

Kobe University Monograph Series in Social Science Research

Piotr Szwedo  
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# Law and Development

Balancing Principles and Values



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# Introduction

*Development* is a heavily loaded term. With the fast pace of scientific discovery and the deepening tendrils of globalisation that have become characteristic of contemporary social life across the globe, *development* has become a recurring and convenient shorthand term across a myriad of contexts. For instance, the term *development* is invoked to describe the maturation of the body and mind, the multiplication of social opportunity, the expansion of an economy, and innovation in art and science. The term is a particularly appealing semantic choice as it connotes progress. *Development* may be taken to insinuate that humanity is—or ought to be—fundamentally concerned with purposeful growth, realisation, and the incremental march towards Utopia. It is not uncommon for people to conceptualise the pursuit of their ambitions as *development*. In fact, who could, or would want to appear to, be *against* development?

Yet experience has shown that the meaning of *development* is very much a subjective matter; it is a question of perspective. When one seeks to define *development*—a necessary task if policies must be devised to achieve it—suddenly the term proves curiously evasive. For, as it turns out, the *development* that tracks innocent infancy to weathered maturity may also describe the consuming proliferation of some malignancy. The *development* that fosters an economy from simple localised barter to sophisticated global trade is also a process that may enrich the elites yet crush the impoverished. The development that cultivates one’s social and cultural identity also may incite nationalism and tribalism.

Etymologically, *development* has its roots in the Old French verb *desveloper*. The prefix *des-* within this context has the meaning of ‘apart’, and the root *velop* (or *velup*) signifies *to wrap up*.<sup>1</sup> In Latin and Italian, *viluppare* means *to enwrap to bundle*.<sup>2</sup> However, the terms *progress* and *growth*, which in everyday use, may serve as synonyms of *development*, have different etymological origins: *progress*,

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<sup>1</sup>Walter W. Skeat, *A Concise Etymological Dictionary of the English Language* (Cosimo Classics, 2005) New York, p. 139.

<sup>2</sup>*The Compact Edition of the Oxford English Dictionary*, vol. I, (Oxford University Press, 1971), pp. 279–280.

from Latin *pro-* meaning *forward* and *gradi* for *to walk*. *Progress* is thus to *move forward*.<sup>3</sup> *Growth* is based on the verb *to grow*, having its roots in various Germanic languages, including Old English and various Scandinavian languages, and is related to the process of the production of shoots in plants.<sup>4</sup> Interestingly, the above etymological analysis paints *progress* and *growth* as a one-way operation of increase—a rather linear process—whereas *development* seems to be a process of multidirectional character. It is therefore legitimate to expect that the term *development* as a normative and discursive concept may well be distinct and more complex and multifaceted than its synonyms in everyday use.

What is more, development is a phenomenon that is often qualified by some descriptor. Invariably, there is a development *of*—e.g., *human development*, *economic development*, *community development*, or *state development*, and so on. The nature of the subject determines the character of the process. This statement leads to a distinction between personal development understood as self-realisation within the context of individual freedom, and the development of communities based on the idea of the common good or interest. The scope of what is defined to be *common* in particular cases determines the need to put aside or relegate *particular* interests and privileges. This statement is true for relations between both individuals and collectives/states.

At the level of international law and international relations, *development* is also conceptualised as a *meta*-value that encompasses other legally entrenched values. More than sixty years ago the United Nations General Assembly observed that: ‘a balanced and integrated social and economic development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and observance of, and respect for, human rights and fundamental freedoms for all’.<sup>5</sup> The underpinnings of a *human right to development* were conceptualised even earlier, in the Universal Declaration of Human Rights of 1948. Article 22 provides that: ‘[e]veryone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality’.<sup>6</sup>

The above-cited provision provides two relationships that are key in understanding the complexity of *development*: namely the connection of development with *human dignity* and with *international cooperation*. Development is instrumental to other values and has an important goal: namely the championing of human dignity. Our inherent dignity is at the same time the ‘foundation of freedom, justice and peace in the world’, as the 1948 Declaration’s Preamble stipulates in its

<sup>3</sup>Walter W. Skeat, *A Concise Etymological Dictionary*, fn. 1, p. 413.

<sup>4</sup>Icel. *grōa*, Dan. *groe*, Swed. *gro*; *ibidem*, p. 224.

<sup>5</sup>United Nations General Assembly Resolution 1161 (XII), *Balanced and Integrated Economic and Social Progress*, UN Doc. A/3716 (1957).

