Law and Development

Critiques from a Decolonial Perspective

Vanessa Boanada Fuchs

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Abstract

The objective of this working paper is to reflect upon the entanglements between Law and Development and to point out the possible contributions a decolonial studies approach can offer with regard to the renewal of the field. The first part introduces the apogee, decline and reemergence of Law and Development as a field of research and applied policy. The second part presents some of the theoretical tools that decolonial studies provides that may serve to enlarge the research interests of Law and Development – from one which focuses on legal reforms and "best practices" to a more reflective approach sensitive also to the impacts of applied research. The subsequent parts discuss the future of the field and suggest new venues of research that link this interdisciplinary field to a Decolonial agenda and specifically encourage the study of the implications of legal reforms and development policy for indigenous peoples' groups. Furthermore, the paper argues that a decolonial studies perspective helps to shift the focus of Law and Development to the interactions, resistances and alternatives presented by indigenous movements in the face of national development projects.

Keywords: Law and Development | Latin America | decolonial studies | indigenous peoples' rights

Biographical Notes

Vanessa Boanada Fuchs is a Ph.D. candidate in Development Studies at The Graduate Institute of International and Development Studies, Geneva, and Research Assistant in the Research Module "Trans-cultural Governance of the Environment in Latin America". Her thesis focuses on the study of the right to prior, free and informed consultation in the case of the Belo Monte Dam in Brazil. She previously obtained her degree in Law and in International Relations at the Pontifical Catholic University of Rio de Janeiro with the thesis "(Post) Modernity Ironies: Indigenous Movements' Strategies of International Litigation" (2009). She has conducted research among the Sarayaku People in Ecuador and indigenous peoples from Volta Grande do Xingu in Brazil. Her research interests focus on the interdisciplinary study of socio-environmental conflicts, informed mainly by her background in law and inspired by political ecology and decolonial studies. This working paper was developed during her stay as short-term Doctoral Researcher at desiguALdades.net in Research Dimension III: Socio-ecological Inequalities in 2011. The author thanks her colleagues at desiguALdades.net for the rich academic exchanges and especially Dr. Julia Roth and Dr. Paul Talcott for comments and suggestions for revision of the previous version of this working paper.

Contents

1. Law and Development – Academic Enterprise and Applied Research

The history of a mutual interest between the fields of Law and Development is long (see Kennedy 2006), but through the efforts that mainly occurred in the United States' academic environment of the 1950s and 1960s, the formerly separate fields of study of Law and Development were brought together in a united approach commonly referred to as the "Law and Development Movement" (Trubek and Santos 2006). Kennedy Davis and Michael Trebilcock point out that the background of this movement is the post-World War II interest in "the poor countries of the world" and the influence of modernization theory advanced by the economic historian Walt Whitman Rostow (Trebilcock and Daniels 2008; Davis and Trebilcock 2008) which emphasized the mono-directionality of the development path.

The initiatives of the Law and Development movement were heavily funded by research initiatives of international and regional organizations, such as the World Bank, the International Monetary Fund, and the Inter-American Development Bank (IADB). During its golden years, the movement proved to be as much a field of "applied activity" as a "scholarly enterprise" (Ginsburg 2009: 164). Applied as public policy, Law and Development aimed at the reform of legal institutions in the belief that this would create an ideal environment to foster economic development. As a scholarly field, Law and Development focused on the causal links between law and development, the effects of the transplantation of best practice models from so-called developed to underdeveloped countries, the possibility of institutional change, and the replication of what came to be known as good governance practices, among others. Finally, the applied research of Law and Development endorsed legal reforms in many countries of the so-called Third World.

But many projects international organizations implemented to foster development through the rule of law failed (Trubek and Galanter 1974), and Western institutions started being questioned increasingly also from social movements inside their own civil societies (Cao 2007: 361) (such as feminist movements, protests related to the Vietnam War, and most recently the "Occupy" movements). As early as the 1970s, the academic field entered a crisis, and from then onwards Law and Development has experienced many ups and downs, especially after moments of crisis in the economic centers of power (Gelpern 2009; Trubek and Galanter 1974; Trubek and Santos 2006).

> In other words, if law and development scholars aimed to assist poor countries in establishing Western style markets and laws, and if the integrity of the latter

is questioned even in developed, Western societies, then the essence of the movement itself must be questioned as well (Cao 2007: 361).

Such forms of social criticism directed at the funding organizations and the policy reforms they had been promoting eventually undermined the academic coherence of the field precisely because Law and Development was focused on the research of best practices that could be transplanted from the centers to the peripheries: the kind of research that had been sponsored by institutions such as the World Bank (WB) and the International Monetary Fund (IMF) among others (Cao 2007; Trubek and Santos 2006; Tamanaha 2011; Pistor 2009b).

Critics pointed out that despite the rich debates the movement engendered, the absence of an agreement on methods turned Law and Development into a very incoherent field of study (Ginsburg 2009), only held together by the idea of the "virtues of law" – or the "law matters thesis" (Pistor 2009b). Furthermore, the field had transformed itself into a "collection of sponsored projects" and confused academic efforts with "applied functionalism" (Mehra 2009: 167), and failed basically to take into account the differences among local contexts.

