THE FUTURE OF LAW AND DEVELOPMENT: SECOND GENERATION REFORMS AND THE INCORPORATION OF THE 'SOCIAL'

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I. Introduction

One of the most significant events in the field of development in recent years has been the effort to incorporate social concerns into the mainstream agenda of market reform and economic development. Largely excluded from the first generation reform agenda, the 'social' diversion has been brought back in through the introduction of a series of additions and reforms, sometimes referred to as 'second-generation' reforms or the 'post Washington-consensus', to the development agenda of the international financial institutions (IFIs).

This is a marked shift in the framing of development policy and priorities. Prior to second generation reforms, social concerns were sharply distinguished from economic concerns; especially to the extent that they were in any sense political, they were seen as not only extraneous to but sometimes even in conflict with the pursuit of economic development. Thus, second generation reforms mark not only the recognition of the social side of development policy, but an effort to make the two sides to co-exist more easily.

This paper probes the manner in which the IFIs are managing the incorporation of social justice and greater participation in the development agenda, and describes how the pursuit of social objectives, in turn, is affected by the governance agenda as a whole.

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A convenient marker of the second generation reforms is the appearance of the World Bank's Comprehensive Development Framework (CDF). Originally presented as a discussion draft circulated by the Bank's president,[1] the CDF identifies two sides to the development agenda. In addition to the macroeconomic and financial aspects of economic growth, the CDF pronounces that greater attention must now be paid to its 'social, structural and human' dimensions. Along with greater attention to issues such as health, education and gender equality, factors such as human rights, good governance and the rule of law are explicitly identified as central to the achievement of development. In addition, the CDF holds that the process of development must be returned to its subjects: no longer a one-size-fits-all agenda that is orchestrated and imposed from above, second generation reforms propose greater country-ownership of the reform process and a development agenda that is generated in a more inclusive and participatory way.

The CDF is represents a holistic framework that, according to the Bank, is now widely accepted as the basis for both generating development policy and achieving sustainable development.[2] The principles and norms it articulates inform the Poverty Reduction Strategy Papers which now ground the formulation of development policy for specific states[3] as well as a wide range of other development initiatives and activities. Nor is the shift embodied in the CDF solely confined to the IFIs: the move toward greater attention to concrete social objectives is confirmed on the wider international stage in the broad endorsement of the Millenium Development Goals.[4]

Second generation reforms are the result of diverse catalysts for change both internal and external to the IFIs. Among the critiques of first generation, 'neoliberal', reforms were that they had more to do

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1. **James** D. W**olfensohn**, A P**roposal for a** C**omprehensive** D**evelopment** F**ramework** (A D**iscussion Draft**) (1999).

2. W**orld** B**ank**, What is CDF: Ten Things You Should Know About CDF, at http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF.

3. For a description, see http://www.worldbank.org/poverty/strategies/.

4. UN Millennium Development Goals, at http://www.un.org/millenniumgoals/.

with the interests of international actors in debt recovery, market access and the protection of investments than with economic growth of states to which they were applied.[5] In addition, reforms entailed practices that seemed obviously problematic from the standpoint of sovereignty.[6] In the view of some, they furthered a conception of development that had long been disclosed as narrow, if not pathological, in its focus.[7] In addition, they appeared to impose disproportionate risks, costs and burdens on particular groups such as women and workers.[8] First generation reforms were also subject to a range of internal critiques, the most telling of which were that they failed in their efforts to generate economic growth and to alleviate poverty by ignoring and arguably damaging the aggregate welfare of the societies in which they operated.[9]

Second generation reforms attempt to respond to these arguments in two ways, by expanding the ambit of development reforms to encompass a greater range of concerns and objectives and by instituting or endorsing a range of procedural changes that place an enhanced emphasis on popular participation and

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5. **Joseph** E. **Stiglitz**, **Globalization and its Discontents** (2002); Balakrishnan Rajagopal, International Law and the Development Encounter: Violence and Resistance at the Margins, at 16, 93d ASIL Proceedings (1999).

6. J. Gatthi, Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law, 5 **Buff. Hum. Rts** L. **Rev.** 107 (1999).

7. Among the best-known alternative indices is the Human Development Index found in the United Nation Development Proram, **Human Development Reports** (New York: Oxford, various years).

8. See **Gita Sen & Caren Grown, Development, Crises, and Alternative Visions: Third World Women's Perspective (1987);** For an analysis of the distributive valence of reforms in the context of transition, see **Kerry Rittich**, **Recharacterizing Restructuring**: **Law**, **Distribution and Gender in Market Reform** (2002).

9. **G. Cornia et al.**, **Adjustment with a Human Face** (1987); **Stiglitz, Globalization and its Discontents,** supra

access to services, including courts. However, it would be a mistake to understand the transformed agenda solely as a response to these now well-publicized critiques, and it would be inadequate to explain the path that second generation reforms have taken in any event. Instead, a series of other events seem to have prompted a transformation of the agenda at roughly the same time. Among them was the appearance of Amartya Sen's influential Development as Freedom. Following its appearance in 1999, development began to be articulated as a project to promote not simply economic growth but a broader set of human freedoms and the capacities to realize them.[10] Imagining development as freedom seemed to both authorize the approach to development policy and market reform on which the IFIs had already embarked as well as signal a shift in the direction of a more humane, responsive, and mature concept of development. Imagining development as freedom also helped to explain the elevation of human rights and the rule of law to the status of development ends or objectives. In addition, the IFIs themselves had come to the conclusion that greater attention to some social issues, such as gender equality[11], might generate better economic outcomes because they appeared to be promising routes by which to enhance levels of investment in human capital. The cultivation of human capital, in turn, had by then been identified as crucial to economic success in the emerging knowledge-based economy.[12] To put it another way, attention to some social issues that once lay outside the purview of the IFIs and beyond the gaze of market

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10. **Amartya Sen**, **Development as Freedom** (1999). Endorsements of this idea have been widespread among the international economic institutions. See for example **World Bank**, **World Development Report** 2000/2001: **Attacking Poverty** (2000); UNDP, **Human Development Report** 2000 (2000).

11. **World Bank**, **Engendering Development**: **Through Gender Equality in Rights**, **Resources and Voice** (2001).

12. **World Bank**, **World Development Report** 1999–2000: **Knowledge for Development** (1999). See also Thomas Courchene, Human Capital in an Information Era, 28 **Can. Pub. Pol'y** 73 (2002).

reformers became justified in the name of economic development itself. Finally systemic crises of various sorts, from the stalled or failed transition in many countries in Eastern Europe and the CIS[13] to the East-Asian financial crisis, provoked calls for a new institutional architecture. In the aggregate, these events converged to produce a development agenda that substantially enlarged the list of 'best practices' and governance strategies that were promoted by the IFIs in the first half of the 1990s.

While restatements of the development agenda have become routine rather than exceptional in recent years, the shift towards the social seems unlikely to be transitory. The development and market reform projects of the IFIs, the Bank in particular, no longer revolve solely around the promotion of economic growth; at least at the rhetorical level, social issues have now been accepted both as ends of development in and of themselves and as important factors to the achievement of general economic growth. As a result, issues ranging from human rights to gender equality no longer stand outside the development agenda, nor is their importance to economic development still seriously debated. Even the issue of equality is now incorporated into the agenda.[14] While some still take the position that social concerns are outside the development agenda, a distraction from the main task of generating economic growth, this perspective is now in the minority as, at this point, the inclusion of the social has now been substantially normalized within the frame of development.

This evolution has shifted the center of gravity in debates around development and social justice in significant ways. Radical critiques of the development agenda remain.[15] In addition, new historical

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13. Joseph E. Stiglitz, Whither Reform? Ten Years of Transition, Keynote Address at Annual World Bank Conference on Development Economics (Apr., 1999) at http://www.worldbank.org/research/abcde/washington_11/pdfs/stiglitz.pdf

14. For example, the World Bank's 2006 Word Development Report will be devoted to the theme of equity and development.

15. For a representative selection, see **The Post-Development Reader** (Majid Rahnema & Victoria Bawtree eds., 1997).

scholarship indicates that some of the social deficits now at issue may be traceable to institutional structures and practices that linger on from earlier moments in the international order.[16] Within the mainstream community, however, debates now largely focus upon the way to conceive the merged economic/social agenda, the relationship between the social and the macroeconomic or financial dimensions of globalization, and the means by which social concerns are to be furthered.

It is difficult, if not impossible, to say much about what a commitment to the importance of the 'social, structural and human' means in the abstract; the same might be said about claims that the reform process should now become more participatory, transparent and democratic. Assessing the varied effects of reforms on the ground is notoriously difficult in any event; the extent to which it is safe or even possible to attribute development outcomes, whether positive or negative, to particular interventions and changes is itself one of the most deeply contested issues in contemporary development debates. Hence the questions. Beyond the reformulated commitment at the rhetorical level, in what ways and to what extent do second generation reforms represent a new and different development strategy, a rupture from the past, versus a continuation or elaboration of the project that has been underway for the last decade and a half? To what extent is there either overlap or conflict between the old (and enduring) imperative of promoting economic growth and the new focus on social issues?

A. Law and the Incorporation of the Social

This analysis proceeds from the assumption that one of the most productive and revealing ways to analyze the transformative potential of second generation reforms is by analyzing the way that they are

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16. See Antony Anghie, Time Present and Time Past: Globalization, International Financial Institutions, and the Third World, 32 N.Y.U. J. **Int'l** L. & P**ol.** 243 (2000); Antony Anghie, Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations, 34 N.Y.U. J. **Int'l** L. & P**ol**. 513 (2002); B**alakrishnan** R**ajagopal**, I**nternational** L**aw from** B**elow**: D**evelopment**, S**ocial** M**ovements and** T**hird** W**orld** R**esistance** (2003).

imagined and operationalized at the level of legal rules and institutions. If a crucial question is whether, and to what extent, second generation reforms represent a transformative moment in development and market reform thinking and practice, there is a variety of reasons why law might provide a crucial lens on the matter.

