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## A Crisis and its Afterlife: Some Reflections on 'Scholars in Self-Estrangement'

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## A Crisis and its Afterlife: Some Reflections on Scholars in Self-Estrangement

Ruth M. Buchanan\*

This is a study of the relationship between scholarship and action. It will show how changes in specialized concepts, theories, and modes of scholarly activity affect and are affected by changes in the moral attitude of scholars toward their professional work.<sup>1</sup>

This essay is an extended reflection on the avenues of influence of a single article, one that is arguably the most cited contribution to scholarship on law and development of the last 40 years. In that article, published in the *Wisconsin Law Review* in 1974, David Trubek and Marc Galanter confidently identified and cogently parsed a 'crisis' in law and development studies in the United States.<sup>2</sup> 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (hereinafter SISE), was undoubtedly a key intervention in the debate over US funding of law reform projects abroad of its time. Yet, as the research conducted for this essay has documented, it continues to be routinely cited by law and development scholars as well as many academics in other fields. In some ways, this tenacity is difficult to fathom—SISE was a piece that was produced at a particular moment of crisis in the field in the US and addresses itself specifically to that moment. It is a piece of writing that is admirably clear about its modest ambitions and the relatively narrow scope of the audience that it explicitly sought to address. The authors note that the paper originated in a report that had been produced for the Research Advisory Committee of the International Legal Centre.<sup>3</sup> Further, they describe the crisis as affecting the 'relatively small group of academics' who are engaged in a 'specialized area of US academic study concerned with the relationship between legal systems and the 'development'— social, economic and political changes—occurring in third world countries.<sup>4</sup> And yet, the paper's influence has extended well beyond the circumstances, political era and geographic location in which it was produced.

Part of this continuing resonance might be attributed to its personal tone. There is both an urgency and an immediacy to its critique that emerges from its self-reflective aspect. Both authors were participants in the 'small group of academics' who were seeking to institutionalise a study of law and development in the academy; both had spent a significant amount of time living and working in developing countries, Professor

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\* I wish to thank the participants at the conference on Global Governance: Critical Legal Perspectives *Liber Amicorum* David M Trubek, which took place in June 2012 at the European University Institute in Fiesole, and David Trubek in particular, for their generous response to the paper on that occasion. Marc Galanter also generously read and commented on the draft. Amanda Legeny provided able assistance with the compilation of the bibliographic database and the final editing of the paper.

<sup>1</sup> DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062, 1062.

<sup>2</sup> *Ibid*, 1063.

<sup>3</sup> *Ibid*, 1062.

<sup>4</sup> It should be noted that at the time, even within the small community of law and development scholars in the US, the paper provoked a considerable amount of comment and controversy. See, for example, the critique offered by Robert Seidman, a prolific law and development scholar and the ensuing exchange. Robert Seidman 'The Lessons of Self Estrangement: On the Methodology of Law and Development' (1978) *Research in Law and*

Trubek in Brazil, and Professor Galanter in India.<sup>5</sup> Yet its continuing influence has extended well beyond what might be expected of reflective practitioners, even very insightful ones. Its endurance, in my view, has more to do with the fact that SISE is a pioneering example of critical legal scholarship. Not only does it speak passionately to contemporary readers, it offers many of them insights that resonate with contemporary issues and problems. Most ambitiously, one might propose that revisiting and reflecting upon such a landmark contribution could lead to a renewed and possibly more robust appreciation of the project of critical legal scholarship itself.

The immediate task of this paper is much more modest, however. It undertakes to document the legacy of SISE in contemporary law and development scholarship, through a close reading of the text itself and a review of recent articles in which it has been cited, as well as an analysis of the relevance of its arguments to a body of critical writing in law and development in which it is not usually cited. In considering the ways in which scholars have made reference to SISE over the past decade or so, I observed two distinct approaches. In the first, it stands as a marker for a particular moment in history: the 'crisis' of the 'first wave' of law and development. Law and development scholarship has benefitted from a variety of reconsiderations of that crisis and its aftermath in recent years, as it sought to come to terms with the re-emergence of an interest in law on the part of development institutions and agencies at the end of the twentieth century. In recent times, the historical account continues, the field of law and development has re-emerged, transformed and re-invigorated by processes of globalisation, professionalisation, and a variety of inter-disciplinary encounters. A number of these types of accounts have been tremendously influential in framing law and development as a field of study in recent years. I am thinking in particular, of course, of the excellent essays collected by Trubek and Santos in 2006,<sup>6</sup> as well as a number of other recent efforts that might be understood collectively as providing a genealogy of the uses of law in relation to development assistance.<sup>7</sup> Typically, although not invariably, essays in this genre have tended to cite SISE for the purpose of marking a particular point in history, from the perspective of its 'aftermath,' or in terms of what came next.

There is also a second, less prominent avenue of engagement with Trubek and Galanter's famous article. In these articles, scholars engage with one or more of the substantive critiques contained in the piece.