<sup>6</sup>United Nations General Assembly Resolution 217 (III), *A Universal Declaration of Human Rights*, UN Doc. A/811 (1948).

first sentence. The way of understanding *human dignity* influences the perception of other human rights and of development. As dignity is a multidimensional notion, the legal and normative conceptualisation of *development* still requires a comprehensive approach, which the present publication aspires to apply. Arguably, legal analyses that take place within rigid positivistic frameworks lead to inevitable reductions and circularities in thinking. Imprecise legal terms are defined by other, often blurry, legal concepts. In order to avoid *ignotum per ignotuis* approaches to such matters, legal methodology ought to be expanded by reference to other social and human sciences: history, economics, anthropology, and ethics.<sup>7</sup> Most often *dignity* is only understood in its modern, Kantian, sense. However, its predominant understanding in international legal scholarship<sup>8</sup> may be isolated from alternative achievements in the study of ethics. Dignity's role in the approach to sustainable development gives it a strong anthropocentric character. Together with its inclinations towards human rights, it serves the re-theorisation of international law, which has traditionally been based on the paradigm of sovereign states. The idea of a global community of individuals that coexists in parallel with an international community of states gives rise to important arguments for the construction of a New Global Law.<sup>9</sup>

Article 22 of the 1948 Universal Declaration also states that *development* may necessitate *cooperation*. This statement also has both legal and ethical implications. The term 'cooperation' has its roots in the Latin prefix *co-* 'together' + *operari* 'to work'.<sup>10</sup> Development is therefore based on common action and may not be achieved differently but through work. On an ethical level, and according to the Book of Genesis, man was put in the Garden of Eden 'to work' (Lat. *ut operaretur*, *Genesis* 2, 15). Therefore, the obligation to work was not a punishment but an integral part of human convocation. Within such reasoning, the duty of states to cooperate with one another is merely a consequence of this very early and fundamental ethical imperative. Cooperation is not only an obligation but also a means of achieving other objectives such as addressing international problems of an economic, social, cultural, and humanitarian character (*cf.* arts. 1, 55 and 56 of the United Nations Charter). What is more, cooperation is also essential for the achievement of sustainable development.<sup>11</sup>

The Preamble to the United Nations General Assembly 1986 Declaration on the Right to Development states that: '[d]evelopment is a comprehensive economic,

<sup>7</sup>Catholic Social Teaching refers to both concepts in key circulars such as *Dignitatis humanae* of the Second Vatican Council and *Populorum progressio* by Pope Paul VI.

<sup>8</sup>*Cf.*, *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/home/EPIL>, paras. 5 and 6.

<sup>9</sup>Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010).

<sup>10</sup>*Oxford Dictionary of English*, ed. by Angus Stevenson (Oxford University Press, 2010), p. 384.

<sup>11</sup>The latter term has gradually displaced the 'permanent sovereignty over natural resources' in international legal documents, *cf.* 2005 World Summit Outcome, UN General Assembly Resolution A/RES/60/1, especially paras 48–56; *cf.*, Nico Schrijver, *Natural Resources, Permanent Sovereignty over*, in *Max Planck Encyclopedia of Public International Law*, fn. 10, para. 16.

social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom'.<sup>12</sup> Development is vital for international economic relations where the need for the harmonisation of economic progress and of other non-mercantile considerations is becoming essential. There has been an important shift in this field of international law following the entry into force of the 1994 Marrakech Agreement establishing the World Trade Organization. In its Preamble, the 'expansion of production and trade in goods and services' is balanced with 'optimal use of the world's resources in accordance with the objective of sustainable development'.<sup>13</sup> A similar conceptualisation of *sustainable development* is also present in the 1987 Brundtland Report where is based on two elements: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of the limitations imposed by the state of technology and social organisation on the environment's ability to meet current and future needs.<sup>14</sup> This definition assumes that development ought not to take place in isolation between different communities. It requires economic cooperation and aid, but, moreover, the creation of equitable opportunities for all.<sup>15</sup> Development is therefore based on an ethical dilemma: either it takes place with due regard to the needs of others—namely the poor in other parts of the world and of future generations or no development takes place whatsoever. *Sustainable development* is not a fixed state of harmony; rather, it is a process of change striving to be consistent with the present and future needs.<sup>16</sup> It is a process in which, although, law plays an important role; other normative orders are also implicated; therefore, *development* should not be analysed only in relation to one of them.

Here, Ermanno Calzolaio counsels caution, invoking Javolenus's maxim, *omnis definitio in iure periculosa est* (i.e. any definition in law is dangerous). Development has many faces. We err when we idolise development per se, placing it upon a pedestal as an axiomatic end in and of itself. Rather, our task should be the mastery of development as a pliant tool, a means to the ends that we choose—whether they be economic growth, environmental protection, human rights, or comprehensive human happiness. Mastery begins with understanding. If development is not reducible to some common meaning, then it can never be more than a vacuous rhetorical device of convenience. At the core of development, as a prerequisite to the realisation of its true potential, there must lie some universality of scope.

<sup>12</sup>Adopted by General Assembly resolution 41/128 of 4 December 1986 (A/RES/41/128).

<sup>13</sup>Agreement establishing the World Trade Organization, adopted in Marrakesh on 15 April 1994 (UNTS, vol. 1867, at 154).

<sup>14</sup>Report of the World Commission on Environment and Development (the Brundtland Report), *Our Common Future* (1987), p. 41.

<sup>15</sup>*Ibidem*, p. 42.

<sup>16</sup>*Ibidem*, p. 17.

The present publication represents neither the initial nor the final efforts of imbuing the term *development* with meaning, though we hope that it represents steps in the right direction. A proper study of the notion of *development* is, as Calzolaio argues, ‘multifarious and multidisciplinary’. Ours is the search for the universality that is required to turn the development construct into reality—even if the reality manifests differently in different cultural contexts. It cannot suffice to examine development from one perspective alone, whether a perspective of nationality, cultural identity, ideology, or discipline per se. Myopic approaches to development are often organised in silos, expanding a self-referential vernacular that is increasingly impenetrable and meaningless to others involved in the pursuit of development, albeit preoccupied with silos of their own. Rather, a *universal* language of development, and a path towards mastery of development as means to worthy ends, must be explored through a vibrant trade in ideas and intellectual engagement.

