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REVIEW ESSAY

Twin Siblings: Fresh Perspectives on Law in Development (and *Vice Versa*)

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Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU, and Germany*, Cambridge, Cambridge University Press, 2013, 604 pp., ISBN 9781139097130, £82.00 (hb).

Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development*, Cambridge, Cambridge University Press, 2015, 374 pp., ISBN 9781107092129, £82.00 (hb).

> 'En el mundo estan ocurriéndo cosas increíbles … Ahí mismo, al otro lado do río, hay toda clase de aparatos mágicos, mentras nosotros seguimos viviendo como los burros'[1]

1. Nought degrees of separation: (International) law and development revisited

In 1972, the year when the third United Nations Conference on Trade and Development (UNCTAD) launched a debate on the general reform of the world economic system in the Chilean capital Santiago, David Trubek concluded a self-reflective rumination on the entanglement of law and development with the (dual) injunction that legal scholars should:

> … keep their value preferences and intellectual preconceptions from blinding them to the actual phenomena of legal life in the Third World. At the same time, they must attempt to construct more precise and universal conceptual categories conducive to realistic generalizations.[2]

He went on to acknowledge a tension between these two goals, notably that, 'universal propositions have obscured rather than clarified empirical perception in the past', and that '… a mere search for empirical details will lead to nothing more than the accumulation of unrelated and unrelatable bits of data'.[3] Yet, he finished on the

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1 Gabriel García Márquez, *Cien Años de Soledad* (2009), 14 ('Incredible things are happening in the world … Right there across the river there are all kinds of magical instruments while we keep on living like donkeys', translation from the Penguin Classics edition 2000 (trans. Gregory Rabassa)).

2 D.M. Trubek, 'Toward a social theory of law: an essay on the study of law and development', (1972) 82 *Yale Law Journal* 2, at 50.

3 Ibid.

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hopeful note that it was precisely that tension which would keep the overall quest for what he then called a – presumably global – social theory of law going. While, at the time, scepticism eventually prevailed and the first 'law and development' movement suffered an early death – by self-diagnosed ethnocentrism and naiveté – only two years later,[4] both the interest in law in and of development, and in Trubek's injunction on how to approach the two entangled fields, have been reborn in different guises ever since.[5] However, its successive incarnations were never merely research agendas aimed at reconstructing the linkage between law and the development project, but they were all imbued with strong normative agendas about the purportedly positive and comparatively superior role of law and legal instruments in promoting human development. This has given them the militant character of 'movements' engaged in delimitation exercises against alternative disciplinary frameworks of reference, most notably (development) economics, comparative politics and international relations. Hence, as a field dominated by lawyers, 'law and development' has always also been about professional 'anxieties of influence' on the institutional superstructure and (local) material base of the development process.[6] Yet, typically for the liberal legalism that underlies the 'law and development' project and the stance of many of its contemporary practitioners, Trubek's injunctions are rarely heeded. While a growing body of critical literature has exposed liberal legalism as an epiphenomenon of a wider (neo-liberal) political economy in which law is both a function of the (market) structural forces at play and a cosmetic device to conceal their operation,[7] there has been comparatively little in the way of Trubek's call for the simultaneous theoretical conceptualization and empirical concretization of a legalized development field.[8]

However, taken together the two monographs under review here make significant progress towards that objective, notably by providing fresh perspectives on different but complementary facets of 'law and development'. Indeed, as will be argued throughout this review, both share Trubek's concern to provide more realistic representations of specific aspects of the operation of law in and of development – and as such, they can be seen as twin siblings in the same way as one of the two authors, Luis Eslava, considers (international) law and development to be twin siblings.[9] On the face of it, this is a counterintuitive assertion, given the very different context and pedigree of either text. Philip Dann's *Law of Development Cooperation*

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4 D.M. 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.

5 See, *inter alia*, D.M. Trubek and A. Santos (eds.), *The New Law and Development: A Critical Appraisal* (2006); D. Kennedy, 'Laws and Developments', in J. Hatchard and A. Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21 St Century* (2003), 17; K. Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social', (2004) 26 *The Michigan Journal of International Law* 199; F. Hoffmann, 'Revolution or Regression? Retracing the Turn to Rights in 'Law and Development'', (2016) 23 *Finnish Yearbook of International Law* 45.

6 The analogy was inspired by S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence', (2006) 19 LJIL 339.

7 See F. Hoffmann, 'International Legalism and International Politics', in A. Orford and F. Hoffmann, *The Oxford Handbook on the Theory of International Law* (2016), 954 at 959.

8 A notable exception, however, is S. Pahuja, *Decolonizing International Law: Development, Economic Growth, and the Politics of Universality* (2011), and, of course, Trubek and Santos, *supra* note 5.

9 L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015), at xiii.

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(*Development Cooperation*) is the outcome of a very German rite of academic passage,[10] the *Habilitation*, which, in effect, is a second, post-doctoral thesis meant to demonstrate the author's qualification to represent his or her (sub-)discipline in its full breadth. In this particular case, the initial target audience of the *Habilitationsschrift* published in 2012 was the select German public law community, and the basic structure of the argument reflects the stylistic and argumentative conventions of German (public law) doctrine.[11] However, in the German text, the author draws not only on German administrative and international (constitutional) law doctrine but also on international approaches, including international organization and administrative law, 'global administrative law' (GAL) and, generally, the 'law and development' literature. The subsequent English translation, published in 2013 – and which is here reviewed – added substantive updates and transposed the text into an international key which represents a fascinating alloy of continental (German) and Anglo-American perspectives on the law of development co-operation. As such *Development Cooperation* can be taken to embody the second part of Trubek's injunction, a supreme exercise in legal constructivism, based on a painstaking and meticulous sifting through of an enormous amount of legal material. Its threefold aim is to produce as detailed and accurate a map of this new legal frontier as possible; to, on that basis, uncover the structural properties that underlie its particular geography; and to articulate, thereby, a normative ideal by which the reality of development co-operation practice can be assessed.[12]

Luis Eslava's *Local Space, Global Life* (*Local Space*), by contrast, is an Australian doctoral dissertation based, by the author's own account, on a decade of research in a diversity of legal academies – and development localities – including, next to his doctoral *alma mater* Australia, also Colombia, the United States, the United Kingdom and Germany.[13] Its author is a critical international lawyer writing (broadly) within the intellectual horizon of 'third world approaches to international law' (TWAIL) and post-colonial/de-colonial thought. He is motivated by a profound dissatisfaction[14] with the dominant narratives about the relationship between international law and the development project. On one hand, he sees them being portrayed as entirely 'separate fields of academic and institutional practice',[15] on the other hand, they are held out to be two sides of the same coin, that is, the narrative of a 'strong alliance between law, ideas of progress, and the sensation that by abiding by the law, some kind of development is ensured; a new step in the *long duree* of global modernity is attained'.[16] They are, thus, represented as either 'deterritorialized and exceptional ventures, frictionless discourses that cross our lives only occasionally',[17] or as pervading the most intimate local spaces and as shaping how 'the world' is understood

[10] It is not, of course, unique to Germany but also exists, amongst others, in Austria, France, and Russia.
[11] See P. Dann, *Entwicklungsverwaltungsrecht* (2012).
[12] For some intellectual background by another mediator between legal worlds see G. Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law', (1989) 23 *Law & Society Review* 727.
[13] Eslava, *supra* note 9, at xiv.
[14] Ibid., at xiii.
[15] Ibid.
[16] Ibid.
[17] Ibid.