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*Sociology* 1, 1–29. Trubek and Galanter's response is published as 'Scholars in the Fun House' *Research in Law and Sociology* 1, 31–40; Professor Seidman offers a reply in the same volume at pp 41–44.

<sup>5</sup> Professor Trubek's curriculum vitae indicates that he served between 1962 and 1964 as an Attorney-Advisor at the US Department of State Agency for International Development in Washington DC and between 1964 and 1966 as Legal Advisor and Chief Officer of Housing and Urban Development, USAID Mission to Brazil, in Rio de Janeiro. While Professor Galanter had little direct law and development experience prior to the publication of SISE, he had spent a considerable amount of time in India as a scholar. In the late 1970s, some years after the publication of SISE, he served as an adviser to the Ford Foundation programme on legal services and human rights programme in that country. (Personal communication with Professor Mark Galanter, 9 June 2013).

<sup>6</sup> DM Trubek and A Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press, 2006).

<sup>7</sup> T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC, Carnegie Endowment for International Peace, 2006); KE Davis and MJ Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 *American Journal of Comparative Law* 895; B Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (2011) 44 *Cornell International Law Journal* 209. A voluminous recent overview is contained in J Faundez (ed), *Law and Development* (London, Routledge, 2012).

These engagements tend to emphasize its relevance to present-day dilemmas and highlight continuities in the framing of the role of law in development. Scholarship taking this second approach constitutes, in my analysis, the 'afterlife' of the crisis, that is, the ongoing salience of its critiques to contemporary issues and debates. Later in the article, I will explore a third, more speculative, avenue, through which I conjecture that Trubek and Galanter's 'crisis' continues to exert an influence. In this group, the article itself is not cited, and yet one or more of the critical arguments that it so cogently summarised play a significant role in the argument. These are instances I will describe as 'hauntings'.

Of course, each of these avenues of influence is important and significant in its own way. However, in relation to this famous article, the hunch with which I began this research was that the dominant mode of engagement had been with its place in history; as the crisis of law and development studies, and its aftermath: the demise of that field. And yet it occurred to me that accounts of the crisis and its aftermath that read SISE as part of a 'moment' in a linear history of the field can function to implicitly distance us from its critique by emphasising the gap or discontinuity between that time and our own. In contrast, law and development scholarship can also be understood as a continuous, or at least contiguous, terrain in which certain concepts, tropes or arguments repeat, overlap and fold in on themselves. This is seen more readily through an examination of SISE's other avenues of influence, both in relation to those scholars who engage directly with the contemporary relevance of its critique ('afterlife') as well as the ways in which those critiques continue to haunt contemporary debates.

The analysis in this paper will suggest that these other avenues are both enduring and significant. That is, dozens of scholars writing on a variety of topics across the wide spectrum of issues that might fall within the broad category of 'law and development' have, in returning again and again to the arguments formulated by Trubek and Galanter in 1974, in effect collectively made the argument that while much may have changed in the past four decades, many of the core assumptions that underpin the law and development project have remained the same. Through a closer examination of these other avenues of influence, then, this essay seeks to disinter Trubek and Galanter's remarkably direct and succinct diagnosis of the contradictions of the law and development project from the comfortable historical resting place to which it has been frequently assigned.

Finally, it is worth noting that the intuition that gave rise to this undertaking was formulated in the classroom. Over the past few years, while teaching law and development to students in British Columbia, Toronto and Melbourne, I have found myself annually revisiting Trubek and Galanter's crisis. These engagements have never failed to engender new insights and/or provocations. Indeed, many students respond to this text as if to a whiff of fresh air after a long day in a windowless library carrel. What is it about SISE that draws in readers across several generations, and arrayed across a much broader geographical swath than, its original audience? This essay is, in part, an effort to answer that question.

In what follows, I first revisit the crisis itself, reviewing a number of the key propositions and arguments set out in the article. Secondly, I report on my research into citational history of SISE since its publication in

1974, including tracking citations by year and by type (aftermath/afterlife). In the third section, I analyse the ways in which some key contributions to contemporary critical scholarship on rights and development trace the contours of arguments made by Trubek and Galanter.

## I. The Crisis Revisited

For an essay that has attracted so much comment, and which continues to be identified as the 'landmark critique'<sup>8</sup> of the project of law and development some 35 years after its publication, Trubek and Galanter's thesis statement was surprisingly modest:

The principal thesis of the essay is that intellectual and moral shifts have created a crisis for this small group of academics, a crisis which threatens the future of their efforts to create theories about and to institutionalize the study of law and development.<sup>9</sup>

Trubek and Galanter go on to identify two dimensions of the crisis: first, that individual scholars became increasingly unable to define or to defend the work, and secondly, that there had emerged a lack of consensus around common interests that could be understood as defining a field. Both of these developments were seen as a direct consequence of the loss of faith in the potency of the liberal legalist model of law, both as a model for developing countries to emulate, and as an accurate description of how law actually worked in the US. One of the important critical contributions of the essay is that it breaks down the 'liberal legalist paradigm' into six key propositions.