In that vein, the scholarly interrogation of the notion of development in the present publication reveals a concept much older and much better known to the human experience than do modern treatments. The contemporary sustainability movement hardly invented the notion of public regulation to preserve the ‘common heritage of mankind’. Franck Duhautoy finds that state control of water resources in Plato’s Ancient Greece was justified by the public interest. Tomáš Gábriš credits—or, perhaps, blames—the Ancient Greeks for our very conception of development as an invariably linear process. At the same time, Duhautoy finds that the commodification of vital resources is equally ancient. He traces the tension between *res communes* and privatisation, with an intriguing balance struck at *res nullius*, from Antiquity (namely Ancient Rome) to the Middle Ages, to, in turn, the present, concerning the exploration of the solar system. The same *public–private* tension plays out across socio-legal and cultural traditions, as witnessed in the Talmud, the Quran, and the modern customary law of Libya.

Concerning current discussions on development, these parallel conceptual streams—one grounded in human heritage and collective social rights, the other in commodification and private economic rights—whilst they have on occasion been complementary, they are often competitive. Christine Mengès-Le Pape and George Garvey point to Pope Leo XIII’s 1891 Encyclical on the Rights and Duties of Capital and Labour (cf., *Rerum Novarum*), as a landmark effort to overcome this contradiction. The Vatican sought to temper the explosive economic growth of the Industrial Revolution with accountability for the social welfare of the workers who constituted the human engine of productive process. This demand—namely that development not forego humanity—became central to Catholic social teaching. Flavio Felice and Luca Sandonà examine the influence of this approach on the thought of Luigi Sturzo during his exile from fascist Italy, informing Sturzo’s conception of ‘constitutional economics’.

More often than not, though, the social and economic emphases in development law and policy diverged in the twentieth century. Even when Sturzo was no longer *persona non grata* in post-war Italy, Christian Democratic economic planning embraced the European *ordoliberalism* of the day, enthroning *competition*, Felice

and Sandonà argue, as ‘the hermeneutical key of economic policy’. The exigency of post-war reconstruction threw the development needle full tilt in the direction of economics, drowning out the idealistic paeans of breakthrough human rights instruments such as the Universal Declaration—which, as Garvey observes, recently turned seventy.

The ‘cultural decade’ of the 1960s brought to the fore the dichotomy of social and economic thinking concerning development. This tension can be detected in the World Bank’s investment dispute resolution treaty, a product of 1960s’ globalisation. In this vein, Tamada highlights the burgeoning controversy over whether social impact is relevant today to the legal interpretation of the term ‘investment’, as conceived half a century ago. Tracing a similar dynamic, Mengès-Le Pape and Garvey explain how the Vatican, with Pope Paul VI’s historic encyclical of 1967, *Populorum Progressio*, had championed the introduction of humanism into the global economic development agenda. This once bohemian notion of ‘integral humanism’ is now revived as perhaps humanity’s best chance for peace.

For all the world’s efforts since the advent of the post-World War II world order, ‘the end of history’ seems to have never arrived. As Gábriš describes Fukuyama’s ultimate abandonment of the end-of-history thesis, neither the establishment of world government nor the neoliberal, post-Soviet ‘renaissance of constitutionalism’ has delivered the basic necessities of the world’s population, much less world peace. To generalise Gábriš’s analysis of Brian Tamanaha’s work, the simple equation *development=modernisation* has failed. The enterprise of development has turned out to be impossibly more complicated than any constituency had anticipated. Economic investment seems only to deepen economic dependence. Socialist planning seems unable to ignite ingenuity. Constitutional democracy seems only to aggravate inequality.

Thus, Gábriš challenges us to consider that development is neither inevitably linear nor amenable to universal definition. To be sure, we may agree on universal *ends*, such as food security, shelter, clean air, and drinkable water. But development concerns *means*, not ends, and when speaking of means, one size does not fit all. In this vein, Zuzana Selementová discusses the concept of *common but differentiated responsibilities* (CBDR) as a necessary strategy in responding to climate change. Whilst the concept of CBDR still allows room for disagreement over the meaning of development, Selementová demonstrates that it is the traditional economic measures of development that fall short as they fail to account for human factors including access to education and health care.

In fact, the failure of twentieth-century development policy, predicated principally on foreign aid, might have cleared the field for the conceptualisation and reconstruction of *development* in the very vein of *integral humanism*, as Mengès-Le Pape proposes, or, in Garvey’s terms, for an ‘integral development’. Today, there is much talk about *sustainable development*. Calzolaio explains the seemingly contradictory, if not arguably oxymoronic, nature of that term, as it seems intent on reconciling current economic growth and long-term environmental welfare. What is more, the term *sustainable development* sounds prospective, as it invokes the interests of future generations. But the term might as well be an effort to remedy our

past failure to reconcile capitalism with humanism. *Sustainable development* has come to represent the far-ranging investigation of context that must inform our mastery of development from an integral perspective.