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and what can – and cannot – be done within it. To Eslava, international law and development are, thus, twin siblings within the grand meta-narrative of modernity whose complicated relationship he sets out to bring out into the open. He does so by focusing on one of the more recent vogues in global governance, namely decentralization, as a laboratory experience in which the deep entanglement of global normativities and local development practices, as well as the shrouding of that close kinship relation, can be observed. Taking his home town, the Colombian capital Bogotá, as his empirical staging ground, he describes what he calls the 'autochtonous internationalization'[18] of its territory and people as a process of (neo-colonial) indirect rule by global actors, institutions, and norms that are at once absent and present in local space. In order to see through the shroud that envelops this process, he employs an ethnographic gaze that allows him to grasp how international law, through the discourse of development, configures the cognitive horizon within which its local subjects construct – but also resist – their 'world'.[19] As such, it is an innovative exercise in ideology critique aimed precisely at Trubek's (first) injunction in its focus on the 'actual phenomena of legal life in the Third World'.[20]

So, not only are (international) law and development twin siblings, but so are, arguably, these two monographs, and, in a sublime way, perhaps, their respective authors as well. Despite evident differences, there are some significant similarities. Both are self-conscious international lawyers interested in working out the specific significance of international law in and for development; they are, thus, both part of a recent internationalist turn in the 'law and development' literature, which had heretofore been dominated by transnational (private) and constitutional legal logics and histories.[21] They are also both explorers who seek to venture beyond conventional disciplinary confines, and map-makers who scout uncharted conceptual territories with a taxonomical mindset. They both have hands-on experience of (legal) life in the global South but (currently) work in the global North. Most importantly, they both see, albeit in distinctive ways, the entanglement of law and development in the broader context of the nature and evolution of international legality and of legal (post-)modernity, in general. Hence, in conjunction, they transcend their own respective concerns and provide a vision for the sort of social theory of (international) law that Trubek called for more than 40 years ago.

2. Managerialism at work: The legalization of development co-operation

Engaging with *Development Cooperation* is not an easy task as it musters more than 500 pages of legal analysis intended to both empirically delimit and to normatively systematize a new (sub)field of international law. As such, it contains a wealth of material that provides an encyclopaedic overview of institutions, normative

[18] Ibid., at 21.
[19] Ibid., at 298.
[20] Trubek, *supra* note 2, at 50.
[21] See B. Rajagopal, *International Law From Below* (2003), xiv.

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frameworks and procedures which will be relevant to practitioners and theorists of both development and international law alike for a long time to come.[22] In line with this purpose, it constructs a detailed two-dimensional 'political' map of the field into which each viewer can then zoom in according to her specific interests – which is why *Development Cooperation* cannot really be summed up. It can, however, be reviewed in terms of its overall approach to international normativity and to the normative substrate that emerges from the reaction chamber of legalized development co-operation.

The elements Dann chooses to base his 'field review' on are the diffuse sets of (international) rules that govern three very different institutional contexts – the World Bank, the European Union, and Germany – and which Dann extrapolates into the 'law governing the institutions and processes of development cooperation'.[23] He is, of course, aware that this represents a significant narrowing down of the field, both in terms of the (near) exclusive focus on the donor side of the law, and in its concentration on multilateral institutions – aka international organizations – and on one donor state. Yet, this particular institutional focus is owed to temporal and spatial expediency, as Dann makes clear in his conclusion, and he himself regards this as a work in progress, or rather, a map in the process of being drawn as more and more details of this new normative field are being explored. He points out, in particular, that the inclusion of the private and transnational side of development co-operation would be a necessary object of future research and an important complement to the emerging legal map. Yet, neither is the focus of this monograph on the public (domestic and international) law of development co-operation just a random choice, but it does express the normative horizon within which Dann sees development, notably as an inherently political field that, therefore, involves 'an ongoing process of taking decisions about public choices to better the lives of those affected by poverty'.[24] It is, thus, to him, an activity that is firmly rooted in the public sphere and subject to public constitutional and administrative legal control, an important choice of focus that will structure the way in which Dann conceives the field. Its normative core is, therefore, the (public) law governing the transfer of financial overseas development assistance (ODA) by states and international organizations, with other forms of development co-operation, notably by private actors or those not strictly aid related, being in the penumbra of this gravitational centre.[25]

As with all map-making ventures, *Development Cooperation* unfolds in a productive tension between an empirical and a normative project and the related

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[22] Dann had (previously) contributed several entries to R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006); has also co-edited the first systematic treatment of 'law and development' in German, see P. Dann, S. Kadelbach and M. Kaltenborn (eds.), *Entwicklung und Recht: Eine systematische Einführung* (2014).

[23] P. Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU, and Germany* (2013), at 7.

[24] Ibid., at 18.

[25] These distinctions are themselves in continuous flux, as, for instance, the recent re-definition of ODA by the OECD in order to allow for (some) military support shows; see 'OECD re-defines foreign aid to include some military spending', *The Guardian*, 20 February 2016, available at www.theguardian.com/global-development/2016/feb/20/oecd-redefines-foreign-aid-to-include-some-military-spending (accessed 26 April 2016).