Law is a condition of possibility of both social justice and democratic participation; even if law were not explicitly emphasized, it would remain important to assess effects of the legal and institutional environment on the realization of social goals. However, second generation reforms themselves center law in new and important ways. The instrumental value of law to development is now well established: whether under the rubric of the rule of law, good governance, or 'best practices', the legal and institutional environment of economic growth has become a site of intense interest and activity in the world of development.[17] Indeed, legal and institutional reforms are increasingly identified as the key to successful development. But not only is law instrumentally important to development; with second generation reforms it is also definitional to development. While the simultaneous installation of law and the social as ends of development may be purely serendipitous, myriad policy documents from the IFIs themselves point to the importance of the rule of law and good governance in securing the social dimension of development. For these reasons, if no other, we might expect a widened conception of development to be reflected in both the content of development and prescriptions about the legal and policy environment for economic growth and greater participation and democratization to inform the processes through which it is to be generated.

Following this intuition, this paper considers the nature and place of legal rules and institutions in the reformed development agenda; the uses to which they are put; the values and interests they seem to

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17. References to good governance are now ubiquitous; for a classic effort to articulate their place in market reforms as a whole, see the collection of essays in **Ibrahim** F.I. **Shihata**, **Complementary Reform**: **Essays on Legal**, **Judicial and Other Institutional Reforms Supported by the World Bank** (1997).

advance; the justifications that underlie them; and their impact on the social objectives to which the IFIs have now committed. However, it also considers the way that social concerns are articulated in this agenda and how their relationship to economic growth is represented and justified. Thus, the paper explores two interrelated questions: To what extent is the regulatory and institutional frame of development altered by the inclusion of social and democratic objectives? What is the impact of the legal and institutional frame on these social and democratic objectives, and what does the current trajectory toward social justice look like as a consequence?

At this point, it seems possible to advance a number of tentative conclusions. First, second generation reforms confirm and consolidate the growing importance of law to development: in important ways, development simply is now a legal/institutional reform project. What is new in second generation reforms is that the importance of legal reform is no longer limited to its role in fostering economic growth; instead those same reforms are now also represented as critical to the achievement of social objectives. Moreover, law itself has become a constitutive element of development: respect for the rule of law, the implementation of particular institutions, and the recognition of certain legal rights have become definitional to the achievement of development itself. Second, despite the expansion of the development agenda and with the important exception of the reforms associated with access to justice initiatives, neither the basic institutional architecture nor the substantive content of the core legal reform agenda has appreciably changed. Third, despite the importance ascribed to law for certain purposes, there is also a new consciousness of the limits of law and a new interest in non-regulatory and mixed modes of governance, especially in respect of social issues. This is reflected in the emphasis on 'soft' forms of regulation and non-legal norms and the expanded role given to non-state actors in functions ranging from norm generation to monitoring and compliance. Fourth, the effort to take greater account of social concerns appears to work both with and against the effort to preserve or expand the zone of democratic and sovereign control over development policies and priorities. It registers as a point of tension in second generation reforms, for the following reason. Conceptions of social justice are not merely being

incorporated into development, they are being transformed in their encounter with and accommodation to other imperatives within the development agenda. The suggestion here is that the encounter of the economic and the social in second generation reforms has led not only to what is most apparent, an enlarged development and market reform agenda; it has led to a struggle around the nature of the social objectives and the strategies by which they should be pursued.

II. Defining Second Generation Reforms

A. *The Rise of 'Good Governance' Or Best Practice in Law and Institutions*

The social critiques of development and market reform are directly connected to a fundamental shift in the activities of the IFIs: the move from project- to policy-based development lending, and the promotion by the IFIs of increasingly comprehensive notions of 'good governance' in a globally integrated economy. While there were also trenchant critiques of traditional project-based lending[18], most have been directed at the attempt to promote economic integration through policy and regulatory transformation, convergence and harmonization in the neoliberal style. Given the mixed genesis of second generation reforms, however, it is useful to rehearse the evolution of the governance and legal project as a whole.

As has long passed into general knowledge, since the 1980s the IFIs have been among the most forceful proponents of market fundamentalism.[19] Actively promoting the market as the engine of growth and social welfare, they have sought to both reduce and redirect the role of the state in economic activity and to reconfigure the structure of entitlements governing market transactions with the aim of providing an environment conducive to private sector investment. This is a project that began with a limited focus

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18. For example, objections to the Bank's engagement in the Narmada Dam project provoked the creation of an internal adjudicatory body authorized to hear a limited range of complaints about its activities. For a description, see I**brahim** F.I. S**hihata**, T**he** W**orld** B**ank** I**nspection** P**anel** (1994).

19. S**tiglitz, G**l**obalization and its** D**iscontents**, supra.

on macroeconomic issues, expanded during the early to mid-1990s to include legal and institutional concerns, and is expanding still further in the context of second generation reforms and the inclusion of the social.

As the IFIs shifted their efforts from project- to policy-based lending, they began to attach conditions to the release of funds. Over time, they developed and deployed a variety of other 'soft' mechanisms to promote the reforms that they regarded as optimal as well. These ranged from technical advice, including legal advice, to states; thematic reports and policy prescriptions on an increasingly wide range of development topics; and empirical research on the determinants of growth, much of which was conducted within the framework of neoclassical and institutional economic assumptions.[20] Policy interventions were originally based upon commitments to liberalization, privatization, deregulation, and the promotion of macroeconomic stability through inflation control, tax reform and fiscal austerity, all as prescriptions that literally came to define the 'Washington consensus'.[21] However, these factors were supplemented over time by an explicit focus on the legal and regulatory framework in which economic transactions take place. This was a consequence of something that became starkly apparent in the transition economies which is that, contrary to earlier assumptions that markets would simply spring up once regulatory impediments were removed,[22] markets do not generate the conditions of their own success. The recognition that 'institutions matter'[23] as well as the increasing focus on both the substantive

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20. I. Shihata, Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms (1997), Law, Development and the Role of the World Bank, 3.

21. John Williamson, Democracy and the Washington Consensus, 21 W**orld** D**ev.** 1329 (1993).

22. On this position, see J**effrey** S**achs**, P**oland's** L**eap to the** M**arket** E**conomy** (1993).

23. This provoked a partial rehabilitation, under strictly disciplined conditions, of the state in the processes of economic development. See W**orld** B**ank**, W**orld** D**evelopment** R**eport** 1997: T**he** S**tate in a** C**hanging** W**orld** (1997)

and procedural legal reforms that have been a feature of the development of agenda since the mid-1990's, also gained force from another direction: this was the conclusion that corruption, a lack of respect for the rule of law, and various other governance failures lay at the root of the ongoing dilemmas of development, particularly in Sub-Saharan Africa.[24]

Both a consequence and a cause of the turn to institutions is that development has been reconceived largely as a question of governance. Legal and judicial reform now regularly appear at the top of the list of fundamental structural reforms[25] and the policy documents of the IFIs are pervaded with statements to the effect that that economic development requires respect for the rule of law, protection of property and other investors rights, and now, human rights.[26] So far, however, any deficiencies in the realm of governance are mostly attributed to national rather than international rules, norms and institutions. There are well-recognized economic pressures on the nation state in an era of globalization and consequent limits on its capacity to act independently of those constraints. In addition, developing states face formidable barriers to participating in the design of the global institutional order and suffer predictable detriments as a result.[27] Despite these well-documented problems, injunctions to respect the rule of law, combat corruption and engage in institutional reform to attract investment, remain central to the reform agenda. These tendencies suggest that, in the eyes of the IFIs, if not elsewhere, any failures of governance are still located at the domestic level.

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24. World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth (1989); **International Monetary Fund**, **Good Governance**: **The** IMF's **Role**" (1997).

25. See, e.g., **World Bank**, What is CDF, supra.

26. For an effort to describe the components and the rationale for the legal reform project, see **Shihata, Complementary Reform**, supra.

27. See, e.g., G. Helleiner, Markets, Politics and Globalization: Can the Global Economy be Civilized? UNCTAD 10th Raul Prebisch Lecture, Palais des Nations, Geneva (Dec. 11, 2000) at http://www.utoronto.ca/cis/working_papers/2000-1.pdf.

The basic thrust of the reform agenda since its inception has been to promote a market friendly legal and institutional order organized around the protection of property rights, the enforcement of contracts, and the provisions of other rules and institutions required to ensure a stable and attractive investment climate.[28] The argument for structural reforms is that the adoption of these rules, norms and best practices are the precondition to participation in the global economic order, without which no state can now hope to achieve growth and escape from poverty. Nor are they irrelevant outside the developing world: rather, they apply equally to states that are already industrialized, on the theory that they are now necessary if states are to protect themselves and their citizens from irreversible declines in their fortunes and well-being in a globally integrated economy.[29]

The original impetus for the introduction of a legal agenda into the development project was law's instrumental value to development. The Bank advanced a general argument about law's role in the success of reforms as a whole, as well as a set of more specific claims about the relationship of particular legal rules, for example property and contract, to economic efficiency and growth. These arguments retain their force; indeed, the Bank increasingly attempts to shore up these theoretical claims with empirical evidence. [30] However, with second generation reforms, law has also broken free of this connection; as part of the 'social, structural and human' dimension of development, law has now been invested with intrinsic value. With the move to development as freedom and the incorporation of human rights, law has become an independent objective in its own right.