If the meaning of development in the traditional economic context of investment disputes might be sufficiently elastic to accommodate factors including social welfare and cultural impact, as Tamada suggests, then the notion of *sustainable development* might be an apt vessel for a *common but differentiated* approach to development across the board. In fact, Daniel Zatorski proposes that *sustainable development* could do just that in relation to the world of commerce, as he links international sales law with corporate sustainability across the common ground of ethical values. Similarly, Adam Szafranski, Piotr Szwedo, and Małgorzata Klein reveal the tension that arises between free trade, on the one hand, and values in the area of Internet regulation, on the other. Unbridled capitalism, under the guise of free-market fundamentalism, threatens the deontological particularities and social fibre of disparate societies. For instance, the choice of a society to protect its minors from harm through exposure to adult content could be undermined by neoliberal demands to pare down regulation. They propose that the law of development can remedy such tensions by ensuring that economic prosperity does not demand as its price the debasement of social values.

Perhaps unsurprisingly, this leveraging of economic advantage with integral humanism is strikingly reminiscent of Pope Leo XIII's efforts to impart economic actors with the responsibility for human welfare. It was that very 'logic of Christianity', in Garvey's words, through which Pope Francis has enfolded 'human ecology', namely by the inclusion of environmental sustainability into Catholic doctrine through the 2015 encyclical, *Laudato Si'*—124 years after the *Rerum Novarum* and by way of the *Populorum Progressio*. Is integral development within reach at last?

There are rare examples, such as the case of South Africa, where the law has sought *to command* that development strives for worthy social goals while maintaining constitutional democracy. Arguably, South African efforts are reminiscent of Sturzo's thought about the role of constitutional economics in real-world practice. Richard Peltz-Steele and Gaspar Kot explain that the post-apartheid constitutional process has been designed to radically shift power from governing institutions to human constituents, in part by transcending the classical divide between public and private sectors. As a result, the private sector is subject to public scrutiny. For instance, large-scale projects purported to be developmental are scrutinised to ensure that they are genuinely beneficial to communities and are not only likely to make the rich richer at the expense of the poorer layers of society. Peltz-Steele and Kot argue that the same mechanism might be equally useful in Europe, where states are wrestling with public investments aimed at stimulating private development.

In the South African experience, the potential of *sustainability* to promote integral development is well demonstrated by the emergent complexity of problems in natural resource management. Jan Glazewski and Wojciech Bańczyk both demonstrate how South African legislators and jurists are thinking broadly about

competing policies that purport to effect development. Similar to those who advocate a progressive approach to the interpretation of investment treaty obligations, South African authorities, in considering whether to approve commercial activity such as mineral extraction, often reject purely economic considerations. According to Bańczyk, these analyses properly consider the collateral impact on discrimination, poverty, labour, and civic participation, as well as the conservation of the environment. At the same time, Glazewski demonstrates that customary subsistence fishing can pit environmental conservation against social values such as cultural identity and reparation for past injustices. Unsurprisingly, deriving sound policy and replicable principles from such *mélange* of concurrent and competing priorities is easier said than done.

So we find ourselves feeling our way forward in new territory, searching for a definition of *development* that will work hard enough to accomplish all we ask of it. When modern international institutions were born after World War II, we were content with *development* as an idealised path that emanated from the experience of the world's most industrialised and prosperous nations. Foreign aid for aggressive modernisation was the requisite catalyst. Later, in a fit of neoliberalism, we reimagined development as a natural progression—an inevitable consequence of social and economic systems when left to their own devices. We redirected resources to facilitate free markets and personal responsibility. Neither of those strategies delivered us the better world we had imagined. And all the while, humanists from the sidelines had decried the fever pitch of economic drivers that seemed to churn social ruin in their wake.

By the end of the twentieth century, a more nuanced approach to development began to emerge—one that rejects panoramic and panacean policymaking in favour of qualitative legal intervention in human, economic, and social activity. International institutions have assumed the ambitious agenda of mapping the highly interdependent economic, social, and cultural conditions that must be navigated to integrate a wide range of competing for policy priorities. Is there a new, pliant understanding of development, imbued with humanism, capable of placing us back on course towards the 'end of history', or placing our diverse humanity on many courses towards the 'end of history'?

As discussed earlier in this introduction, the term *development* comes to modern usage by way of Old French. Referring to the undoing of containment, or envelopment, *developing* is a 'cousin' to such terms as *unfurling* and *unwrapping*. As recently as the eighteenth century, the notion of a slow and steady progression was central to conceptualising *development*. Thus, the term suggests the gradual revelation of something within: something as yet unknown; something that, once revealed, is capable of changing our circumstances and our very nature. Therein lies the universality of *development*: not in its meaning as an ultimate end or destination, but our journey in its pursuit. We differ over methodology—over course. But we labour together to unfurl the revelation of our deliverance.