However, the most fundamental reason for the decline of the law and development movement was that it was widely perceived to have been a failure in enhancing appreciably most developing countries' state of development (Davis and Trebilcock 2008: 26).

It was by that time that actors in the "Third World" gained momentum to start advocating for taking development matters into their own hands. During the last years of the Cold War by means of the efforts of "Third World" diplomats and scholars in form of the Movement of the Non-Aligned countries advocated then for the recognition of an international right to development as part of the creation of a new economic order following the demise of colonialism. As part of the efforts from the South, the links between the two fields (Law and Development) were eventually re-enacted in new ways. The aim of the criticism developed by "Third World" scholars on the fields of Law and Development was to obtain a better share of the profits from the global economy for the countries of the so-called "Third World" and to do so with the guarantee of non-interference over domestic affairs – one of the most important points of this agenda related to sovereignty over natural resources.

1.1.   The Right to Development

The right to development reflected the above-mentioned claim, urging the international community to share the benefits of economic growth through economic cooperation alongside the respect of national sovereignty, and non-interference with domestic affairs. A set of regional and international instruments recognizing the right to development as a right of all peoples were signed (see: the 1981 African Charter on Human and Peoples' Rights (OAU 1981); the 1986 United Nations Declaration on the Right to Development (UN 1986) and the 1993 Vienna Declaration and Programme of Action (UN 1993)).

Article 1 of the UN Declaration on the Right to Development reads as follows:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources (UN 1986).

But even new national development plans which were related to the idea of independent nation-building, the principle of non-interference and sovereignty over national resources, seemed to reproduce internally the existing patterns of global inequality and exclusion. These plans benefitted only state elites that were connected to international capital (Grosfoguel 2008) and did not provide room for the inclusion of the previously existing non-state actors who live inside of and sometimes at the overlapping of national borders such as indigenous groups. The national development agendas of the South constructed this way, thus, contributed to the reproduction of old inequalities and the consolidation of new ones, as they had as final objective to climb the ladder of development and follow in the (foot)steps of Northern industrialized countries (Chang 2002).

1.2.   The Internalization of Colonial Relations in Development Planning

In a nutshell, the paradigms underlying national development models that have been put into practice in Latin America circumscribed the interpretation of the right to development of "all peoples" to the more restricted meaning of the right of development of "all states". No paradigm of national development significantly expanded that narrow understanding of the right to development in the actual implementation of development policies, including the state-controlled import substitution model and its successors, the neo-liberal state, and the progressive turn in the early 21st century.

First, the new national development plans of the import substitution period required investments in resource intensive energy production and infrastructure expansion. Such development policies were mainly dedicated to the creation of infrastructure facilities and energy production to provide Latin American countries with means to explore the richness of their natural resources that would, then, fuel the nascent industrial sector. These plans also entailed the construction of roads and ports to distribute the goods domestically and to international markets. Unfortunately, many Latin American countries incurred high foreign debt through loans to finance their programs of national development during the time of the expansion of national industries, especially after the international oil crisis in 1973 (Sunkel and Griffith-Jones 1986).

The following decades witnessed recurrent economic crises that led those countries to renegotiate debts with international funds like the IMF, the World Bank, and the IADB. The renegotiation was conditioned to structural adjustments, much of the pattern "Law and Development" mentioned in section 1.1. above. Invariably, these structural adjustments would entail austerity for public spending and the liberalization of the economy, both of which had a disproportionate effect on the most vulnerable sectors of the society.

For example, the structural adjustments obliged the state to retreat from the provision of the few services it had provided during previous periods to indigenous peoples who, by being associated with campesinos (peasants), were incorporated into the class struggle. They thus benefited marginally from the credit associated with early steps of agrarian reform in many Latin American countries (Yashar 1998). What is more, the parallel liberalization of the economy (also) attracted foreign direct investment that also fuelled the expansion of the resource intensive models of development into ancestral territories of indigenous peoples by the same time most states had little apparatus to control and regulate their activities and deal with the pressures of international investors (Fontaine 2003). Regardless of all the normative development concerning indigenous

rights in the international human rights regime, in Latin America, de facto, there was not much governmental control and enforcement at the domestic level.

As the late 1980s witnessed the restoration of democracy in many Latin American countries, their democratic opening coincided and matched with economic neoliberalism in paradoxical ways. Democracy on the one hand opened possibilities for indigenous peoples to voice their claims domestically and internationally (Brysk 1994 and 2000; Cott 2007; Finnemore and Sikkink 1998; Keck and Sikkink 1999); on the other, neoliberal policies inflicted more economic and environmental pressure on indigenous ways of life. This peculiar context of political relaxation and economic pressures contributed to the re-emergence and strengthening of indigenous movements across Latin America – movements that are today exponents in the fight against new forms of internal colonialism and assimilation.

In part, the growing role of the abovementioned movements and other demands from popular sectors of society contributed to the progressive turn Latin American politics took at the beginning of the 21st century (Lima 2008). The current economic blossoming in Latin America and, in particular Brazil, allows governments to vindicate the financial control of development planning and to invest according to their own priorities, without the pressures of international financial organizations. At first, this turn was expected to account for considerable changes in development planning, yet this does not seem to be happening.