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28. For a more detailed consideration of the logic of the legal reform agenda, see R**ittich**, R**echaracterizing** R**estructuring,** supra, chapter 2.

29. IMF, **World Economic Outlook: Advancing Structural Reforms** (2004), Chapter III, "Fostering Structural Reforms in Industrial Countries", at http://www.imf.org/external/pubs/ft/weo/2004/01/pdf/chapter3.pdf.

30. **World Bank, Doing Business in 2004: Understanding Regulation** (2003); **World Bank, Doing Business in 2005: Removing Obstacles to Growth** (2004).

The ideal regulatory agenda was originally envisioned as a regime that is relatively free of state 'interventions' and regulatory encumbrances, on the theory that they were likely to impede efficient transactions and impair the extent and quality of investment. Since at least 1997[31], the Bank has rejected a purely minimalist or night watchman conception of the state and recognized that a variety of distortions, market failures and externalities may warrant intervention and regulatory action in at least some instances. For example, the Bank as well as other international financial and economic institutions became acutely aware as a result of the transition process that privatization prior to the installation of an adequate regulatory infrastructure could result in "the opaque transfer of ownership, corruption, and the dissipation of assets".[32] The arguments for regulation, however, remain securely tethered to the goals of enhancing the competitiveness and efficiency of markets.[33] Moreover, except to the extent that they have been reconsidered because of their clear contributions to productivity-enhancement, claims about the nature of efficient and pro-competitive interventions remain largely as they were in the first generation reforms. Conventional wisdom in the IFIs remains opposed to the use of regulation for purposes other than the correction of market failures; technocratic advice on policy retains a strong presumption about the likelihood of corruption and government failure. Together, these serve to limit both the purposes and the reach of legal reform; the presumption of government failure often undercuts the case for intervention by the state even where it might be otherwise warranted under the logic of efficiency-enhancement. It is also important to note that, quite apart from these articulated concerns, the logic of regulation and intervention has always operated somewhat unevenly within and across different sectors in ways that are

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31. **World Bank, World Development Report 1997: The State in a Changing World** (1997).

32. **World Bank Legal Vice-Presidency, Legal and Judicial Reform: Strategic Directions** (2002), 53.

33. Id. at 52.

difficult to explain.[34] Notwithstanding the modifications to the very conception of development, the Bank retains an enduring attachment both to its initial position on 'good law' for development and an abiding wariness of the state and still describes as axiomatic the proposition that growth is most likely to result from policies of deregulation and liberalization that encourage foreign investment.[35]

B. From Critique to Reform

The social critique of this project has taken two basic forms. One is that efforts to consolidate a global economic architecture around market-centered policies systemically neglected the social dimension of economic growth.[36] The second is that market reform and development policies have themselves produced undesirable social outcomes, either in the aggregate or for particular groups such as workers[37] or women.[38] These concerns are often articulated in the framework of human rights: either they are

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34. For example, the Bank deploys different regulatory arguments, and exhibits different categories of regulatory concerns in the area of financial regulation than it does in respect of either environmental or labor regulation. See **Rittich, Recharacterizing Restructuring**, supra.

35. **World Bank, Legal and Judicial Reform**, supra, at 11. See also the definition of structural reforms in IMF, **World Economic Outlook**, supra note.

36. This was a major focus of the United Nations Summit for Social Development in 1995. See Copenhagen Declaration on Social Development and Programme of Action of the World Summit on Social Development, March 12, 1995, U.N.Doc. A/CONF/166/9 (1995). It remains a live concern among some of the international institutions. See, e.g., ILO, A F**air** G**lobalization**: C**reating** O**pportunities for** A**ll**, Final Report, World Commission on the Social Dimensions of Globalization (2004) available at http://www.ilo.org/public/english/wcsdg/index.htm.

37. G**uy** S**tanding**, G**lobal** L**abour** F**lexibility**: S**eeking** D**istributive** J**ustice** (1999).

38. Diane Elson & Nilufer Cagatay, The Social Content of Macroeconomic Policies, 28:7 W**orld** D**ev.** 1347 (2000).

failures to attend adequately to human rights or are themselves breaches of human rights.[39] In addition, there seems to be evidence that market reforms and the upheavals associated with economic integration can provoke or exacerbate social conflict, especially in ethnically divided societies.[40] Both critiques gained traction, however, from a third concern, one rooted in a fundamental ordering principle of international law and institutions, namely sovereignty. This concern is simply that, however well motivated and to whatever economic effect, the constraints placed upon states by the conditionalities attached to loans were deeply invasive of sovereign power and democratic political priorities. Indeed, reforms raised fundamental questions about the legitimacy of the IFI's policy-based lending and the extent to which the institutions had mandates to intervene in the internal policy decisions of states.[41]

For the most part, the criticisms of first generation reforms did not focus on the legal framework of development or the broader governance agenda as such. Instead they were largely concerned with

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39. See Copenhagen Declaration, supra; United Nations, ECOSOC, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights", Statement adopted by the Committee on Economic, Social and Cultural Rights, 4 May 2001, UN Doc E/C.122001/10, 10 May 2001, available at: http://www.unhchr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/518e88bfb89822c9c1256a4e004df048?OpenDocument.

40. **Amy Chua**, **World on Fire**: **How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability** (2003)

41. This issue was raised inside the Bank in the early 1990s. For the Bank's effort to respond to the legal constraints on its engagement in governance issues, see **Ibrahim** F.I. **Shihata**, Issues of "Governance" in Borrowing Members – The Extent of their Relevance Under the Bank's Articles of Agreement, in **The World Bank Legal Papers** 245 (2000).

macroeconomic policies and their effects upon either specific groups or societies at large.[42] Despite the fact that their concerns intersected and sometimes directly overlapped with those who were alert to the questions of sovereignty and the distribution of power between the developed and developing world, many advocates of greater attention to the social side saw little to question or object to, and much to commend, in the whole idea of good governance. This is true a fortiori in the context of second generation reforms, now that good governance has come to encompass human rights. However, the decision to bracket the legal framework of development or simply to assume that good governance lives up to its advance billing and can be treated as co-extensive with promoting the social side of the agenda may be a mistake[43], or at the least a matter that now needs to be addressed.

The significance of good governance and legal reform to development is conventionally attributed to their roles in enhancing the security of entitlements and the efficiency of economic transactions and their importance to the overall political and economic climate in which stable investment and human development occur.[44] However, in order to locate the role of law in social and distributive justice, as well as the democratization of development and market reform, legal rules and institutions need to be analyzed in a number of other modes as well. This is a complex and multifaceted topic; here I want only to signal those connections that seem to be most salient to the social agenda and the objectives of democratization.

The first is the discursive or ideological: claims about the rule of law and the nature and content of good governance can be used to legitimate attention to particular social objectives such as human rights

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42. See Elson and Cagatay, The Social Content of Macroeconomic Policies, supra.

43. Social justice critics have often avoided deep engagement with questions of market design. A variety of factors is surely in play: division of labor along disciplinary lines; discomfort with the language and analytic tools of economists; and a tendency to rely on human rights and constitutional norms as the vehicles of transformative legal and political change.

44. S**hihata**, Issues of "Governance" in Borrowing Members, supra.

or gender equality. But they can also be used to alternatively normalize or delegitimate their legal or institutional expression or the frame in which they are pursued. Both on the ground and in the wider international context, such claims may make it alternatively easier or more difficult to secure support for particular reforms. This may be either beneficial or detrimental; it may also function to empower some groups at the expense of others, whether local, foreign, or some mixture of both.

This links to the second mode, the distributive: because legal rules and institutions constitute an important means of allocating power and resources to different social groups, the form and content of legal reforms can be crucially important to the question of who benefits and who loses in the course of reforms. The fact that they may be instituted to enhance competitiveness or address market failures does not change this. The manner in which reforms actually play out on the ground will undoubtedly vary, some times considerably, because of pre-existing institutions and path dependence; because they will inevitably engender resistance as well as compliance from those whose behavior they are intended to regulate; because different groups will be differentially positioned to deploy the entitlements that they are allocated; because reforms are destined to intersect with a wide range of other normative orders, whether legal, social or cultural; and because the process of adjudication sometimes alters, or even subverts, the initial valence of reforms. Even if these complexities make it difficult to project the economic effects of reforms - whether aggregate or distributive - with complete accuracy, it also seems true that structural reforms are clearly relevant to a host of social concerns, many of which are either closely connected to or directly about the distribution of resources and power. Thus, tracking the trajectory of legal and institutional reforms remains important to understanding the rising and falling fortunes of different groups and the fate of social goals.

The third is the constitutive. Legal rules and institutions play a role in (re)constructing the very subjects and activities that they are often imagined to merely regulate. This is occasionally recognized in current development literature, particularly when, as in the references to ‘rule of law’ respecting societies, this process of reconstruction is regarded as uncontroversially good. However, if legal rules and

institutions are inside, rather than outside, social and economic practices, it seems important to consider that ideas about good governance and 'best practice' in law and policy may themselves be implicated in the reformulation of social goals that seems to be emerging in tandem with second generation reforms. They are also likely to be implicated in defining the range of democratic options available to both states and communities. It is also worth observing, that private law rules serve a political as well as an economic function; property, for example, has long been identified as a delegation of sovereignty.[45] Thus, quite apart from their distributive effects, the effort to normalize a particular structure of private rights and to confine regulatory interventions by the state will likely affect the scope of sovereign power and the extent of democratic control at the national and local levels.[46]

These observations suggest that legal reforms might provoke or enable a variety of transformations beyond their explicit purposes. Moreover, reforms might work at cross-purposes, rather than in a clear or unitary direction; goals advanced at one level may be modified or subverted at another. Whether the idea is to assess the prospects for realizing social objectives or merely the economic objectives, a more nuanced idea of law seems in order.