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# Chapter 1

## “Law & Development” in the Light of Philosophy of (Legal) History



Tomáš Gábriš

**Abstract** This chapter is to provide a number of insights into the interface of philosophy of (legal) history and Law & Development movement, challenging the idea of linear historical “progress” in constitutional law and human rights, seemingly approaching some ephemeral final goal of history. Taking general philosophy of history as a starting point, in fact, the idea of Francis Fukuyama on having reached the end of history in the form of a worldwide victory of liberal democracy was in the meanwhile abandoned even by the author himself. Still, looking at constitutions of many states, Fukuyama’s thesis seems to be largely accepted by the legislators of today in their view of liberal democracy and human rights standards as the final and superior stage of evolution, the “end of history”. Current discussions on the so-called material core of constitutions, meaning unchangeable constitutional principles and values (of liberal democracy, human rights, etc.), precluding any future changes, go along the same path. The same view used to be accepted by proponents of the Law & Development movement as well, internalizing the modernist view of linear historical evolution leading towards yet greater progress attainable through legal tools. However, this view has been challenged in recent decades by numerous postmodern thinkers in general and by philosophers of history in particular. They are doubting the idea of progress and of linear development in history, as well as of the acceptability of imposing Western standards onto other cultures throughout the rest of the world. Based on these and some other arguments, in this chapter we shall try to reconsider the relevance of the Law & Development movement in the light of currently prevailing philosophical views.

**Keywords** Law · Development · Legal history · Philosophy of history · Historiography

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## 1.1 Law & Development, Legal Development and Legal History

### 1.1.1 *Law & Development Versus Legal Development*

Law & Development, often understood as “modernization through law” was paid attention to recently by the well renowned scholar, Brian Tamanaha.<sup>1</sup> This movement was traditionally building on the assumption that market reforms and governmental reforms in numerous countries of Eastern Europe, Asia, Africa or Latin America require legal backbones. Their legal regimes were therefore to be modelled on Western legal systems, requiring uniformity and comprehensiveness, a monopoly of power, equal application of the law, rationality, rule-bound decision making, bureaucratic organization, an emphasis on rights and duties of individuals, and an instrumental view of law (to serve identified social needs), with the system run by legal professionals. It was namely generally held that “a more highly developed legal system leads to a more highly developed economy or polity”<sup>2</sup> and therefore, Law & Development initiatives mainly took the form of transplanting Western legal institutions into developing or otherwise underdeveloped countries.<sup>3</sup> The majority of the work done in this respect was funded by prominent international entities such as the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Association, the UN Development Program (UNDP), the U.S. Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the United Kingdom’s Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency, and others.<sup>4</sup>

Thereby, Tamanaha points out that “Law & Development” is to be strictly separated from the so-called “Legal Development”, which simply means development of the law itself, taking a form of continuous or discontinuous evolution, influenced by numerous social factors, being studied by the discipline of Legal History.

However, we shall claim in this chapter that even the traditional approach to “Law & Development” proper has to do with legal (constitutional) history—namely, with a philosophy of legal history, and more specifically, with the idea of linear development and progressive evolution towards the ideals perceived as historically superior, similar to Hegelian and Fukuyamian concepts of the end of (constitutional or legal) history.

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<sup>1</sup>Tamanaha [1].

<sup>2</sup>Id.

<sup>3</sup>Id. at 210–211.

<sup>4</sup>Id. at 217.

### ***1.1.2 Development and Legal History***

Many of the “modern” disciplines of legal scholarship and legal education trace their origins to a research on the relationship between law and other disciplines—literature, psychology, economics, and so on. In contrast, legal history has always been perceived only as a history of law, not as a relationship between law and history. However, it is precisely from this neglected point of view, close to the philosophy of law or to the philosophy of legal history, that one may better understand the importance of the “legal development” as well as of the “Law & Development”—based on a deeper understanding of the interconnections between law and history. Law is namely a historical phenomenon on its own—immanently—foremost terminologically, as well as through its traditional institutes, but also through the historical traditions of legal scholarship and of legal professions. From a different point of view, in addition, history (not just the history of law) is a topic that appears in law also explicitly—when invoking the past in laws and constitutions.

The “Law & Development” movement itself implicitly implies an underlying historical (and philosophical) approach to law as well. Namely, the idea of the historical evolution of law and society, with the possibility of its influencing through the introduction of legal backbones of the desired social, economic and political development (progress). This makes the proponents of this movement seem like they truly believe (in Hegelian terms) in ideas (“spirit”) changing the material world, in contrast to the Marxist perception of law as being only a reflection of the material conditions of society, unable to surpass the historical period of its origin. Specifically, in terms of the “Law & Development” movement, its representatives apparently believed that the liberal democracy, human rights standards as well as all the respective conditions of life would take the forms of the Western models, simply through a transplantation of the “superior” Western legal standards (perceived as a sort of the “end of evolution” both in legal as well as in social and economic terms; especially after the fall of the rival idea of evolution towards the utopian communism in 1989).

At present, however, the continuous and linear interpretation of history in the sense of ever higher progress is being questioned and often faces an outright rejection by current philosophers of history, together with the belief in the transformative force of law on its own. This also lies at the heart of Tamanaha’s article on Law & Development. Still, a thorough analysis of the idea of continuous evolution and progress (development) in law towards a liberal democracy and basic human rights guarantees is yet to be undertaken, in order to be able to reassess and revisit also the ideas of the “Law & Development” movement, finding a place for this movement in the postmodern world. In order to at least attempt to undertake such an introductory analysis here, we shall explain first the postmodern approaches to the ideas of progress and evolution in the philosophy of history, and then apply these ideas onto the perception of history by legislators (lawyers), finally coming to a reformulation of the status and role of the “Law & Development” phenomenon.