In the past, there were – and still are in the present – several accounts of family, social, cultural and economic disruption which followed the implementation of development projects in the region, especially large scale ones. For indigenous groups living in remote areas, the implementation of development projects represents invariably impacts over their lands and their ways of life, as they foster an intensive fl ow of people with the arrival of official and unofficial workers, legal and illegal commercial activities, the increasing numbers of machinery, and land and real estate speculation. In many cases, indigenous men and women end up migrating to satellite cities in search of work after the disruption of their previous economic activities, and not infrequently find themselves in a context of poverty and discrimination – leading to depression, negation of ethnic origins and, sometimes, alcohol addiction. Such rather direct impacts are often not accompanied by a proportional increase in the provision of public services and the fulfillment of basic human rights such as access to health, education, and adequate housing. These factors contribute to a negative correlation between the development of national large scale resource intensive development projects and indigenous welfare, a notion that is expressed better by the expression

Sumak Kawsay or *buen vivir* (Bustamante and Jarrín 2005; Sawyer and Gomez 2008; Dávalos 2008; Walsh 2010).

The concept of *buen vivir* (good living) has its origins with the indigenous peoples of Ecuador and Bolivia and is an idea that is put into contrast with the western concept of development by many Latin American scholars, like Pablo Dávalos:

> Sumak kawsay is the voice of the Kechwa peoples for good living. Good living is a conception of life far removed from the most cherished elements of modernity and economic growth: individualism, the search for profit, the cost-benefit relationship as a social axiom, the use of nature, strategic relations between human beings, the total commodification of all spheres of human life, the inherent violence of consumer selfishness, etc. Good living expresses a different relationship between human beings and their social and natural surroundings. Good living incorporates a human, ethical and holistic dimension of the relationships of human beings, not only to their own history but with their natural surroundings […] Sumak kawsay (good living) proposes the incorporation of nature within history, not as a productive factor nor as a productive force, but as an inherent part of social being. Sumak kawsay proposes several epistemological frameworks that imply other ways of conceiving and acting; in those new epistemic formats the existence of time as circles, which can coexist with the linear time of modernity; the existence of a communital-being is considered, or if one prefers, non-modern, as an ontological subject validated by the relationship between human beings and nature; a meeting between the sphere of politics with that of economics, a position with respect to markets in which the logic of use values predominates over that of the values of exchange, among others (Dávalos 2008).

All these years of "progress" towards the ideal model of national development expanded the actual borders of the state and the capital over indigenous ancestral lands, engendering what some scholars call the second colonial conquest (Fontaine 2003; Blaser et al. 2010), a subject that I will come back to in the next section.

Why is it that internal forms of colonialism were consistently reproduced throughout the implementation of different paradigms of national development, be it driven by a protectionist, a neoliberal or a neo-developmentalist progressive state? That is a subject that should attract the interest of the Law and Development literature; I suggest further that the movement can benefit from a dialogue with decolonial studies to unveil the mechanisms that account for the internal reproduction of colonialism – departing

from (an)other angle and asking other questions, going to the roots of the mutual implications and roles played by Law and Development in that regard.

2. Possible Dialogue between Law and Development Studies and Decolonial Approaches

Today, a growing number of voices are advocating the broadening of the object and objectives of research in order to overcome the "unequivocal directionality that defined Law and Development, […] [that] fits awkwardly with the ascendance of the G20, BRIC summitry, global imbalances" (Gelpern 2009: 173). To broaden the field implies including concerns of power, culture, local institutions and pluralism and taking the field beyond the mere concern for the reform of legal systems and institutions pro economic development. Development has an economic and legislative context, but also a cultural context in which its norms are embedded (Cao 2007) – therefore, the need of studying social and cultural norms in a broader sense, as a "repository of social meanings" (Riles 2005: 358) and their relation with the established development frameworks and the proposed reforms. Unfortunately, research that takes these issues into account remains marginal in most studies of Law and Development. As I argue, broadening the field implies asking not only what kind of legal reforms can work to boost development; we must also ask what kind of development is fostered by different types of legal reforms, who benefits from such legal designs, and many other relevant research questions that have so far been poorly developed within Law and Development, despite strong criticism directed at these "blind spots" of the field.

This section presents the contributions that decolonial studies can provide for the Law and Development movement concerning its blind spots. I believe that a dialogue with decolonial studies approaches can prove productive for the study of the very inequalities presented at the intersections between Law and Development and that have been brought about in Latin America in a context of enduring historical structures of exclusion combined with recent legal international and domestic efforts for promoting social justice and economic inclusion.

2.1. Another Angle: Concepts and Contributions of Latin American Decolonial Approaches

Decolonial studies can contribute to the Law and Development debates from the point of view of Latin American history and the effects of the countless waves of development models that affected the continent, including the Third World critique. The Decolonial literature tells the story of colonialism (and I suggest development) from its

own perspective, the conditions of possibility of the domestic reproduction of relations of coloniality are documented and questioned. Coloniality refers to the concept of "coloniality of power" developed mainly by the Latin American scholar Aníbal Quijano and describes the enduring post-independence effects of colonial classifications as a legacy of practices in the political, social and economic realms, and hierarchical classification of knowledge that produce and reproduce forms of exclusion (Quijano 2000a and 2000b). Similar to other critical manifestations in the social sciences, the modernity/coloniality/decoloniality perspective (Escobar 2007) criticizes the effects of the Westernization of sciences and modes of knowledge production that have silenced other voices and alternative forms of knowledge. However, by contrast, Latin America is presented as a geo-historical location with a distinct genealogy of thought in which critical tradition the Decolonial program flourished (Coronil 2004). Therefore, Latin America is understood not only as a geographical location, but as an epistemic perspective (Escobar 2007).