1. Society is made of individuals and the state; since individuals consent to the state, state control furthers individual welfare.
2. The state exercises control over the individual through law; law is understood as addressed to all individuals similarly situated; the state is constrained by law.
3. Rules are consciously designed to achieve social purposes and formulated through pluralist processes that are fair (that is, not unduly influenced by special characteristics such as wealth or race).
4. Rules are enforced equally for all, in accordance with their purposes.
5. Courts have the principle responsibility for defining and interpreting legal rules; adjudication proceeds on the basis of an autonomous body of learning.
6. The behaviour of social actors tends to conform to the rules.<sup>10</sup>

Trubek and Galanter make three important critiques of the project of law and development in the article, all of which relate to the inadequacy of one or more features of this liberal legalist paradigm. First, they note

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<sup>8</sup> Davis and Trebilcock, 'The Relationship between Law and Development' (n 6) 915.

<sup>9</sup> Trubek and Galanter, 'Scholars in Self-Estrangement' (n 1) 1063.

<sup>10</sup> Ibid, 1071-72.

that the guiding assumption of the law and development movement, that the liberal legalist model could be used as a basis for recommendations regarding legal development in poor countries, had come to seem both ethnocentric and naive to many of those who had been working in the field. That is to say, liberal legalism is not a universal/universalisable model of law in society. As its participants developed

deeper knowledge of particular legal systems based on fieldwork and exchanges with local lawyers and academics, it became clear that social, cultural, political and legal systems in many countries tended to look very different from the ideal type assumed in each of the above propositions. Moreover, first-wave law and society research (gap studies) was beginning to reveal that many features of the liberal legalist model were not even a particularly accurate description of how law worked in the US. The second critique is directed at the assumption of legal potency itself—Trubek and Galanter suggest that law and development scholars needed to be alive to the possibility that legal change is not instrumentally linked to social change; that is, they must consider the possible irrelevance of law. This critique relates specifically to propositions three, four and six. If changes to specific legal rules cannot be understood instrumentally as relating to or bringing about certain socially desirable outcomes, or even if one imagines that legal reforms might bring about such outcomes but are routinely ignored, then a great deal of the justification for the investment in legally-oriented development assistance disappears. Thirdly, and perhaps most devastatingly, they suggested that legal reforms in developing countries might have a ‘negative face’—that is, law reform might in fact do more harm than good judged in terms of such liberal values as promoting greater social equality, political and social empowerment or democracy in a given country. This section is worth quoting directly, as it lays out in some detail the many ways in which well-intentioned legal development assistance can go awry:

The legalization of areas of social life and the increased formalization of the legal process may increase the costs of protest, deflecting political pressures for social change without any corresponding gains in freedom or equality. Law may be used to justify and legitimate arbitrary actions by government rather than to curb or ban such excesses. The social structure and economic interests of the legal profession may make it a natural ally of conservative groups, and an enemy of groups pushing for fundamental change. Legal changes ostensibly designed to reform major areas of social life and achieve developmental goals may in fact be a form of symbolic politics, the effect of which is not to cause change but to defeat it by containing demands for protest, thereby strengthening, rather than weakening groups committed to the status quo. And increased instrumental rationality in legal processes together with governmental regulation of economic life may contribute to the economic well-being of only a small elite, leaving the mass no better, or even worse, off.<sup>11</sup>

The article provides a detailed consideration of both how the crisis emerged and the factors that contributed to the loss of faith in the efficacy of the export of liberal legalism, including the deepening of empirical knowledge of developing states, accelerated in many cases through the contributions of legal scholars from developing countries, the ‘turn against law’ in the US,<sup>12</sup> doubts about the desirability and

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<sup>11</sup> Ibid, 1083–84 (footnotes omitted).

<sup>12</sup> See generally M Galanter (2002–03) ‘The Turn Against Law: The Recoil Against Expanding Accountability’ 81 *Texas Law Review* 285.

universal applicability of the US legal/political system as a model for emulation by developing countries, and finally skepticism about the motives behind government-funded legal assistance. Not all law and development scholars shared all of these concerns, and some continued to adhere to liberal legalism, all of which contributed further to the fracturing of the nascent field.<sup>13</sup> In their concluding section, Trubek and Galanter articulated three possible perspectives on the way forward, that is, justifications on the basis of which scholars might ground their continued work in the field. They identified them as pragmatic problem-solving, positivist pure science, and eclectic critique.<sup>14</sup>

To the extent that aspects of the 'liberal legalist' paradigm continue to exert a powerful influence over the ways in which many legal development projects are conceived, funded and implemented, the critiques offered in SISE continue to be relevant. Conversely, one might suggest that how much contemporary relevance scholars find in SISE tends to reflect their assessment of how many of the above-noted liberal legalist propositions remain in play. A citational analysis of SISE that reflects not only how many times it has been cited, but also endeavours to capture the ways that it has been used, then, might provide one avenue through which we could ascertain the extent to which contemporary law and development scholars continue to be troubled by the gap between the assumptions of funders and development agencies and what we know about how law works, or doesn't work, as an agent of social change.

