
19. The Global Administrative Law of development cooperation

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1 INTRODUCTION

The debate on Global Administrative Law (GAL) has opened new perspectives on international institutional law, but it has also – and in perhaps unexpected ways – enriched research on law and development. GAL in general has devoted attention to the emergence of a ‘global administrative space’ and the immense powers of international public authority, and thus boosted research on the legal premises of institutional configurations in global governance.¹ Normatively, this attention is guided by a search for overarching ‘global’ standards that set limitations upon this global power, taken from the provenance of administrative law (transparency, accountability or participation) or infused with more constitutional law elements (rule of law, human rights).

At the same time, GAL has contributed to the literature on law and development – perhaps even adding a third, new, branch. The first branch studies the role of law as an instrument for development in *domestic* settings, while the second branch analyses *international* law from a development perspective, be it in the area of international economic law (trade, investment, sovereign debt), environmental law, intellectual property or any other area of law.² Scholars have accompanied developments in a pragmatic fashion or at a critical distance. Next to these two, there is an emerging third branch that could be called the *institutional law* of development, the law of development cooperation and finance – or, more in line with this contribution, the GAL of

¹ Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; Sabino Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 *New York University Journal of International Law and Politics* 663; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, ‘Developing The Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in Armin von Bogdandy, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010); Eyal Benvenisti, *The Law of Global Governance* (Brill Nijhoff 2014).

² On law and development, see David Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press 2009); Michael J Trebilcock and Mariana M Prado, *What Makes Poor Countries Poor?: Institutional Determinants of Development* (Edward Elgar Publishing 2012); Lawrence M Friedman, ‘Law and Social Change: Culture, Nationality and Identity’ in *Collected Courses of the Academy of European Law* (IV, Book 2, Kluwer International 1995); on international development law, see Peter Slinn and Francis Snyder (eds), *International Development Law* (Professional Books 1987); Joel Trachtman and Chantal Thomson, *Developing Countries in the WTO Legal System* (Oxford University Press 2009).

development.³ Here, the law of institutions that organize the transfer of funds and knowledge for development purposes (such as the World Bank, United Nations Development Programme (UNDP) or domestic aid agencies) is the focus of attention – and again, normative questions of their limits of powers and accountability are guiding.⁴

To some extent, one could wonder what an institutional perspective and the focus on development cooperation might add. Taking into consideration the quantitative dimension of the financial flows regulated, development cooperation funds (in comparison, for example, to trade and investments) seem almost negligible and their effects have been contentious. One could also voice pessimism regarding the impact of legal scholarship engaging with development and equality. Emmanuelle Jouannet, for example, has recently and poignantly reviewed the efforts of development thinking and law in the past decades, emerging with a rather sceptical stance.⁵ And yet, inquiries into the GAL of development provide important insights. For one, the concern for development has left a considerable institutional footprint on all levels of public authority and is therefore a fruitful field of inquiry from a GAL perspective. In particular, it is a field in which the interaction between the international and the individual is especially tangible and thus illuminating. Most importantly, however, the powers of institutions in this field reach further than what is concretely visible and measurable in GDP. They transport ideas, concepts and languages, and thereby shape global society in profound ways.

This chapter will introduce this field of law and legal inquiry in three steps: it will, first, circumscribe the field by briefly highlighting four basic characteristics of the legal

³ The terminology is not always coherent, either with regard to the field of legal research or to the respective policy area. The latter is variously called development cooperation or international cooperation, foreign aid or foreign assistance. To simplify matters, these terms will be used interchangeably here. On terminology, see Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013), 27.

⁴ Laurence Boisson de Chazournes, 'Partnerships, Emulation, and Cooperation: Towards the Emergence of a Droit Commun in the Field of Development Finance' in Hassane Cissé, Daniel D Bradlow and Benedict Kingsbury (eds), *The World Bank Legal Review 3* (The World Bank 2011), 173; Daniel Bradlow and David Hunter, 'International Law and the Operations of the International Financial Institutions' in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer 2010); Dann (n 3); Kevin E Davis, 'Financing Development' (2008) NYU Institute for International Law and Justice Working Paper No. 10; Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011); Andrea N Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of 'Judicial Spirit' in Public International Law* (Eleven International Publishing 2009); Laurence Boisson de Chazournes, 'Policy Guidance and Compliance: The World Operational Standards' in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000).

⁵ Emmanuelle Tourme-Jouannet, *What Is a Fair International Society?* (Hart Publishing 2013), pointing out that the domestic approach of law and development is copied and taken over by agencies that repeat the mistakes of the 1960s in a rather crude technocratic replay, while the global economic system regulated by international law is no less tilted and unjust than it used to be.

regulation of development cooperation, discussing some methodological problems to approach it and introducing principles that help to better reflect and critique the field in a systematic manner (Section 2). Second, it will sketch the general structures of the field (institutions, financial sources, formats of transfer), taking into account the profound transformation of these structures in current years (Section 3). Against this background, four specific instruments of the GAL of development are presented to illustrate how law concretely works in this context (Section 4). In short, the Chapter will try to answer two questions: what is the law of development cooperation – and how is it GAL?

2 CIRCUMSCRIBING THE FIELD AND ITS SCHOLARSHIP

2.1 The Basic Characteristics of Development Cooperation Law

Four basic characteristics provide a first understanding of this rather new field of inquiry.

First, the fundamental mode of operation in development cooperation is one of organizing transfers. In principle, development agencies and development agreements engage in facilitating transfers of mainly two things: funds and knowledge. Traditionally, the centre of attention is the provision of *funds*. Providing loans or grants, and hence financing development, is an essential task. At the same time, *knowledge* is an important object of transfer too. To provide advisory services, data or support capacity building is a central task of development agencies and of the law regulating them. In principle, the law of development cooperation structures the mostly cyclical procedures of transferring funds and knowledge – and organizes the learning from such transfers for the future.

To be sure, this focus on transfers is a heuristic abstraction. It serves the purpose of highlighting the basic logic that drives institutions in this field and their law. Development itself is, of course, an extremely multifaceted and multidimensional process that is driven by various activities and context factors. The point here is that development agencies and the law regulating them do not engage in these activities themselves, but enable others to do so – by providing funds and/or knowledge. It is also true that development agencies engage in many more activities than transfers alone. However, again, the argument here is that their principal and most characteristic task is that of organizing transfers.