From the perspective of Latin America, then, Decolonial approaches define the "discovery" of the Americas in 1492 as the marker of modernity and as the starting-point for the creation of the centrality and superiority of European knowledge – and not, like most postcolonial approaches the expansionist colonialism of the 18th century (Quijano 2000b: 374; Escobar 2007: 184). As a consequence, coloniality is not understood as being in opposition to modernity, but as constitutive of it – its "dark side" – like the two faces of the same coin (Mignolo 2002: 81, 1998a). Both modernity and coloniality were co-constituted through the process of European expansion, state-formation, and colonialism.

In the process of expansion, the knowledge production of the social sciences was of extreme importance for the consolidation of European states and colonialism as interrelated social phenomena (Castro-Gómez and Martin 2002: 270-275). This modernity fostered the illusion that knowledge is delocalized, universal, neutral and objective. But these criteria were judged from a Eurocentric viewpoint, and therefore only European productions of knowledge (or those according to the European model) were accepted as possible and valid (or legitimate). This supposedly neutral positioning was the standpoint par excellence from which the universalization of observations was made possible. Santiago Castro-Gómez hence calls this standpoint an epistemology of punto cero (Castro-Gómez 2005).

In the same line, according to Sousa Santos, modern Western thinking produced, "abyssal lines that divide the human from the sub-human" (Santos 2006: 4). The origins of these abyssal lines can be traced back to the European expansion. One side

of this line was imagined as the realm of regulation/emancipation and as the space where civil society is possible. The other side was displaced territorially and temporally, and thus made invisible to the reality of the metropolitan societies. The space of the colony was a space where everything was possible and subject to experiment. The line, then, had a very marked and distinguishable cartography very neatly represented by the Papal Bulls which divided the territory of the Americas and distributed it among the colonial powers, considering it *terra nullius*, and they further gave the sovereigns the power to convert the "Indians", considering them per analogy *anima nullius*. This line was operated by a "dual modern cartography" put into place through European epistemology and also translated into law (Santos 2006: 4).

Modernity as such an "alterity-generating machine" (Castro-Gómez and Martin 2002: 269) creates the denial of a coevalness ("negación de la coetaneidad en el tiempo"), engendering the impossibility of simultaneous epistemologies and different forms of knowledge production (Castro-Gómez and Grosfoguel 2007: 15). The effect of these church-sanctioned presuppositions was that other (non-European or non-compliant) peoples, and their knowledge and languages were deemed inferior or irrational (Damázio 2009: 3). The colonial difference thereby constructed marks the limits of what is assumed to be possible and relevant thought (Mignolo 1998b: 15, 2002: 90). The equation between the geographical location and the classification of knowledge is related to the demarcation of border zones trapped between local histories and global colonial designs – those who did not "buy this package" became submitted to all kinds of indirect and direct violence in form of the constant reproduction of coloniality (Mignolo 2007: 450).

This aspect of modernity is also reflected in the ways the law, as a system of juridical knowledge, negates other possibilities of conceiving juridical subjects, rights, and forms of social regulation. In accordance with certain colonial legal constructions, for example, indigenous groups of the Americas have been denied temporal co-existence, or simultaneity. Against the backdrop of a combination of the entrepreneurial spirit of European expansionism and the Christian mission to bring civilization to the world, they were considered to be living in a condition prior to the formation of civil society and, therefore, to be uncivilized. Following legal-political discussions, not only the inhabitants of the "New Continent" were subjected to colonialism, but also their lands were considered either as *terra nullius* or as not properly economically organized or efficiently exploited (see: Francisco de Vitoria (Vitoria 1991), Bartolomé de las Casas (Casas 1999), Juan Ginés de Sepúlveda (Sepúlveda 1951)). Such logic engenders the illusion of universality, but veils structures of inequality based on a logic of center-periphery not only concerning spaces, but also (human) beings, types of knowledge,

social forms of organization, and norms. One of the objectives of a Decolonial perspective is thus to question the logic of the "punto cero" of the production of knowledge detached from the geopolitical configuration of the world (Mignolo 2009: 159).