## II. Noting Up SISE: Two Avenues of Influence

In order to track the influence of SISE, we first compiled a database of citations to this article in English language journals since its publication in 1974.<sup>15</sup> Our searches produced 407 citations in English language journals since that date; 216 of those citations have occurred since 2001.<sup>16</sup> In addition to its citation in a very wide spectrum of US law reviews and social science journals, we found that SISE has been cited in a number of international publications in English, including publications from China, India, Turkey, South

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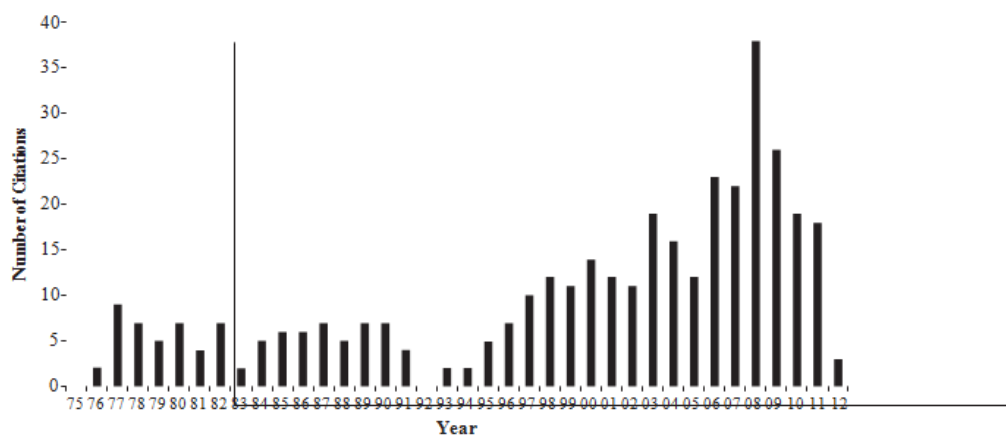
<sup>13</sup> Ibid, 1096.

<sup>14</sup> Ibid, 109

<sup>15</sup> In order to find all of the available English language article citations of SISE online searches were conducted in a variety of databases. We acknowledge that this method is likely to be much more comprehensive with respect to more recent years, as significantly fewer publications would be searchable online prior to the mid-1990s. This search excluded theses and books, as these could not be comprehensively searched by keyword in the same manner. All of this information was saved in a bibliographic database, and put into an Excel spreadsheet for analysis. The searches are recent as at 21 June 2012.

<sup>16</sup> In HeinOnline, ProQuest and Web of Knowledge, the search brought up the original article along with an icon that stated its number of citations and a link to access these. Additionally, in these databases, and in several others (LexisNexis Quicklaw, LexisNexis Academic, Westlaw, LegalTrac, Justis, Ebscohost, Scholars Portal, JSTOR and Springerlink) a search was conducted using the term 'scholars in self-estrangement'. At this point, to verify that the correct article was cited, the search would be narrowed, the citation would be viewed in each article, or both. If the search was narrowed, it was done so by searching the name 'Trubek'. The variants 'Trubeck' and 'Trubec', or the truncated 'Trub', were also searched to account for any misspellings. Additionally, a keyword search was performed through articles that had been found for previous research, on topics of new developmental state and critical empiricism. From here, an article that was not found in the searches mentioned above was discovered, due to a misspelling of the word 'estrangement'. Searches were then conducted in each of the aforementioned databases, with the variant spellings 'enstrangement', 'enstrangment' and 'estrangment'. While a Google Scholar search will produce a higher number of results, closer to 480, our more limited number of citations can be explained by the facts that our search was confined to academic journals published in English, and that the data-base has been checked for duplications.

Africa, Israel, Australia, the UK, Europe and Canada.<sup>17</sup>



**Figure 1: Citations by Year**

Articles citing SISE have been found in publications as diverse as the *China Economic Review*, the *Australian Feminist Law Journal*, *IIMB Management Review* (Indian Institute of Management in Bangalore), and *World Development*.<sup>18</sup>

With respect to the frequency of citations, shown in Figure 1, two things are worth noting. First, that there has been no year since its publication that SISE was not cited somewhere, and second, even taking into account the fact that online records are much more comprehensive since the mid 1990s, the number of citations of SISE has increased dramatically over the past decade. While it is only a very rough indication, this increase could be read as a reflection of the growing interest in 'law and development' across a very wide range of disciplines. A review of the titles of some of the articles collected in the database reveals the remarkable diversity of the issues, disciplines, specialisations and regions that are spanned by the descriptor. Without revisiting the fruitless debate over whether law and development is or might be described as a 'field' of scholarly inquiry rather than a 'poorly constructed category that lacks internal coherence',<sup>19</sup> I note that the citations to Trubek and Galanter's article provide, rather than a shared analytic framework or even coherence, a thin thread by which we might trace the outlines of a broad terrain of engagement and contestation that