One aspect should be noted here too: these transfers do not come without costs. Either recipients must repay loans; or, in the case of low-income countries, transfers come in exchange for policy influence and reforms that align recipients with a model of free trade, private property, rule of law and liberal democracy (in this context mostly called good governance), as favoured by mostly Western donors. This point will be seen in further detail below.

Second, development cooperation law structures an essentially cyclical process and thus contains a great deal of procedural and administrative law. The process of organizing transfers may be divided into five stages: (1) country planning, i.e. setting a multi-year plan of activities for a given country; (2) budgeting, i.e. the allocation of

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funds for a country per year or planning period; (3) designing, negotiating and concluding agreements on concrete intervention; (4) implementation of intervention; (5) control of intervention – and new planning. The law of development cooperation also encompasses ‘constitutional’ elements, providing institutional foundations, competences and general principles for their activities. Development cooperation law is therefore concerned with establishing the structures for the process of transfer by constituting the actors, delineating their powers and setting procedural rules as well as substantive standards for the process.

In the past few decades, this procedural approach of multi-year planning and then an iterative execution of the plans has been the dominant approach. However, this is not necessarily the only feasible way. Market-driven, bottom-up or experimentalist approaches are also conceivable and practised by mostly smaller or private-law-based actors.⁶ They have not (yet?) altered the basic approach of the dominant aid agencies, but surely deserve greater attention, in legal scholarship too.

The third basic characteristic of development cooperation law concerns its sources: this is a truly multi-level and ultimately global body of law. Relevant actors in this field may be found at all levels. There are international institutions (such as UNDP, the World Bank), national departments or organizations (such as the American, British or German ministries of development cooperations, i.e. the United States Agency for International Development (USAID), the Department for International Development (DFID) or the Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung (BMZ) respectively) and even supranational bodies (the EU) – as well as, of course, the recipient or partner states. The law of development cooperation is laid down by and between these actors. It is to be found most importantly in the rules of donor agencies, i.e. their founding treaties and their secondary law⁷ or national laws on development;⁸ therefore, donors unilaterally (!) set the rules of how they operate, which in consequence binds those who want transfers from them. Development law is also laid down in bilateral agreements between a donor and a recipient, legally structuring concrete interventions. There is finally a (slim) layer of multilateral declarations and soft law that provides a normative framework within which actors cooperate. The best example in this respect are the Millennium Development Goals or the Paris Declaration, which in 2005 established five general principles on how donors and recipient countries should interact and reform their relations.⁹

⁶ William Easterly (ed.), *Reinventing Foreign Aid* (MIT Press 2008); Abhijit Bannerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Public Affairs 2011); Charles Sabel, Gráinne de Búrca and Robert O Keohane, ‘Global Experimentalist Governance’ (2014) 44 *British Journal of Political Science* 477.

⁷ See for example the World Bank Articles of Agreement and its Operational policies, or the EU’s basic treaties and its regulations.

⁸ E.g. Foreign Assistance Act 1961 (US); International Development Act 2002 (UK); Official Development Assistance Accountability Act 2008 (CA); Ley de Cooperación Internacional para el Desarrollo 1998 (ES).

⁹ United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000); Paris Declaration on Aid Effectiveness (2005), OECD Publishing <<http://dx.doi.org/10.1787/9789264098084-en>> accessed 3 March 2015.

Two further observations underline the particular multi-level and global character of law in this field. First, the law and activities of these organizations are parallel to each other, not hierarchical. If the UN engages in an intervention, it does not legally bar any other actor. Development cooperation and its law is therefore a *heterarchical* system. At the same time, the content of development law across these levels and organizations follows a similar pattern, as mentioned above: any development agency (be it national, international or supranational) organizes the transfer of funds and knowledge through cyclical processes and with very similar formats of transfer (project and budget support, knowledge support). Over the years, actors from different levels have learned from one another. Diffusion and cross-fertilization especially between donor agencies have taken place, which has brought about a visible coherence in terms of instruments or procedures. It is interesting to note that innovation, in this respect, has very often come from the international level, in particular from the law of the World Bank. Indeed, today it is possible to observe a ‘common law or *ius commune* of development cooperation’ across actors and levels.¹⁰

The fourth characteristic of development law is not legal but refers to its political economy, as it encounters two structural factual problems. One is the general uncertainty on the process of development and thus the risk element in development cooperation. Many decades into the concerted effort called ‘development’, there persist fundamental lacunae and profound disagreements as to the effects of certain economic or regulatory instruments deployed and the appropriate ends and means of the process as such.¹¹ The other factual problem is the (potential) asymmetry of partners, i.e. the inequality of those seeking and those giving transfers. It is true that the rise of emerging economies (such as China or India) has altered the balance in many cases. However, this should not distract from the fact that many countries seeking transfers are still much weaker in terms of economic or political clout. Legal relations exist in the shadow of this hierarchy. This aspect will now be explored further.

2.2 The Contentious Concept of Development – and the Role of Legal Scholarship

As the contours of the ‘GAL of development’ are sketched, it is particularly important to reflect upon the concept of development itself. This is not a neutral concept. It touches upon the identity and self-understanding of speakers, writers, institutions. It recalls the colonial heritage of (international) law and its persistent consequences for today’s post-colonial or not so post-colonial but surely unequal world.¹² The concept of development thus evokes bitter memories and lingering suspicions.

¹⁰ This is the basic argument of the author’s book, Dann (n 3); for a similar argument, see Boisson de Chazournes (n 4).

¹¹ Roger C Riddell, *Does Foreign Aid Really Work?* (Oxford University Press 2007); David Dollar and Lant Pritchett, ‘Assessing Aid: What Works, What Doesn’t and Why?’ (World Bank Policy Research Report, Oxford University Press 1998); Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How There Is Another Way for Africa* (Penguin Press 2009).

