Global Public Goods or Commons as a Lens to Development?
A Legal Perspective

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Abstract

Two related concepts have recently gained a prominent place in the field of development cooperation. One the one hand, since the series of three books edited by Inge Kaul and her colleagues of the United Nations Development Programme, it is now considered to be in the self-interest of donors to cooperate and to combat the negative externalities that could arise in the absence of global public goods such as climate change mitigation, biodiversity or eradication of communicable diseases. On the other hand, since the landmark book Governing the Commons by Elinor Ostrom, the concept of commons has also evolved into a powerful alternative paradigm to rethink development beyond the market-State dichotomy and place communities at the centre of the governance of shared resources like water or forests. This paper shows that, in the field of development, whereas legal institutions based on commons favour bottom-up initiatives of citizens to counter the traditional private-State divide and to respond to threats to our common heritage, the urgency to produce global public goods seems to justify a turn to trust funds and public-private partnerships which bring less attention to communities.

1. Introduction

The political foundations of official development assistance (ODA) have always been, and continue to be, the subject of debate among multilateral donors like the World Bank or the European Union (EU), influential bilateral donors like France or Sweden and even civil society and charity organizations like Oxfam or the Bill and Melinda Gates Foundation.¹ The ideas of good governance, sustainable development or effectiveness all stem from the same concern to re-legitimise development programmes in the eyes of both decision-makers and public opinion.

Among others, two related concepts have recently gained a prominent place in the field of development cooperation. On the one hand, since the series of three books on global public goods edited by Inge Kaul and her colleagues of the United Nations Development Programme (UNDP),² it is now considered to be

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in the self-interest of donors to cooperate and to combat the negative externalities that could arise in the absence of global public goods such as climate change mitigation, biodiversity or eradication of communicable diseases. These books bring to light that in an increasingly interconnected world, the problems of the South in security, financial stability, health and environment inevitably also affect the North, and therefore require collective action at the global level.

On the other hand, since the landmark book *Governing the Commons* by Elinor Ostrom, the concept of commons has also evolved into a powerful alternative paradigm to rethink development beyond the market-State dichotomy at the global level. Under a commons approach to development, communities are placed at the centre of decision-making processes to govern their shared resources. This new model fundamentally recasts the traditional idea of development based on private property and wealth accumulation.

In putting this simple research question forward in the title – ‘Global Public Goods or Commons as a Lens to Development? A Legal Perspective’, my objective is to unravel contradictions between both development paradigms and shed new light on their respective normative and added value. Indeed, from a legal perspective, what is so distinctive about framing development in terms of global public goods or commons? How are both notions of development translated in terms of legal vehicles? In answering these questions, particular attention will be devoted to the policies and operations of the World Bank, which still remains the world’s foremost development agency with near global membership and with the single largest source of net income. My argument is that, instead of assimilating commons to global public goods, both analytical and normative frameworks should be cautiously distinguished as they imply different legal mechanisms for development.

2. Global Public Goods

2.1 Development paradigm

The concept of global public goods is, in essence, grounded in the neoclassical economic theory of (national) public goods. As opposed to a private good, such as a pie or a car, a public good refers to goods that are non-rival and non-excludable. By virtue of the inherent free-rider problem in the provision of public goods, coercive authority is considered necessary in ensuring at least a minimal contribution by all. Therefore, at the national level, State intervention is seen as indispensable in the financing and provision of public goods.

Yet, at the global level, there is no global government or effective global governance mechanism capable of providing public goods which transcend national boundaries. This is in essence the observation made by a series of development practitioners led by Inge Kaul, former director of UNDP’s Office of

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4 Compare with ‘club goods’ that are non-rival but excludable (e.g. a toll road), and ‘common pool resources’ that are rival but non-excludable (e.g. high seas fisheries or the geostationary orbit).
Development Studies, in three books published in 1999, 2003, and 2006 on the new concept of GPG. Their message is clear: certain public goods, such as climate change mitigation or control of infectious diseases, cannot be adequately provided at the State level.

Over the last 15 years, the concept of global public goods has permeated the policy discourse of a large number of development organisations as new powerful rhetorical device to advocate more international cooperation on a number of cross-border issues such as peace, the environment, trade and finance. Organisations such as the United Nations Industrial Development Organisation (UNIDO), the Food and Agriculture Organisation (FAO), the World Bank, the Organisation for Economic Coordination and Development (OECD), the World Health Organisation (WHO), and the European Union (EU) have all branded the provision of global public goods as a new policy challenge. Even private charities such as the Bill and Melinda Gates Foundation began talking about global public goods.