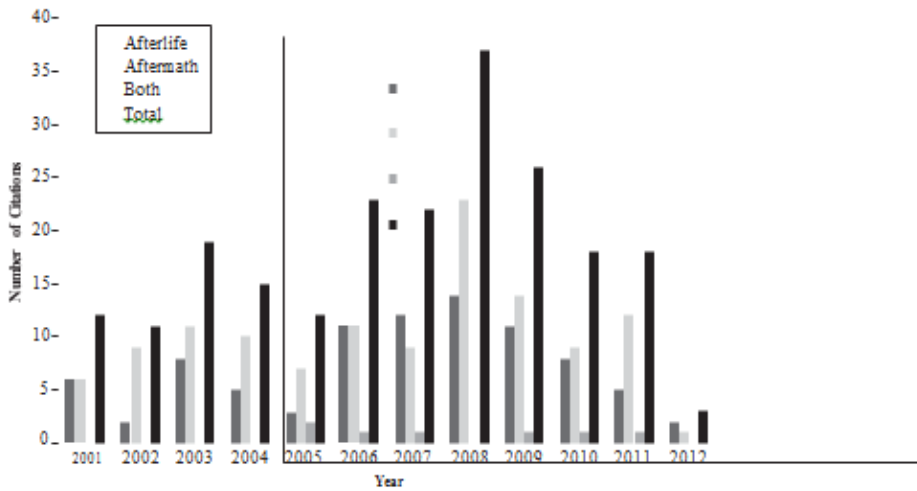
<sup>17</sup> See, eg J Goldring, 'Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education' (1987) 17 *University of Western Australia Law Review* 216; D Fitzpatrick, 'Developing a Legal System in East Timor: Some Issues of UN Mandate and Capacity' (2000) 5 *Austrian Review of International and European Law* 5; MM Feeley, 'Three Voices of Socio-Legal Studies' (2001) 35 *Israel Law Review* 175.

<sup>18</sup> See, eg JKM Ohnesorge, 'China's economic transition and the new legal origins literature' (2003) 14 *China Economic Review* 485; E Bertolino, 'The Politics of Subjectivity in the Women, Law and Development Discourse' (2006) 25 *Australian Feminist Law Journal* 119; S Gupta, 'Competition Policy and Law: Academic Perspective' (2007) 19 *IIMB Management Review* (Indian Institute of Management Bangalore) 426.

<sup>19</sup> Brian Tamanaha used this descriptor in a talk published as B Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (2009) *St John's University School of Law Legal Studies Research Paper Series No 09-0172*. In the paper of the same title subsequently published in 2011, he had changed his wording although not his substantive view: 'Conceiving of law and development as a field, I will argue, is a conceptual mistake that perpetuates confusion.' B Tamanaha, 'The Primacy of Society and the Failure of Law and Development' (2011) 44 *Cornell International Law Journal* 209, 220.



could be identified with the term 'law and development'.<sup>20</sup>



**Figure 2: Type of Citation by Year**

The second figure reflects our effort to analyse the citations over the last 10 years in terms of the mode or type of engagement, using the distinction between 'aftermath' and 'afterlife' which I drew above.<sup>21</sup> References that emphasised the historical role of SISE, and focused on discontinuities between that era and our own, were coded as 'aftermath'. Citations that focused on the contemporary relevance of the arguments in SISE, identified continuities or sought to apply specific arguments made in SISE to contemporary issues and problems, were coded as 'afterlife'. In a few cases, authors utilised both forms of engagement. What we can see from this figure is that while 'aftermath' references constitute the majority of citations, there were a substantial number of articles in every year that approached SISE from the perspective of its contemporary, rather than historical, relevance. The breakdown of citations since 2001 was 122 'aftermath' references, 88 'afterlife' references and seven that involved both. What can be said on the basis of this analysis is that the substantive critiques of Trubek and Galanter continue to resonate with a significant number of scholars currently publishing in the field of law and development.

However, what this coarse-grained overview does not reveal is which of the several strands of critical argument in the Trubek and Galanter paper are the ones most frequently picked up by contemporary scholars, and how they are being used. Anecdotally, I have noted quite a number of references to the

<sup>20</sup> See also A Perry-Kessaris, 'Introduction' in A Perry-Kessaris (ed), *Law in the Pursuit of Development: Principles into Practice* (Abingdon, Routledge, 2010).