¹² Anthony Anghie, *Colonialism, Sovereignty and the Marking of International Law* (Cambridge University Press 2004); Matthew Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’ (2005) 74 *Nordic Journal of International Law* 335; Sundhya

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One way to grasp the concept is to study theories of development.¹³ Down this path, one could start with the *modernization theory*, which has shaped development thinking since the 1940s and has understood development as the remaking of developing countries and their economic development in the image of industrialized economies; the main focus here was (and for many still is) on economic development, measured mainly in terms of economic growth. Since the 1970s, the awareness grew that development requires a much broader understanding, which includes ecologic and social elements; the status of the individual as actor and end of development was recognized. The notion of *sustainable development* captured this evolution and human rights came to serve as a more appropriate measurement of development. The 1990s brought another turn, with the concept of *good governance*. This emphasizes the importance of institutional structures for an understanding of development and stresses that transparent, accountable, rule-bound and thus foreseeable ways of public authority are key to development.

Such a rehearsal of development theories, however, is somewhat myopic, narrow and ultimately instrumentalist. Another way could be to analyse the political economy of global relations and hence place the field on a map of political and economic interests over time. And surely, one must also consider the fundamental critique of the concept of development. For post-colonial or rather post-developmental authors, the concept of development is nothing less than a cunning reformulation of the civilizing mission that shaped the pre-1945 colonial quest. In this perspective, the very language of the field is telling, which sorts the world in ‘developed’ vs ‘under-developed’ countries, ‘givers’ vs ‘takers’, etc. The World Bank, donor agencies and their mainly Western financiers are, in this perspective, as problematic as their colonial predecessors. ‘Development’ is a disguise for an ongoing subjugation of the Global South – and therefore unacceptable. The very notion of development and its presumably inherent idea of remaking the South in the image of the North are therefore rejected.

Against this backdrop, the role of legal scholarship requires consideration.¹⁴ Two approaches mark opposing poles and demonstrate the possible variety of directions. The first is an approach of *critical distancing and deconstruction*. Given the contentious nature of the concept of development, many argue that it is more adequate to interrogate the ‘law’ from an external, i.e. theoretical, historical and critical, perspective, which lays open the underlying structures of power and dependencies. Doing otherwise would be an exercise in masking and succumbing. The second approach is that of a *pragmatic and doctrinal engagement*. This approach can point to the fact that

Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

¹³ For especially illuminating accounts, see John Martinussen, *Society, State and Market* (Zed Books 1997); and Gilbert Rist, *The History of Development* (Zed Books 2008).

¹⁴ For a general interrogation on the role and idealistic impetus of legal scholarship, see Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012); Luis Eslava and Sundhya Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law’ (2012) 45 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 195; Jochen von Bernstorff, ‘International Legal Scholarship as Cooling Medium in International Law and Politics’ (2014) 25 *European Journal of International Law* 977.

the area is surely structured also by law, which requires serious attention if it is to function as an instrument of regulation and design.

The approach taken in this chapter is a combination – and seeks synergies between the critical and the pragmatic, the doctrinal and the contextual engagement. It is acutely aware of the political economy of development and the historical and theoretical problems of the concept of development. It therefore tries to understand and interpret the law (or rules) in their broader cultural and societal context. However, it also recognizes the need to engage with the existing rules and structures in a doctrinal manner, i.e. according to a systematizing approach that takes rules seriously and seeks to understand them in a coherent way. It perceives the current and increasing disconnect between legality and legitimacy in the international and global order as alarming and as undercutting the instrument of law in general. This approach therefore holds on to an understanding of law that ascribes it three main functions: law as a public and credible indicator of normative ideas and ideals; the formalizing effect of law, and the transparency function of law. In this perspective, law is a fundamental instrument of emancipation – and not merely one of good will or mere power.

The understanding of development that forms the basis of this study is a minimalist and procedural one. In terms of substance, its core aim is to reduce inequalities between and in states. More importantly, however, it regards ‘development’ as a political process concerning economic and societal choices. Therefore, there is no thick overarching goal to be achieved by economists, technocrats or lawyers, but rather an ongoing process of contentious debate about choices.¹⁵

2.3 Principles

One approach and task of legal scholarship in a fairly new and fragmented field, as is the law of development cooperation, is to propose principles. Principles, such as precaution in environmental law or most-favoured nations in trade law, serve three main functions. First, they highlight the general ideas and guiding notions of a field and thus help to systematize the legal material ‘around’ these notions; they thereby help to create a more transparent understanding of the legal field in general. Second, they provide internal (i.e. legal, and not political or philosophical) yardsticks to evaluate norms in the field. Third, they rationalize collisions and conflicts between different values or interests that find their expression in these principles.¹⁶

Given that the GAL of development (just like GAL in general) is dealing with a largely under-researched field with a non-transparent set of rules, it appears to be particularly advisable and important to suggest principles for the GAL of development. There are two sets of principles upon which such an endeavour can be based. First, there are the general GAL principles: participation, right to be heard, transparency and

¹⁵ For an elaboration of this understanding, see Dann (n 3) 17–21.

¹⁶ Martti Koskenniemi, ‘General Principles’ in Martti Koskenniemi (ed.), *Sources of International Law* (Ashgate 2000); Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (2008) 9 *German Law Journal* 1909.

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accountability.¹⁷ These provide basic notions for an analysis of internal institutional rules, in particular those that deal with the role of the individual vis-à-vis administrations and the (in practice) often blurry contours of administrative powers.¹⁸

Another set of principles is more contextual and thus based more directly on the circumstances in the field of development. Five principles in particular have been proposed here:¹⁹ (1) *collective autonomy* as the basic concept behind sovereignty, self-determination and ownership, which reacts to the fact that states are important actors in development cooperation and their autonomy is a central (and legally founded) notion in the field; (2) *human rights* (or individual autonomy), which emphasizes the fact that individuals are also important actors in the development process and their well-being is the ultimate end of the process in general; (3) *efficiency* as a more procedural notion, which highlights the fact that development interventions must also be justified in terms of their outcomes and the demand that (in particular) public money has been spent efficiently; (4) *accountability*, to emphasize that respect for and control of agreed rules beyond the traditional Public International Law (PIL) notions of responsibility are particularly important in the area of development cooperation;²⁰ (5) *development*, which underscores that although there may be no convincing substantive notion of development beyond the reduction of inequality, a procedural concept of development should inform all rules and actions of institutions.²¹

These two sets of principles certainly overlap, in particular where they underline the individual's role in and expectations of the legal regime. Participation and the right to be heard are specific human rights that are as relevant in the GAL context generally as in the development context in particular; transparency is, in the understanding of this author, a precondition and thus a special element of accountability – and, as stated above, also particularly important in the institutional law of development. However, the contextualized principles in the second set go beyond this, and therefore appear to be more helpful. For one, they take into account the legally founded interests of more actors, in particular of states (through the principle of collective autonomy). Second, they emphasize specific issues that are of special relevance here, in particular efficiency and development.