Given the centrality of legal reforms to the overall development agenda and the multiple modes and registers – ideological, distributive, constitutive, regulatory, normative - in which they resonate and operate, it seems unlikely that good governance and legal and institutional matters could be entirely separate from the realization of social objectives. Legal rules and institutions constitute the frame in which social objectives are pursued; they are part of the structure by which risk, reward and responsibility are established. As such, they function as a key transfer point between the two sides of the development agenda. Regulatory and policy prescriptions fill out the content of general objectives, illuminating the contours of both the economic and social sides of the development project. They also disclose a great deal about how different objectives are intended to co-exist; for example, they may represent an expression of

45. Morris Cohen, Property as Sovereignty 13 **Cornell L.** Q. 8 (1927).

46. C.B. M**acpherson**, P**roperty**: M**ainstream and** C**ritical** P**ositions,** Introduction (1978).

the balance that is struck between distributive and efficiency concerns. Although much of the relationship between social objectives and the legal and institutional frame of development has been held in abeyance up to this point, it seems difficult to avoid confronting it directly once the social dimension of development is in play.

III. Law and Governance in Second Generation Reforms: Change and stasis

Due to the focus on institutions, law had already come to play an important role in the reform agenda prior to the introduction of second generation reforms. Arguments from law had been consistently deployed to support market reform since the IFIs became immersed in the institutional reconstruction occasioned by the transition to markets in Central and Eastern Europe and the CIS[47]; as a result, the discourse of best practices in law had been under active construction since the early to mid-1990s. Both ideas about the nature of law in the abstract and claims about necessary legal rules and institutions in market societies continue to play a central role in second generation reforms, as they did in the first. Whether it is the importance of the rule of law or the connection between property rights and security and political stability[48], theories and arguments about law are woven throughout the governance project, helping to justify the choices and decisions that are made.

With second generation reforms, however, the IFIs have become interested in new modes of governance and begun to explore an expanded set of regulatory options; this turn is especially marked with respect to social concerns. Although causal relation is uncertain – either interest in alternatives to traditional modes of regulation and governance may be driving the approach to social issues or the pressure to address social questions may itself be the catalyst for the interest in new modes of governance

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47. **World Bank, World Development Report 1996: From Plan to Market** (1996).

48. See, e.g., **World Bank**, **World Development Report** 2002: **Building Institutions for Markets** (2001).

– the direction of change seems relatively clear. While the pursuit of economic goals continues to attract a deep interest in questions of legal rules and institutional structure, the embrace of the social coincides with a burgeoning interest in alternative modes of regulation and an increasingly nuanced set of distinctions among norms and the different modes and routes by which they can be pursued.

In the early discussions of law and development, the absence of formal law was typically represented as the absence of normativity and regulation tout court, co-extensive with chaos, disorder, arbitrariness, corruption - in short a Hobbesian state of nature. While the claim that the rule of law and formal legal institutions are the sine qua non to development remains, it is just as common now to encounter arguments that law is the problem: badly-crafted rules and policies, even the regulatory state as a whole, may be impediments to growth or otherwise incompatible with the demands of a globally integrated economy. Hence, the task is to import not just law, but the right set of institutions.

With second generation reforms, however, the IFIs seem to have moved still further, beyond the point at which the goal is simply the creation of law-based societies in which sovereign control of territory is even and complete; there are no disjunctures between regulatory space and regulatory power; there are no serious gaps between regulatory objectives and the law in action; and the legal system operates seamlessly and without competition in the interests of progress and growth. Despite its centrality to securing the right climate for investment, the IFIs no longer necessarily assume that effective power resides in the state in a transnational world of commerce and production, nor are they confident that standard regulatory institutions will generate solutions to the problems of the post-industrial economy. Instead, a new regulatory paradigm may be needed; sometimes law may even be irrelevant. Hence, sometimes the role of formal law is refashioned and carved back, as governance projects demote both law and the state, or privilege it in defined forms such as private law and specific locales such as commercial regulation.

In the process, more space is created for private actors to devise their own normative regimes and alternative modes of securing compliance are encouraged. Arbitration, for example, may be promoted

over adjudication, similarly consultation and cooperation among the affected actors may be preferred to regulation. For concerns such as human rights, labor standards, gender equality and environmental issues, alternative modes of governance are especially popular: soft law is preferred over hard; frameworks, voluntary solutions, and market incentives promoted rather than rules and regulation; and negotiated compliance preferred over strict enforcement of rules and standards. In the alternative, these issues may simply be relegated to the domain of policy, where policy is understood as distinct from and subordinate to rules and institutions.

Thus, the legal reform agenda in second generation reforms is marked by both change and stasis. The argument here is that, because there is such a range of claims and logics informing the discussions of law, governance, norm generation, and because they seem to be loosely associated with different issues, attention to both the change and the stasis is critical to understanding the direction of the social agenda and the prospects for transformation.

A. *Change*

In second generation reforms, change is clearly visible in the following interconnected areas: 1) legal restraints upon the powers of the state; 2) greater emphasis on judicial process and institutions; 3) expansion of the actors engaged in governance; 4) the turn toward 'soft' law; 5) the recognition of non-legal sources of normativity; and 6) the use of human rights. All mark a shift toward a much more fragmented and polycentric normative order, one in which the center of gravity in respect of governance and regulation is no longer always located in the state.

1. Legal Restraints upon the Power of the State

Because concepts such as good governance are full of history and content, but also contestable and unstable, an ongoing effort is required to manage the direction of legal and policy reform. One problem is that whatever purchase market-friendly rules, policies and institutions have in any jurisdiction, they remain vulnerable to challenge due to political pressure and regime change. There remains the possibility, present in both authoritarian and democratic regimes, that political authorities might make

decisions that are suboptimal or disruptive from the standpoint of furthering investment and growth. Their capacity to do so is variably explained as evidence of corruption, 'arbitrariness' in the exercise of power, the persistent vulnerability of the state to capture, or lack of credible commitment—in short, the malfunction or dysfunction of the state in some way.

One of the ways that these concerns play out is in efforts to decommission the political arms of the state in an expanding zone of policy and regulatory activities. The motivation is to bind the state into the future so that reforms agreed to at one point in time with one administration cannot be undone, at least without considerable expense and effort, at a later date. The Bank has now concluded that the answer to the problem of states credibly committing to 'good' policies may be the delegation of a range of functions typically associated with the state to either independent agencies or external, international institutions. Taking a cue from the independence of central banks, the Bank proposes that tasks such as tax collection and trade policy might be taken out of the political or legislative arena as well.[49]

These proposals track the trend toward the constitutionalization of international economic reforms; efforts to obtain regulatory pre-commitment from states regarding investor rights are already well-described in the international literature.[50] While limits on state power are hardly new—restraints upon state power are a familiar part of all rules-based regimes and form the basis for constitutional oversight of the state—their traditional justification lies in the potential that the state might use its disproportionate power to oppress individuals and vulnerable groups. The logic of constitutional restraint has already been extended to non-natural persons such as corporations; what is noteworthy about the

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49. W**orld** B**ank**, W**orld** D**evelopment** R**eport** 2003: S**ustainable** D**evelopment in a** D**ynamic** W**orld**, chapter 6 (2002).

50. David Schneiderman, Investment Rules and the New Constitutionalism, 25 L**aw** & S**oc.** I**nquiry** 757 (2000); Deborah Z. Cass, The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade Law, E**ur.** J**. Int'l L.** (2000).

evolution of the governance agenda in second generation reforms is the increasing tendency to tightly circumscribe the political choices of democratic electorates as well.

Such proposals represent an important moment in the struggle between governance norms and sovereignty and democracy, if only for the reason there is no necessary limit to the application of the principle of credible commitment; it might be argued that states should commit on a broad range of issues, social issues included. But whether they actually extend this far, restraints such as those described above are likely to have important implications for the pursuit of social initiatives. For example, states that are vulnerable to investor suits for regulatory 'takings' may experience regulatory chill in areas such as environmental or health and safety issues.[51] It is now evident that even purely economic commitments can affect the scope for responding to social issues, especially those that have resource implications (which is to say almost all of them). For this reason, states within the European Union have discovered that a monetary union quickly moves toward a fiscal union too, and that fiscal constraints quite directly affect the pursuit of social objectives, if not the fabric of the social state in its entirety.[52]

2. Judicial Reforms

While the interest in this issue can be traced back before second generation reforms, there has been an astonishing proliferation of judicial reform projects in recent years; to date, the Bank has embarked on over 600 projects.[53] Judicial reforms encompass alterations to judicial institutions and training, as well as an enhanced focus on process, procedure, and access to justice; they may involve

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51 See, e.g., Mexico v. Metalclad Corp., [2001] B.C.J No. 950, May 2, 2001.

52. The recent rejection of Euro on the part of Sweden, for example, is widely attributed to fears that monetary union would put at risk its welfare state.