2.2. Asking Other Questions: Coloniality in the Latin American Context

Expansionist European colonialism might have reached an end through the waves of new state formations and (formal) decolonization in the Americas about 200 years ago, and in Africa during the 20th century. However, this process did not mean the emancipation of all peoples. From a Decolonial perspective, the end of the colonial period did not put to an end to long-lasting structures and logics of power that were enacted by coloniality as structural colonial regimes of power and knowledge. Instead, the end of the colonial era set in motion a "transition from modern colonialism to global coloniality" (Grosfoguel 2003: 6). The forms of domination changed, but the structures remained marked by a binary logic of "center-periphery". As described above, these hierarchical and asymmetrical structures keep reproducing the colonial difference (Castro-Gómez and Grosfoguel 2007: 13; Quijano 2000b: 381). As a consequence of the continuous structural coloniality of power, the production of difference today represents an epistemic location. This location can be reproduced domestically and it has been constitutive of the formation of Latin American states. In their search for emancipation and the legitimization to play among the club of international independent states, the elites that were at the forefront of the independence processes in Latin America ended up reproducing imported epistemological locations that marked the geographic space of the newly independent states (Mignolo 1998b:19).

Consequently, the waves of independence referred to as decolonization movements only shook the abyssal lines that seemed to be moving in the direction of the elimination of the other side (as to expand the logic of regulation/emancipation, and reduce that of violence/appropriation) (Santos 2006: 5). But the decisive part of the logics that governed colonial times is still in place, even if they come in a new garment. The new framework only transferred the locus of violence/appropriation from inter-state to intra-state locations.

The processes of decolonization indeed produced a renewal of law represented by the emergence of new legal subjects in the international society: the newly independent states. However, with respect to the Law and Development movement, it is important to signal that an instrumental concern emerged with the affirmation of "Third World" sovereignty which brought legal and development discourses even closer together. Decolonization was the political side of the claim for emancipation, and development

was the socio-economic requirement for the effective exercise of emancipation. Thus, development (following the European model) became the *raison d'état* of the newly independent states (Rajagopal 1999).

The early colonial civilizing mission (of modernity) was then replaced by the concept of "development" as the modernization framework (Mignolo 1998a, Donghi 1992). This configuration of power perpetuated the colonial matrix of power represented by the dominant discourses of most Western governments and international organizations. What is more, this structurally asymmetrical configuration was reflected in the academic enterprise of the Law and Development movement which these very governments and organizations financed:

> [T]he concepts of development and underdevelopment are new versions of the rhetoric of modernity insofar as both concepts were invented to re-organize the temporal and spatial colonial differences (Mignolo 2007: 472-3).

The location of underdevelopment has become defined as behind in time and far away in space, in a way similar to how the colonies had been subordinated before. And although this concept originates in the field of economics, it implicitly positions the spaces categorized as underdeveloped as lacking the capacity of knowledge production. Eventually, the concept of development that was once used to describe the differences among countries became detached from geographical spaces to be imprinted into the bodies of people that represent the periphery and a challenge to a unified notion of national development.

Consequently, many indigenous groups did not benefit directly from the formal processes of independence of Latin American countries. To date, indigenous communities rarely benefit from the implementation of development projects related to resource extraction. Rather, they are among the groups most negatively affected by such projects (Cycon 1990: 761-2). Regardless of the evolving international framework for the rights of indigenous peoples, their domestic implementations moreover most frequently range from poor application to complete absence (Sawyer and Gomez 2008).

> The effects of this convergence of ideologies of national liberation, state building and development could be seen in several forms in international law: the confinement of the principle of self-determination to the colonial context; the doctrine of uti possidetis juris […] which enabled international law to ignore all movements for cultural/territorial autonomy, the doctrine of permanent sovereignty over natural resources, which focused the attention of source control

over exploitation of resources, rather than on how just this exploitation itself was; and the doctrinal differences between refugees and internally displaced, that justified the uprootment of millions through 'wars on poverty' […] (Rajagopal 1999: 23).

In the following section, I identify the emergence of the indigenous right to development as a starting point for a fruitful dialogue between Law and Development and decolonial studies which might help to broaden the horizons of the former and contribute to the aim of intercultural production of the latter.

3. Themes for Further Research: Indigenous Peoples' Right to Development

For most of the Republican period, indigenous peoples in Latin America were treated as second class citizens or neo-colonial subjects (Lucero 2008). They thus share the common legacy of colonial history and of attempts at assimilation or destruction that this history engenders. Hence, social, economic and political conflicts have emerged since the beginning of the processes of Latin American state formation which did not fulfill the promise of liberation of peoples that had been subordinated to the metropolitan powers. The newly founded states were quickly subjugated to local elites that were more attached to and interested in establishing links with the former metropolis and their positions in the international market than to the construction of internal cohesion. The project of nation state building was based on the construction of the citizen as the "mestizo" while a whole range of groups remained excluded from the national project. Moreover, this process resulted in the structural negation of the de facto socio-economic, political and cultural diversity that marked Latin American territories.

> Con la independencia Americana [...] el problema cultural no sufre ninguna mejora [...] los nuevos gobernantes nacionales adoptan, sin mayores reajustes, el capitalismo como modelo de organización económica y el liberalismo [...], como principio filosófico; y declaran a los nuevos estados como independientes y a todos sus habitantes ciudadanos libres, cerrando así toda diferenciación política, cultural, propia de un continente plural (Simbaña 2005: 198).

Such negations of difference resonated with the narrative that indigenous peoples represented a delay for the Latin Americans' path towards civilization and economic progress. This notion was imbued by a colonial legacy that depicted indigenous groups as backwards and racially inferior.

