What We Talk About When We Talk About Law and Development

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Abstract: This article describes how the authors understand Law and Development (L&D), and L&D teaching, based on their conceptual views, as well as on their practical experiences in the classroom. In light of Miola's experience, it describes a possible purpose for L&D: that of influencing the minds of future development policymakers. This idea is presented in the description of a practical experience of teaching an L&D undergraduate class for nonlaw students. In such an environment L&D's well-established emphasis on the imbrication of law and economic performance can help nonlaw students perceive and discuss the roles of law in the economy and development policies – the domains in which many of them will likely act as professionals. Based on Coutinho's experience in teaching at a law school, it describes how researching and teaching L&D involves developing a lens (or a "technology") through which the law can be seen (and eventually changed, in an institutional design exercise) as a tool to shape democratic arrangements devised to structure and implement development policies. The authors also highlight what they perceive to be common between these two relatively distinct research and teaching experiences, and discuss what they mean regarding their views about what constitutes L&D (and, once more, how to teach) it: Miola's course seeks to shape a different "legal consciousness" of future development professionals who are not lawyers, so they can devise or deal with development policies without ignoring legal institutions, whereas Coutinho's class, in turn, aims to enable law students to visualise their field of practice as a powerful "technology" to development to critically analyse and improve institutional arrangements, and hence of themselves as agents with a privileged position to operate it.

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A. Introduction

What do we talk about when we talk about teaching Law & Development (L&D)?[1] This is the intriguing question we posed to ourselves, motivated by the kind invitation we received from the editors of this special issue. We are both law professors interested in studying the functions of Brazilian law and its impact on Brazilian development, we share conceptual references, we teach in a similar institutional setting (public research universities in South-east Brazil), and we have a record of previous collaboration. We expected our answers to that question converge in many ways - and they certainly did.

While sharing many views and experiences of teaching L&D, however, we also noticed that they are, in many relevant aspects, diverse. We adopt different strategies to similar goals, but sometimes we also seek distinct objectives while teaching similar topics and we emphasise different theories and objectives traditionally attributed to L&D. At first, we thought of these differences as a potential obstacle to putting together a piece about our teaching experiences. After all, how could we produce a unitary account of what it means to teach L&D if, in practice, our experiences are different?

Instead of abandoning the goal of delivering a collaborative take on our experiences, at the end we realised that these differences are illustrative of what we see as the beauty of L&D as a sociolegal approach to development studies: it can be (almost) whatever you want it to be, as long as you are able to justify and anchor your claims consistently. Variously characterised in the last decades as a sort of umbrella concept, L&D brings together a variety of meanings, methods and epistemological premises. In our view, attempts to define its content unequivocally, to draw its epistemological contours rigidly, or to provide a single "general theory" for L&D may end up compromising such rich diversity. Although our teaching experiences are somehow diverse, in reflecting on them, we also perceived that they have a core in common, a sort of shared attitude no matter how distinct our teaching is: the effort of self-consciously investigating the complex and often contradictory roles and functions played by the legal apparatus in the puzzling process of economic development.

These, we came to conclude, are the premises and ideas that reflect the type of L&D we currently do in our research and in our graduate and undergraduate classes in Brazil, inside and (as seen below) outside the law schools where we teach. As in the memoir by Haruki Murakami (What I Talk About When I Talk About Running), the history of L&D and the narratives aiming to define it remind us of long-distance running: the more you strive, the more you reflect and derive satisfaction. This is why (above) we say "currently": we believe that L&D can also be understood as a long open-ended conversation in which feedback loops resulting from incremental and iterative incorporation of learning and knowledge are of the essence. The descriptive practices of L&D vary in time and space,

1 The authors are grateful for the comments, criticism and suggestions received from David Trubek, as well as from an anonymous reviewer. We also thank Thomas Dollmaier and Siddharth Peter de Souza for the invitation and opportunity to contribute to this special issue.

along with the theoretical (normative) assumptions on what it ought to be or become. This is, again, what makes it a plural and multifaceted field.

In this article we briefly (and somehow loosely) describe how we understand L&D (and L&D teaching) based on our conceptual views, as well as on our practical experiences in the classroom. Our experiences illustrate and celebrate the pulsing variety that defines L&D, and what can be its distinctive roles in respect to traditional legal scholarship. In section 2, based on Miola's experience in teaching L&D, we describe a possible purpose for L&D: that of influencing the minds of future development policymakers. This idea is presented in the description of a practical experience of teaching an L&D undergraduate class for nonlaw students. In such an environment, we argue, L&D's well-established emphasis on the imbrication of law and economic performance can help nonlaw students perceive and discuss the roles of law in the economy and development policies – the domains in which many of them will likely act as professionals.

In the third section, based on Coutinho's experience in teaching L&D at a law school, we present some ideas on what L&D can be, and on how it can be done (as a research project and as class content). We describe how researching and teaching L&D involves developing a lens (or a "technology") through which the law can be seen (and eventually changed, in an institutional design exercise) as a tool to shape democratic arrangements devised to structure and implement development policies. In the conclusion, we highlight what we perceive to be common between these two relatively distinct research and teaching experiences and discuss what they mean regarding our views about what constitutes L&D and how to teach it.