53. Legal Counsel to the World Bank, Remarks, NYU (Mar. 1, 2004).

'supply side' reforms, such as anti-corruption efforts and reforms to judicial institutions, or 'demand' side access to justice reforms. [54]

Some of the time, judicial reforms appear to be driven by efforts to improve the position of marginalized groups. However, so far supply-side concerns appear to have dominated the funding process. While recently there have been more access to justice projects that target specific groups such as women[55], whether they might become a central rather than peripheral concern is unclear. At this point, much of the interest in judicial reform is clearly linked to the 'old' goals of facilitating transactions and securing property and contract rights. Judicial reform has become a major part of the effort to promote the rule of law and secure a stable investment climate: the presence of institutions capable of enforcing property and contract rights and the appropriate attitude of judges to the adjudication of conflicting rights are both crucial if reforms are to realize their potential.[56]

3. New Actors

A hallmark of second generation reforms, particularly since 2002, is the effort to take account of the way in which governance is dispersed across society rather than centered in the state.[57] However, not only does the Bank recognize that regulation occurs in multiple sites; reform prescription actively seeks to displace governance to different sites and to empower a range of regulatory actors other than the state. Thus, more and more of the regulatory projects conventionally assumed by the state are being allocated to

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54. **World Bank Legal Vice Presidency**, supra

55. **THIS WAS BLANK**.

56. This is not to suggest that they actually deliver on these objectives; the link between judicial reforms and greater economic growth seems elusive and can be very difficult to establish.

57. See in particular, W**orld** B**ank**, W**orld** D**evelopment** R**eport** 2002, supra and W**orld** B**ank**, W**orld** D**evelopment** R**eport** 2003, supra.

actors in the 'third sector'. The market and market actors, more particularly investors and capital holders, are becoming important sources of law, normativity, rule and control.

It has been recognized at least since the mid 1990s that market actors can be an important source of demand for 'good law'.[58] Within the Bank, this is normally imagined as an uncomplicated relationship. There may be those who, seeking protection from the challenges of globalization, make demands that, if acceded to, would distort the market. Workers, for example, are often identified as a 'special interest' group;[59] women too may seek 'protections' or rules that deviate from market norms and introduce inefficiencies.[60] But such exceptions aside, the demand that market actors create for law is normally treated as simply co-extensive with the production of the framework conditions for growth.

There is also evidence of the 'third sectorization' of law and policy,however, as there is of development and market reform as a whole. This has complexified the regulatory logic around development. No longer do policy debates revolve solely around the state and the market, although this relationship remains a central preoccupation. Moving from the margins closer to the center of the good governance debates is a host of actors that make up the third sector. The third sector comprises myriad non-state, non-market, civil society organizations such as voluntary associations, NGOs, and religious organizations who are now invited, indeed expected, to play a greater role in public life. Like the market, they too may serve not only as service providers or partners in public/private ventures or as sources of

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58. **World Bank**, **World Development Report** 1996: **From Plan to Market** (1996). The historical roots of this claim date at least to Weber: see David M. Trubek, Max Weber on Law and the Rise of Capitalism, **Wis. L. Rev**. 720 (1972).

59. **World Bank**, **World Development Report** 1995: **Workers in an Integrating World** (1995).

60. For a discussion, see **World Bank**, **Engendering Development,** supra.

valuable 'social capital'[61]; they are also sources of 'demand' for institutional change. For example, they may serve as useful vehicles of resistance to the state, particularly where the state is pursuing policies that contravene conventional wisdom on good governance. They may also serve as conduits of information and democratic preferences to policy makers, a role they may play in competition with or even in lieu of political institutions. They are sometimes also recognized as independent sources of normative authority

However, the third sector also functions as a repository of concerns that are properly excluded from the law and the state. Sometimes the intransigence of 'culture' or 'society' is invoked as a brake on expectations around social change and a ground for regulatory non-intervention on the part of the state. For example, if a problem such as gender inequality lies in cultural norms, legal and institutional remedies may be futile. Instead, social change beyond the realm of the state is needed.[62]

4. Soft Law

Despite the belief that the fundamental institutional architecture of development is now well settled and due to ongoing concerns about government failure, a desire to confine the role of the state, one place where development is clearly visible is in the use area of soft norms and institutional processes. There is increasing reliance upon voluntary initiatives, incentives, and standards generated at the local level or by the parties most directly affected; this is particularly the case in respect to issues typically consigned to the 'social' rather than the hard economic side of the ledger.[63] For example, while the IFIs

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61. **World Bank**, **World Development Report** 2002, supra; **World Bank**, **World Development Report** 2003, supra. For a critique of the uses of social capital see Ben Fine, The Developmental State is Dead—Long Live Social Capital? 30 **Dev.** & **Change** 1 (1999).

62. **World Bank**, **Engendering Development,** supra.

63. Indeed, there are increasingly complex blends of different 'soft' strategies. For an argument for the use of market incentives to establish the content of corporate codes of conduct, see

remain deeply committed to the idea that the formalization of property and contract rights is required to facilitate investment, production and exchange,[64] they often propose soft norms and strategies to deal with any 'social' concerns associated with these activities. For example, corporate codes of conduct to further human rights, labor standards and environmental protection are classic 'alternative' regulatory initiatives that currently find favor. This turn to soft law is not unpredictable; indeed, it is consistent with the established view that regulatory initiatives for distributive purposes are likely to impede efficiency and the ongoing concerns about regulatory 'intervention' even where some form of regulation might be indicated.[65]

5. Non-Legal Normativity: Informal Norms, Social Networks and Culture

In a related turn, one of the most important elements of second generation reforms is the attention that is beginning to be given to non-legal sources of normativity and the effort to take account of local practices and norms, especially those emanating from market actors and civil society groups. One effect is to expand the reach of good governance beyond formal law, into the interstices of societies and cultures. While the phenomenon of legal pluralism and its impact on and importance to the operation of formal legal institutions has long been noted in the legal literature[66], the turn outside of formal institutions marks a significant shift in the regulatory approach of the IFIs. While the justification for formal law remains centered around its role in attracting investment and promoting growth, culture and society have now

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Archon Fung et al., Realizing Labor Standards: How Transparency, Competition, and Sanctions could Improve Working Conditions Worldwide, 26 B**oston** R**eview** (2001)

64. See, e.g., **World Bank, Policy Research Report, Land Policies for Growth and Poverty Reduction** (2003).

65. S**hihata**, Law, Development and the Role of the World Bank**,** in **Complementary Reform**, supra.

66. See Harry Arthurs, Labour Law Beyond the State?, 46 **U. Toronto L. J.** 1 (1996)

been partially rehabilitated and there is new interest in the role of informal norms in furthering efficiency as well as growth. Moreover, the discourse is around law becoming more complex, as at least some of the anti-formalist critiques have been absorbed.

Rather than the antithesis of law, now informal norms may supplement or even supplant formal law in the facilitation of business transactions. Although the rhetoric of corruption remains as strong as ever,[67] the Bank has come around to the view that social networks can be an efficient way to close deals and convey information, even though they have tendencies to function as insider-networks. They may be especially critical for the poor for whom formal law is often unavailable. In addition, such networks spread risk and raise the relative returns from market transactions, which they do by defining property and contract rights and managing competition.[68] These are, of course, precisely the same arguments that are advanced for formal law, although the arguments for the formalization of law are rooted in the inherent limits of societies governed by culture and convention.[69]

What is perhaps most interesting is the view that civil society and the third sector also have a role in responding to market failure. While market failures are one of the classic bases for state intervention, the Bank is now of the view that non-state bodies may be able to substitute, providing solutions to such problems in at least some cases. Part of their attraction lies in the fact that they represent an alternative to the state, a means of avoiding a return to 'old style', top-down regulation. Yet reliance on civil society also produces countervailing worries. For example, informal norms may serve multiple objectives rather

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67. Page 1 of the **World Development Report** 2003, supra, begins with the statement: "Development is sustainable if the rules of the game are transparent and the game is inclusive." See also the references to property rights and the rule of law as essential to the creation of 'human-made' assets and efficient markets.

68. **World Bank**, **World Development Report** 2002, supra.

69. Here, an important contemporary influence is Hernando de Soto; see his **The Mystery of Capital**: **Why Capitalism Triumphs in the West and Fails Everywhere Else** (2000).

than efficiency simpliciter; in particular, informal laws and norms may reflect distributive concerns.[70] Nonetheless, the extra-legal has clearly been acknowledged to some extent as a source of regulatory authority and efficiency, at least for those who do not circulate in the realm of global capital.

6. Human Rights

Human rights make a significant appearance throughout the second generation reform literature. There are countless references to the need for basic human rights such as freedom of expression and freedom of association, including the freedom to establish non-governmental entities[71]; anti-discrimination norms too now make a regular appearance.

The IFIs have embraced human rights as part of the reformulated definition of development on a number of grounds: because they are now an official 'end' of development; because they contribute directly to good economic outcomes; because they protect the interests of civil society groups and serve as a counterweight to the power of the state; and because they form part of the political climate necessary to attract investment and ensure growth. Thus, human rights serve both economic and social purposes. For example, freedom of association may be necessary to empower civil society groups vis-à-vis the state, while anti-discrimination norms serve to increase market access and participation for excluded or disadvantaged groups, something that is expected to enhance economic growth as well as social inclusion.

The recognition of human rights is highly significant, in part because human rights often structure the debate on issues ranging from gender equality and global labor standards to the protection of indigenous peoples and the environment. Progressive reformers, too, not only endorse human rights as ends in themselves; they also frame their arguments for change to development reforms and practices in

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70. Id. at ?

71. See World Bank, Anti-corruption: Civil Society Participation, available at: http://www1.worldbank.org/publicsector/anticorrupt/civilsociety.htm.

the language of human rights, hoping that the moral heft provided by the framework of human rights will help to overcome arguments and resistance they otherwise encounter.