What is, then, so distinctive about an approach to development based on global public goods? First, development seen through the lens of global public goods is not just a matter of pure altruism or charity anymore; it is now considered to be in the self-interest of donors to cooperate and to combat the negative externalities that could arise in the absence of climate change mitigation, prevention of armed conflicts, biodiversity protection or eradication of communicable diseases. The theory of global public goods borrows its key concepts and reasoning from economic theory, which gives new legitimacy to ODA. That is the strength of global public goods – their ‘economic rhetoric’.

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Second, this new approach connects ODA to global policy issues which affect both developed and developing countries.16 This shift from country-specific development to cross-border issues is reflected in recent instruments framing development cooperation. The Addis Ababa Action Agenda adopted in July 2015 stressed that the ‘global partnership should reflect the fact that the post-2015 development agenda, including the sustainable development goals, is global in nature and universally applicable to all countries.’17 The new set of Sustainable Development Goals indeed represents a shift from the prevailing approach to development ‘assistance’ to a sense of common and shared ‘responsibility’ for enabling sustained poverty reduction at the global level.

Third, the requirement to provide Global public goods also justifies new, additional funding for development cooperation. Building upon an idea that emerged during the 2002 International Conference on Financing for Development and the 2002 World Summit on Sustainable Development, France18 and Sweden19 signed an agreement to initiate an International Task Force on Global public goods. In the final report, the Task Force’s message was clear: because greater financing for global public goods does not only benefit developing countries, but also donors, global public goods need to be addressed separately, and in addition to ODA.20

2.2 World Bank21

From 2000 onwards, just after the publication of the first UNDP study, the World Bank encouraged the supply of global public goods across all its development programs. This was in particular a recurring theme in the meetings of the joint World Bank/International Monetary Fund (IMF) Development Committee, which assists the Bank’s Board of Governors with some of the most critical development issues.22 While outlining the same characteristics and challenges as in the UNDP studies, a staff report prepared for the Development Committee in 2000 redefined global public goods in the context of the Bank’s policies as ‘commodities, resources, services – and also systems of rules or policy regimes with substantial cross-border externalities that are important for development and poverty-reduction, and that

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18 Id.
20 Id., pp. xxv and 110.
22 Known formally as ‘Development Committee’, the Development Committee consists of a Joint Meeting of twenty-five Ministers of Finance or Development and meets twice a year since 1974. See IBRD, Board of Governors, Resolution No. 294, ‘Establishment of Development Committee’, 2 October 1974.
can be produced in sufficient supply only through cooperation and collective action by developed and developing countries. 23

The same report described five global public goods priority areas for the Bank, which were endorsed by the Bank’s management in a Strategic Directions Paper in 2001:24 (i) ‘protect environmental commons’ (e.g. through the Global Environmental Facility25), (ii) ‘prevent the spread of communicable diseases’ (e.g. through the Global Fund to Fight AIDS, Tuberculosis and Malaria26), (iii) ‘strengthen the international financial architecture’ (e.g. through the Consultative Group to Assist the Poor27), (iv) ‘strengthen the global trade system’ (e.g. through the Enhanced Integrated Framework for Trade-Related Assistance for the Least Developed Countries28), and (v) ‘disseminate knowledge for development’ (e.g. through the Consultative Group on International Agriculture and Research29).

Again recently, at the Annual Meetings Plenary on 7 October 2016, the World Bank Group President Jim Yong Kim called for ‘a much expanded role for the World Bank Group in the Global Public Goods agenda’, that is on climate change mitigation, refugee services and pandemic preparedness and response.30 While the institution does not provide comprehensive data on the funds or exact programmes it dedicates specifically to global public goods, it is clear that the term has become important in the policy discourse of the Bank.

3. Commons

3.1 Development paradigm

Since the book of Elinor Ostrom, Governing the Commons, the conditions identified by her for the successful self-governance of shared resources have been applied in very different contexts.31 Over the last decade, the commons have been embraced by civil society as an inspiring social imaginary to rethink the traditional public-private and market-state divides, and to prioritize ecological and human needs of communities over market and state.32 The commons have also been a popular subject of academic

inquiry which served to recast the traditional foundations of the disciplines of economics, law, sociology and political theory. The field of development cooperation was of course not immune to these debates.

The prevailing model of development favoured by industrialised countries and grounded in private poverty, economic growth and wealth maximization was indeed fundamentally questioned in the commons literature. Fritjof Capra and Ugo Mattei, for instance, vigorously denounced an ‘idea of “development” as ‘fundamentally quantitative’ and ‘rooted in seventeenth-century notions of “improvement”’, without recognizing ‘that unrestrained extraction and exploitation of natural and human resources is at odds with the fundamental principles of ecology.’

David Bollier, another prominent activist of the commons, proposed to ‘abandon the whole mindset of “development” itself’ and, instead, to start talking about ‘human flourishing’.