B. Teaching L&D as "countersocialisation" to future development policymakers

The first experience of teaching L&D that we share is a bit peculiar, as it takes place outside the law school, in an interdisciplinary setting. This is an undergraduate level course that has been taught by Miola since 2018 at the Federal University of Sao Paulo, offered to students majoring in business, economics, international relations, accounting, and actuarial sciences that are part of a multidisciplinary campus.[2] This teaching experience, therefore, did not involve law students, but rather undergraduates in the broad field of "applied social sciences," which has at its core economic phenomena. This means that, in the future, they will likely be relevant agents in development policies, as public officials, economic policymakers, negotiators representing Brazilian interests in foreign policy, managers, consultants and employees of corporations, NGO activists, academics formulating and evaluating policies, among other roles.

Under the name of "Interfaces between Law and the Economy" (ILE), the course covers some of what we understand to be core issues for L&D scholarship, and most

2 This course was inspired by a similar course conceived and taught by Sol Picciotto and Iagê Miola between 2015 and 2020 as part of the master's programme of the Oñati International Institute for the Sociology of Law (IISL), in Spain.

importantly it seeks to disseminate an approach that allows students to understand the role of law in economic development and navigate legal concepts and institutions that they will encounter in their professional careers. ILE is an elective course.

Most students in this course are undergraduates in the final semesters of their 4- to 5-year period at the university, which means that they arrive at this course with some previous, introductory experience with law in other courses, depending on the degree they are pursuing. For instance, those in international relations take mandatory international law courses early on in their studies as undergraduate students. Business and accounting students also have courses in legal disciplines such as corporate law and tax law in their first semesters, apart from other more specialised courses later on in their coursework. These involve understanding, for instance, the logic of the judicial system, or whether certain business conduct is allowed, prohibited or mandatory, locating what norms may apply to a certain commercial relation, identifying what the essential clauses are in a contract to effectively allocate risk, or the main tax or labour obligations of a company, among others; in other words, typical legal questions.

This means that most ILE students already had or at some point will have some basic notions of certain legal disciplines (something relatively common in Brazilian universities) – especially those more directly related to their professional domains –, which raises a question: what, if any, could be the purpose of teaching L&D in such an environment? What could it bring to students outside the law school? It was clear from the outset that to be pertinent and relevant, the ILE course would have to bring something new in respect to the other law class credits offered to nonlaw students.

Such novelty is related to what can be perceived as two typical L&D goals. First, convincing students (as it is often the goal inside law schools as well) that legal norms, meanings, agents and institutions are not peripheral to the universe in which they are inserted – the economy, but rather decisive in shaping the behaviours they deal with in their fields (of corporations, governments and consumers, for instance) and the environments in which they perform their roles (of organisations and markets, for example). This is a potentially relevant objective since a still influential perspective in contemporary university education (especially in economics departments and business schools) consists of understanding the economy as "an autonomous sphere of social life"[3], one that conceives the motives and conditionings of economic behaviour as detached from cultural, social and legal relations.[4]

This approach does not mean advocating that law is necessarily and always central. Rather, in a more modest way, it seeks developing a sort of "awareness" that law is a rele-

3 *Ricardo Abramovay*, Entre Deus e o diabo: mercados e interação humana nas ciências sociais, Tempo Social 16 (2004), p. 39.

4 Although still influential, this approach to the economy has been attenuated in the last decades, as Abramovay suggests, both from "inside" economic thinking – as the neo-institutionalist turn of the 1980s and 1990s illustrate – and from "outside", due to the growing collaboration between economic science and other fields, most notably psychology.

vant variable for economic phenomena – that it both reflects and shapes economic relations –and thus for the work they will perform as future professionals managing corporations, producing public policy in government, acting in third sector organisations, or researching the economy as future scholars.

As discussed above, L&D precisely emphasises the imbrication of law and economic performance. In this sense, the course highlights different ways in which law interplays with the economy: how law constitutes the basic categories and institutions of the economy (for instance, the corporation and notions of employer and employee), regulates economic behaviour, imposing standards and outcomes, and facilitates certain transactions, while impeding others (for example, through contractual arrangements).[5]

Austin Sarat has described his experience teaching law outside the law school – in his case, public law to political science students - as a "chance to engage in a little countersocialization".[6] In a similar way, apart from convincing students that the law matters for economic development, the ILE course also seeks to challenge how they think about the law. This means questioning students' "legal consciousness"– that is, what they "do as well as say about law", a certain shared way of understanding the law that becomes so stabilised that it constrains future meaning-making about the law.[7] There are two foundational aspects of this "consciousness" that the course seeks to destabilise. One is the image of the law as an internally coherent system formed by legal texts of clear and fixed meaning that can (and should) be applied to reality in a politically "neutral" form.

Contrary to this view, by combining the L&D approach with insights that have been historically developed by Critical Legal Studies and the socio-legal tradition, the ILE course emphasises that the meanings of legal norms that are relevant to the economy are often fluid and contested, and thus dependent on interpretation.[8] Being a social process, interpretation is open to the incidence of elements that are often viewed as "external" to the law, such as ideology, economic interests, and politics. The course therefore seeks to develop a different "legal consciousness", one that can visualise the porous boundaries between law and the political economy, as well as the problems and potentials posed by this tense relationship.