<sup>21</sup> The criteria that were considered when determining whether each citation was to be coded as afterlife or aftermath were as follows. Generally, qualities of an afterlife citation were having contemporary relevance, emphasising continuity between the time of publication and today, engaging substantively with the arguments of the paper, and including a large number of citations or direct quotations from the text. An example of a citation that was treated as afterlife would be one in which the author noted lessons that could be learned from SISE. Indicators of aftermath treatment were historical relevance, emphasising discontinuity, a short citation without much or any discussion, and fewer citations within the paper. Articles classified as aftermath include those that use SISE to indicate the demise of the law and development movement of the time. When the actual coding was being performed, the continuity or discontinuity, and the contemporary or historical relevance indicated in a paper, tended to be the strongest factors considered.

critique of ‘ethnocentricity’ in relation to the export of the American ‘liberal legalist’ paradigm, especially in the context of the ‘legal transplants’ debates, and it may well be that this first critique has been the most frequently engaged in the ‘afterlife’ literature.<sup>22</sup> It has also been suggested that the second and third critiques, that is, the critique of legal potency and the ‘negative face’ of legal intervention, are less frequently considered in contemporary law and development scholarship.<sup>23</sup> Further content analysis of the ‘afterlife’ group of articles, along the lines of the discussion in the following section, might help to further advance our understanding of the content of this particular ‘critical’ or ‘skeptical’ wing of law and development scholarship.

### **III. Hauntings: Critical Responses to the Convergence of Development and Human Rights**

A familiar strand of debate within contemporary law and development scholarship concerns the emergence of rights-based approaches to development. Usually traced to the influence of Amartya Sen, and linked to creation of the Human Development Reports at the United Nations Development Programme (UNDP), under the leadership of Abub al Haq, the discourse of human rights has made a significant incursion into development debates of the new millenium.<sup>24</sup> It has quickly become a vast terrain of scholarship and practice.<sup>25</sup> Without sidetracking into an exegesis on the Right to Development, the Millenium Development Goals, Rights-based Approaches, or Poverty Reduction Strategy Papers, it can be observed at a general level that efforts at integration between various UN agencies on the one hand and the Bretton Woods institutions on the other, have produced a degree of consensus, at least at the level of discourse, on the need to integrate human rights considerations into the design of development projects, not only in order to ensure that projects do not negatively impact human rights, but because advancing human rights is now understood as both a means to, and an end of development, not unlike the rule of law.

This contemporary narrative of convergence of human rights and development stands in marked contrast to the two solitudes that has characterised these disciplines for most of the past 40 years. It fails to fully recognise these discourses as the contested and contingent outcomes of historical struggles, and in so doing, can tend to overlook the importance of contestation in relation to the current

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<sup>22</sup> See, eg S Basheer and S Guha, ‘Outsourcing Bayh-Dole to India: Lost in Transplantation?’ (2010) 23 *Columbia Journal of Asian Law* 269; M Lawan, ‘Liberal Legalism and the Challenge of Development in Nigeria’ (2009) 2 *Law, Social Justice & Global Development Journal*; U Mattei, ‘A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance’ (2003) 10 *Indiana Journal of Global Legal Studies* 383.

<sup>23</sup> See Trebilcock and Davis, ‘Optimists versus Skeptics’ (n 6) 45. See also, B Garth, ‘Law and Society as Law and Development’ (2003) 37 *Law and Society Review* 305.

<sup>24</sup> See, eg the thoughtful account in S Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge, Cambridge University Press, 2011) 222–28.

<sup>25</sup> See for example, C Rodriguez Garavito, J Kewitel and LT Waisbich, ‘Development and Human Rights: Some Ideas on how to Restart the Debate’ and the rest of the contributions to the symposium issue on Development and Human Rights in (2012) 9 (17) *Sur International Journal on Human Rights*.

situation. These issues have hardly gone unnoticed, however. A number of legal scholars, frequently writing from a perspective located within or sympathetic to developing countries, have offered a variety of critiques of the human rights and development encounter. Without engaging in a full discussion of this significant body of critical scholarship, for present purposes, using a few key illustrations, this section will briefly show the extent to which the legal scholars can be seen to track the three critiques we have identified in SISE. The three critiques again, are:

1. the critique of universality (ethnocentrism of liberal legalist paradigm);
2. the critique of (formal) law's potency (significance of informal alternatives); and
3. the dark face of legal reform (empowering elites, containing protest and so on).

With respect to the first critique, a plethora of examples could be cited; a recent contribution by Issa Shivji to the human rights and development debates is illustrative.<sup>26</sup> Shivji approaches both development and human rights as contentious, fragmented discourses. He identified the UN debates over the right to self-determination in the 1960s and 1970s, during the efforts to promote a New International Economic Order, as pivotal. It was during this era that the developmental and human rights discourses became polarised. From the perspective of newly-independent African states, to the extent that human rights discourses were posited as 'neutral' and 'universal', they were also anti-development, insofar as they could not acknowledge the particular histories, demands and aspirations of peoples in developing countries. Through the era of structural adjustment and since, the growing convergence of development and human rights discourses has led to the narrowing and technocratisation of the former, and the fragmentation and particularisation of the latter. Shivji remains highly sceptical of the emancipatory potential of contemporary reformulations of human rights in the development context. In his analysis the common thread that unites the earlier era with the present has been the marginalisation and containment of developmental concerns and proposals emanating from developing countries. According to Shivji, so long as the dominance of the North over the South in the world system is unacknowledged within human rights discourses, adding a 'developmental' dimension to human rights is unlikely to alter this trajectory.

