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 exercise 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 conceptual, logically oriented analysis. A typology of "development" concepts and "rule of law" concepts may be constructed 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 historical 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 cultural 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 into 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 macro-oriented, towards building strong countries (with strong entrepreneurial and/or bureaucratic classes) and a new international order accommodating the changes in power and privileges among countries?

or

is it predominantly micro-oriented, towards building strong human beings and strong local communities (or basic autonomous units in general) in which human beings can unfold themselves à l’hauteur de l’homme?

aspect: is it predominantly one-dimensional, and in that case particularly focussing on economic dimensions, on social structure, institution-building, ecological dimensions, cultural aspects, and so on?

or

is there an attempt to be multi-dimensional, even "holistic", taking the "totality" as the focus of development, encompassing 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-dimensional combinations. There are two basic models, the liberal/capitalist and the marxist/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 without growth. The crisis of these two models is what is known today as the "development crisis". Exacerbating the situation is the fact that the superpowers, the US and the SU, demand from their client states that they by and large adhere to the blue and red development models respectively. If not, they are branded as security risks.

At the other extreme, then, is the multi-dimensional, micro-oriented approach, often called community development. It is characterized in most thinking and practice by a high level of local self-reliance, short economic cycles, informal/green economies, direct democracy, much par-
participation, and much emphasis on human growth, personal development. 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 facilitate 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 contradictions between the "old" and the "new" to get a dialectic going - 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—focusing on the material needs most clearly related to their economic growth and institution-building only, and have so far been partly successful in this. Precisely because of their success, 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 successful there would be scope for a protest movement in favor of some more macro-oriented approaches. Today that movement is more than sufficiently "successful", and entrenched.

Thus, development is seen as a complex dialectic between the micro and macro levels and between the one-dimensional 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 inflected. In principle these are approaches from the bottom up—a 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 see them as evolving from a much larger sociological category of mutual rights and obligations, the normative material weaving together any human group, defining 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 receiver, not necessarily third parties), and there is the content 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 (crencien) is the holder of the right, "everybody", the citizen, the human being
the norm-content (objet précis) is the substantive 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 shall 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, alienating 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, particularly 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 defendant 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, collective 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 criminal law, in this kind of intergovernmental criminal law the compensation given to the victims is weak or non-existing, leav-
ning him/her not even with a certificate to the effect that s/he was right, only that the offender was wrong and should be punished, 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 multiply 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 machineries, 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 certain 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 codified, 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 emphasizing the general thrust of the argument, the basic needs entitlement, 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 development: 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 appropriate 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 conveniently converted, or on being able to obtain conversion, locally?

in the field of participation: is the focus on access to a ballot box or on life in a participatory structure?
In the Appendix I have given some indications, from an other
document of the GPOD 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 import-
ant 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 automaticity, 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 sub-
sistence tries to avoid depletion and pollution because he him-
self will be the victim of the consequences (the transnational
agro-business corporation does not need taking this into ac-
count as the consequences will be far away, and when they be-
come too disastrous the TNC will move to other areas on which to
prey). In the structural approach certain obstacles are re-
moved 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 organi-
zations. 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 ensure 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 element of the small. We say an element, for those small communities could, of course, be federated into something bigger, based both on the solidarity within and the solidarity among such communities. The key word is actually solidarity, and the key problem 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 structure-oriented, more liberal than marxist in another word-pair, and hence more geared towards institution-building than structural 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 question 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.