The other component of a "legal consciousness" that the course attempts to challenge is one that is often present not only outside the law school, but can also frequently be found in Brazilian legal thinking. This is what Jorge Esquirol describes as a "common perception"

5 *Lauren Edelman* and *Robin Stryker*, A sociological approach to law and the economy, in: Neil J. Smelser / Richard Swedberg (eds), The Handbook of Economic Sociology. New York 2005, pp. 527–551.

6 *Austin Sarat*, Beyond the Law School: Teaching Law in Political Science, Perspectives on Political Science 21 (1992), p. 147.

7 *Susan Silbey*, Legal Consciousness, in: Peter Cane / Joanne Conaghan (eds.), The New Oxford Companion to Law, Oxford 2008.

8 *Iagê Miola* and *Sol Picciotto*, On the Sociology of Law in Economic Relations, Social & Legal Studies 31 (2022), pp. 154–155.

of the law in Latin America as "failed law".[9] The diagnosis of the failure of law in the countries of the region comes in different forms, as Esquirol describes: law is ineffective, national judiciaries are inefficient and corrupt, the rule of law is not enforced, and so on. These descriptions, suggests Esquirol, are reached based on comparing Latin American legal institutions and practices with "legal constructs often incommensurate with local arrangements", criteria that depict Latin American legal systems as inferior in respect to other legal systems – notably from northern, developed countries. Such a "paradigm" of the "failure of law" echoes what a significant part of law and nonlaw students often say about Brazilian law – especially when they are called to think about the connections between law and economic development. It is a widespread belief among students (and not only among them) that Brazilian law is inferior, when not inherently pathological, while there would be better or more pure legal systems that should be mimicked by Brazil if the economy is to work better. Foreign legal practices, models, concepts and institutions become idealised references against which their local legal system is measured and evaluated, and that should inspire reforms.

Against this view, the ILE course tries to develop an understanding of the law as a product of its social and economic context - for bad and good –, that is, as a social phenomenon that cannot be simply mimicked, or transplanted from one place to another – a key-lesson of the historical debates and the very self-reflection of L&D scholarship.[10] Rather, the course tries to convince students that if properly understood as a product of its context, this law that is so quickly dismissed as "inferior" and not fit for economic development may show qualities that are worth considering - which makes thinking about policy changes and legal and regulatory reform much more challenging and exciting.

Stressing the importance of understanding the local conditions in order to grasp how the law works in the economy does not mean a sort of "epistemological nationalism". Contrary to that, the ILE course also highlights the inevitable need of understanding that law cannot be done separately from global dynamics, as law is locally and globally determined and the way it shapes the economy is the product of the interplay of these two levels. The course therefore aims at familiarizing students with the existence of international and transnational legal phenomena that are key for the economy and that also shows that law can be extremely problematic, unequal, and distant from its promises of neutrality also in

9 *Jorge Esquirol*, The Failed Law of Latin America, The American Journal of Comparative Law 56 (2008), pp. 75–124.

10 *Kevin Davis* and *Michael Trebilcock*, The Relationship between Law and Development: Optimists versus Skeptics', American Journal of Comparative Law, 56 (2008), pp. 895–946. Thus the motto "scan globally, reinvent locally", *David M. Trubek*, Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?, Nagoya University Journal of Law and Politics 258 (2014).

the apex of economic development.[11] It explores the influence of global actors in moulding the law, and the recursivity between national and global contexts in law making.[12]

To achieve these goals, the course has been structured in three parts. Part one presents to students a variety of theories and concepts that can be useful to build a new "legal consciousness" around the role of law in the economy. It starts by reconstructing and comparing encompassing approaches to how law relates to social and economic development from a point of view that is "external" to the law, and hence somewhat familiar to the way students outside law school are used to thinking about it. These perspectives include, for instance, Max Weber's foundational analysis of the imbrication of capitalist development to a specific type of law that both responds to and shapes an economic system that is based on the generalisation of exchange. It also encompasses the emphasis of the Marxist tradition on a critique of the role of law in the capitalist economy as one that reflects and perpetuates deep inequalities that are inherently inscribed in this economic system.

The "embeddedness" of the economy in broader social relations (including legal ones) is yet another theoretical device discussed in this first part of the course. This notion is explored both in the formulation of Karl Polanyi about the political and economic origins of capitalism and its "disembedding" forces, and in the view of economic sociologist Mark Granovetter[13], who maintains that even in market societies economic behaviour may be still considerably embedded in complex social relations.

Another component of the theoretical "toolkit" presented to students at this initial stage is the lens of "legal pluralism". Through this concept, students can visualise that the economy is embedded not only in legal norms and relations produced by the act of states nationally or internationally, but also in a multitude of normative orders that do not stem from the state, are often of private character and that may occur both within national borders and beyond it, transnationally.

These different approaches are not discussed in a purely theoretical form, but rather connected to empirical phenomena that are close to students outside the law school. When dealing with Weber's theoretical apparatus, for example, students are invited to discuss it in light of a long-standing case of debate in the Brazilian economy: that of the astonishing bank interest spreads practiced in the country, much higher compared to other countries. Students are faced with questions such as: can this economic phenomenon be attributed, as some suggest, to the legal uncertainty induced by the judiciary's morosity or its tendency to favour debtors? Or is it better explained by factors such as market structure, other macroeconomic variables or the interplay between all of the latter?

11 *Katharina Pistor*, The Code of Capital: How the Law Creates Wealth and Inequality, Princeton 2019.