Shivji's analysis reminds us of the extent to which the first two critiques continue to resonate in the African context. A recent review essay by Sally Falk Moore underscores the ongoing relevance of the second critique, again in the African context.<sup>27</sup> Moore reviews two recent books on law reform efforts in South Africa, in the context of both evolving approaches to legal pluralism in the academy and her decades of fieldwork with the Chagga people of Mount Kilimanjaro, in Tanzania. Her analysis finds more points of continuity than difference between her conclusions regarding the 'potency' of large-scale law reform efforts in Tanzania, as they related to the Chagga, and the findings of the more recent ethnographies under review, which concerned the South African Truth and Reconciliation Commission and the land reform efforts

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<sup>26</sup> IG Shivji, 'Human Rights and Development: A Fragmented Discourse' in C Peter and I Juma (eds), *Fundamental Rights and Freedoms in Tanzania* (Dar Es Salaam, Mkuki Na Nyota Publishers, 1999). See also IG Shivji, 'Constructing a New Rights Regime: Promises, Problems and Prospects' (1999) 8 *Social and Legal Studies* 253–76.

<sup>27</sup> SF Moore, 'The Legislative Dismantling of a Colonial and Apartheid State' (2011) *Annual Review of Law and Social Science* 7.

in South Africa. In all of these cases, the control of the state, and hence the reach of law, was revealed to be 'necessarily incomplete and uneven.' She further notes that:

African populations do not passively adapt to legislation but have agendas of their own ... Each case makes plain that control by the state is a partial affair only and that it is deeply affected by the semi-autonomous social fields that exist within the state and their internal and external goings on.<sup>28</sup>

Although legal anthropologists have been teaching us these lessons for quite some time, the persistence of ambitious, formalist and instrumental approaches to law reform in development projects, most recently reframed in the language of rights, suggest that legal scholars and lawyers in development contexts are still loathe to give up on their disciplinary commitments to legal efficacy, even in the face of considerable evidence to the contrary.

This continuing allegiance to formal law as a particularly potent avenue through which to effect large-scale societal transformations that are likely to increase social inclusion, decrease inequalities and improve social justice, especially in the human rights and development context, is even more difficult to sustain, as Trubek and Galanter observed, when one has become aware of the 'negative face' of legal reforms.<sup>29</sup> Yet contemporary scholarly accounts of the dark side of rights talk in the development context are plentiful. A well-known critical formulation of the argument about the implications of the convergence of rights and development is found in work of Upendra Baxi, who claims that the paradigm of universal human rights found in the United Nations Human Development Report (UNHDR) is being supplanted by a new model, which he has described as 'Trade Related Market Friendly' rights.<sup>30</sup> A number of critical scholars have recently both extended and illustrated the argument that in the encounter with development agencies, rights have largely become reformulated as a mode of regulation, in a manner that largely neutralises their potential to be used in contentious politics.<sup>31</sup> For development agencies, the turn to rights is attractive in part because it seems more responsive to the growing demand for accountability, yet as Sally Merry, Kerry Rittich and many others have pointed out, the turn to indicators itself can have insidious effects.<sup>32</sup> For Merry, while rights indicators offer a technology for producing accessible and standardised forms of knowledge, it is important to note the mechanisms by which this technology functions to consolidate power in the hands of experts and obscures the complex political and social choices that are embedded in those measures. According to Merry, indicators 'create a commensurability that is widely used to compare, to rank, and to make decisions even though the users

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<sup>28</sup> Ibid, 14.

<sup>29</sup> Trubek and Galanter, 'Scholars in Self-Estrangement' (n 1) 1083.

<sup>30</sup> U Baxi, *The Future of Human Rights* (New Delhi, Oxford University Press, 2002).

<sup>31</sup> SPahuja, 'Rights as Regulation' in BMorgan, *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Aldershot, Ashgate Publishing, 2007); R Perry, 'Preserving Discursive Spaces to Promote Human Rights: Poverty Reduction Strategy, Human Rights and Development Discourse' (2011) 7 *McGill International Journal of Sustainable Development Law and Policy* 61.

<sup>32</sup> See K Rittich, 'Governing by Measuring: The Millennium Development Goals in Global Governance' in H Ruiz, R Wolfrum and J Gogolin (eds), *Select Proceedings of the European Society of International Law*, vol 2 (Oxford, Hart Publishing, 2010); SE Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 (S3) *Current Anthropology* S83. See, generally K Davis, A Fisher, B Kingsbury and SE Merry (eds), *Governance by Indicators: Global Power through Classification and Ranking* (Oxford, Oxford University Press, 2012).

recognize that these simplified numerical forms are superficial, often misleading, and very possibly wrong.<sup>33</sup> She argues that the political struggles over what human rights mean and what constitutes compliance are submerged in the turn to indicators by technical questions of measurement, criteria and data accessibility.