The most important argument for the more contextualized principles, however, consists in the observation that they serve better the third function of principles,

¹⁷ Kingsbury, Krisch and Stewart (n 1) 37–42; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247; Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187.

¹⁸ On human rights generally as relevant yardsticks of review, see Benvenisti (n 1); Jochen von Bernstorff, 'Procedures of Decision-making and the Role of Law' in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer 2009), 803.

¹⁹ Dann (n 3), 219 with a more elaborate explanation of these principles and more references on each of them.

²⁰ *Ibid.*, 445.

²¹ *Ibid.*, 226. For an extensive account of the welfarist tradition in international law, see Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations* (Cambridge University Press 2012).

mentioned above: they rationalize collisions and conflicts between different values or interest that find their expression in these principles.²² The principles relate to each other in many ways, which are sometimes complementary, but more often contrasting. The collective autonomy of recipient countries may conflict with the autonomy of donors; the duty of solidarity can contradict donor autonomy; human rights may restrict the autonomy of recipient states; efficiency may undermine autonomy. Other conflicts are also conceivable. The question of how they are to be resolved is unavoidable. There are no general binding rules for conflict resolution, nor is a hierarchy among them discernible. Certainly, legal principles have precedence over structural ones, but there is no order of priority between the legal principles of collective and individual autonomy. Creating conflict resolution rules hardly appears to be possible, given the many different forms that conflicts might take. Instead, it seems that specific solutions must be found for individual cases.

3 STRUCTURES IN TRANSFORMATION: INSTITUTIONS, FINANCES, FORMATS

Against this backdrop of characterizing the basic features of the field, its concrete institutional structures, financial sources and formats of transfer or financing instruments will now be examined. What complicates this examination, and at the same time makes it particularly interesting, is that these structures are undergoing a profound transformation. Since approximately the turn of the century, the system of development cooperation is morphing from an area that is mostly dominated by Western public administrations that organize financial transfers in barely coordinated ways into a field in which a great variety of actors (public and private, from the ‘North’ and the ‘South’) operate, in which also the transfer of knowledge has become central, and which is increasingly shaped by competition between actors.²³ The reasons for this transformation are manifold: the rise of emerging economies such as China, the radically lowered communication costs thanks to the Internet, incredible amounts of private wealth in search of meaning, etc. Whatever it is, the emergence of a development system 2.0 is undeniable – and an important part of this transformation are rules and regulations and hence the GAL of development.

3.1 Actors and Interactions

Up to the 1990s, the development system was dominated by Western public donors, acting bilaterally as national donors and multilaterally through international organizations.²⁴ States set up specialized departments (USAID, DFID, BMZ, etc.), as did the

²² Dann (n 3), 297.

²³ Jean-Michel Severino and Oliver Ray, ‘The End of ODA: Death and Rebirth of a Global Public Policy’ (2009) Center for Global Development Working Paper No. 176; Dirk Messner, Jing Gu and John Humphrey, ‘Global Governance and Developing Countries. The Implications of the Rise of China’ (2008) 36 *World Development* 274.

²⁴ Dann (n 3) 158 ff.

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EU. On the international level, a special type of international organization was created to deal with the special task of development: development banks, such as the World Bank, with a broad membership but dominated by donor countries; the same applies to regional development banks. Western donors organized themselves collectively but separated from recipients in the OECD's Development Assistance Committee (DAC), which provides information and helps to formulate coordinated rules.

On the other hand, the recipient countries never formed lasting collective and separate structures. Certain attempts, in particular vis-à-vis the EU, which re-negotiates its development cooperation with a large group of countries every five years, did not bear fruit.²⁵ The most important universal and truly common organization was (and is) the UN. In particular, since the 1960s (when developing countries gained a majority), it turned a major part of its attention and organizational structure to development questions. The UN surely has a global presence, but seldom became a leading institution in terms of new policies or instruments; such a role was rather played by the World Bank.

Interaction between the actors in this traditional structure was characterized by high complexity, a lack of transparency and a continued failure to effectively coordinate their actions. Since the 1960s, the idea of coordinated action was called for on many levels (EU, UN) but never really succeeded.²⁶

This institutional setting has been profoundly transformed since approximately the year 2000. While the old structures have not vanished, they have been complemented by a number of new actors that might ultimately change the entire character of the development system. A first set of new actors are emerging economies.²⁷ The most prominent example is China, which has become an important provider of financial and technical assistance itself. Other emerging economies such as Brazil or India invest in development policies having mostly regional reach; the Arab states have done the same, since as early as the 1970s. None of them is integrated in the OECD-DAC (Organisation for Economic Co-operation and Development's Development Assistance Committee) as part of the 'Western club', and they generally do not subscribe to the Western model of providing aid against economic and political reforms that aim to mould them

²⁵ E.g. the ACP Group, established in 1975 through the so-called Georgetown Agreement; see Dann (n 3) 212 ff.

²⁶ Lester Pearson, *Partners in Development: Report of the Commission on International Development* (Praeger 1969); Jacob Kaplan, *International Aid Coordination: Needs and Machinery* (West Publishing Company 1978); Dennis Whittle and Mari Kurashi, 'Competing with Central Planning' in William Easterly (ed.), *Reinventing Foreign Aid* (MIT Press 2008); Kirsten Schmalenbach, 'Netzwerke und Verwaltungsräume in der Globalen Entwicklungszusammenarbeit' in Philipp Dann, Stefan Kadelbach and Markus Kaltenborn (eds), *Entwicklung und Recht: Eine systematische Einführung* (Nomos 2014); Jörg Faust and Dirk Messner, 'Entwicklungspolitik als Global Governance Arena' in Helmuth Breitmeier, Michèle Roth and Dieter Senghaas (eds), *Sektorale Weltordnungspolitik: Effektiv, gerecht und demokratisch?* (Nomos 2008).