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jurisprudential approaches. One of its ingredients is, by the author's own assertion, 'international or even global (administrative) law' [sic][26] as it has been framed by the incipient Global Administrative Law (GAL) school. The latter represents the endeavour to take global governance at factual face value and to normatively reconstruct it as a global administrative law geared to at once safeguard (governance) functionality and (political) legitimacy. Its jurisprudential project is to open up (international) legal analysis to the 'vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence', including in 'such fields as the conditions of development and financial assistance to developing countries . . . '.[27] To this end, it seeks to shift law-ascertainment from the state-centric (classical) sources doctrine based on subjects and legal pedigree to effective normative output, a shift in focus that allows it to take a fresh look at what makes law in the international context and to consider all relevant forms of international and transnational, soft and hard, public and private normativities that structure the various governance regimes.[28] However, GAL is not about charting a new global law without a 'head or centre',[29] but it seeks, on the contrary, to spell out the underlying administrative legal principles that lurk behind these regimes in order to provide them with a unifying normative horizon.[30] That horizon is that of the regulatory state scaled to a global dimension and with the concomitant emphasis on the de facto regulatory authority of rule-making and rule-applying bodies.[31] GAL is, thus, about regulating the regulators by subjecting their acts and procedures to a set of administrative guiding principles that broadly correspond to those underlying the good governance agenda, including accountability, transparency, participation and, generally, legal due process and judicial review. Yet, in the absence of a global political community in which such a meta-regulatory authority would be vested, and, indeed, on the backdrop of a decentred institutional field,[32] the foundation for the legality of a global administrative law is located by GAL in the law itself, or rather, in two structural properties that are deemed to inhere in it, namely publicness and legitimacy. Hence, it defines global governance, firstly, as a public activity and postulates that its legal architecture needs necessarily to be amenable to be understood as reasonable and proportionate; and, secondly, as one geared towards an administrative rationality that defines systemic functionality as the effective (re-)connection of transnational decision-making mechanisms with

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[26] Dann, *supra* note 23, at 1.

[27] B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', (2005) *New York University Public Law and Legal Theory Working Papers – Paper No. 17*, 15 at 16.

[28] See J. D'Aspremont, *Formalism and the Sources of International Law* (2011); I. Venzke, 'Contemporary Theories and International Law-Making', in C. Bröhlmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (2016), 66.

[29] For this well-known metaphor, see N. Luhmann, 'Die Weltgesellschaft', (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 1.

[30] See B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 EJIL 23, as well as the two engaged replies by A. Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', (2009) 20 EJIL 985, and M.-S. Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', (2009) 20 EJIL 997.

[31] See Somek, *supra* note 30, at 986.

[32] Ibid.

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their stakeholders.[33] It is this connection that produces the sort of systemic legitimacy that is deemed to be foundational of the legality – and legalization – of global governance. It works in two complementary ways, notably as 'top-down' problem-solving and as 'bottom-up' accountability, with both ways being articulated through the mentioned principles. The GAL approach to global legal ordering, thus, reconstructs an – albeit largely procedural – material normativity out of the empirical operational practices of what Dann calls – again with respect to development co-operation – a 'heterarchical multi-level system of governance'.[34]

As such, it has significant connection points with another school in international legal theory, notably global constitutionalism, that is closely associated with recent German contributions to the field and that forms the other significant methodological source for – and constitutency of – *Development Cooperation.* Like GAL, global constitutionalism is concerned with re-embedding what it sees as a fragmented global legal field dominated by managerial functionalism into a value-based constitutional framework.[35] Also like GAL, it ventures to do so by identifying the legal principles that underlie particular legal regimes, though unlike GAL – or, as one might argue, complementary to it[36] – it derives their legitimacy from a hypothetical value base emanating from a hypothetical international community whose supreme purpose is to realize (individual) human dignity through, 'the assurance of peace and freedom under the rule of law'.[37] As a consequence, it cannot content itself, as GAL does, with a regulatory (legal) paradigm in which the relevant institutions and rule regimes are merely horizontally interlinked by administrative principles and accountability mechanisms, but it must counterfactually establish some sort of factual constitutional hierarchy – which it does by reconstructing existing legal regimes such as human rights law, humanitarian law, or trade law – as concretizations of these higher-level constitutional *Grundnorms.*[38] For global constitutionalists, global governance is, hence, not only legalized but also constitutionalized from within and without the need for a global *pouvoir constituant.*[39] And like its GAL relation, it places publicness and legitimacy at the core of its normative project.

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33 See M.-S. Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism', (2011) 44 JILP 55, at 80; see also A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities', in A. von Bogdandy et al. (eds.) *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010) 3.

34 Dann, *supra* note 23, at 200.

35 See A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', (2006) 47 HILJ 223.

36 See, for instance, N. Krisch, 'Global Administrative Law and the Constitutional Ambition', (2009) *LSE Law, Society and Economy Working Papers 10/2009.*

37 See Bogdandy, *supra* note 35, at 238, and M. García-Salmones, 'On Carl Schmitt's Reading of Hobbes: Lessons for Constitutionalism in International Law', (2007) 4 *Nofo* 61, at 77.

38 See H.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13 EJIL 621 and the critical reply in P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', (2002) 13 EJIL 815; see more recently A. Orford, 'The Politics of Anti-Legalism in the Intervention Debate', *Global Policy*, 30 May 2014, available at www.globalpolicyjournal.com/blog/30/05/2014/politics-anti-legalism-intervention-debate (accessed 23 April 2016).

39 See H.G. Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', (2012) 44 *International Law and Politics* 1049; J. von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law', (2012) *Goettingen Journal of International Law* 659.

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That project is Dann's, too, with the consequence that *Development Cooperation* really embarks on two distinct agendas, a normative one to establish the regulatory–constitutional framework through which the ODA transfer regime can be legally governed and adjudged, and an empirical one to aggregate and order its diffuse normative substance across the three institutional contexts examined in his study. The structure of the book follows this dual agenda and, generally, it is structure rather than argument that conveys the point throughout this work. It begins, in its first part, with setting the conceptual and historical scene, introducing core delimitations and disclaimers to establish the book's underlying semantics, and also betraying its author's fundamental approach to the field, which is pragmatic. While he shows an impressive breadth of reading in both 'law and development' and in development studies, and an admirable ability to present these literatures concisely, he tends to go for lowest-common denominator understandings that fudge taking on some of the field's more contested issues. This is a deliberate strategy, as his primary aim is to clear the way for the sort of legal analysis he wishes to advance. As a consequence, he defines development procedurally, notably as, 'a political process in which the relevant participants decide on their understanding of development',[40] a process underwritten by a transactional regulatory framework which Dann sets out to compile. He, therefore, generally avails himself of the technical vocabulary of ODA transfers while, in line with his express intent to contextualize and compare,[41] he acknowledges the conceptually limited and analytically limiting nature thereof. His definition of ODA, hence, relies on the widely-used one issued by the OECD's Development Co-operation Directorate (OECD-DCD-DAC):

> [ODA is comprised of the] flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective and which are concessional in character with a grant element of at least 25 per cent.[42]

Relying on this definition serves the purpose of situating the field in the public law realm of the regulation of public spending and the constitutional control of administrative authority. It also opens the door for a legal(ist) reading of the political nature of ODA transfers in which, following the administrative-constitutionalist approach, their legitimacy is derived from a higher-level procedural legality purportedly untouched by the structural critiques of post-colonial or TWAIL perspectives.[43] The price for this is, however, a replication of the state-centrism which has marred both development and international law.