Sometimes human rights do seem to represent a point of intersection between the two sides, a common way to frame the wider social agenda. For example, basic education and health care at least occasionally are described by Bank officials as "rights to which people are entitled and should have the ability to assert".[72] It is important, however, to recognize that references to human rights within development and market reform policies are not necessarily references to human rights as they are understood by the international human rights institutions, human rights scholars, the activist community or the wider civil society. Rather, they are inevitably references to only a limited domain of human rights, typically identified as 'basic' human rights. While access to basic health care and education may sometimes be described as a 'right', in general the IFIs speak the language of human rights only in regard to civil and political rights. As described above, there is support for freedom of expression, religion and association; arguably some of the access to justice initiatives could be subsumed under the framework of human rights too, especially those that target women or other marginalized or excluded groups. The IFIs also endorse equality, as formal anti-discrimination norms are viewed as fundamental to societies organized around market participation.

But what is excluded, left behind in the process of importing human rights into development, is also telling. Apart from the protection of property and contract rights, the rules, institutions, policies and practices that organize the economy, work and production do not generally fall within the normative framework of human rights; this remains the case even when they appear to be essential to the realization of objectives that are recognized as human rights, such as gender equality or core labor rights. As described next, any assumption on the part of reformers that acceptance of the formal right entails agreement about its concrete institutional, financial or other implications is unsafe.

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72. Nicholas Stern & Shantayanan Devarajan, Power to the Poor People, **Globe & Mail**, Sept. 24, 2003, at A23.

There may be a sizable gap between the endorsement of human rights on the one hand and legal recognition and institutional entrenchment of those rights on the other in any event. While human rights may have been accepted at the normative level, it is unsafe to assume that this recognition has any necessary or determinate impact upon the design of institutions and legal rules. For example, despite the formal acknowledgement of freedom of association and core labor rights for workers as human rights, the IFIs continue to resist the implementation of labor market rules and institutions that facilitate collective bargaining in the face of employer intransigence or protect workers from reprisals from union organizing and respect for workers' freedom of association.[73] Despite the general endorsement of gender equality, there is similar resistance, both normative and instrumental, to a host of well-entrenched proposals to promote gender equality.[74] In short, there is selective engagement with both human rights norms and their institutional implications, at least as those implications are understood in other constituencies.

For related reasons, there is also resistance to the idea of endorsing a 'rights-based' approach to development tout court. The campaign for rights-based development is an effort to get the IFIs, and a wide range of other actors and institutions both global and local, to recognize a number of rights to which people are entitled and which they would have the ability to assert in the context of development.[75] Those calling for rights-based development typically seek to subject the entire range of development and market reform policies to an overarching set of human rights and public and international law norms. This includes a range of market reform policies that human rights and social justice activists have identified as

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73. For a discussion, see **Kerry Rittich**, Core Labour Rights and Labour Market Flexibility: Two Paths Entwined?, Permanent Court of Arbitration, Peace Palace Papers, in **Labour Law Beyond Borders**: ADR **and the Internationalization of Labour Disputes** (2003).

74. **World Bank, Integrating Gender into the World Bank's Work: A Strategy for Action** (2002).

75. This is a major demand of the human rights community in the context of development. See Alston for example.

inimical to the advancement or protection of human rights, social rights in particular. Such as: fiscal austerity drives that limit the resources for health, education and other social services; macroeconomic and monetary policies that increase unemployment and aggravate the plight of the poor; and liberalization and deregulation policies that shift the balance of power among social actors domestic and foreign and increase inequality both within and among states. So far, the Bank and the Fund have decisively resisted this move, not because they object to human rights per se but on the basis that they have no mandate to endorse development policies that do not demonstrably lead to and may in their view actually impair economic growth. But they go still further, arguing that economic growth is itself necessary for human rights, thus subverting the argument that development and market reform projects should automatically be subordinated to human rights norms.

B. *Stasis*

The new approaches to governance and norm generation in connection with social objectives and the complexities that are visible in the encounter with human rights are difficult to account for on their own terms. However, they do seem connected to the stasis in the larger legal and institutional reform agenda.

Despite the redefinition of the aims of development and market reform; the central role assigned to law in second generation reforms, efforts to increase the country ownership of reforms, and some alterations to the processes by which reforms are implemented as a result, the actual content of the legal reform agenda has changed surprisingly little. Discussion and policy prescription on the rules and institutions that are needed for development remain centered around concerns about the promotion of efficiency and competition through the protection of property and contract rights.[76] At the same time, corruption, transparency and accountability remain the major preoccupations in respect of the state. As a

76. IMF, **World Economic Outlook,** supra note, at 104–05

result, the fact that the development agenda has been reformulated to include the social is almost completely unreflected in the core legal and institutional reform project.

Although one of the touchstones of second generation reforms is the rejection of a 'one size fits all' template for development and the importance of wider participation in the formulation of development goals, there is surprisingly little diversity in either the discourse or the prescriptions about the legal reforms needed for development. In part this may be due to how the process of participation is itself imagined. As one recent Bank publication put it, enhancing participation involves first diagnosing the problem and then designing reforms according to the relevant known best practices; at this point, it becomes important to get local 'buy-in' as to priorities and sequencing.[77] Despite the reminders that context matters, there is no evident pluralization in the reform proposals. Whether 'one size fits all', especially with respect to economic rules and regulations, still seems to be a matter of internal dispute within the Bank.[78] But even if it no longer still rules at the formal level, then its impact is yet to cash out in any visible way.

The resulting disjuncture between the expanded development agenda and the legal reform project is stark. There is a wealth of empirical research exploring the connection between the existing 'best practice' rules and growth; indeed second generation reforms are marked by an intensified focus on measuring the results of reforms and shoring up the empirical base of the reform agenda.[79] Research and policy reports also increasingly suggest a congruence or overlap between the institutional demands of

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77. **World Bank Legal Vice-Presidency, Legal and Judicial Reform**, supra, at 55.

78. See **World Bank, Doing Business in 2004**, supra, at 119.

79. See activities of the World Bank Institute, available at: http://web.worldbank.org/WBSITE/EXTERNAL/WBI/0,,contentMDK:20097853~menuPK:204763~pagePK:209023~piPK:207535~theSitePK:213799,00.html. See also W**orld B**ank, D**oing B**usiness in 2004, supra; Norman V. Loayza & Raimundo Soto, On the Measurement of Market-Oriented Reforms, December 2003, available at http://econ.worldbank.org/files/37707_wps3371.pdf.

social justice and economic growth.[80] But research on the distributive or other social effects of the legal reform agenda itself is sparing to non-existent.

The result is a wall between the two sides of the development agenda, the effect of which is to make the established legal framework the background condition in which other objectives, including social objectives, must be pursued. It is as if the legal framework of investment, production and exchange had no effect on the social and, aside from the changes described above, the incorporation of social objectives into the development agenda had few necessary institutional implications. Yet whatever the promise of procedural reforms, it is not only lack of popular participation in the development and market reform process that has attracted concern. Nor has the social deficit necessarily been attributed to the absence of the rule of law, inadequate legal process or procedure, or lack of access to judicial institutions. Rather, much of the criticism concerns the values and interests that have been furthered and neglected in the process of reform and the groups that have been alternatively harmed or advantaged in the process.

Because of the varied properties and effects of legal reforms described at the outset, these concerns seem likely to be intimately related to, rather than separate from, the institutional choices that have governed the development and economic integration agendas. However, apart from a nod in the direction of civil and political rights, the discussion of legal rules and institutions still largely proceeds in terms of their expected contribution to efficiency. A vast number of legal rules and institutions in contemporary market societies are of course expressly designed to further distributive and social goals: collective bargaining rules, consumer protection laws, landlord and tenant laws, and zoning laws all re-allocate the bargaining power that would otherwise be obtained through contract and property law. They may also guarantee social minima, whether in respect of housing, health and safety, employment or other concerns. But is doubtful whether the structure and content of other laws, not only those that obviously further social objectives but those that further efficient transactions too, can be explained apart from the conflicting interests and concerns of different constituencies. Despite the expansion of development

80. See, e.g., **World Bank, Engendering Development**, supra.

objectives to include the social, there is no explanation for rules that deviate from efficiency other than that the regulatory process has been captured by special interests.

What is missing, is any recognition that the legal and institutional reform projects may be implicated in some of the very social problems that they are now being conscripted to help solve because of their effect on the allocation of power and resources. Yet while their connection to social concerns seems to be absent, there is some degree of consciousness that distributive struggles may be played out in and around legal rules. For example, in a recent restatement on the relationship of law to development, the Bank makes reference to the fact that legal rules "determin[e] who gets what and when" and notes that "all institutional structures affect the distribution of assets, incomes, and costs as well as the incentives of market participants and the efficiency of market transactions".[81] However, this insight is largely deployed to confirm the distinction between good and bad law and the wisdom of the established path of reform: "By distributing rights to the most efficient agent, institutions can enhance productivity and growth."[82] Similarly, a recent Fund report on the political economy of structural reforms analyzes the phenomenon of 'status quo bias'[83], described as the tendency of potential losers to hold up the process of regulatory reforms. However, this insight does not provoke a more general reflection on the fact that winners and losers are routinely produced in the course of reforms.

In addition, it seems likely that some reassessment of the legal reform project may be needed expressly for the purposes of furthering the social side of the development agenda. Efforts to improve the position of groups such as workers, women and indigenous peoples, or simply to alleviate the hardship of those who are generally dispossessed, do not always live comfortably with efforts to facilitate transactions and provide a market-friendly investment environment. While greater equality may be entirely compatible

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81. W**orld** B**ank**, W**orld** D**evelopment** R**eport** 2002, chapter 1, supra.

82. Id.

83. IMF, **World Economic Outlook**, supra.

with growth[84], typically there are real and perceived tradeoffs. And even if greater attention to inequality and other social objectives does also aid growth, there can still be critical disputes about the manner and extent to which they should be addressed through legal rules and institutions. This is a particularly live possibility in second generation reforms, as many of the routes by which social objectives either might be pursued or traditionally have been pursued conflict with the norms and assumptions that organize good governance. For all of these reasons, we might expect the introduction of social concerns to engender both contestation and change in the realm of governance and legal reform.