²⁷ Alice H Amsden, *The Rise of 'the Rest': Challenges to the West from Late-Industrializing Economies* (Oxford University Press 2003); Julie Walz and Vijaya Ramachandran, 'Brave New World: A Literature Review of Emerging Donors and the Changing Nature of Foreign Assistance' (2011) Center for Global Development Research Paper 273 <http://www.cgdev.org/files/1425691_file_Walz_Ramachandran_Brave_New_World_FINAL.pdf> accessed 3 March 2015.

in the Western image. They rather focus on securing natural resources and geopolitical loyalty. Most recently, there has been talk of plans to set up a separate development bank (the so-called ‘BRICS Bank’), which would provide an alternative to the World Bank and Western-dominated development banks.²⁸

Equally important is the rise of new or partly re-engaged private actors. These include philanthropic organizations, the most prominent example being the Bill & Melinda Gates Foundation, which invested USD 3.9 billion in 2014. However, several NGOs increasingly use the Internet, crowdfunding or idea-sharing to advance developmental goals. Next to these are private banks or wealth funds, which have (re-)discovered developing countries as good places to invest.²⁹

The emergence of these new sets of actors is changing the modes of interaction in the development system in general. China and other emerging donors are placing increasing pressure on the traditional system, creating competition. The OECD has aimed to integrate them, but with limited success. The OECD and the World Bank together have advanced agreements on better coordination through soft law, such as the Paris Declaration, to coopt new actors into the general system; this too with only limited success, as it concerns the integration of new actors. The World Bank has started major reforms of its internal law to accommodate the interests of countries such as China. Thus, institutional competition in the development system has surely grown.

3.2 Financial Sources: the ODA and Others

With the emergence of new actors, the financial sources of development cooperation have also changed profoundly. Until the 1990s, public funds invested in development were the central source for the development system, measured in the OECD-developed category of Official Development Assistance (ODA).³⁰ However, since the turn of the century, alternative sources are becoming increasingly important, and by now clearly outweigh ODA. Development cooperation is increasingly financed by money from private actors. There is, first of all, foreign direct investment (FDI), which is larger than any other source. Financing from private philanthropies has become much more

²⁸ Mariana M Prado, ‘The BRICS Bank’s Potential to Challenge the Field of Development Cooperation’ (2014) 47 *VRÜ/Law and Politics in Africa, Asia, Latin America* 147.

²⁹ Gates Foundation Fact Sheet <<http://www.gatesfoundation.org/who-we-are/general-information/foundation-factsheet>> accessed 5 March 2015; on crowdfunding see ‘Crowdfunding’s Potential for the Developing World’ (2013) Information for Development Program and World Bank <http://www.funginstitute.berkeley.edu/sites/default/files/WB_CrowdfundingReport-ES%20%281%29.pdf> accessed 5 March 2015; on private banks and sovereign wealth funds, see Annalisa Prizzon, ‘Old Puzzles, New Pieces: Implications of the New Development Finance Landscape for Post-2015 Scenarios and for Partner Countries’ <<http://www.iilj.org/newsandevents/Prizzon.pdf.pdf>> accessed 5 March 2015.

³⁰ On this category, see Dann (n 3) 14–17; on its reform, see *infra* (n 32). Since the 1960s, the UN and developing countries have demanded that 0.7 per cent of the GDP of industrial countries should be devolved as ODA. Traditionally, the US is the largest provider of ODA in absolute numbers, whereas the Scandinavian countries stood out in relative terms, investing between 0.5 to 0.9 per cent of their GDP into ODA.

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important. Another hugely important source, although not for common purposes, are remittances, i.e. the private transfers of cash from migrants to their relatives 'back home'.³¹

These developments have challenged the focus on ODA and public donors. A broader view is necessary to grasp the entity of the financial resources that flow into development; ODA is only one and a smaller part of the financial flows to the Global South. As a consequence, the OECD has already revised the ODA category.³² However, ODA surely remains an important source, in absolute terms but also in a more substantive perspective: only public donors will pursue common purposes and keep an eye on causes that do not promise good returns. The financial crisis has demonstrated how volatile private investors (i.e. FDI) can be.

3.3 Formats of Transfer: Plans, Project and Budget Support, Knowledge Products

A dynamic evolution and diversification is also taking place with regard to the formats that are used to transfer funds or knowledge or organize such transfers.³³ A central element of this evolution is the emergence of knowledge products; however, plans and budget support have also changed in meaning.

At the beginning of the cycle of development interventions based on external transfers is the *multi-year plans*, which formulates tasks and focus areas. These are normally set by the donor agency with different grades of coordination with the recipient.³⁴ Legally, these plans are mostly internal documents of the donors, which bind their staff but are without external effect. Since the late 1990s, so-called Poverty Reduction Strategy Papers (PRSPs) written by recipient state governments precede the donor plans. These were meant to provide recipient states with greater 'ownership' but also to hold them responsible for their compliance.³⁵ Most donors have adopted internal provisions that oblige them to set their plans only on the basis and within the framework of PRSPs.

Originally, the central and still very important format is *project support* (also called investment lending). Here, a donor agency contributes funds or knowledge to a

³¹ In 2010, workers' remittances amounted to a total of USD 25 billion in lower-income countries (LICs) and USD 300 billion in middle-income countries (MICs): see Prizzon (n 29), 8.

³² See OECD-DAC, Scoping the New Measure of Total Official Support for Development (TOSD), DCD/DAC(2014)35 <[http://www.oecd.org/dac/stats/documentupload/DCD-DAC\(2014\)35-ENG.pdf](http://www.oecd.org/dac/stats/documentupload/DCD-DAC(2014)35-ENG.pdf)> accessed 1 June 2015.

³³ The terminology is difficult to select, because different actors use different terms (and change them continuously). The World Bank speaks of 'financing instruments' when it comes to project or budget support. However, this does not cover non-financing instruments. The term 'format of transfer' is therefore used here as a general term indicating all instruments that serve to organize the orderly, focused and effective transfer of funds and knowledge.

³⁴ While since the 1970s the EU has negotiated bilateral frameworks with the ACP group, the World Bank establishes its Country Partnership Frameworks unilaterally after consultations: World Bank Group, Directive on Country Engagement 2014, s 3 (2).