That said, the author is by no means blind to the complexities and vagaries of development co-operation over time. Indeed, he dedicates two sizeable chapters just to the historical evolution of the field, dividing the period from 1945 to the present into two broad sections, notably what he terms the 'formative years' (1945–1975) and the

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40 Dann, *supra* note 23, at 25.

41 Ibid., at 21 and 23.

42 See OECD DAC Statistical Reporting Directive, DCD/DAC (2010) 40/REV1 of 12 November 2010; See Dann, *supra* note 23, at 15.

43 Dann is, however, neither unaware of, nor, in principle, unsympathetic to these perspectives, as is made clear(er) in his recent, 'The Global Administrative Law of Development Cooperation', in S. Cassese (ed.), *The Research Handbook on Global Administrative Law* (2016), 415.

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'years of transformation' (1975–present). Within these, he distinguishes five periods that stand for distinct paradigms in development co-operation – 'emergence and improvisation' (1945–1965), 'breakthrough and contestation' (1965–1975), 'stagnation and instrumentalization' (1975–1990), 'expansion and rejection' (1990–2000), and the present paradigm marked by 'aid effectiveness and the "rise of the rest"' (2000–present) – a broadly conventional classification which he, however, enriches by a very fine-tuned sensitivity for the complicated relationship between the evolution of development thinking and the institutional dynamics of development practice. Unsurprisingly, the picture that emerges is of a veritable roller-coaster ride, oscillating between improvisation and professionalization, politicization and legalization, substance and process, and normative fragmentation and harmonization. Overall, Dann identifies two structuring dichotomies in this historical process: one is the always tense and asymmetric relationship between donors and recipients; the other is the polarity between the heteronomy or autonomy of the development project, that is, between its dependence on broader political agendas or political economies, or its (relative) independence from these. The position of the pendulum on these scales at any given time is determined by three factors, namely complexity, power, and knowledge. The first has to do with the high degree of vertical and horizontal fragmentation which is well exemplified in *Development Cooperation*'s heuristic triad of the World Bank, the European Union, and Germany. It occurs both within donor institutions in terms of a partially overlapping multiplicity of actors and mandates which may lead to 'broken feedback loops',[44] and amongst donors, with currently over 70 public (domestic and international) bodies engaged in ODA transfer in an institutionally decentred and normatively diffuse global aid regime. Power, in turn, is spread out across this regime, with partly interlinked, partly competing political economies continuously seeking to shape the particular semantics of development (co-operation). To Dann, this prevailing instrumentalism is a problem he believes, in best constitutionalist fashion, to be remediable through a proceduralist legalization which references the entire system to standards deemed autonomous of any particular (political) interest. Indeed, one of his normative ideals is to avoid capture and colonization by providing all stakeholders with equal access to a politically neutral, inter-institutional law. This, then, is also his approach to the knowledge problem, which flows from the other two and entails that no single actor or institution within the system is capable of exercising epistemic hegemony over 'what is happening' and, more particularly, what recipients really need. This has, of course, led to a continuous requirement for feedback and measurement which is, in turn, subject to politicization and power. Here, too, Dann argues for a, 'framework in which development actors negotiate their preferred measuring techniques on an equal footing and thus contribute to the production of knowledge that is perceived as legitimate by

[44] See, for instance, L. Schulpen, B. Loman, and S. Kinsbergen, 'Worse than Expected? A Comparative Analysis of Donor Proliferation and Aid Fragmentation', (2011) 31 *Public Administration and Development* 321, and, 'officially', S. Knack, 'Donor Fragmentation and Aid Effectiveness', *World Bank Development Research Group Brief*, available at siteresources.worldbank.org/INTPUBSERV/Resources/477250-1172079852483/knack_print_060208.pdf (accessed 22 April 2016); See Dann, *supra* note 23, at 132.

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all concerned'.[45] Dann sees an emergent awareness and self-reflectivity about these issues in the current phase of development co-operation and, hence, potential empirical building blocks for his normative project. Hence, for *Development Cooperation*, the aid effectiveness agenda has been articulated in a number of consecutive and coherent steps: it was first articulated in the *Monterrey Consensus* in 2002, and was then elevated to a quasi-constitutional level in the *Paris Declaration* (2005) with its five proceduralist principles of ownership, alignment, harmonization, results-based management, and accountability; it was reaffirmed in the *Accra Agenda for Action* (2008), and broadened to address the concerns of core non-OECD donors in the *Busan Partnership for Effective Development Cooperation* (2011); in all it can, in Dann's view, be seen as a push for legalization and, to a more limited extent, constitutionalization, of ODA. Similarly, the turn towards indicators and measurability in form of the massive realignment of development priorities in the wake of the Millenium Development Goals (MDGs) and the Sustainable Development Goals (SDGs) favour the formalization and objectivation of development discourse – if at the cost of partly gross oversimplification, a charge Dann is not unaware of.[46] Lastly, the appearance of new donors from emerging economies and their partly differential approach to development co-operation has increased donor fragmentation and with it the – for Dann – concomitant need for a broadening of the Western-(donor)-oriented Paris framework.

He then sets out to provide just such a framework, first by meticulously ploughing through the institutional setting and the legal basis of each of the three examined development co-operation schemes, then by establishing the guiding principles which (ought to) govern development co-operation. What emerges is, indeed, a heterarchical multi-level system in which Dann discerns three archetypes of development administration: an autonomous–technocratic one exemplified by the World Bank, a diplomatic–heteronomous type embodied by the EU, and what he terms a 'gubernatorial' one represented by Germany.[47] The autonomy–heteronomy distinction is an important structuring dichotomy for Dann which he uses to denote the degree of goal independence that development co-operation (policy) enjoys in the different institutional contexts. Hence, the more independent development co-operation is as a distinct objective the more autonomous its institutional and normative framework is deemed to be and vice versa. In other words, while the World Bank's proceduralism is geared to a technically defined hardcore of development co-operation, the EU's framework is much more linked to that organization's overall political agenda. However, the autonomy/heteronomy distinction is less purely taxonomical than Dann makes it out to be, though to grasp its deeper implications, the substantive principles that constitute development co-operation need first to be (re-)visited. Indeed, in formulating these, Dann tones down his constitutionalist agenda by explicitly

45 Dann, *supra* note 23, at 150.
46 Ibid., at 149.
47 See also his earlier A. von Bogdandy, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', (2008) 9 *German Law Journal* 2013; specifically on the World Bank, see T. Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model', (2011) 52 HILJ 288.