There are at least three ways in which the governance frame itself might be affected by the pursuit of social objectives. The first, and most obvious, is that incorporation of social concerns raises the possibility of reliance upon the regulatory, redistributive state. As described below, a central thrust of the governance agenda is to promote and legitimate a shift from the Keynesian or New Deal to the 'enabling' or 'post-regulatory' state.[85] The incorporation of the social might also call into question the adequacy of a legal and institutional order organized primarily around the promotion of efficiency and competition. For example, attention to gender and other forms of equality might compel a re-examination of the assumption that markets adequately value human capital and contributions to economic growth[86]; it might also revive attention to the distributive properties of background rules and institutions in households and families, civil society, and the market. But attention to social concerns might also provoke a

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84. Ravi Kanbur & Nora Lustig, Why is Inequality Back on the Agenda?, World Bank, Annual Bank Conference on Development Economics, (Apr., 1999), at http://www.worldbank.org/poverty/wdrpoverty/kanbur499.pdf.

85. David M. Trubek & Louise G. Trubek, Hard and Soft Law in the Construction of Social Europe, SALTSA, OSE, UW Workshop on "Opening the Open Method of Coordination", European University Institute, Florence Italy (July, 2003), paper on file with the author.

86. Diane Elson, Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues, 27 **World Dev**. 611 (1999).

reconsideration of the nature of efficient markets and their institutional foundations. For example, it may turn out that a serious examination of labor and workplace equality issues also casts doubt on the assumptions about the efficiency of the current 'deregulatory' approaches to labor market institutions.[87]

All though it seems unlikely that this is the final word, so far none of these possibilities is much in evidence. Instead, there are clear efforts to manage the institutional implications of the expanded development agenda by confining the growth and direction of formal legal entitlements and relying upon new forms of governance; by fashioning a new social role for the state; and by channeling many social concerns away from the state toward non-state actors and institutions. The end result are social agendas that do not seriously disturb the established institutional and regulatory frame and that sometimes circumvent formal institutional solutions altogether.

One possible explanation is that the core reforms from the first generation are regarded as entirely compatible with enhanced attention to the social side; as the President of the Bank announced in 1999, what is required is simply more attention to the other side of the agenda.[88] Another possibility is that core reforms are thought to be not only compatible but necessary to the realization of social objectives. This too, has some resonance in current development discourse: as the Bank and the Fund have become fond of saying, not only does development now include human rights, the realization of human rights requires economic development.[89] Indeed, it has been argued that deficits, inflation, subsidies and trade restrictions are themselves contrary to human rights.[90] Yet a third possibility is that core legal reforms themselves directly embody or promote social objectives, even if we never realized it before. This too forms part of

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87. Simon Deakin & Frank Wilkinson, Labour Law and Economic Theory: A Reappraisal,. **Legal Regulation of the Employment Relation** 29 (H. Collins, Paul Davies, & Roger Rideout, eds., 2000).

88. **James Wolfensohn, A Comprehensive Development Framework** (1999)

89. **World Bank, The World Bank and Human Rights** (1998)

90. Sergio Pereira Leite, Human Rights and the IMF, 38 **Fin. & Dev**. (2001).

the current development narrative: where before property rights were defended in the name of attracting investment and economic growth, now we learn that they are in fact of most benefit and importance to the poor and critical to the direct alleviation of poverty as well.[91] Whatever the explanation, attention to the social side of development proceeds largely through pre-existing legal institutions or outside them altogether.

IV. Assessing the Rise of the Social

A. *Transforming the Social*

The discussion of social concerns in the context of second generation reforms suggests that addressing social concerns require the following shifts. It entails more emphasis on human rights; an enhanced focus on process and procedure; greater attention to popular participation in the formulation of development policy. It may also involve alterations to policy and resource re-allocations to encourage investment in human capital and enable more highly-skilled, highly-valued market participation. It almost certainly involves greater involvement of civil society, NGOs, and grassroots groups, whether in the formulation of norms or the delivery of services. This is turn may imply more volunteer work, especially in the context of fiscal constraints or the devolution of state responsibilities to the local level. But it also involves a cultural or psychological shift, namely becoming more alive to the possibilities of the market and moving beyond the expectation that the state is either the source or the guarantor of social entitlements.

However, an important part of furthering the social side centers around ensuring broad participation in the market, which the IFIs are promoting through a variety of what might be described as

91. **World Bank Legal Vice-Presidency, Legal and Judicial Reform**, supra.

'market-centered' agendas for social justice.[92] These are projects that respond to issues ranging from gender equality[93] to improved corporate social responsibility[94] and better labor standards in the new economy[95], largely by relying upon market forces and market incentives. What both joins them together and distinguishes them from other social justice projects is that they present the pursuit of social objectives as essentially congruent and coterminous with the current direction of institutional reform, if only they are approached in the right spirit and with a proper consciousness of governance norms.

While these efforts often collapse the distance and conflict between economic growth and social objectives that marked first generation reforms, they also reframe social objectives in ways that make them more compatible with market-centered growth.

At this point, many of these projects can at best be described as speculative. But whatever the prospects that they will actually realize their objectives, their impact upon the social goals themselves is significant.

Among the results are that the object and scope of social goals are being reduced. For example, formal equality, especially in the form of participation rights, is being substituted for substantive equality. Social programs are being 'targeted' to assist only the poorest rather than provide universal or broad-based protection.

These trends are evident in the Bank's policy research report on gender equality. In this report, the Bank sets out the case for incorporating gender equality into the development agenda, explaining it as

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92. This turn seems not unrelated to a trend already identified by human rights scholars. See, e.g., Upendra Baxi, Voices of Suffering and the Future of Human Rights, 8 T**ransnat'l** L. & C**ontemp**. P**robs.** 125 (1998).

93. **World Bank, Engendering Development**, supra.

94. **United Nations, The Global Compact: Corporate Leadership in the World Economy** (1999).

95. Archon Fung et al., Realizing Labor Standards, supra.

'good for growth' while at the same time defending development as good for gender equality.[96] However, in the process, the report advances a particular definition of gender equality that explicitly rejects the goal of substantive economic equality between men and women, even as it promotes market processes and greater market participation as the engines of gender equality.[97] A similar process is at work with respect to global labor standards. When the Bank and the Fund are pressed to recognize certain 'core' worker rights as human rights, they give a qualified endorsement, explicitly reserving their position on what the ILO identifies as the linchpin of the global labor agenda, freedom of association and the right to bargain collectively.[98] But just as important is that they are also reformulating the basic objectives of worker protection: according to the Bank and the Fund, the goal is not to secure the traditional collective interests of workers; this may amount to 'special interest' protection.[99] Instead, what is important is that workers' individual rights and freedoms are respected. In their view, the economic security and welfare of workers lies not in job security protection or other labor and employment standards, but in greater flexibility and adaptability to the demands of the market.

The IFIs are also altering the mechanisms through which social objectives are achieved. While this was arguably implicit in first generation reforms, with the new attention to the social side of the

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96. **World Bank, Engendering Development**, supra. The Bank also argues the obverse, contending that growth is good for gender equality.

97. Id.

98. **World Bank, Core Labour Standards and the World Bank**, Background Document for ICFTU/ITS/World Bank Meetings on Core Labour Standards (Jan. 20, 1998); **World Bank, World Development Report** 2000, supra.

99. **World Bank, World Development Report** 1995, *supra*.

104. However, this shift in the language of justification is not confined to the Bank; those pushing for reforms from outside now frequently frame their claims in the language of efficiency too.

agenda, the limits on those objectives are now becoming more explicit. In particular, the strategies of engagement with social concerns resist the use of market rules and institutions for distributive purposes on the basis that they can be expected to have a depressing effect on aggregate growth; similar arguments are advanced for restraining the use of tax and income transfers.

These developments all indicate a growing instrumentalization of social justice claims. Social objectives are embraced not only because they are human rights or are socially desirable, but because they enhance growth. Although with second generation reforms at least some social justice issues now have status as independent ends or goals of development, debates over social justice are increasingly conducted in terms of their contribution to economic growth. [104] Social goals are themselves being re-ranked: those that appear to most directly enhance the extent and quality of market participation, for example investments in human capital, such as education and worker training, are preferred over those that do not.

There is also a marked individualization of the social welfare calculus. Rather than common and universal entitlements in respect of pensions and health care, market reformers propose the establishment of individual accounts calibrated to levels of market participation. Furthermore, as described above, workers are increasingly represented individuals with rights rather than constituencies with collective interests and demands.[105]

To repeat, in their efforts to propose solutions to the social, the IFIs are as likely to reject as embrace the claims and evaluations of other international institutions, scholarly experts and civil society groups. Whether they diverge from other norms or not, however, may matter less than the simple fact that

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Even the ILO now routinely advances arguments for worker protection in terms of their contribution to economic growth, as well as their intrinsic importance. See, e.g., ILO, **A Fair Globalization,** supra.

105. Bob Hepple, Introduction, in **Social and Labour Rights in a Global Context** (Bob Hepple ed., 2002).

since the inception of second generation reforms, they have established an authoritative presence in such debates. Whether the issue is gender equality, global labor standards or human rights, the IFIs routinely stake out positions on the content of social and political concerns and their policy and institutional implications.