The development approach has traditionally always been strong in Latin America. From the colonial period onwards, the Americas were seen as a source of raw material such as precious metals and other resources that were of high value for metropoles. After independence, ex-colonies occupied their place in the chain of international commerce, as exporters of primary goods and importers of industrialized products.

Waves of protest against the development models driven by foreign powers have arisen frequently. What has been commonly referred to as the "indigenous problem" has nevertheless been ignored, met with attempts to assimilate these peoples, or has been dismissed as being a problem. This happened via diverse strategies and the related underlying socio-economic theories which are strongly developed in Latin America (from export-led, to critical import-substitution industrialization and regional integration policies). For many indigenous peoples in the region, these policies have meant a continuity of colonization.

> [D]evelopment is the major influence on 300 million indigenous peoples around the world, almost always to their detriment. […] Sometimes governments, and other cultures, still consider that indigenous people are an obstacle to development – or are simply in the way of mineral exploitation or someone else's property development (Swepston 2005: 65).

From the European conquest of the Americas through the following practices of expansionist colonialism, to post-independence integration policies, legal constructions with regard to indigenous groups in international and domestic law have reflected representations of the indigenous subjects "made by positive and negative relationships to modernity" (Tennant 1994: 4). The consequence was not only that indigenous groups were denied discursive coevalness. Rather, in different periods of time, the enacting of laws excluded, transformed or assimilated the "colonial different" (or "other"). Even where indigenous rights were asserted by domestic legislation, implementation of these rights failed to reach the level foreseen by legal norms in Latin America.

Colonial rule, state governance, and capitalists practices have intervened historically in indigenous peoples' lives to significantly set up the playing field where they find themselves today, and establish the parameters and rules within which their actions are circumscribed (Sawyer and Gomez 2008: 6).

Based on the assumption that indigenous cultures would eventually melt into the broader national one (Hannum 1996), it was commonly believed that the problems associated with their distinct existence would disappear once they were included in

the national society and took a share in the economic benefits of development. Since indigenous ways of life were linked to notions of backwardness and misery which could be extinguished by modernization, it was regarded as legitimate to stimulate the development of regions with a concentration of indigenous populations as a means to promote their inclusion (Tennant 1994: 16; Falk 1988: 18).

> If progress is accepted as desirable, and if indigenous peoples are located at the far bottom end of the ladder of progress, than it is an act of compassion and humanity to develop and assimilate indigenous peoples into modern society (Tennant 1994: 10).

Paradoxically, however, indigenous groups resisted external forms of representation by turning also to the law and to legal courts in order to preserve their distinct ways of life, economies, territories, etc. Indigenous movements, such as the Sawhoyamaxa, Yakye Axa (Paraguay), Kankuamo (Colombia), Sarayaku (Ecuador), Awas Tigni (Nicaragua), among others, perceived:

> [t]he relevance of a legal discourse that was, conventionally speaking, 'not their own' as a way of liming a status, and its associated rights. […] Despite the problems of translation, indigenous peoples learned that how they represented themselves in international affairs mattered in consequential ways to how they were related to and what rights they were perceived to be claiming (Barker 2005: 18-19).

One of the most relevant assertions that indigenous movements make is related to the claim for the right to self-determination and the right to define their own priorities for development. As a consequence of indigenous groups' engagement with law both at home and abroad, very active indigenous lobbying influenced the revision and adoption of two international instruments that are concerned exclusively with the rights of Indigenous Peoples. The right to development was no exception.

3.1.   Early Standards

The International Labor Organization was the first international organization to create standards dedicated to indigenous groups and their relation with the states surrounding them in form of the Indigenous and Tribal Peoples Convention 107 of 1957. Initially, these standards were aimed at promoting the integration of indigenous peoples into the encompassing society and to foster their economic and social inclusion, higher standards of labor, and better living conditions. This was justified by the argument that

indigenous peoples had been colonized so long ago that this process was irreversible. The proposed solution was then to increase their living standards and incorporate them into the national society (Magallanes 1999; Rodríguez-Piñero 2005; Swepston 2005; Xanthaki 2007).The language of the Convention had a particular influence on the domestic policies of many countries in Latin America. Instead of exclusion, the post-colonial language of Law and Development fostered by international organizations aimed at promoting the training and education of indigenous groups in order to create qualified work force, following the precedents enacted by the ILO (Rodríguez-Piñero 2005). Wherever the ILO established the Andean Program, Law and Development were associated, through the coordinated implementation of indigenous rights with national economic development plans (Tennant 1994: 28). Such programs were in accordance with the mainstream corollary that "sees law as a force which can be molded and manipulated to alter human behavior and achieve development" (Burg 1977: 505).