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allocating to principles only a heuristic function and not the thick normative veneer common to this approach;[48] he, thus, distinguishes between structural principles that locate, 'defining regularities in a set of positive legal rules',[49] and legal principles which are higher-level, or 'evaluative', as he terms them, norms that serve as 'normative yardsticks' within a particular norm setting.[50] He identifies three sources both types of principles draw on in different measure, notably (domestic) donor law, international treaty law as the *lex specialis* that governs donor-recipient relations, and general international law. The latter delimits legal principles, in particular, whereas structural principles ought to be seen as sector-specific normativities that vertically apply to all development co-operation and, thus, form a genuinely global law.[51] To find these principles, he purposely sets out to transcend the mostly programmatic but discourse-dominating *Paris Principles* and, instead, inductively pieces together what he sees as the four semantic pillars of development co-operation, going through, in each case, their purported legal base, their content, and their addressees. He, thus, identifies two structural principles, notably 'development' and 'coherence and efficiency', and two legal principles, namely 'collective' and 'individual autonomy'.

As for 'development', he derives the principle's legal base from a combination of the UN Charter (Article 2(I)), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and a number of UN General Assembly resolutions, including on the right to development.[52] On this basis he concludes that the provision of ODA – or, indeed, of the notorious 0.7 per cent of GDP – is legally discretionary but that, once it is provided, the principle provides for what could be termed a (legal) due process obligation in the sense that the procedures of ODA transfer must be materially and formally lawful. The principle's material substance is, Dann finds, now concretized by poverty reduction, good governance, and human rights, with the first of these having become the core of development co-operation, its *conditio sine qua non*, whereas the latter two are procedural precepts guiding the former's realization. The second structural principle, 'coherence and effectiveness', in turn, is also made up of three elements: first, 'cost-effectiveness, result orientation and concentration', which is implemented by the turn to goals and indicators; second, 'alignment' with recipient policies and procedures; and, third, 'coordination and complementarity' of donor development co-operation efforts. These elements largely flow from the *Paris Principles* and enshrine the good governance agenda's bottom lines; while Dann is adamant that they cannot be considered fully positivized 'hard' legal obligations, they do structure the way in which the different stages of the ODA transfer process is conceived. If these two principles can be taken to cover the macro- and the micro-levels of the development co-operation process, the two legal principles define its particular legality. For behind 'collective autonomy' lurks, of course, the

48 Dann, *supra* note 23, at 222.
49 See A von Bogdandy, 'Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung', in H.-H. Trute et al. (eds.), *Allgemeines Verwaltungsrecht – Zur Tragfähigkeit eines Konzepts* (2008), 683 at 692; See Dann, *supra* note 23, at 222
50 Dann, *supra* note 23, at 223.
51 Ibid., at 224.
52 See UN Doc. A/RES/41/128 (1986) and *Realizing the Right to Development – Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, HR/PUB/12/4 (2013).

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core question of development co-operation, namely what it implies in terms of the classical concept of state sovereignty. Dann divides up the discussion into – unsurprisingly, again – three parts; first, he looks at the narrowing of sovereignty into the concept of procedural ownership which, effectively, comes down to a formal priority position by recipient states as regards the formulation of development goals and the approval of development plans. Second, he examines the legal status of the notion of sovereign equality and any right to equal representation in multilateral development organizations, to conclude that this is as yet mostly an aspirational horizon rather than a hardened norm, though one that continuously lurks in the background of donor-recipient relations. And third, he attempts to determine the meaning, in development co-operation law, of potential safeguards for collective autonomy (aka the state sovereignty of recipient states) deriving from treaty law or from the principle of non-intervention; neither, he finds, afford hard legal protection from developmental intervention into the domestic affairs of recipient states, though there may be a prohibition to misalign ODA transfers in terms of the general objective of poverty reduction. The second legal principle, in turn, deals with one of the dominant frameworks for development discourse today, notably human rights and the 'rights-based approach to development' (RBA) that pervades ODA transfer law. It is particularly tricky as its ubiquity in virtually all development planning contexts seems still to be inversely related to any agreement on its precise legal force and content.[53] Dann, thus, looks at the emergence of RBA in general, and on the human rights obligations of the three institutional contexts of his study, in particular, to conclude that from a classical-dogmatic perspective their respective obligations are diffuse, narrow, or limited, but that recent advances in the international legalization of non-state actors provide a more solid basis for the assumption that a fundamental human rights responsibility does exist (in ODA law). What is less clear is to what extent that responsibility extends to extraterritorial acts – as is, of course, the norm in development co-operation – in the sense of establishing justiciable rights by individuals and groups in donor states in relation to ODA transfers.[54] Dann also examines recent discussions on whether a general human rights responsibility within ODA transfer law includes a duty for human rights impact assessments of development policy, as well as whether it gives rise to participation rights by individuals and groups. The response is, as before, middle of the road, there are, in essence, good enough arguments – and ample material evidence in development planning guidelines – for the existence of such rights, though the horizontal nature of development co-operation law precludes the 'hard' implementation (i.e., justiciability) of such rights.

This analysis forms the constitutional(ist) matrix by which Dann proceeds to examine the substantive ODA transfer process. He subdivides it into five aspects, notably the – all important – programming phase, then the three main types of ODA finance, notably project aid, budget support, and results-based financing, and,

53 See V. Gauri and S. Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy', (2012) 44 *Polity* 485; Hoffmann, *supra* note 5.

54 See S.P. Marks, 'The Human Right to Development: Between Rhetoric and Reality', (2004) 17 HRRJ 139.

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finally, the various accountability mechanisms attached to these various regimes. It is, as Dann concedes, a choice constrained by the empirical complexity of the field which renders a systematic appreciation of, for instance, recipient-state legal procedures or of compliance monitoring unfeasible at least on the level (and breadth) of analysis adopted in *Development Cooperation*; it is, however, a sufficient sample to tickle out the overarching properties of development co-operation as framed in the book. Indeed, these central chapters provide a wealth of observations and insights that are likely to remain an authoritative – in fact, probably indispensable – source for studying any of the three institutional contexts and their assemblage into the new field of development co-operation law for some time to come. It is only possible here to feature some of the overarching properties of that law – and at the risk of somewhat misrepresenting the book's analytical density and systematizing purpose – namely those that provide some insight into its structural qualities and that feed into Trubek's second injunction.

The picture that emerges shows a complex managerialism that is characterized by self-referentiality and self-legitimation.[55] While its singular meta-objective, poverty-reduction, forms this system's cognitive horizon – and self-description – its de facto functionality is geared towards the production of an (input) legitimacy that is largely autonomous of actual outcomes and primarily serves the self-reproduction of the normative regime at its base.[56] It is built on three structural pillars which emerge from Dann's analysis and which pervade the system across institutional environments, namely recipient-oriented programming, conditionalities, and accountability mechanisms. The first is the primary means for producing what could be termed first-order input legitimacy, as it is the primary device through which knowledge is 'harmonized', interests are articulated, and policies are co-ordinated.[57] All three institutional environments give recipient ownership of programming – really of the entire ODA transfer process – a prominent if not determinative place, though each creates regulatory horizontal effects which streamline the managerial imperatives of the respective institutional environment into the outcome of the process. Hence, in the case of the World Bank, the now dominant programming tool of Poverty Reduction Strategy Papers (PRSPs), meant to be recipient-based inputs, are informally co-owned by current and former World Bank staff in advisory positions vis-à-vis recipient governments, and formally stand in a path-dependent relationship with the subsequent Joint Staff Advisory Notes and, on the EU side, the Country Strategy Papers.[58] In the case of the EU, there is a genuinely co-operative

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55 See M. Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 *European Journal of Legal Studies* 8; ibid., 'The Politics of International Law' (1990) 1 EJIL 4; ibid., 'The Politics of International Law—20 Years Later' (2009) 20 EJIL 7; ibid., 'Miserable Comforters: International Relations as New Natural Law', (2009) 15 *European Journal of International Relations* 395.