12 *Terence Halliday* and *Bruce Carruthers*, The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes, *American Journal of Sociology* 112 (2007), pp. 1135–1202.

13 *Mark Granovetter*, Economic Action and Social Structure: The Problem of Embeddedness, American Journal of Sociology 91 (1985), pp. 481–510.

In these discussions, students often find theoretical substance and frameworks that add sophistication to many insights and notions about the law that are somehow "common sense" to them. These categories also equip students to conceptualise phenomena that are already familiar to them - maybe too familiar, up to a point that they never thought of it as an example of how the law affects economic relations and development. For example, the notion of "legal pluralism" helps them make sense of the rationale of different initiatives of self-regulation and "soft law" that are often of great relevance in the day-to-day of business and economics students, such as norms produced by the International Swaps and Derivatives Association (ISDA) and the International Capital Market Association (ICMA), corporate codes of conduct enacted by transnational corporations, the *lex mercatoria* through which conflict resolution takes place in private arbitration for an immense portion of the business relations.

The goal in covering this broad spectrum is not to delve into the details of each theoretical perspective or to "convince" students of the superiority of one over other. Rather, such overview intends to highlight different possible and relevant ways to think about law's connection to economic development, its advantages to explain certain phenomena, but also its limitations.

Equipped with this "toolkit", in the second part of the course, students explore the legal conditionings of key economic categories, which include property rights, the corporation, markets, competition, and finance. Property rights, for instance, are taken as an illustrative example of how the law is central to the economy by establishing the very preconditions for the existence of markets, often taken as natural or spontaneous.[14] The course discusses the origins, economic and philosophical justifications and economic implications of the notion of property rights that is already widely shared among students – that of property as a synonym of exclusive private property. It also explores how social and cultural relations shape property rights, with special attention to race and gender – for instance, in discussing gender differences in land ownership in Latin America.[15]

In addition, students debate the tensions around property in face of nonrival goods such as knowledge[16] and the intellectual property rights system, its rationale and implications in shaping global economic relations and often enclosing traditional knowledge and biodiversity (which is of special relevance in countries of the Global South such as Brazil, as such rights are vastly concentrated in developed countries).

Another illustrative example of how different economic categories are explored in the course in is that of the "main form developed under industrial capitalism for carrying on

14 *Iagê Miola* and *Sol Picciotto*, On the Sociology of Law in Economic Relations, Social & Legal Studies 31 (2022), p. 142.

15 *Carmem Diana Deere* and *Magdalena León*, Diferenças de gênero em relação a bens: a propriedade fundiária na América Latina, Sociologias 10 (2003), pp. 100–153.

16 *Sol Picciotto* and *David Campbell*, Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property, in: Alistair Hudson (ed.), New Perspectives on Property Law, Obligations and Restitution, London 2003, pp. 279–303.

business, and hence is a key social institution"[17]: the corporation. The course discusses how and why the corporate form – a legal construct whose main features are conferred by law, such as limited liability and legal personality[18]– has become the main form for conducting economic activity under capitalism, as well as its implications to economic development. One of the main issues debated at this point of the course is the way the corporation is legally formatted and managed – especially under the doctrine of shareholder value maximisation. By looking at concrete cases, such as that of major environmental disasters provoked by corporate negligence in the mining sector in Brazil, students are invited to discuss how the law that constitutes the corporation induces certain problematic behaviours that are contradictory to models of economic development that also aspire to be socially and environmentally sustainable.

Students are also induced to reflect on whether and how there are alternative ways of mobilizing the law and institutions such as the corporation toward more emancipatory models of economic development – in other words, the possible roles and limitations of the law in counter hegemonic economic forms. This discussion is proposed to students in the context in of a global economy, that is, considering that instead of developing the whole cycle of production within the borders of one single state, corporations of many sectors often organise their economic relations in so-called global supply chains, which are not subjected to a single national legal system. Returning to the notion of "legal pluralism" previously debated in the course, the limits and potentials of national legal systems, international treaties and "soft law" such as corporate codes of conduct are debated in light of empirical studies of human rights violations by corporations in the Global South.[19]

The third and concluding part of the course invites students to weave together the different categories discussed in the second part into a systematic account of socioeconomic transformations and the law in Brazil. The goal is to equip students with an overarching view of how legal and economic change relate to each other in Brazil; i.e., what are the legal features that are most salient in distinct development models that can be observed in the country and how do they differ?

To do so, students are stimulated to identify, in different historical moments, what are the prevailing economic ideas, how do they translate into development policies and through what set of legal concepts, institutions and norms.[20] Looking at the first half of the 20th

17 *Sol Picciotto*, Regulating Global Corporate Capitalism, Cambridge 2011, p. 108.

18 *Marie-Laure Djelic*, When Limited Liability Was (Still) an Issue: Mobilization and Politics of Signification in 19th-Century England, Organization Studies, 34 (2013), pp. 595–621; *Sol Picciotto*, Regulating Global Corporate Capitalism, Cambridge 2011.

19 *César Rodríguez-Garavito*, Nike's Law: The anti-sweatshop movement, transnational corporations and the struggle over international labor rights in the Americas. In: Santos, BS, Rodríguez-Garavito, CA (eds) Law and Globalization from Below. Cambridge 2005, pp. 64–91.