The projects of national development "read" the indigenous peoples as wasted work force. Therefore, development was presented as a national effort in which indigenous occupied the position of rural labor force by discursively approximating them to peasants and allocating part of the public budget to agricultural reforms and training programs for them. It was believed that the encompassing society could gradually assimilate them culturally as soon as they started to participate in sharing the benefits of economic growth. As the failure of these programs proved, this strategy of assimilation ended up representing a new conquest of indigenous subjects and lands. The wording of the Convention and the vagueness of the concept of integration failed to be translated into domestic policies that would include participation not only with regard to the labor market, but also on that level of decision-making (Xanthaki 2007: 66; Magallanes 1999: 238) and compromise the survival of indigenous peoples as distinct cultures. The Convention was finally criticized as a form of legal paternalism, because it continued to refer to indigenous peoples as "less advanced" (Sanders 1993: 55; Knop 2002: 223). Indeed, in practice, the ILO Convention did not envision or recommend that state signatories would include the participation of indigenous peoples in decision making processes regarding priorities of national development. Even after the second wave of decolonization and the formation of the Non-Aligned Movement, together with the exhortation of self-determination of nations, emancipation, decolonization, and non-interference, indigenous communities all around the world had little participation in the construction of new national development plans.

3.2.   A New Place for Indigenous Peoples in National Development?

In 1986, the ILO convened a Meeting of Experts that agreed to revise Convention No. 107 and to establish clearer standards that should serve as a guide for states as a reaction to the ongoing indigenous criticism directed at international standards. In combination with the existing standards and allied with the disparate domestic policies of assimilation, the poor ability of most states in moderating the relationship between national development plans and the physical and cultural survival of distinct indigenous groups added to the negative effects they had upon the indigenous population.

As a result of the revision decided at the Meeting of Experts, the ILO in 1989 approved Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries by abandoning the paternalist language of assimilation from the previous text (Hannum 1996: 78, 103) and offering a multicultural outlook to stimulate governments to include indigenous peoples in decision-making processes (Swepston 2005). The Convention also identified indigenous peoples as "partners in the development and evolution of the national society" (Xanthaki 2007: 90), calling on states to consult them in administrative and legislative measures which may affect them, including development plans and the safeguarding of the natural resources of ancestral territories. Finally, it also called for attention to customary laws when applying national jurisdiction to indigenous peoples (Hannum 1996: 78).

At the United Nations level, the UN Special Rapporteur's "Study on the Problem of discrimination against Indigenous Populations" (1972) concluded that a Working Group on Indigenous Populations should be created with the mandate of reviewing the situation of indigenous peoples worldwide and drafting standards for their protection (Magallanes 1999; Tennant 1994).

The United Nations Declaration on the Rights of Indigenous Peoples started to be drafted in 1985 in co-operation with representatives of indigenous peoples, NGOs and states (Hannum 1996: 84). Those discussions captured a moment of creative spin in the production of international norms, and marked the rise of new actors in the history of international society (Lâm 2000: 55) putting the principle of state sovereignty under severe scrutiny. Launching their claims which are based on their collective identity and inherent rights from within and across the borders of the states encompassing them, indigenous groups represented a challenge to the state view of self-determination: such claims call into question notions of territorial sovereignty and unified nationality "juridically administered by governmental organs" (Falk 1988: 18). Their claims also

challenged the notion of development as an enterprise that could be single-handedly carried out by the nation-state.

Articles 19 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples are of particular interest to the study of the intersections between law and development with regards to indigenous peoples and their relation with the state.

> Article 19
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

> Article 32
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (UN 2007).

The Declaration therefore presents the right to development as one of the manifestations of the indigenous right to self-determination (Arts. 3 and 4), which turns out not to be compatible with a monolithic approach to development at the national level, but requires a pluriversal perspective.

According to Erica-Irene Daes, the right to prior, free and informed consultation derives directly from the right to self-determination (Daes 1997: 35), according to which indigenous peoples should be able to take part in decisions that affect them. The requirement of prior consultation is especially relevant when regarding development projects that may affect natural resources located inside ancestral lands and upon

which indigenous peoples rely for the maintenance of their economic systems and for social and cultural survival. In that sense, consultation should enable indigenous peoples to define their own development priorities.

Note that the wording of the ILO Convention 169 concerning this right is "consultation", while in the Declaration it is referred to as "consent". Consultation is understood as the process through which indigenous groups get consulted over matters that may affect their ways of life, and it implies no right of veto. Consent, on the other hand, would imply the agreement, or authorization of indigenous peoples before the enactment of administrative or legislative measures that may affect them, as well as the definition of development priorities and projects concerning or affecting indigenous territories and lives. The difference in the wording of the two documents is relevant because the first instrument – a convention – is enforceable and the second – a declaration – has only political power so far. Nevertheless, indigenous groups make use of the Declaration before courts as an argument of authority and make efforts to have it incorporated into customary law and domestic regulations.

Politically, it is precisely the right of self-determination and the need of prior, free and informed consent indigenous peoples have been organizing their agendas around (Barker 2005: 20), especially when faced with development projects that expand their territories. They put emphasis on the need for further decolonization and social justice. Their engagement was, for example, translated into constitutional reforms and amendments. The two most recent ones being the Constitution of Ecuador (approved in September 2007) and the Constitution of Bolivia (approved in February 2008). One example of indigenous influence over constitutional reforms is the concept of *buen vivir* adopted by the constitution of Ecuador as a transversal axis that should guide the intersections between the regime of national development, the rights of people and of nature (Walsh 2010). Many other constitutions in the region have also been amended as a consequence of domestic indigenous pressures and the changing international context described previously.