56 See A. Furia, *The Foreign Aid Regime Gift-Giving, States and Global Dis/Order* (2015); J. Beard, *The Political Economy of Desire: International Law, Development and the Nation-State* (2007); P. Zumbansen, 'Administrative Law's Global Dream: Navigating Regulatory Spaces Between "National" and "International"', (2013) 11 *International Journal of Constitutional Law* 506.

57 Dann, *supra* note 23, at 305.

58 See R. Gottschalk, 'The Effectiveness of IMF/World Bank-Funded Poverty Reduction Strategy Papers', in Y. Bangura (ed.), *Developmental Pathways to Poverty Reduction* (2015).

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programming relationship only vis-à-vis the Africa, Pacific, and Caribbean Group of States (ACP) – a relationship that has, however, to be considered as politically pre-configured by (post-)colonial 'special relationships' – whereas non-ACP ODA works in a similar 'co-decision' manner as in the World Bank's case. In both cases, recipients' ownership, and any recipient-specific interests such as human rights, are further constrained by donor-side mid- and long-term programming in form of Country Assistance Strategies (CAS – World Bank) and Country Strategy Papers (EU) which (pre-)define what is ultimately going to be 'in it' for a recipient state. In light of a regulatory density that creates epistemic tunnels within which both the World Bank and the EU, as well as their recipient governments, are bound up,[59] the more archaic planning unilateralism of Germany appears actually to be more transparent and accountable.

The logic underlying programming extends into the three substantive forms of ODA transfers examined here. The still by far largest and most traditional of these is project aid and it is in this context that the different conditionality modalities have been developed. As Dann works out in great detail, they ultimately function to ensure total donor control of all stages of the ODA transfer process, not least as they always imply a unilateral right on the part of donors to decide on non-compliance and to derogate from terms set out during programming. The World Bank and the EU stand for different conditionality approaches, with the former representing, according to Dann, a venture-capital approach premised on *ex ante* conditionalities and the EU a diplomatic–political approach based on *ex post* conditionalities. In either case, however, a 'development-related right to participation [by recipient governments or individuals and groups within recipient countries] cannot (yet) be said to exist'.[60] The other two ODA transfer forms, budget support and results-based financing can, as Dann again persuasively shows, be seen as outgrowths of the logic underlying both programming and project aid conditionalities. The former has been adopted as a sort of 'permanent exception' to a project-centric development paradigm otherwise averse to macroeconomic intervention and politics, in general. It became, however, a necessary corollary of the PRSP-oriented planning process – for which overall budgetary allocations must be made – and of the aid effectiveness agenda, which led to an increasingly critical assessment of a non-contextual project-finance approach. The logical next step in this development has been the third and as yet nascent form of ODA transfer, namely results-based financing. On the face of it, it is meant to transfer much greater ownership of the ODA process onto recipient governments by shifting conditionalities from inputs to results. However, the price for greater flexibility is an even greater good governance – and especially anti-corruption – imperative which is meant to constrain recipient governments from within. A crucial part of this self-disciplinary regime is played by accountability mechanisms which are meant to ensure that information about system performance is channelled back to control instances, thereby promoting compliance and, thus, output legitimacy. Accordingly, each of the three institutional environments has fairly dense and sophisticated

[59] Dann, *supra* note 23, at 335.
[60] Ibid., at 409.

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accountability mechanisms, though, as Dann shows, they ultimately do not work to address the (political) root causes of imbalances in influence and interest, and, thus, they tend to merely reinforce the respective system's self-referentiality.

3. Ruling by proxy: The local in international (development) law

If *Development Cooperation* shows the inner workings of legal (development) managerialism, *Local Space* shows how it works on its intended object, notably local spaces and subjects.[61] It does so by using the empirical case of 'internationalization from within', namely in Bogotá, as a new and sharper prism for law and development in action. Its strategy is, thus, not to provide an entirely new argument, but rather to cogently (re-)combine several strands of existing debates into a new perspective on how international law works in and through development. The first and largest surface of this prism is, of course, the well-rehearsed contention that international law and the development project, as Eslava terms it, are deeply entangled with one another.[62] Secondly, the level where that entanglement is concretized and where one, therefore, has to look for it is, counterfactually, the local level. What is significant about this affirmation is not its newness but the epistemic privilege which the author subsequently accords to this assertion. Thirdly, the reason for that privilege lies in the particular way in which international law is bound up in the global (good) governance agenda, notably as a form of indirect rule which has, under the name of decentralization, recently come to occupy the local. Fourthly, the concrete forms of that occupation can only be made visible by employing what the author terms an ethnographic approach that goes beyond conventional legal analysis (and critique). And finally, what becomes visible through that approach is not just the (indirect) rule of a global law but also and importantly the equally indirect ways in which the objects of that rule are at least partly able to resist their subjectification.

So this is an ambitious narrative that purports to show the other and, as Eslava is adamant, dark(er) side of the legalization of development (co-operation). In fact, he goes well beyond the now common critical starting point that, 'modern international law … is a product of an ambivalent and complex interaction between international law and social movements of people in the Third World faced with a process of enormous transformation unleashed in their territories called "development"'.[63] To him, development is quintessentially an (international) legal endeavour, and the project metaphor he employs expresses that normative spin. So development:

> should … be seen as part of a long-term quest for the effective deployment of authority over territory and population in the Third World … a forceful attempt to bring social and institutional life within a particular universal narrative of progress.[64]

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61 Eslava, *supra* note 9, at 71.
62 See Pahuja, *supra* note 8.
63 Rajagopal, *supra* note 21, at xiv; See Eslava, *supra* note 9, at 291.
64 Eslava, *supra* note 9, at 91.