## 1.2 The Philosophy of History and the Philosophy of Historiography—Towards the Philosophy of Law & Development

### 1.2.1 *The Philosophy of History—A Return to Multiple Traditions?*

The birth of the concept of the “philosophy of history”, similarly as with the “philosophy of law”, is associated with the person of G. W. F. Hegel, albeit the idea of development of human society with the passage of time was not alien even to the ancient civilizations. Both Greek and Jewish cultures, for example, distinguished between the cyclical and linear understanding of the passage of time—the sacred time, along with the alternation of seasons of the year, were cyclical, while the historical development was linear. Thereby, in the case of the Greeks, linear evolution was descending, human race falling down on its route from the golden age to the ever-worsening periods of history. In contrast, in the case of Jewish culture, there was an unspecified end of history expected in the linear future.<sup>5</sup> Linear understanding in the sense of approaching the definitive (and glorious) end has been introduced specifically in Christian thought, with its chiliastic and messianistic understanding of history (awaiting the second arrival of Christ).<sup>6</sup>

Not surprisingly, building on Christian traditions, even the secular society formulated its own versions of the narrative on the end of history. Thus, while Giambattista Vico<sup>7</sup> still talked about the rotation of *corso* and *ricorso* (rise and fall of cultures and empires), the French enlightened thinkers such as Voltaire, Turgot and Condorcet, believed in the idea of linear evolution and ever-greater progress.<sup>8</sup>

Turgot, for example, understood progress as determining the meaning of history, while specifically emphasizing the importance of economic growth in social development. Still, Condorcet’s understanding of the historical progress was even more ambitious. Based on historical material, he tried to connect the past with the future through the presence. By his methodological approach, he hoped to offer an objective interpretation of human progress, with the possibility of anticipating future tendencies. His historicism, fuelled by Hegel and other philosophers of history of the 19th century, kept on influencing the philosophy of history up until the 20th century, when K. R. Popper voiced his attacks on historicism.<sup>9</sup> Condorcet namely divided human history into stages of development, great historical epochs, separated by epochal changes such as invention of letters, the contributions brought about by Greek science, the invention of the printing press, and the birth of modern science.

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<sup>5</sup>Cf. Umlauf [2, p. 117].

<sup>6</sup>Id. at 119.

<sup>7</sup>In his work *The New Science* (1725, *Scienza Nuova*).

<sup>8</sup>Valent and Chovancová [3].

<sup>9</sup>Popper [4].

Subsequently, while Kant made a turn from nature to man, emphasizing the human perception of organizing the surrounding world rather than humans being conditional upon external experience and senses, Hegel then overestimated this idea to the extent that he considered thinking and being as identical. That is, he claimed that there was no difference between idea and reality—everything that we think of, exists, and everything that exists is the subject of an intangible idea, thinking. An idea was understood by Hegel as an impersonal principle, reason, spirit. This spirit evolves in the world and in a man, upon the principle of so-called dialectics, that is, by overcoming contradictions. Every idea, which is a subject matter of a thesis, is negated by its antithesis, and from this denial, which is not absolute, there is a synthesis arising. Such a synthesis, in his view, is also a new proposition (thesis) that awaits its antithesis and following synthesis, to further replicate the process of dialectical evolution. However, this development is not infinite—the spirit goes through three historical developmental stages until the end of history is reached. Specifically, in the first phase, the idea or spirit develops in itself. In the phase of antithesis, the idea is separated from itself in the form of nature. In the third phase, the idea and nature merge into the “absolute spirit”. That is the end of history and of the development of the spirit (the idea). It was this Hegel’s idea of the end of history and of the purpose of history that inspired Karl Marx and his followers to believe that the end of history was in fact not the regime of the Prussian state, as Hegel believed it to be in his works,<sup>10</sup> but rather that it would be the phase of Communism.

The evolution of thought after Hegel went in the German-speaking countries both towards idealistic thought, focusing on intangible ideas and will,<sup>11</sup> as well as towards materialistic thought, culminating in the thinking of Karl Marx and Friedrich Engels. Marx namely emphasized the development on a material basis instead of the development of ideas and spirit. In his view, the material basis influenced and conditioned the development of the spiritual superstructure and not vice versa, meaning that the method of production influences the division of society into classes, always creating the dominance of one class, which must be overthrown at the end of the respective historical epoch. In addition, in Marx’s view, the material basis determines not only social stratification, but also morals, art, religion, and law. Therefore, he could also claim that the law is the will of the ruling class promoted to law.<sup>12</sup> Marx thus understood the state as a power tool for organized violence and for the suppression of one social layer by another. He believed that after the victorious Communist revolution all mechanisms of regulating society such as the state and law would cease to exist, and the individual, on the basis of voluntariness and one’s own awareness, as a new

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<sup>10</sup>In 1990s, the American political scientist Francis Fukuyama, under the influence of Hegel, reported that the end of history has come through the victorious liberal democracy after 1989. However, this was opposed by Samuel Huntington’s prediction of the “clash of civilizations” as the next phase of the development, denying “the end of history”.

<sup>11</sup>See the works of Arthur Schopenhauer (1788–1860), who draws everything in the world from human will, and he considers the world only in terms of will and imagination.