³⁵ Tan (n 4).

recipient country's project, for example the construction of a dam.³⁶ From a legal perspective, project aid is normally agreed in a bilateral project agreement between the donor agency and the recipient country, which outlines the design of the project and assigns roles and responsibilities to different actors; and, in particular for the donor, provides for payment in one or more tranches as the project proceeds. The procedures of appraisal and negotiation of projects are intensely regulated by donors' internal policies.³⁷ The advantages of project aid for the donors lie in the fact that it is fairly easy to control and thus to evaluate, contains a limited financial risk – and is also often quite visible, which makes it attractive to politicians. However, there are also clear disadvantages: projects normally have a limited reach and they come with high administrative and transaction costs. From the recipient perspective, projects might come with fairly intensive control of lenders, precise obligations and hence intrusion. This is less and less attractive for those recipients who have expertise and access to other sources of funding, such as China or India.

In reaction to these disadvantages, too, a second instrument has become popular mainly since the 1980s: *budget support* or policy lending (originally called structural adjustment lending).³⁸ In this case, donors do not finance a concrete project, but subsidize a recipient's sectoral budget, e.g. the health budget, and leave the recipient to decide how to spend it. This reduces transaction costs, has a broader impact and gives more influence to the country's political and perhaps democratic process, since the budget is normally controlled by the parliament. However, budget support also comes with a clear risk from a donor perspective: it has much less control and measurability. To compensate for this, donors use the instrument of conditionality to retain a grip on the intervention. This means that the donor agrees to provide the funds only on the condition of certain (prior) actions by the recipient. These prior actions may be far-reaching policy reforms, such as the privatization of certain markets (for example energy or water) or the liberalization of customs regimes, but also participation in political dialogues or other softer forms of engagement or control. In legal terms, budget support is again agreed upon in bilateral agreements. Equally important is the letter of intent from the recipient in which the recipient 'promises' to execute certain policy reforms requested by the donor.

From the very beginning, donors provided not only financial but also *technical support*, i.e. the transfer of knowledge. This was originally connected to concrete

³⁶ After World War II, the focus of projects was mostly on sectors such as infrastructure and energy ('brick-and-mortar-phase of development cooperation') but since the 1960s and 1970s has extended into more sectors, such as education (building or staffing schools), health policies (building or staffing hospitals, educating doctors) or even the justice system (reforming court administrations).

³⁷ World Bank OP/BP 10.00, Investment Project Financing; Regulation (EU) 233/2014, Financing Instrument for Development Cooperation 2014–2020; BMZ-Verwaltungsvorschrift, *Leitlinien für die bilaterale finanzielle und Technische Zusammenarbeit* [Guidelines for bilateral financial and technical cooperation] (March 2007) <<http://www.bmz.de/de/mediathek/publikationen/reihen/strategiepapiere/konzept165.pdf>> accessed 21 September 2015.

³⁸ Celine Tan, 'Regulation and Resource Dependency: The Legal and Political Aspects of Structural Adjustment Programmes' in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer 2010).

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projects (e.g. providing the engineering expertise to build a dam) and hence rather limited in impact. Since the 1990s, technical assistance or advisory work, however, has become increasingly widespread and more far-reaching. Donors such as the World Bank now provide or actually suggest policy advice, for example by helping to draft new laws on financial regulation. Such transfer of knowledge is much less regulated, although it may reach even more deeply into the recipient's autonomy and might have wider impacts on the rights of citizens in the recipient country. Their provision is also agreed upon in project agreements, but their regulation is hardly regulated.

A central problem of development cooperation has always been the control and evaluation of its actions. Since the 2000s, another knowledge instrument was developed and became particularly important: the instrument of *measurements and indices*. The World Bank especially (but also the UN) has started to create indices that rank countries and actors according to various criteria.³⁹ The best-known indices are the UN's Human Development Index and the World Bank's Doing Business Index. These instruments are not connected to a specific (financial or knowledge) transfer but evaluate actors more generally, and thereby pre-structure the perception of actors. This can have an immense impact: investors can rely upon these indices to decide about their activities; indices can put pressure on governments to compete in accordance with the criteria of such indices; they also determine the allocation of funds in donor agencies. At the same time, these knowledge instruments are hardly regulated by law, even though they have a tremendous impact on the evaluated parties. They clearly constitute an exercise of (public) authority that calls for a better regulation by law.

4 INSTRUMENTS AND MECHANISMS

Having set out principles, structures and formats, it is now possible to turn to four concrete examples of legal instruments or mechanisms that are particularly representative for the GAL of development. These 'deep drills' demonstrate how law concretely shapes development interventions. These four fall into different phases in the cycle of development interventions: conditionality and safeguards mostly affect the agreement and implementation phase; indicators are relevant for all phases; while complaint mechanisms concern mostly the implementation phase.

4.1 Conditionality

In the context of development law, conditionality became a prominent topic with regard to structural adjustment lending (now budget support or policy lending) of the World Bank and the International Monetary Fund (IMF) in the 1980s. Often, acutely needed payments were conditioned on the enactment of (often neoliberal) macroeconomic reforms, the contents of which were usually highly contentious, yet were nevertheless

³⁹ Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford University Press 2012); Dann (n 3), 147–150; Michael Riegner, 'Towards an International Institutional Law of Information' (2015) *International Organizations Law Review* (forthcoming).

mostly accepted without any democratic process.⁴⁰ Ever since, conditionality has been a central instrument of development law and one of its most controversial ones. Given the political, economic and historical context of the actors in a development intervention, it appears like an instrument to exploit the weak position of recipients and abuse the asymmetries of power.

At the same time, conditionality is simply a well-known and probably indispensable instrument of any finance law contract. It serves the principally legitimate purpose of compliance, as it aims to ensure that the content and the purposes of the contract are attained.⁴¹ In development cooperation, in particular where cooperation is financed with public money, conditionality reacts to the expectation that public funds (i.e. taxpayers' money) is not wasted but spent effectively. Its increased use here is also a reaction to the observation that compliance by developing countries is often weak.