20 *David Kennedy*, The "Rule of Law," Political Choices, and Development Common Sense, in: David M. Trubek / Alvaro Santos (eds.), The New Law and Economic Development: A Critical Appraisal, Cambridge 2006.

century – the "Post-war Consensus" according to Kennedy[21] or the "Keynesian Era" in the terms of Faria[22] – students explore the legal features of the Brazilian experience of a developmental state. These include, for instance, the strong reliance of development policies on public law instruments to instrumentalise and enforce measures such as exchange and price controls and tariffs, state monopolies established in the constitution, as well as the legal form of a state-owned corporation. By delving into the period, students understand the origins and rationale of an "antiformalist" legal rationality that is still relevant in Brazilian law, and that in many ways infuses economic relations, through law, notions such as "social function", "public interest", "collective interest" and "national security".

The neoliberal critique of the economic and social performance of such development model is then discussed. The diagnostics of the crisis of the developmental state in the 1980s – which most of these students have already mastered – is thus expanded to include, besides purely political and economic variables, also a legal component. In this new momentum of the relationship between law and development – that of the "Washington Consensus"[23] or the "Globalization Era"[24] – students locate the origins of several characteristics of the legal system that directly affect their professional fields. For instance, the legal reforms that created rules that strengthen protection of private property and contracts (as in the field of bankruptcy). Also, if discretion in economic policy making was an important feature to be granted by law to a developmental state, the neoliberal critique has resulted in a series of legal limitations. Examples discussed in class can be found nationally, such as fiscal responsibility laws and the "rule of law" agenda that sought to reform the judiciary, as well as globally, such as the creation of an international legal arena to regulate commercial strategies of nation-states such as the World Trade Organization. Similarly, students also debate the shift from a developmental state toward a regulatory state in Brazil.

Such periodisation performs two main roles for students outside the law school. First, it enables them to better understand the complexity of the Brazilian legal system as the coexistence of different models[25] and the result of the interplay of domestic dynamics and global forces. What was probably seen as a pathology of Brazilian law before students had contact with such an L&D approach – a "failed law" –, can now be properly understood and therefore becomes a terrain that can be navigated and reflected (and acted) upon.

Second, it further sophisticates their conceptual and empirical "toolkit" to produce diagnostics about the Brazilian landscape. Based on the described periodisation, students are invited to discuss how to conceptualise the triangulation of economic ideas, development policies and legal institutions in the recent years in Brazil – often described as the rise and

21 *Ibid.*

22 *José Eduardo Faria*, O Direito Na Economia Globalizada, São Paulo 2000.

23 *Kennedy*, Fn. 20.

24 *Faria*, Fn. 22.

25 *Mario Schapiro*, Do Estado Desenvolvimentista Ao Estado Regulador? Transformação, Resiliência e Coexistência Entre Dois Modos de Intervenção, Revista Estudos Institucionais 4 (2018), pp. 574–614.

fall of a "new developmental state", as discussed below, which is the context in which they grew up and the setting that they will have to deal with. Attempting to grasp these recent periods helps develop an ability that can be useful for them, not only academically, but also professionally; for instance, in assessing risks and opportunities and devising strategies if they are in the private sector, or identifying from historical experience what works and what doesn't work when designing development policies in government.

When assessing his experience teaching public law to political science students, Sarat concludes that there is an important difference between "teaching law to students so that they can use it as a tool in their professional lives" and teaching "about law as a social institution and about what happens - good and bad - when law is learned the way lawyers learn it". The described experience in teaching L&D outside law school has been influenced by the perception of such difference. When taught to lawyers, among its many potentials, L&D may have the power to produce new L&D scholars, or to offer students abilities necessary to legal professionals to use it as a "tool" to contribute to the development process in their legal careers. In the case of students outside the law school, the goal may be a bit different: to inculcate a certain "legal consciousness" about the law's role in the economy and society that will hopefully contribute to the formation of future development professionals so they can better deal with the legal norms, institutions and practices that both condition and are impacted by the development policies they will design.

C. Teaching L&D as a "technology" for development policies

What follows is a reflection based on Coutinho's experience in his graduate classes on L&D at the Faculty of Law of the University of São Paulo, where graduate students discuss the legal functions and the institutional design of Brazilian development policies. Under the name of "Law and Development: rationalities, tools and arrangements", the course is conceived as an academic invitation for lawyers and legal scholars to get involved in the critical discussion of development policies – particularly when it comes to their law-shaped institutional arrangements - without resorting to conventional formalistic or doctrinal approaches or methods.

Classes usually combine initial presentations – partly based on previous readings on development theories, policies and historical examples - with subsequent debates and seminars in which students are invited to choose, research and present cases mainly to identify and criticise the roles and functions played by the legal apparatus in policymaking. Such cases deal with topics related to inequality, technological and policy innovation, state capacities, justice and human rights, gender and race, industrial upgrading, environmental protection, structural reforms, institutions and institutional change, among others.