<sup>12</sup>*Manifesto of the Communist Party by Karl Marx and Frederick Engels, February 1848*, Marxists (Aug. 29, 2018, 10:04 AM) <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>.

person, would endorse the principles of the new community where any social conflicts would cease to exist—in a world where everyone rationally understands their duties towards the community.<sup>13</sup>

Marx and Engels thereby believed that by revealing the primacy of the material basis to the ideological superstructure and by revealing the patterns of their historical development, the laws of the development of human society were uncovered. Namely, based on the method of production, Marx and Engels believed the human development was linearly evolving towards progress, through the alternating socio-economic formations—from the primitive society through slavery, feudal society, bourgeois society, up to, finally, a communist society. This development, similarly as it was put by Hegel, was seen as a transition from the “state of necessity” into the “state of freedom”, where no one works under the pressure of urgency and external effectiveness.<sup>14</sup>

This utopian idea of the end of history was in fact tested in the 20th century when the communist parties in Eastern Europe and also in some non-European states attempted to implement it. Most of these attempts, however, failed—at first, it became clear that the need to preserve state and law persists even after the revolution. To explain this, a new developmental stage was introduced between the bourgeois society and the communist society, being called Popular Democracy and its later form being labelled as Socialism. However, society itself rejected this concept, and, at its latest in 1989, the “historical return” to the bourgeois stage of development, law and society, with the ideology of a liberal democracy, took place in Eastern Europe. That is why the American neo-conservative political scientist Francis Fukuyama wrote in 1989 an article called “The End of History”, and later edited the book *The End of History and the Last Man* (1992), where he argued that the liberal democracy is the actual end of history, after overcoming the competing theory of the Marxist interpretation of history. In the spirit of Hegel’s concept of evolution towards freedom, Fukuyama believed that after 1989 history was in fact culminating in a period of the highest possible degree of freedom.<sup>15</sup> It was this freedom that the West wished to import also to the rest of the world, making the victory of liberal democracy absolute and beyond doubt.

However, even this idea recently got into a crisis. Witness to this is the fact that in the meantime, Fukuyama himself abandoned his theories after Samuel Huntington had published his *Clash of Civilizations*.<sup>16</sup> Instead of the end of history, Fukuyama now constructs a new concept of the philosophy of history—he claims we are entering now the stage of the struggle for identity, understood as a national and cultural identity that can be individual and independent of Huntington’s “civilizations”.<sup>17</sup> The concept of identity is thereby similarly invoked also by the current Ghanaian-British-American philosopher Appiah, who believes we are in wars of identity because we

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<sup>13</sup>Valent and Chovancová [5].

<sup>14</sup>Hegel inspired Marx also as far as labour and production is concerned. Cf. Singer [6].

<sup>15</sup>Umlauf [2, pp. 333–334].

<sup>16</sup>Fukuyama [7].

<sup>17</sup>Fukuyama [8].

keep making the same mistake: exaggerating our differences with others and our similarities with our own kind...<sup>18</sup>

Albeit this might sound new, in fact, this approach only follows what Hannah Arendt had already diagnosed about our times fifty years ago... Hannah Arendt’s historical thinking, duly expressed in her book *The Past and Future*, is namely based on an (not very well argued) idea that up until the 19th century, history represented a chain of historical traditions, regardless of whether this tradition was explicitly expressed, and whether the alternating generations were aware of it. Arendt herself sincerely admits that it was only the case of the Romans’ receptivity of the Greek culture that proves they were expressly aware of the tradition. The second historical moment of an openly proclaimed awareness of the tradition then followed only in the period of romanticism at the beginning of the 19th century. However, romanticism with its emphasis on local and national traditions, has also, in Arendt’s view, outlined the approaching departure with tradition perceived until then as an intergenerational chain.<sup>19</sup> According to Arendt, this departure from tradition was brought about at the philosophical level by three major philosophical figures—Kierkegaard, Marx and Nietzsche. All three were undoubtedly following Hegel, who was one of the major thinkers to perceive the whole of historical development not as a chain of tradition, but rather as a continuous thread, in the spirit of a secular linear understanding of history leading to one ultimate end of history, irrespective of local and national traditions emphasized by romantics.

It was thus in the end of the 19th century that the importance of the “chain” of traditions was lost, claims Arendt, since Kierkegaard, Marx, and Nietzsche have abandoned in their thinking all the “traditional” past authorities and values, thus opening the door to a complete erasure of the concept of tradition, role of which was newly assumed by the idea of a linear evolution of history with its own rules and with the ultimate goal of history (be it liberal democracy or communism).

In the 20th century, respectively already by the end of the 19th century, men have additionally abandoned not only “tradition”, but according to Arendt also the whole “triad” of tradition, religion and authority, being three closely interconnected elements, previously connecting the generations. Under Arendt, the “traditional” concept of philosophy of history was thus replaced by a newly-conceived philosophy of history, perceiving the evolution of humanity as being globally uniform, heading towards the future set out specifically in the 20th century by totalitarian regimes convinced of their truth as to the ultimate goal of development of human society, regardless of any local (temporary) specificities.<sup>20</sup>

According to Arendt, the aforementioned changes of the 19th and 20th century were primarily the consequences of an influence of scientific thinking in the field of natural sciences, believing that modern science can reveal all the patterns and laws of natural relations and forces. Modern thinkers under this impression accepted that the same patterns and causality must exist and can be discovered even in the

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<sup>18</sup> Appiah [9].