More general legal structures of conditionality are difficult to pin down. They are instruments that all donors use. However, there is hardly a general and explicit framework. In budget support, two levels of conditionality apply.⁴² Donors require, first, that recipient governments generally fulfil certain criteria of good governance to ensure that their funds are invested in a partner that is 'worth their trust'. On a second level, now with respect to concrete transfers, they demand specific activities (in the World Bank called 'prior actions') that support the intentions of the concrete budget aid. In project support, donors have different approaches. The World Bank, for example, conditions its transfers upon demands that must be fulfilled *ex ante* (before an agreement is concluded and money dispensed), safeguards in particular. The EU, to name another example, rather uses *ex post* conditionality.⁴³

Observed through the lens of the principles of development law, introduced above, some of the contentious issues can be reformulated in more abstract ways – and perhaps directions of inquiry be made out. Surely, conditionality can collide with the collective autonomy of recipient states, which is pushed to accept certain demands. However, they are also often introduced to safeguard the collective autonomy of donors and their claim to decide how the money is spent. If donors demand radical reforms that endanger people's livelihoods, this may collide with the principle of human rights. The principle of accountability would demand more transparency.

Two problems are particularly alarming. First, there is often no broader political discussion and agreement on conditions, because agreements are concluded by governments. A greater transparency and broader involvement of relevant constituencies is missing. Second, there are no limits to what a lender might include; the conditions may cover any topic and be of any intensity. While in domestic law a morality clause would cut unbearable conditions (and courts would uphold those limits), nothing of this sort exists in international law.

⁴⁰ Tan (n 38); Mary C Tsai, 'Globalization and Conditionality: Two Sides of the Sovereignty Coin' (2000) 31 *Law and Policy in International Business* 1317.

⁴¹ Dann (n 3), 358–361.

⁴² Tan (n 38), 184; Dann (n 3), 417–424.

⁴³ Dann (n 3), 372–380 (on the World Bank); 392–393 (on the EU).

4.2 Safeguard Policies

The notion of *safeguard policies* is taken from the law of the World Bank, but the instrument is common to several donors. It refers to the internal policies of the donor agency, which set substantive standards and procedural rules that must be complied with before the donor can agree to give a loan. The Bank began to adopt such policies in the 1980s, beginning with the regulation of an environmental assessment, and has since extended their scope to various environmental and social concerns.⁴⁴

The impact of these safeguard policies is far reaching. They demonstrate that the risks connected to the (extraterritorial) effects of transfer activities must be taken seriously and set self-imposed⁴⁵ limits on what the donor in question is allowed to do. Moreover, while they are internal Bank policies and hence directly binding only upon its own staff, they also indirectly bind recipients, which must comply with these policies to obtain a loan. Some countries have therefore simply modelled their laws upon them. At the same time, The World Bank's safeguard policies initiated a process of inter-institutional learning or competition; first the International Finance Corporation (IFC) and later regional development banks adopted similar instruments, often further developing them – such that now the World Bank is reforming its safeguards to keep up the pace. Interestingly, however, neither the EU, one of the world's largest donors, nor many national donors have formally adopted similar general and transparent substantive and procedural standards.

Again examined through the lens of general principles, various conflicts may be seen. As explicit rules on environmental and social protection, they are important instruments in setting transparent standards and ensuring individual autonomy or human rights and accountability. From the perspective of collective autonomy, however, they also raise concerns, as they limit the autonomy of states to set and apply their own laws. This is connected to several questions. One concerns scope. Do safeguards apply to all formats of transfer (i.e. project and budget aid and knowledge transfers) or only to some? While the World Bank applies them only to project aid, others have extended them to budget support and thus immensely increased their reach. Which substantive area do they cover – only environment and social or labour rights, or also political rights? The broader their scope, the less flexibility recipient countries have to set their own standards. A second question concerns the 'density' of regulation. From the perspective of human rights, one is inclined to be in favour of high standards of social and environmental protection. However, this can also overburden recipients that have less capacity – or willingness – to accept demands. Many emerging economies are simply not willing to accept extensive regulation through development banks – and

⁴⁴ Ibrahim FI Shihata, 'World Bank and the Environment: A Legal Perspective' (1992) 16 *Maryland Journal of International Law* 1; Charles Di Leva, 'International Environmental Law, the World Bank, and the International Financial Institutions' in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer 2010); Jose E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005).

⁴⁵ Jochen von Bernstorff and Philipp Dann, 'Reforming the World Bank's Safeguards: A Comparative Legal Analysis' (2013) <http://www.jura.uni-tuebingen.de/professoren_und_dozenten/vonbernstorff/projekte/WorldBanksSafeguardsacomparativelegalanalysis.pdf> (last accessed 3 June 2015).

demand more flexibility and room to apply their own national laws and systems of protection. Safeguards are, then, to the detriment of collective autonomy, but also of the effectiveness of interventions, where project agreements are so cumbersome to follow that transaction costs are very high.

This has led the World Bank, which is engaged in intense competition with other, often private, lenders, to reform its system. It has introduced a new transfer format (the so-called Program-for-Results lending) and it is in the process of giving more leeway in safeguard aspects.

4.3 Indicators

The latest instrument, which has already had a profound impact on the development area and is emblematic of global governance more generally, is indicators. Indicators are numerical standards to measure behaviour (and situations) on the basis of statistical data.⁴⁶ In development policies, they are often used in a fairly simple way: a policy declaration or loan agreement formulates aims expressed in numbers (e.g. reduce child mortality by two-thirds); it then names quantifiable indicators as criteria for their achievement (e.g. under-five mortality rate, infant mortality rate, proportion of one-year-old children immunized against measles) and sets a deadline to achieve the aim (e.g. end of 2015).

Examples of the use of indicators in the development area abound: the most prominent example are the Millennium Development Goals (MDGs), which formulate eight aims to be reached by 2015. It is the most ambitious and visible agenda for development that has been established in decades, and is to be continued in another set of development goals to be set for the period between 2015 and 2030 – and operationalized through a set of indicators. Closer to the institutional law of development is the Paris Declaration of 2005, which uses the same mechanism to enshrine and effectuate basic principles of how development institutions cooperate.⁴⁷ Principles such as ownership, harmonization or mutual accountability are broken down and measured to achieve a more efficient development cooperation. Today, indicators are also used extensively in the internal regulations of donor organizations. For example, the World Bank deploys indicators to measure the situation and performance of recipient countries to determine how much of the budget should be allocated to them (Country Policy and Institutional Assessments – CPIAs).⁴⁸ Indicators are now also a typical instrument to measure behaviour in concrete development projects, and control compliance with safeguards (e.g. the IFC's performance standards).⁴⁹

Indicators are a widespread instrument in development for many, though not always good, reasons. In particular, they suggest two advantages. First, they appear to be especially helpful in making development interventions more effective and the responsible actors more accountable. They 'simply' state what has happened (or not). They are therefore able to show progress (or the lack thereof) towards goals. Second, they are

⁴⁶ Davis et al (n 39); Dann (n 3), 147–150.