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Hence, not only is international law the form through which development, not least on the local level, is articulated, but, conversely, development is the deeper purpose of international law. Yet, *Local Space* goes even further than that, in that it understands this law to produce a new cognitive horizon through which its subjects come to see the world in a different light – notably that of politically, socially, and economically harmonized world relations in the service of globalized liberalism and capitalism.[65] As Eslava poignantly puts it, international law, 'forms and reshapes our surrounding realities to such an extent that it actually becomes impossible to conceive of [it] as existing and operating except through the very things and bodies that it creates'.[66] International law is here cast as development´s ideology that at once projects a normative (First World) utopia and that, thereby, obscures the asymmetric apologism on which it is based.[67] For its (Third World) subjects it produces a magical realist narrative that mystifies the distance of the local from the global and creates the impulse for a progressive development towards the latter, a process which Eslava describes as, 'the amalgamating role that law and its subsequent festishization are playing at a moment when a convoluted South is anxiously trying to integrate, and to reconstruct itself in the service of global economic and cultural forces'.[68]

Local Space, thus, builds on a line of recent critical engagements that have sought to show that international law is (also) a governance technique in the service of a development project deeply entangled with Western liberal modernity. Indeed, in this reading, the concept of development is a natural outgrowth of the Weberian (counter-Marxian) interpretation of modernity as the progressive rationalization of political, economic, and social life within and through the (nation-)state. Its specific function is that of a cognitive gatekeeper for the modern (aka Western) way of life that helps to stabilize the latter's identity through differentiation. It is aimed simultaneously at globalizing Western liberal values (aka representative democracy and the market economy) and at, thereby, protecting Western political and economic interests, notably by keeping the developing world in a permanent bind between subjugation and exclusion. As Weber argued, and as Eslava recalls throughout *Local Space*, law is the primary vehicle for this permanent 'modernization' and, thus, for development, though not just because it transports the substance of a universal(ized) rationality but, perhaps more importantly, because it represents that rationality in and of itself;[69] development, hence, implies not merely the rule *by* law but the rule *of* this particular (international) law. If recent post- and de-colonial critiques of international law and a critical turn in the 'law and development' literature have outlined this reading,[70] Eslava goes yet one step further, notably by taking one of its corollaries

[65] Ibid., at 93.
[66] Ibid., at xvi.
[67] See Hoffmann, *supra* note 7, at 959.
[68] See also J. Comaroff and J.L. Comaroff, 'Law and Disorder in the Postcolony', in J. Comaroff and J.L. Comaroff (eds.) *Law and Disorder in the Postcolony* (2006) 1 at 22; See Eslava, *supra* note 9, at 37.
[69] See C. Thomas, 'Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform', (2008) *Cornell Law Faculty Publications - Paper 118*.
[70] See Pahuja, *supra* note 8, as well as, L. Eslava and S. Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law', (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee (VRÜ)* 195.

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seriously, namely that if international law and development form the same ontological entity, then development's objects must be international law's real subjects. He, thus, shifts the focus of international law away from states and international organizations, and onto the local level, that is, onto the smallest administrative units and, ultimately, onto the people of the developing world themselves.

This shift does not only derive from the generic role of international law in development but it also corresponds to the current phase of development policy which has itself shifted its attention to the local level, notably to cities, and to decentralization as the new paradigmatic remedy for 'underdevelopment'.[71] Accordingly, *Local Space* devotes considerable room to what it terms the 'changing of places' of development, ranging from a detailed discourse analysis of (then) UN Secretary General Kofi Annan's opening speech to the 2005 *Localizing the Millennium Development Goals* summit (Chapter 2) to an examination of the broader political economy of decentralization within contemporary development discourse (Chapter 4). This, in turn, sets the stage for a further two 'case study' chapters on Bogotá which illustrate the decentralization logic at work. The picture that emerges is one in which, 'local jurisdictions have become the preferred spaces in which to promote global ideals of democracy, peace and human economic, and environmental development',[72] the most direct way to roll up development from below and to re-program the objects of development to become productive but highly (self-)disciplined subjects of the global cosmopolis. Indeed, Colombia and its capital Bogotá are among the best possible examples for the process *Local Space* wishes to showcase, as the Colombian state has long struggled with significant governance and governability problems while its capital has been transformed from an 'overpopulated, chaotic, badly administered and financially deprived city'[73] into Latin America's urban success story, 'the trendy capital of Colombia, cool, safe enough to visit but still seedy enough to feel far from home'.[74] Yet, it is Eslava's project to show in minute detail how this ascendancy story has been enabled by a forceful reconditioning of the city's human geography. It is an urbanization story in which the global city is produced by progressively circumscribing and disciplining 'illegal neighbourhoods' by means of a re-legalization of local space and its management. In fact, this is the global administrative law of *Development Cooperation* in action, producing, as it were, a normative remix on top of traditional international and local legalities. Its precepts come from the very global development co-operation law dealt with in *Development Cooperation* and, as such, it transcends both the remit of classical international law and of domestic jurisdiction. It operates on the local level and in the form of a complex mix between zoning laws that emanate from conventional (domestic) law-making and pseudo-legal administrative procedures that institute and police the new (global) normative horizon on

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71 See also his own earlier 'Istanbul Vignettes: Observing the Everyday Operation of International Law', (2014) 2 *London Review of International Law* 3; M. Dias and L. Eslava, 'Horizons of Inclusion: Life between Laws and Developments in Rio de Janeiro', (2013) 44 *University of Miami Inter-American Law Review* 177.

72 Eslava, *supra* note 9, at 293.

73 Ibid., at 61.

74 A. Giridharas, '36 Hours in Bogotá, Colombia', *New York Times*, 25 June 2010, available at www.nytimes.com/2010/07/04/travel/04hours.html (accessed 22 April 2016); See Eslava, *supra* note 9, at 64.

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the ground. As Eslava aptly puts it, 'these administrative exercises aspire to create a parallel jurisdiction that is amenable to technical administration and to reconstruct residents' perceptions of themselves vis-a-vis the city's ideals and its laws, a decentralized state and a global order'.[75] It is the latest incarnation of the notorious 'new developmental state', a state that has been allowed back onto the scene of post-Washington consensus development because it has been politically neutralized and legally streamlined according to the global good governance agenda.[76] Through the example of Bogotá's 'urban revolution' Eslava manages to decipher the intricate workings of this process and shows how well the decentralization agenda has served to undercut traditional state sovereignty (aka international political agency) in the name of a people-centric development paradigm. Indeed, the decentralization agenda transfers the straightjacketing of the state onto the community level under the label of local empowerment (against allegedly inefficient superior state organs); hence, as Eslava poignantly puts it:

> local governments, local residents, and local territories have become the bearers of new obligations – obligations that are often contradictory at best, if not actually impossible to realize, thanks to structural conditions that are entirely beyond the control of local communities.[77]