Without private property, economists and lawyers traditionally assume that rational self-interested individuals will not have any incentives to protect their resources and accumulate wealth. This postulate finds its origin in the Coase theorem, which views private ownership as the best way to minimize externalities and ensure the best allocation of resources. This is why development policy-makers have rarely gone beyond the public-private and state-market dichotomies and have often considered local forms of communal ownership as “archaic and in need of modernization via privatisation and market integration”.

However, the tragedies of ecological, financial and social crises have also shown the limits of this standard vision of development based on privatization. Gradually, the commons approach seems to have gained some momentum as a new, alternative, way of doing development. Numerous development projects are now analysed through the prism of the commons and the eight criteria for self-governance developed by Elinor Ostrom. Commons institutions in development countries can involve the technical and financial assistance of external donors. This was for example the case in Peru, where the United States Agency for International Development (USAID) participated in the creation of an indigenous communal forestry enterprise which met most of Ostrom’s design principles. In the outskirts of Kinshasa, a local NGO supported by international donors also promoted decentralised water systems which were managed at the local level by the users themselves in order to respond to deficient water

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In a country where public authority is weak and private investors are absent, these autonomous water governance systems proved more effective than traditional public or private water supply services. In Bolivia’s capital too, peri-urban communities succeeded in putting in place small cooperatives to supply water as ‘genuine commons in Ostrom’s original sense’. To sum up, it now seems possible to talk about commons as an emerging ‘approach’ which can complement that of the market and the state in the field of development cooperation. First, development actors should stop dispossessing communities of their commons through expropriation or privatization in the name of modernization, such as concessions for land mining. Second, the role of the State is not simply to provide public goods, but also to recognize the right of communities to organize themselves and govern commons in an autonomous fashion. As the Commission on Legal Empowerment of the Poor notes:

The majority of the rural poor depend to a large extent on non-arable resources such as forests, pastures, swamplands, and fishing grounds. (...) The state should enhance the asset base of the poor by enabling community-based ownership and management of private commons (...).

These new forms of management can prove more effective than the market and the state in building long-lasting trust and a deep feeling of responsibility among people involved. They are not only a factor of social cohesion, but also of respect for the communities’ ecosystem. Third, the development community can also invent new commons such as digital platforms to share new development experiences.

### 3.2 World Bank

Little support can be found for the commons as an alternative development and governance paradigm in the World Bank’s policies. The institution rather stands as a fierce defender of privatization strategies in developing countries. In its 2005 World Development Report (WDR) on *A Better Investment*...
Climate for Everyone, the Bank advocated enhancing the security of private property rights as a means to create a better investment climate and foster economic growth: '[t]he better protected these rights, the stronger the link between effort and reward and hence the greater the incentives to open new businesses, to invest more in existing ones, and simply to work harder'. It is striking how the WDR’s vision of property echoes Hardin’s tragedy of the commons. It is therein claimed that in the absence of clear property rights, those in control of a natural resource will use it as much as possible, since ‘they are not sure the resource will be theirs tomorrow’. While the 2005 WDR does not rule out the existence of ‘community-wide agreements on the use of resources’, it clearly assumes that, when natural resources are ‘held collectively’, individuals have less incentives to protect them against depletion.

In 2016, the IEG published a report drawing lessons from land administration projects supported by the World Bank from 1998 to 2014. The report made it clear that World Bank-supported land administration projects were all based upon the assumption that clear, secure and transferable property rights stimulate land market, develop real property markets, facilitate access to credit, lead to greater productivity, improve land values, and reduce conflicts over land. From the review, it also seems that most of the Bank’s projects focused on a Western understanding of individual property that is transferrable in land markets, and not on commons of local communities like communal lands of pastoralists, fishers and forest-dwellers. Some titling schemes even excluded some areas from their geographical scope because the lands in question were governed by communal and customary rights which were not recognized in land laws.

The World Bank’s little support for communal and collective systems of tenure in the name of ‘modernization’ has not been without criticism. In fact, the IEG report itself, while not pointing out individual titling explicitly, noted that most of the Bank’s land administration projects did not aim to include the poor or vulnerable groups (such as women or ethnic minorities) in addressing land access or redistribution in their objectives. As a former General Counsel of the Bank observed, conventional private land titling ‘is not the only way to improve security of tenure’ since land tenure may already be recognized under customary law in some rural areas. The High Level Commission for the Legal Empower of the Poor also denounced the recurrent mistake of development actors, inspired by the ‘tragedy of the commons’, to transform customary tenure and interests in commons into private property rights, instead of registering these as the group-owned property of communities.