What this admittedly very brief and schematic account has tried to suggest is that the contemporary human rights and development encounter is a very contentious and uncertain project. Kerry Rittich sums it up well when she notes that ‘in second generation reforms, human rights are better understood not as the answer to the social deficit but as the terrain of struggle.’<sup>34</sup> In this contested terrain, critical scholarship can and should play an important role in questioning assumptions, containing expectations, and challenging the power of entrenched institutions. The three critiques of Trubek and Galanter haunt these debates; in that haunting, perhaps, one might see the potential for another painful, yet ultimately instructive, moment of crisis.

#### IV. Conclusion

The crisis itself and the malaise it generates has been of immense value in clarifying major issues in legal theory, social science, and public policy.<sup>35</sup>

SISE is an enduring essay that can be read on many levels. Rereading it today, after so many years, might help us to reflect on the role that we envision for critical scholarship in law generally, and in relation to law and development in particular. As already noted, it is most frequently invoked for its role in articulating, or perhaps even accelerating, the crisis of the ‘first moment’ of law and development. While it is indeed an article that is deeply embedded in the local scholarly debates of its own time and place, I have argued that it articulates a series of critiques that continue to have relevance in relation to a wide range of contemporary issues, and which are perhaps particularly apt in relation to current rights and development debates. It might also be fruitfully revisited, in the context of the present volume, for what it has to say about the project of critical legal scholarship itself.

To that end, it is useful to recall that SISE was concerned with the loss of institutional support for law and development scholarship in the US; particularly support for a particular kind of interdisciplinary scholarship that enabled the construction of a community of scholars; there is an almost elegiac tone to the conclusion in which the authors note the irony

in the prospect that the malaise will destroy the field rather than moving it to a higher level of awareness and sensitivity. The malaise resulted from the critical perspective on legal development; this itself was the result of the effort to create interdisciplinary and international centers of social research on law.<sup>36</sup>

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<sup>33</sup> Merry, ‘Measuring the World’ (n 30) S85–S86.

<sup>34</sup> K Rittich ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social’ in Trubek and Santos, *The New Law and Economic Development* (n 5) 245.

<sup>35</sup> Trubek and Galanter, ‘Scholars in Self-Estrangement’ (n 1) 1102.

<sup>36</sup> Ibid.

Rereading this passage in 2012 invites consideration of whether contemporary analogies to the lost community of SISE exist, and if so, where they might be found and what their sources of support might be. While a number of exemplary networks have emerged over the years, it would be difficult to assert unequivocally that critical scholarship of the type envisioned by Trubek and Galanter (interdisciplinary, international) has gained a more secure foothold in the academy in recent decades.<sup>37</sup> At this level, SISE is an article that invites critical legal scholars to (once again) reflect on the material conditions of their existence.

SISE is also unapologetically normative. It speaks in the language of morality, which might sound dated to some post-foundational ears.<sup>38</sup> Yet, this tension presents another question for contemporary critical scholars. Where might we find contemporary illustrations of the engaged and committed approach to scholarship embodied by Trubek and Galanter in SISE?

Finally, we might want to consider whether and to what extent the tension identified by Trubek and Galanter between their professional identification as lawyers and their critical stance as social scientists is an enduring feature of critical legal scholarship. As lawyers we are professionally invested in the efficacy of the law, even while we work to reveal its illusions, its injustices, and its incompleteness. Perhaps the most significant contribution of the article has been to alert those of us who came later to the fact that 'self-estrangement' may be an occupational hazard of critical legal scholarship, while at the same time, enlivening us to the possibility that it is an impasse that can nonetheless be productively and successfully navigated.

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<sup>37</sup> Of course, the Critical Legal Studies movement, which began at a meeting in Madison in 1977, can be understood to have picked up the torch thrown down by Galanter and Trubek in 1974, although CLS remains fairly firmly grounded in the US legal academy. Several more recent networking efforts, such as the International Network on Transformative Employment and Labour Law (INTELL) which began meeting in 1994, and the network of scholars identified with Third World Approaches to International Law, are more international, although effectively unfunded. One might also point to ongoing networks formed as Collaborative Research Networks under the auspices of the Law and Society Association, associated with Harvard's Institute for Global Law and Policy (IGLP), or the Stellenbosch Institute for Advanced Studies in South Africa, as exemplars of vibrant, ongoing international interdisciplinary and critical networks of legal scholars. Whether any of these more recent networks will be able to secure stable long term institutional funding and support is the critical question.

<sup>38</sup> '[L]iberal legalist thought on law and development was always both more and less than science. It was both a form of scholarship that was linked inevitably to action, and a kind of action that used scholarship as its principle tool. Liberal legalism was a fusion of moral aspirations and cognitive assertions. The moral aspects of the current crisis are its most important feature; these can be resolved only by a change in moral views or in the behavior that has created moral doubts.' Trubek and Galanter, 'Scholars in Self-Estrangement' (n 1) 1101.