The course is mainly based on premises – open to debate in class - that revisit the existing interplay between law, political economy and institutions in the Brazilian history and in its developmental trajectory. One of the key underlying ideas is that political economy and law have historically had a unique relationship with each other and, despite

recent initiatives, this relationship has remained unexamined by legal scholars. Crudely put, political economy is about the forms of political organisation and how they meet societies' economic needs. In the realm of political economy, the state is a key institution and a protagonist, in that it establishes connections between political preferences and economic demands. It is the law, however, that translates economic policy objectives into specific norms. In other words, while political economy is about the political choices of economic organisation, law provides the normative instruments and institutional arrangements by which the objectives of economic policy can be converted into concrete policy measures and initiatives.[26]

Another key premise behind the course – a mantra in development studies – is that that institutions matter. Nonetheless, to what extent institutions are legally designed and structured and operated (and how to describe and analyse this as part a research agenda) are key questions proposed for students. The course aims, with this, to "unpack" institutions to unveil their legal forms, content and functions, so that Brazilian lawyers and legal scholars can contribute to institutional creation and change when it comes to policymaking.

To be more concrete and contextualised, the course follows a historic path in which the Brazilian development path is revisited. Since the second half of the twentieth century, the interaction between political economy and the law in the country has been quite marked in the form of periods, giving rise to at least three institutional contexts or 'moments': developmentalism and interventionist law, neoliberalism and economic regulation, and the law of the new activism of the state.[27] More recently, in the 21st century, starting with

26 *Mario G. Schapiro* and *Diogo R.* Coutinho, Political Economy and Economic Law in Brazil: From Import Substitution to the Challenges of the New State Activism, in: Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds.), Critical Legal Perspectives on Global Governance - Liber Amicorum David M. Trubek, Oxford 2014. As put by Trubek, "we cannot interpret laws and regulations without understanding the policies they are designed to 'implement' and the theories which led to these policies". But, on the other hand, he continues, "there is no way to say what the 'policy' is without studying the law"*, David M. Trubek*, Law, Planning and the Development of the Brazilian Capital Market: A Study of Law in Economic Change, Bulletin Yale Law School Studies in Law and Modernization (3) 1971, pp.72–73.

27 Very briefly, classic developmentalism during the 20th Century translated itself into industrialisation, modernisation, de-linkage, and intervention, among other policy measures, whereas neoliberalism (as of 1990) roughly meant a retraction in the entrepreneurial role of the state (and the law) in the economy, privatisation of state owned enterprises, liberalisation of trade regimes, openness to foreign investment, more emphasis on the role of exports in growth strategies, institutional reforms to ensure that markets operated efficiently. New developmentalism (starting in 2002) is characterised by the acceptance of a major (albeit selective) role for the state in steering investment, coordinating projects and providing information especially in projects with multiple inputs and long-term payoff, extensive collaboration and communication between public and private sectors, innovation, attention to social protection (*David M. Trubek., Diogo R. Coutinho* and *Mario G. Schapiro*, New State Activism and the Challenge for the Law, in: David M. Trubek, Helena Alviar Garcia, Diogo R. Coutinho and Alvaro Santos (eds.), Law and the New Developmental State - the Brazilian Experience in the Latin American Context, Cambridge 2013). For a discussion and periodisation of the history of law and development and its 'moments', see also *David M. Trubek* and *A Santos,* The New Law and Economic Development: a Critical Appraisal, Cambridge 2006.

Dilma Roussef's controversial impeachment in 2016, a new political economy erupted: when Jair Bolsonaro took office in 2018, a variation of authoritarian legalism combined with old-style neoliberal policies was adopted. While we write this article, Bolsonaro's authoritarian political practices are increasingly eroding the 1988 Constitution democratic regime from inside. In a "marriage of convenience" with the financial elites who worship the finance minister, a Chicago trained free marketeer (Paulo Guedes), Bolsonaro and his anti-politics, anti-climate, pro-torture, anti-vaccine Covid-19 pandemic denying rhetoric is escalating an attack on state capacities and bureaucrats.[28]

Based on readings on the Brazilian developmental history, students are then invited to discuss how the political economy setting illuminates the structures, functions and roles played by the law in the implementation processes that follow (but also influence) ideological, political and economic cycles. They learn that besides uncovering disputes that define who wins and who loses, the political economy lenses also reveal the contours of the institutional arenas in which legal changes take place. This opens avenues for further class debates and discussion on how L&D can be seen as lenses through which social and institutional construction and dismantling can take place. Ths dimension is important because, among other reasons, the institutional arrangements enmeshed in the political economy arenas provides L&D scholars with analytical and material substance for an "embedded law in action" type of analysis. In doing that, the institutionalist political economy perspective (IPE), a variety of institutional thought, is particularly rich and helpful in such a research task. Without referring to the law explicitly (an inviting gap, we think), IPE creates plenty of room L&D scholarship.[29]

IPE readings adopted in the course recognise the development process as structural change (technological and institutional) chiefly induced and coordinated by the state action, by the developmental state specifically, which is considered a strategic and privileged actor. For the IPE, institutions constitute social, economic and political relations and, in a complex causation interplay, they can change mentalities and world visions at the same time they are changed by such ideas. That is to say that institutions are important for economic development not only because they *result* from capital accumulation and technical and technological progress, but also because they *cause* structural changes.

Such a periodisation was discussed in light of the Brazilian case in *Mario G. Schapiro* and *Diogo R. Coutinho*, Political Economy and Economic Law in Brazil: From Import Substitution to the Challenges of the New State Activism, in: Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (eds.), Critical Legal Perspectives on Global Governance - Liber Amicorum David M. Trubek, Oxford 2014.