Organized indigenous movements keep on challenging and pointing out the limits of development models which were pushed through by international organizations and are now reproduced by most Latin American governments. Recent cases spur especially around the Amazonian region, target of several regional development projects – like interstate-roads and hydroelectric plants (see, for example the case of the peoples of the Xingu region against the Belo Monte Dam in Brazil).

4. The Future of Law and Development for Indigenous Peoples: Towards a Broadening of the Research Agenda and Theoretical Tools

This brief survey makes clear that the entanglements between politico-legal representations (as a byproduct of specific forms of knowledge) and ideas of development (as constitutive of nation-building processes) can reproduce power structures which can keep indigenous peoples in a situation of coloniality (or colonial asymmetry).

My intention with this working paper is to give food for thought by pointing at the fact that a deeper study of such entangled forms of exclusions is missing from the general picture of Law and Development Studies. Further, I aimed at pointing out that the challenges posed by the Decolonial approach can help to provide useful tools for future research. The question that lies before us concerns the future of the field of Law and Development as an academic enterprise and the necessary critical relation towards the practices legitimized by its productions. The reform of international standards and the growing engagement of indigenous groups in domestic and international forums are some of the many aspects that can be explored in the study of the entanglements between Law and Development, combined with the agenda and theoretical tools of decolonial studies. Most importantly, these topics call for new theoretical tools that can offer another viewpoint that enables us to seek and ask new questions in the search for dialogues concerned with the other side of modernity, the production of and resistances to the dominant languages of Law and Development. By distancing themselves from the tradition to which they had historically been related in the region (Yashar 1998), the re-articulation of indigenous movements in Latin America for the past 30 years shows that indigenous groups have been playing an active part in social and political debates.

Despite making use of modern conceptual constructions (like democracy, self-determination, human rights, etc), indigenous movements reinterpret these very constructions in the light of indigenous cosmologies and contribute to the expansion of their meanings, an exercise that challenges the concepts built by the tradition of Law and Development. For that particular characteristic and their epistemic location, indigenous communities are pointed out by Decolonial scholars as one of the groups with the most potential to produce Decolonial projects and intercultural dialogues (Santos 2006; Santos and Rodriguez-Garavito 2005; Mignolo 2007; Walsh 2002, 2007, 2010).

Decoloniality (or the Decolonial paradigm) and its theoretical tools can also be applied to the study of Law and Development to re-signify politico-juridical concepts, opening the literature of the intersections between Law and Development to other realities and understandings around these two major driving forces of the Occident.

Precisely because of their border location (Anzaldúa 1987), their unique capacity of moving along the diversity of historical processes (Escobar 2007: 185/7) and their different cultures, indigenous peoples are in a position to think about epistemological and methodological alternatives or "border thinking" (Mignolo 1998a: 16). If the purpose is to think "outside the box", to challenge the "point zero" epistemology, then the site of colonial difference appears to be a "privileged epistemological and political space" beyond the categories imposed by Western epistemology (Walsh 2003). However, such interactions entail not only the translation of indigenous groups' own conceptions of law and political, social, cultural and economic organization into "modern Western" formulations. Such interactions further produce important impacts on indigenous' epistemologies and conceptions of "how they are represented and understood" (Barker 2005: 19).) In that sense, the interest of the field should turn not only to the translation or transplantation of best practices of the rule of Law and Development, but to the possible transformations that can occur on both sides of the dichotomy modernity/ coloniality. The encounter, translation and transformation of indigenous perspectives surrounding that theme are the locus of production of liminar knowledge. Caught up in between the nation-state and the communitarian traditional creations and living in a situation of coloniality, procedural and substantial participation by indigenous peoples could contribute to further creative theoretical developments productive both for academic research and applied activity in Law and Development.

> [W]e must be aware that social movements not only disrupt previous orders but also reproduce important elements of them. Indians (indios [sic]) can organize and challenge the nation-state, but they often become politically articulate precisely through state categories and processes […]. They have learned the languages of the state, of social science, and of development and are undoubtedly transforming all of them (Bello 2004, own translation).

The objective of looking through Decolonial lenses is to take into account the other side of modernity and its expansionist drive – coloniality (which, according to Fernando Coronil provided the condition of possibility for European modernity). For the social sciences, this process entails at least three joint efforts: (1) the critical study of historical processes of domination (that can take the form of colonialism or post-colonial state building) to understand present forms of domination and violence that are reproduced

following a colonial pattern of power, (2) the focus on the experiences resulting from (structural) coloniality (of power and knowledge) as a consequence of the maintenance and expansion of such forms of domination (based on a colonial power asymmetry), and (3) the dialogue with the knowledge that has been produced through resistance from the other side, as a product of (and response to) modernity.

To open the study of Law and Development to the conceptions and worldviews that are produced at locations where these encounters occur implies to open the established fetishization of science and universalism of the field to the defiance, strategies and proposals that are developed in resistance to and in response to coloniality. Such an opening up to dialogue would constitute the search for an active, continuous and engaged process of interculturality, both in political-juridical practice and in the social sciences.

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Institut**
Preußischer Kulturbesitz

Contact

desiguALdades.net
Freie Universität Berlin
Boltzmannstr. 1
D-14195 Berlin, Germany

Tel: +49 30 838 53069
www.desiguALdades.net
e-mail: contacto@desiguALdades.net