical context, may be as significant as universal human rights, but one does not exclude the other.

Then, there is another dimension of human rights thinking that is of basic significance for the right to develop- ment: is the right institution-oriented, or structure-oriented? The meaning of this crucial distinction can be seen from a couple of examples:

in the field of food: is the focus on being fed, or on being able to feed oneself through the appro- priate structural arrangements?

in the field of health: is the focus on access to institutions for somatic and mental health service, or on living in a structure that produces a maximum of somatic and mental health?

in the field of energy: is the focus on having access to energy conveninently converted, or on being able to obtain conversion, locally?

in the field of participation: is the focus on access to a ballott box or on life in a participatory structure?

In the Appendix I have given some indications, from an other document of the GPID project, of what the structural approach in the fields of food, health and energy might mean. The key point would be local self-reliance even to the point of local self-sufficiency where these three fundamentals are concerned, "local" meaning not necessarily the small community, it could also mean bigger units if the economic geography makes self-reliance at the truly local level impossible. With some important technological innovations in recent years, especially in the field of energy conversion, there should be space for some optimism in this field.

In the"structural approach"the basic idea would be that certain goods and services are made available with a certain level of <u>automaticity</u>, and certain bads and disservices (eg in the field of pollution) are avoided with a certain automaticity. These factors are built into the structure, as the saying goes - as when a farmer growing foodstuffs for subsistence tries to avoid depletion and pollution because he himself will be the victim of the consequences (the transnational agro-business corporation does not need taking this into account as the consequences will be far away, and when they become too disatrous the TNC will move to other areas on which to prey). In the structural approach certain obstacles are removed by changing the structure - the approach is preventive rather than curative, when the focus is on bads and disservices. All of this can also be done at the macro level, nationally and internationally, by governments and by intergovernmental organizations. But there is one thing that cannot be done at the macro level, and that is direct participation. If one accepts the basic assumption underlying the green approaches, enlightened self-in-

terest, but "self" in the sense of "Self", in the sense of a
collectivity small enough to permit not only identification but
direct participation so as to trigger off the mechanisms that en-
sure the automaticity, not as the result of benign action from
above but as the accumulated effect of myriads of actions below,
then the structural approach has as a condition at least an ele-
ment of the small. We say an element, for those small communi-
ties could, of course, be federated into something bigger, based
both on the solidarity within and the solidarity among such com-
munities. Thekey word is actually solidarity, and the key pro-
blem is how one builds it so that it comes more automatically,
making institutionalized attempts to enforce solidarity marginal,
residual.

Again, it is obvious where the thrust of the human
rights approach has been: macro-level rather than micro-level;
institutional rather than structural. The first speaks to the
interests of the people behind it, probably more attracted by
the prospects of work at the macro level - governmental and/or
inter-governmental - than at the local level. The latter speaks
to their deep ideology, probably more actor-oriented than struc-
ture-oriented, more liberal than marxist in another word-pair,
and hence more geared towards institution-building than struc-
tural transformation. It will probably belong to the picture
that these people themselves will either deny the former or deny
that it has any significance other than positive, and would be
blind to the significance of the latter - seeing, like everybody,
better the biases of others than of oneself. But all of this is
probably also undergoing change, even right now.

4. Some words on the relation between "development" and "rights"

In a sense it has all been said above: it is a ques-
tion of compatibility and contradiction. But from that it does

not follow that the only valid approach is micro-level, holistic development, protected by structure-building mutual rights and obligations. This would first of all presuppose a world where all societies are in the same historical situation (I do not say "stage" or any such term), and secondly presuppose that the good society is the contradiction-free society. Of the two sets of four approaches, one for development and one for human rights, I would be inclined to be in total disfavor of none of them, nor of any of the combinations. The richness and complexity of these schemes bear some testimony to the richness and complexity of the human condition in general. But having said that I think there is little doubt that much more emphasis should be placed on the lower level, local level approaches both for development and for human rights, and on the structural approaches for both of them. The details of this, however, I would prefer to leave for the discussion.