<sup>19</sup> Arendt [10].

<sup>20</sup> Antaki [11].

case of the evolution of human society. This discovery was proclaimed by no less important figures than Hegel (in the spirit of idealism), Marx and then Lenin and Stalin (in the materialist sense). Similarly, according to Arendt, along with belief in the possibility of influencing the development of nature, the idea of influencing the evolution of mankind has emerged—being probably also the idea behind the Law & Development movement.

Of course, since the work of Arendt is often more of a general and speculative nature, it may be questionable (and a challenge for further research) for professional historians, whether the turn of the 19th and 20th century has indeed definitely rejected past values and traditions as well as their overall concept. Similarly, one can but contemplate whether the reported abandonment of traditions in the 19th and 20th centuries is irreversible, or whether, under the impression of postmodernism, multiculturalism and globalization, this development steps back—towards re-inventing the traditions, as could be suggested by the current hunger for their “revival” under the heading of “identity”.

Thus, to conclude this section, we have apparently still not reached the end of history, albeit this is not fully acknowledged yet neither by legislators, nor by the representatives of the Law & Development movement, who still seem to stick to the traditional “historiography” believing in having uncovered the laws of history, evolving towards the “end of history”.

## ***1.2.2 Philosophy of Historiography***

Having mentioned historiography, it is important to explain that the philosophy of history (with its origins and peaks in Vico, Voltaire, Hegel, and Marx) must be distinguished from the philosophy of historiography.<sup>21</sup> The fundamental difference between these two philosophical areas lies in the fact that while in the “philosophy of history” (in English, also referred to as “the substantive, material philosophy of history”) the historical development itself is being explained (mostly in a “speculative” way), while in contrast, within the “philosophy of historiography” (in English, it is also referred to as “analytical philosophy of history”) the subject of inquiry is the scholarly discipline and methodology of the discipline that examines the past.

Interestingly, in the same way as Arendt linked the emergence of the modern philosophy of history with the model of natural sciences, she also explains the breaks in the way history is being written about, that is, in the philosophy of historiography. Namely, instead of Homer’s, Herodotus’s and Thucydides’ “impartiality”, under the impression of the natural sciences belief in “objectivity” and in the possibility of the objective knowledge of laws of social development was introduced, influencing the form and methodology of historical scholarship and writings.<sup>22</sup> Similarly, Arendt explains the opposite developmental trend in historiography—in the 20th century,

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<sup>21</sup>Cf. Tucker [12].

<sup>22</sup>Arendt [10].

doubts about “certainty” and “truth” in historical scholarship emerged, in the sense of epistemological doubts as to the possibility of an objective evaluation of history by historians. However, Arendt does not go so far as to dispute the ontological foundations of history (i.e., objective history, objective existence of the past), in the sense of existence and truthfulness of historical facts on their own. As a matter of example, she offers a historical fact of an attack on Belgium by Germany committed on 4th August 1914, which is an example of a historical fact that is difficult to dispute. Still, Arendt specifically and openly speaks about nationalistic (*Nazi*) and Socialist (Communist) practices of rewriting history (and creating false, new traditions).

Arendt’s preoccupation with and criticism of relativistic approaches to historical facts and their various interpretations (including misinterpretations and falsifications), was an early reaction to decades of intensely expanding constructivist and narrativist approaches to historiography and history, which were present among the philosophers of history and historiography especially between the 1960s and 1990s. The essence of these approaches was to discuss the possibility of objectivity in historiography, the possibility of objective reconstruction of historical events and of the ability to discover any “laws” in historical development. In particular, postmodern authors—Arthur Danto, Louis Otto Mink, Hayden White, Paul A. Roth, and also the Dutch author Frank Ankersmit, considered every piece of historical writing to be only a “construction” of a historian, attributing to the past certain characteristics from an *ex-post* perspective.

In this regard, however, it should be remembered that although Arendt accepted that historians should not believe in the existence of any historical laws or of the linearity of historical evolution, and that the explanation of historical events and facts should instead always take the form of an *ex post* search for roots and causes (*Ursachen*) of historical events, without the possibility of absolute certainty and without the right to completeness of the explanation, at the same time, Arendt herself cannot be considered an outright postmodernist constructivist of narrativist.

Similarly, returning now back to the problem of relationship between law and development, in both of its forms—of Law & Development as well as Legal Development—, it seems that our modern legislators stand in opposition to both constructivist and narrativist postmodern approaches to historiography. However, they also stand in opposition to Hannah Arendt’s perception of historiography. Namely, judging from the wording of national constitutions, laws and from the traditional approaches to Law & Development, modern legislators still believe they have discovered the universal laws of history and are writing their own one and only correct (hi)stories—an idea that both Arendt and postmodernists refuted!

### 1.3 The Legislator as a Legally Binding Historiographer?

The philosophy of history and the philosophy of historiography are not objects reserved solely to historians—they are strongly influenced by philosophical discourses and narratives of the period, historically e.g. by the works of the French