28 On the "marriage of convenience" between Jair Bolsonaro and Chicago-style neoliberalism in Brazil (and the dismantling of the regulatory state in the country initiated through the so-called "Bill of Economic Liberty), see *Iagê Miola* and *Diogo R. Coutinho*, Entre autoritarismo e ultraliberalismo: o Estado regulador no governo Bolsonaro (2022, forthcoming).

29 *Diogo R. Coutinho*, O Direito Econômico e a Construção Institucional do Desenvolvimento Democrático, Revista de Estudos Institucionais 2 (2016), p. 1.

With that in mind, the course assumes that institutions can be somehow –that conjecture being key to the course approach of L&D – be designed and modified in a self-conscious manner to influence world visions and behaviours, and thus change the *status quo.* Contrary to the mainstream neoclassic view – the one professed by Douglass North in his new institutional economics, for example[30] –, according to which institutions mainly serve as *constraints* to behaviour, IPE emphasises their *enabling* roles.[31]

In other words, the course intends to persuade students that institutions can also foster change and that the law (both formal and informal) inscribed in their structures plays an appreciable function – not easy to perceive, let alone steer, nonetheless – in such complex process. This ultimately means that the L&D course assumes, in its normative face, that law is also constitutive of economic institutions that regulate the economy. At the same time, L&D does not take for granted that teleologically instrumentalizing the legal apparatus to foster or reach certain goals is an easy task. On the contrary, it acknowledges that as an intricate, often contradictory and risky *tour de force*.[32] Moreover, IPE, deeply influenced by Polanyi, implicitly presumes that the law, as economics relations, is embedded in the fabric of society, and that the legal apparatus defines rights and obligations, and, in doing so, affects institutions (both public and private) and their performance. The law inscribed in the institutional architecture also ensures democratic legitimacy (or endorses autocratic regimes).

For IPE, the law is all but neutral or epiphenomenal,[33] with this being the reason why such an approach not only allows, but also demands a legal analysis devoted to investigate the mysteries of development. The legal definition of what is property, a central touchstone of capitalism and also a legal convention, is, among others, an example of the crucial

30 *Douglass North*, Institutions, Institutional Change and Economic Performance, Cambridge 1990.

31 On the enabling roles of institutions for development, cf. *Erik Reinert*, Institutionalism Ancient, Old and New: A Historical Perspective on Institutions and Uneven Development, in: Working Paper Series, World Institute for Development Economic Research 2006.

32 IPE also carries out economic and institutional analysis in their political context, thus exploring its explanatory potential in the institutional change. In doing that, IPE rejects the primacy of market transactions taken as "natural" as opposed to the "artificial" action of the state in the economy (*Ha-Joon Chang*, Breaking the mould: an institutionalist political economy alternative to the neo-liberal theory of the market and the state, in: Social Policy and Development Programme Paper - United Nations Research Institute for Social Development 6 [2001], p. 5). It also rejects the simplistic dichotomy state-market (or its radical version state *versus* market) favouring the multiple forms of coordination and regulation between both (*Alain Caillé*, Towards an Institutionalist Political Economy, Revue du MAUSS Permanente [2008]). In addition, as pointed out by Streeck, IPE rejects the methodological individualism in favour of a methodological holism, which sees the individual as a member of a group, organisations, institutions, families, or cultural, political communities *Wolfgang Streeck*, Taking Capitalism Seriously – towards an institutionalist approach to contemporary political economy, in: Max-Planck-Institut für Gesellschaftsforschung, MPIfG Discussion Paper 10/15, Köln 2010.

33 *Geoffrey Hodgson*, The Enforcement of Contracts and Property Rights: constitutive versus epiphenomenal conceptions of law, International Review of Sociology 13 (2003), pp. 375–391.

constitutive role of law in the economy. The same applied to money, credit, contract, salary, taxes and other key capitalist institutions shaped by legal and institutional regimes. This is (in a nutshell) why Coutinho's course sees the IPE approach as helpful for an L&D course: it particularly emphasises the role of the state, as well as the regulatory roles of law, in the capitalist economic life.[34]

As the course flows during the semester, students move towards a more applied and contextualised approach and discussion with the purpose of discussing *how* the law can operate at the institutional level as a "technology" for development. To do that, students are invited to identify and assess examples of development policies, and their institutional arrangements (IAs) as case studies. IAs can be seen as rules that agents create for themselves in their economic and political relations, and define a specific for of process coordination so as to determine who is allowed to participate in a certain process, the goals of such process, as well as the types and forms of relations that govern the interactions among such actors.[35] Students find out that IAs are key to the functioning of institutions in a broader sense – particularly in policy implementation – but, in addition to that, as mentioned above, they also serve as lenses to dynamically observe and reflect upon the law embedded in an applied way.

Students also learn that IAs can be seen from two angles: technical and political. The former is related to *efficacy* and indicates the existence (or the lack of) organisations, instruments and professional staff – bureaucrats and public officials technically competent – able to coordinate actions in the governmental sphere. The latter, related to *legitimacy*, are those IAs whose goal is to ensure the inclusion of stakeholders more directly affected by the policies through an institutional framework permeable to participation and social control - in other words, IAs that make development policies democratic. We also see in class that technical and political IAs are differently and unevenly developed in political economy "moments" (time) and contexts (space) and are also combined in multiple ways. Development policies can be effective without being democratic, and can also be ineffective at the same time they are inclusive and participatory. Many other subtle combinations are possible.