⁴⁷ Dann (n 3), 141–147.

⁴⁸ Riegner (n 39).

⁴⁹ Von Bernstorff and Dann (n 45), 18.

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assumed to be objective and non-political. However, it is obvious that these two advantages are highly problematic. They obscure the questions not only of who sets indicators and measures, but also of whether measurement is possible or data are reliable. Indicators cloak political and contentious decisions in a guise of objectivity.

Indicators also pose fundamental legal questions. Most fundamentally, one might ask whether and how they relate to law at all. This is not only a question of their source (indicators set down in law are law) but of their mechanism. How do they relate to or square with norms such as human rights? Can rights be quantified and thus translated into indicators? Another question concerns the competences to establish and the ability to check indicators. From a more practical perspective, one might question how it can be ensured that the data retrieved is correct.

4.4 Complaint Mechanisms

A fourth area of innovation concerns the growing number and importance of accountability mechanisms in the institutional law of development. A number of new instruments and an institutionalization of external third-party control seek to increase mutual accountability and, in particular, to give voice to the individuals affected.

Most prominent among these is the World Bank's Inspection Panel. Set up in 1993, the Panel hears complaints by project-affected parties who claim that the Bank has violated its own safeguard policies, and can oblige the Bank to react. A regular case law has developed, which spells out the boundaries of the actions that the Bank may take. Today, almost all development agencies have similar institutions, although they mostly lack transparent standards to check (such as the Safeguard policies) and their procedures are less formalized (e.g. the EU Ombudsman).⁵⁰ Second, there is a trend in development law (of Western donors) to oblige recipient countries to establish 'grievance mechanisms' through which project-affected parties can voice complaints while projects are ongoing. The third example of mechanisms that strengthen the accountability of development actors are actually not complaint mechanisms in themselves, but provide a basis for them: access to information policies that give individuals the right to see documents on development decisions.

The effects of these instruments lie in their strengthening of the role of the individual, pushing forward an element of an international rule of law. The reasons for this development are manifold, and two in particular should be highlighted. First, development interventions pose risks for individuals (such as in involuntary resettlement). It is therefore only natural that those who are negatively affected should be given a voice. At the same time (and this is particularly important), these complaint mechanisms serve a particular learning and knowledge-building function in the logic of

⁵⁰ Andrea N Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of 'Judicial Spirit' in Public International Law* (Eleven International Publishing 2009); Ibrahim FI Shihata, *The World Bank Inspection Panel* (Oxford University Press 2000); Kirsten Schmalenbach, 'Accountability: Who Is Judging the European Development Cooperation?' in Sandra Bartelt and Philipp Dann (eds), *Entwicklungszusammenarbeit im Recht der Europäischen Union: The Law of EU Development Cooperation* (Europarecht-Beiheft No 2, Nomos 2008) 162.

development cooperation, since development cooperation is a cyclical system. Complaints, therefore, not only have the function of voicing dissent, but also provide feedback and information and hence (ideally) contribute to a learning process.

Here again, legal scholarship has many questions to study. While there are now several studies that provide overviews on the various instruments, these should be considered in more detail: who exactly gets heard by whom, about what and when. This calls for further interdisciplinary and empirical work on the use and effects of these instruments.

5 CONCLUSION

The GAL of development carries the promise of transparency and accountability through law – and eventually effectiveness and respect for autonomy in development processes. These are hopes relating to the law's *effects*. More tangible is that the GAL of development is already an especially fruitful example of and testing ground for research on global legal regulation – for various reasons, outlined as follows.

First, law and legal innovation are driven here primarily by international institutions, thus emphasizing the increasing powers and potential that such institutions wield and the great and sometimes bewildering variety of instruments and techniques that they use. The law is established at all levels of authority and is thus a truly multi-level law. This raises one of the central (and most difficult) questions about GAL in general, i.e. the question of what 'global' actually means in a legal realm in which sources of law are normally linked to a specific level of authority (either domestic *or* international *or* supranational law). In the GAL of development, it is possible to recognize a common law or *ius commune* that has common features across levels and types of institutions. Finally, the law of development cooperation is a fruitful subject, because it is especially vulnerable to critical questions about the autonomy of law vis-à-vis other rationalities, such as politics or economy – and hence stimulates a contextual approach that seeks synergies between the doctrinal and the critical.

At the same time, development policies and their law are a fascinating mirror of the global order in general. One example of this role is the evolution of instruments in development cooperation as a mirror of the rise of and challenge to Western thought over the past 60 years. Originally, in the early Cold War decades of the 1950s and 1960s, development interventions were rather discrete projects, affecting a limited geographical area and a fairly discrete group of people. Since the 1980s, new instruments such as budget aid and knowledge instruments have been designed, which have the potential to affect whole countries and polities. Taking the example of the privatization of the water supply, a new policy or law in this realm profoundly changes the way in which a society distributes one of its most fundamental resources. The emergence of such wide-impact instruments coincided with the politicization of development policies. Starting in the late 1970s and dominating since the 1990s, (Western) donors have injected (ever) more openly political dimensions and conditions into their work. What began with a limited insistence on respect for human rights (Uganda, late 1970s) evolved in the 1980s into an aggressive agenda of economic liberal reforms (Washington Consensus) and ushered in the heyday of the 1990s' liberal

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triumphalism and self-confidence in the good-governance agenda, and thus a comprehensive blueprint of how politics are supposed to be organized. The architects of these changes, in particular the World Bank and the OECD-DAC, are therefore now described as ‘globalizers’ that spread their concept of development and good societies across the globe.⁵¹

Today, the 1990s already seem far away, and the liberal agenda is encountering increasing competition and rejection. Suffice it to mention the newly founded Asian Infrastructure Investment Bank. Again, development law and its instruments are a mirror of this. Studying the GAL of development therefore promises to provide insights into the legal and political structures of this ongoing transformation of the global order.

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⁵¹ Ngaire Woods, *The Globalizers: The IMF, the World Bank and their Borrowers* (Cornell University Press 2006).

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