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48 Ibid, p. 82, Box 4.4.
50 Ibid, para. 5.1.
51 Ibid, para. 4.10.
4. Two false friends in international law

While global public goods and commons are often confused in the literature, it is submitted that a distinction can be made between both concepts in terms of the legal norms, principles, and institutions which support their respective cooperation schemes. The objective of the commons approach to development is to empower communities and promote their participation and collaborative input in the governance of shared resources. What is striking with the commons framework is that it inevitably entails a profound and challenging transformation of the structural premises of our international legal order. In the commons literature, the international legal system based on state sovereignty is viewed as an obstacle, rather than a positive instrument of resistance against enclosures. Ugo Mattei and Fritjof Capra, for example, argue that ‘seeking the use of “top-down” international law to protect the commons is like trying to employ a fox to protect a chicken house’.  

Instead of our State-centric international legal system, the commons approach promotes democratic, participatory, and community-based methods which allow citizens to claim their rights in development projects. The development process based on commons is locally owned. Communities are empowered as key actors in the governance of their own shared resources, rather than passive recipients of global public goods. International law recognises under the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) the right of indigenous communities to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Article 23). The traditional lands and shared resources of indigenous communities are also protected against enclosures. The protection of commons under international human rights law also extends beyond that granted to indigenous peoples. Article 1 of both 1966 International Covenants enshrine the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development (para. 1) and to freely dispose of their natural wealth and resources (para. 2). Last but not least, the latest draft of the UN Declaration of the Rights of Peasants explicitly states that ‘States shall recognize and protect the natural commons and their related systems of collective use and management’ (Article 19(3)).

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Remarkably, legal scholars adopting a global public goods lens to international law also often argue that a major overhaul of the international legal system would be required to more adequately provide global public goods. In particular, they contend that international law as it currently stands, with its cardinal principles of State sovereignty and State consent, constitutes a hindrance to the effective provision of global public goods. Trachtman, for example, argues that, ‘[i]n the international system, based as it is on individual state consent, it may be tougher to make rules that would bind free riders’.58 Nico Krisch even contends that the effective supply of global public goods calls for a ‘turn to non-consensual law making mechanisms, especially through powerful international institutions with majoritarian voting rules’.59

In the context of development, the need to provide global public goods is indeed most often reflected in the creation of trust funds which coordinate collective action among various development actors with overlapping legal mandates – such as international organizations, national governments, civil society, and corporate sector. What is peculiar with such legal mechanisms is that they ‘are not exclusively “public”, as private actors play an important and increasing role in their elaboration and delivery’.60 Such private actors increasingly contribute to such trust funds that often focus on specific results on a short term basis in well-identified sectors of development. In this way, development actors try to avoid the heavy bureaucratic structures of traditional public donors and promote efficiency.

So in contrast to the commons approach that promotes more collaborative input in governing common resources, decisions in the global public goods model appear to be largely legitimised through a narrow criterion of economic efficiency. Whereas legal institutions based on commons favour bottom-up initiatives of citizens to counter the traditional private-State divide and to respond to threats to our common heritage, the urgency to produce global public goods seems to justify a turn to new public-private partnerships in development cooperation – such as the Gavi Alliance or the Global Fund to Fight AIDS, Tuberculosis and Malaria in the case of the World Bank’s operations. It is however not clear what role communities can play in such trust funds. As commons activists Burns H. Weston and David Bollier noted, ‘[g]overnments and multilateral intergovernmental bodies such as the UN and the World Bank frequently talk about “global public goods,” but the concept is really a deception […] because there is no sovereign order with authority over global resources and no recognized world citizenry in the technical sense to whom such authority would minister.’61 The risk is indeed that a process solely based on global public goods results, considers people as passive beneficiaries and consumers of development services, and does not take communities into account in the same way as the commons.

5. Conclusion

The development community is faced since the 90’s with two conceptual and normative frameworks which seek to reframe the process of development. Both approaches reflect a deep frustration with the principle of State sovereignty as cardinal principle of international law. What this contribution however attempted to do, was to draw a line between both ideas in comparing them in the specific field of development cooperation. Indeed, at a point where everybody admits that both commons and global public goods risk becoming ‘catch-all’ phrases and buzzwords to which development agencies can attach anything they want, conceptual clarity appears to be needed to reveal the distinctive risks and added legal value brought by each approach to development.

In conclusion, the message is to be careful not to overstretch the meanings of both frameworks and to recognise the specific normative content of each. The power of the commons discourse, in particular, is to propose an alternative vocabulary and governance paradigm to that of the traditional market-state dichotomy. There are indeed plenty of institutional arrangements which are formed by the communities themselves and which often prove more effective than the typical ‘all-public’ and ‘all-private’ solutions in development policies. Thus, instead of assimilating commons to global public goods, both development frameworks should be cautiously distinguished to avoid that the powerful alternative force of community-driven initiatives become mere marketing products to dress up the same old development methods.