Based on seminars presented by students, the class then maps and discusses the notion of IAs as a workable and useful unit of analysis that illuminate state capacities in countries, regions, cities, sectors or government policies. Also, it strives to untangle such IAs to remind that they all are "made" of law – mainly public law, but also private law and, moreover, public-private legal connections. Last but not least, the discussions also shed light

34 *Simon Deakin, David Gindis, Geoffrey M. Hodgson, Huang Kainan* and *Katharina Pistor*, Legal institutionalism: capitalism and the constitutive role of law, Journal of Comparative Economics 45 (2017).

35 *Alexandre de Ávila Gomide* and *Roberto Rocha Coelho Pires*, Capacidades Estatais e Democracia - abordagem dos arranjos institucionais para a análise de políticas públicas, in: Alexandre Gomide / Roberto Rocha Coelho Pires (eds.), Capacidades Estatais e Democracia - arranjos institucionais de políticas pública, Ipea 2014.

on how IAs "display" political economy substance in the sense that they are the indirect outcome of underlying ideologies, preferences and disputes in each historical moment.

To sum it up, based on seminars and their case studies, this L&D course aims to show that while not exclusively, the implementation of policies for development largely depends on the qualitative aspects of the legal apparatus - and, consequently, on how it is worked out by legislators and, at the implementation level, by the government. In doing this, students are invited to reflect on how studying the implementation of IAs - and how they are shaped by the law (and operated by policymakers, be they lawyers or not) - is a possible application of L&D that allows legal and other social science scholars to assess efficacy and democratic legitimacy from an institutional point of view. And, as political scientists remind us, if the implementation of policies is actually part of policy conception (a policy is created *as it is* implemented), the roles of legal tools (norms, processes, actors, interpretations and institutions) become even more central, even though these premises are usually absent or obscure in the traditional legal scholarship perspective[36] (Coutinho, 2016).

At the final stage of the course, once cases and IAs are selected and assessed in their functioning, students are asked to detect and imagine how to fix bottlenecks that compromise and weaken efficacy, and legitimacy can be discussed in legal terms so as to allow room for institutional reforms that improve their quality. In a sort of "reverse engineering" through which problems can be detected and potentially solved, L&D can, we discuss in class, serve as an artifact – in this sense, a "technology" – to improve democratic development policies that are able, to a maximum extent, to promote developmental goals in different historical and special contexts. At the end of the course, students are stimulated to write assessed short papers that can later become academic articles – or research projects - on L&D.

D. Conclusion

In our view, rather than conceptually and formally *defined*, L&D is above all something to be *done* by legal scholars concerned with the intricate relationships that bring together law, politics, economics, policies and institutions. This notion makes room for a wide variety of approaches and forms of doing and teaching L&D. Our own experiences are illustrative of the possibility of such diversity. Both courses we briefly described here seek to develop "legal consciousness", and shed light on the rich, complex and challenging interplay between law and the political economy. While the first approach resorts to the "law and society" tradition to discuss how law acts as constituting, facilitating and regulating economic relations, the second approach reflects an institutionalist route of teaching, one that emphasises how law operates at the levels of institutional and political economy as a "technology" for development,

36 *Coutinho*, Fn. 29, p. 1.

The two are also examples of the different goals that L&D teaching can pursue, depending on the audience. Miola's course, being outside law school, seeks to shape a different "legal consciousness" of – hopefully – future development professionals who are not lawyers, so they can devise or deal with development policies without ignoring legal institutions. Coutinho's class, in turn, aims to enable law students to visualise their field of practice as a powerful "technology" to development to critically analyse institutional arrangements, and hence of themselves as agents with a privileged position to operate it.

Although by different means, our experiences also show that we end up converging in many important ways. For instance, both accounts resort to some common epistemic and methodological devices to teach the relationship between L&D. This is the case of the political economy "periodisation" of Brazilian development trajectory as a way of organising the empirical chaos in which economic policymaking and legal thinking take place. Another illustration is the use of case studies to ground the discussion of theories about how law affects development in the country.

More importantly, the two courses – through considerably different means – also end up bringing students to face very similar substantive claims about how we understand law to relate to development; for instance, that the law is not peripheral or solely dependent upon economic or political relations, but as other institutions, it is crucial in shaping, reproducing and transforming certain models of development, as economic relations are highly embedded in social and legal relations. Another example is that, as a corollary of the first, the dichotomy between state and market can only take us so far, as market relations are constituted and dependent on legal categories and institutions. In addition, both courses and ways of thinking about L&D suggest that such roles of the law are to be properly understood as long-running and collective academic enterprises. Finally, both courses methodologically rely on examples, case studies and concrete policy initiatives to illustrate theories, practical implications and to foster interactive dialogue and debate among students.

As Murakami wrote in the foreword to "What I Talk About When I Talk About Running", this book does not contain a "philosophy per se" about running, but rather "lessons" learned while putting the body in motion. These lessons, he says, are not easy to generalise because, in the end, they are just too personal; they are who he is. Our effort in this article is somewhat similar. Our reflections are no grand theory of L&D, but rather personal lessons that depict what we learned along the way.