However, this core observation is, as Eslava reiterates throughout *Local Space*, only possible because of the microscopic vision that is made possible by complementing a (critical) legal analysis with an ethnographic gaze. The latter strikes the reader at first as a slight hyperbole, as Eslava does not really engage in a deeper discussion of ethnographic methodologies in this context. In fact, it soon becomes clear that what he means by it is rather the 'interrogation of international law and development beyond their traditional normative, administrative, spatial, and human confines'.[78] It means, in essence, to bring in the normative perspective and agency of the individual and collective subjects of global development governance outside of and beyond the legal-disciplinary framework which the latter ordains for them. Yet, this new gaze reveals not only the, 'new world . . . made possible by the internalization of the international as local'[79] but it also shows how the local manages to (at least partly) resist this 'normalization'. Hence, by means of extensive interviews with local administrators, on one hand, as well as with residents of both (as yet) illegal neigbourhoods and recently legalized neighbourhoods, on the other hand, Eslava finds three modalities of resistance to this 'indirect rule' of (international) law. One is to strategically use the proceduralism of the new urbanization regime in order to gain voice and influence its implementation; a second is open protest and awareness-raising civic engagement to challenge that regime's epistemic hegemony in terms of what and who is part of the

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75 Ibid., Eslava, at 297.

76 See D.M. Trubek, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law', (2008) 1075 *University of Wisconsin Legal Studies Research Paper* 1; J. Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', (1999) 5 *Buffalo Human Rights Law Review* 107.

77 Eslava, *supra* note 9, at 259.

78 Ibid., at 294.

79 Ibid., at 271.

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city; and a third form of protest consists of attempts to institute alternative local-level development schemes that stake bottom-up development agency against top-down subjectification. Yet, in laying out these modes of resistance, Eslava simultaneously recognizes the paradoxically interdependent relationship they have with the regime they are up against, for each is ultimately premised on the new normativity not just in a strategic, but in a more generally epistemic way. Thus, by revealing the other side of the river, full of miraculous objects, as José Arcadio Buendía observes in Gabriel Garçia Marquez's *One Hundred Years of Solitude*, not only is a new horizon with new desires and the attending behavioural norms created, but also new possibilities for using these objects in new and unexpected ways. After all, the horizontal legality of global administrative law is sufficiently indeterminate to enable for a degree of (self-)transgression.[80]

4. The province of (international development) law determined ... and resisted

What, then, is the overall response 'law and development's' new twin offspring give to Trubek's two injunctions? Do they, in conjunction, manage to bridge the cognitive gap between the universal/global and the particular/local? Do they succeed in unifying a descriptive account of a new global legality and a normative critique of its real-life consequences? And do they, finally, provide guidance on how to deal with the (seeming) inevitability of liberal legalism and its own twin sibling, namely managerialist (political) realism? As stated in the introductory section, neither monograph on its own can be held to be answerable to these (meta-)queries, and any response must, thus, be a constructed artifice, which, however, allows this reviewer – on his responsibility alone – to make some overarching points. Hence, what emerges from the combined perspectives of *Development Cooperation* and *Local Space* is a reiteration of the 'law and development' movement's deep ambivalence about the role of law in development. In fact, both monographs ultimately contain two competing narratives about that relationship. In one, (international) law is colonized by development and stands, thus, in an instrumental, or, in Dann's administrative-legal terminology, a heteronomous relationship to the latter's objectives, which today broadly correspond to a (neo-)liberal political agenda.[2] This is evident both in the manifold structural biases which the incipient legal system of development co-operation displays: the general donor-bias built into the diverse ODA financing procedures; the ideal of the market-friendly 'new (developmental) state' that underlies the normative substance of the successive international agreements from Monterrey to Busan; and the aggressive legalization by which the decentralization and urbanization agenda is implemented at the local level. However, in the other narrative, development is inversely colonized by an ever expanding and essentially self-referential legal proceduralism that constitutes an increasingly autonomous field and operates, therefore, at least partly independently of the underlying

[80] See P. Kotiaho, 'A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture', (2012) 13 *German Law Journal* 483; Hoffmann, *supra* note 7, at 973.

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purposes of development. The exceedingly dense and highly complex set of norms and procedures that Dann identifies as comprising the new administrative legal field is in evidence of this, for it clearly brings to the fore the complaisance for institutional path dependencies engendered not just by the 'technocratic-autonomous' World Bank regime, but also by the more 'diplomatic-heteronomous' (aka politicized) one of the EU (and Germany). Likewise, Eslava's micro-mapping of how international normativities (and pseudo-normativities) work on their local subjects shows how that law's inherent formal indeterminacy can undercut its substantive purpose by providing the means for its own (partial) subversion.

Behind these two narratives lurks yet another dichotomy, one which Martti Koskenniemi has described in terms of Ludwig Wittgenstein's rabbit-duck allegory,[81] namely between critical legalism and the (re-)politicization of the law. *Development Cooperation* is a masterful exercise of the former, as Dann openly endorses legalization as a way for ODA to, 'grow out of its politicized niche and become an autonomous legal regime that can be used to effectively check political powers'.[82] For him, as, probably, for a majority of contemporary international lawyers, development co-operation's main challenge is a realist (particularist) politics that counteracts its rational (universalist) precepts. From this perspective, legal proceduralization provides a shield against such political subversion and, therefore, represents progress – even if this position is, of course, itself a political one. What is more, a relative autonomy from political interference does not end law's inherent indeterminacy and its tendency to proliferate and mutate well beyond, and sometimes in contradiction to, its intended rationale. Dann is well aware of this when he critically examines the many twists and turns of the legal processes underlying development co-operation, which is why he insists on a constitutional (meta-)framework by which 'real life' legalization can be continuously assessed and re-aligned. His normative aim, ultimately, is that of the progressive legalist, notably to employ legal formalization against a 'bad' politics dominated by the interests of the few in order to create the conditions for the pursuit of a 'good' politics for the many. *Local Space*, in turn, can be seen as taking up the baton precisely from there, notably by deciphering the structural biases of the law, and of the good governance principles that form its constitutional framework, and by linking them with particular political positions and objectives. For Eslava, the outcome of this deconstructive exercise is highly ambivalent, as:

> this approach to global ordering is at best predicated on a troublesome distribution of rights, obligations, and forms of authority. At worst, it is responsible for perpetuating an ongoing cycle of disempowerment, whose most destructive effects are experienced by the most peripheral members of our world.[83]

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81 See M. Koskenniemi, 'The Politics of International Law', (2012) Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, 26 January 2012, available at www.youtube.com/watch?v=-E3AGVTHsq4 (accessed April 26, 2016).

82 Dann, *supra* note 23, at 23.

83 Eslava, *supra* note 9, at 305.

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Yet, one of the great feats of his treatise is to bring the real subjects of international law out of the black box of the state and to show how the very ubiquity of this law engenders new forms of transgressive agency. For that other side of the river which development represents will not remain unchanged on account of the very law used to impel its crossing.

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