The result is a 'new normal', a reconstitution of norms at the level of subject or citizen, social institutions and societies as a whole. However paradoxical, quintessential second generation ideas that there should be self-determination in the development process and greater attention to the social or human side of the development equation manage to coexist with the view that there must be continued fidelity to market principles and the institutions said to embody them. While there is a place for human rights, heightened attention to social concerns, and even some room for equality, they are envisaged within a fairly well defined set of market-centered and market-promoting parameters.

At least part of the reason is not hard to intuit. The embrace of the social dimension of development risks rehabilitating goals and resuscitating strategies that have been systematically challenged if not discredited outright in the governance agenda as a whole. To the extent that responsiveness to social welfare and social justice concerns is reflexively associated with intervention, regulation, protection or redistribution by the state, the IFIs (along with many other international and domestic actors and bodies) seek to break this connection.

Thus, one possibility is that efforts to promote the social are better explained in conjunction with the governance agenda than in terms of established ideas about human rights or the route to social justice themselves. There are two issues integral to governance norms that appear to have had an impact on the way that social concerns are imagined in the context of development. The first is the nature of sovereignty; the second is the emergence of the enabling state.

B. *Recalibrating Sovereignty*

Since its inception, policy-based lending has raised a fundamental set of concerns around sovereignty, legitimacy and the limits of the mandates of the IFIs. The original aim behind policy-based

lending was to identify and isolate a set of regulatory and institutional issues from the wider zone of political contestation, on the basis that this isolation from 'normal' politics was necessary to stabilize the economy and promote growth. These efforts produced resistance, much of which was articulated in terms of the infringement of democratic processes and sovereign political priorities. The move to promote good governance, particularly in dysfunctional or 'failed' states, has not solved this problem, despite the second generation idea that reforms should become more democratic and participatory.

This is partly explained by the fact that the development of governance norms has been coextensive with the continuous erosion of the prohibition on interference in the internal affairs of states. Distributive concerns such as human rights and gender equality had long been characterized as 'political' issues; as such, they originally fell outside the realm of considerations that the IFIs were authorized to use as the basis of lending decisions.[106] As policy-based lending expanded into a fully-fledged governance agenda, one whose promotion became not simply normalized but central to the activities of the IFIs, the specter of the forbidden political loomed large. Faced squarely with the issue, however, the IFIs simply redefined the existing boundary between economic and political issues. Armed with an opinion issued by the Bank's legal counsel on its governance activities[107], they proceeded to articulate a comprehensive economic rationale for engagement with domestic policies and regulations, effectively ratifying the path of action on which they had already embarked. If in the first phase of policy-based reforms, sovereignty stood as a reproach to market reform initiatives but was largely ignored, then over time sovereignty has simply been redefined.[108]

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106. **Shihata**, Political Activity Prohibited, **The World Bank Legal Papers** 219, supra

107. **Shihata**, Issues of "Governance" in Borrowing Members – The Extent of their Relevance Under the Bank's Articles of Agreement, **The World Bank Legal Papers** 245, supra.

108. To the extent that it resembles the process identified by Antony Anghie in the mandates in the interwar period, it suggests that the international institutions are continuing a remarkably long and

What should be stressed is that the governance opinion, and the expansion into new policy, the regulatory and institutional terrain that it purported to explain and authorize, is not only a significant marker in the recalibration of sovereignty. It is also critical to the socialization of the development project in two ways. First, it provided the conduit for the incorporation of such issues into the development and market reform agenda by establishing the principle that however otherwise political, such activities did not fall outside the institutional mandate laid out in the Articles of Agreement as long as they could be plausibly linked to economic development.[109] However, by determining the parameters in which the formerly excluded social and distributive issues could now be legitimately considered, it also helped determine the place of such concerns within the agenda and the language or frame in which they would materialize. Arguments for greater attention to social issues would be articulated in terms of their contribution to growth and they would be measured in terms of their impact upon economic growth, failing or succeeding along that metric.

Thus, if one of the criticisms of the Washington Consensus was that it invaded the sovereign domain of states and constrained the exercise of democratic choices, the paradox of second generation reforms is that in responding to the social deficit of the first, the development institutions seem to have increased their reach. Second generation reforms proceed in the name of democratizing the development process and returning it to its subjects. However, with the acknowledgement of the social dimension of development and the effort to elaborate what it does and does not involve, the IFIs have expanded the territory in which they operate and generated governance norms that are arguably even more disciplinary than their predecessors. This effectively places a still greater range of issues and decisions beyond politics, producing a qualified and reduced form of sovereignty.

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well-established practice of intervention into sovereignty. See Anghie, Colonialism and the Birth of International Institutions, supra.

109. Id.

C. *Toward the 'Enabling' State*

Good governance, legal reform and rule of law projects might be understood as an effort to establish, in comprehensive ways, the institutional parameters of normal markets and normal market societies. However, what makes this a complex exercise is that it is not simply a question of diffusing market norms to states that have failed to sufficiently assimilate them. Rather, what is 'normal' within market states is also under active reconstruction, with settled elements of the established normal under assault. In other words, projects of diffusion and transformation are simultaneously underway.

Second generation reforms consolidate a central element of the governance agenda, which is a fundamental reconfiguration of the place of the state in society and a new division of labor among the state, the market, the individual, and civil society in social life. It is difficult to overstate the paradigm shift in relation to the state that underpins the agenda as a whole. Arguably its most fundamental element, the linchpin of the exercise, is the shift from the 'protective' and 'regulatory' state to what might be described as the 'enabling' state. With the shift to the enabling state, the role of the state is to protect a limited set of private rights and to create the framework conditions for the flourishing of markets. It is against this metric, rather than simply the respect for the rule of law or the capacity to implement democratic preferences, that the 'goodness' of governance and the competence of the state are now measured.

With second generation reforms, the events and outcomes that the state is expected to enable has expanded; rather than merely facilitate economic transactions, now it must promote goals such as gender equality and greater social inclusion too. However, as described above, market participation is itself now a primary vehicle for these ends: despite the inclusion of the social and the commitment to expanded citizen participation in the development process, the conception of the state's role has not fundamentally shifted.

The idea of the 'enabling' state has clear implications for the democratic and participatory objectives. Part of what is at stake in the shift from 'government' to 'governance' is a challenge to the

singular authority of the state in the generation of norms; now other actors are now clearly involved in the process too. But the enabling state also already embodies objectives, objectives that may limit the zone of democratic action. Because the enabling state confines or rules out many traditional Keynesian or New Deal approaches to ensuring economic security and furthering objectives such as social justice and cohesion, intensified market participation becomes a much more attractive, perhaps necessary, strategy for addressing a wide range of social ills. Thus, it is not surprising that the main plank of the social agenda, whether it concerns gender equality, improving the position of workers in the global economy, or even the general problem of poverty alleviation, is the market.

V. Second Generation Reforms: Transformative Possibilities?

From a legal standpoint, the second generation reform agenda does not look particularly new; indeed, the legal and institutional framework of the ideal market economy seems remarkably unaltered by the inclusion of the 'social, structural and human'. Nor is it substantially altered by the injunction that development should be democratized and rendered more participatory; however these ideals are imagined, there is little evidence that they have penetrated to the level of institutional design. Even the discourse around core legal reforms is largely unchanged, notwithstanding the new objectives that development now encompasses.

There are new references to human rights, freedom of expression and associational rights in particular. There is also enhanced emphasis on entitlements that secure or improve access to the market: while in first generation reforms, such concerns revolved around investors, now they extend to workers and women as well. However beyond this, few new legal entitlements appear to be envisioned for those left behind in first generation reforms.

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111. Even in first generation reforms, there was a range of competing explanations and justifications for reforms. **Rittich, Recharacterizing Restructuring**, supra, chapter 2.

The legal and institutional agenda is also not obviously responsive to the push to make market reform and development more democratic and participatory. Instead of the product of political conflict and democratic choice, in second generation reforms as in first, the legal and institutional frame of economic development stands largely outside the democratic process, setting the parameters in which all social and political decisions are made. So even as the incorporation of social concerns seems to represent progress or improvement on one level, the range of options through which to address them is being constrained on another.

From another vantage point, however, the relative stasis and continuity in respect of legal entitlements and institutional forms and the change that is visible elsewhere in second generation reforms is completely explicable. The IFIs may well be committed to human rights and social goals. However, it is important to understand that the protection of investor interests and the commitment to efficient legal rules and institutions remains a major part, perhaps *the* major part, of their strategy to advance greater social well-being and social justice. This is because of the longstanding argument advanced by the IFIs that the only real form of poverty alleviation lies in growth. While in many quarters, better social outcomes are fundamentally a distributive problem, for the IFIs they remain largely dependent upon drawing new participants into the market and generating greater aggregate wealth.

But the interest in market incentives and alternative modes of regulation and norm-generation, through which to further social goals, seems deeply connected to their views about the proper role of the state. Similarly, their resistance to traditional, state-centered modes of pursuing social justice seems inseparable from their abiding belief that they cannot help but interfere with economic growth.

Three additional observations may be germane to the discussion. First, it is worth noting that there are two projects simultaneously in play: one is the generation of economic growth at the local and national levels; the other is building the architecture of the global economy. While the IFIs work tirelessly to suggest that these two projects are necessarily congruent, if not joined at the hip, in a globally integrated economy, it seems clear that they may diverge in normative or institutional terms at least

occasionally. 'Developed' country concerns such as increased market access may be important reform objectives, even though they tend to be submerged in the official narrative about poverty alleviation. Notwithstanding the efforts to link best practices in law to greater economic growth, the institutional preoccupations of the IFIs and their resistance to alternative paths and proposals may be better explained by their commitment to the second project than by their failure to apprehend the costs and limits of conventional reforms in particular contexts and locales.

Second, ascribing independent importance to law opens up the reform project to new objectives. This could clearly lead either to an expanded list of legal entitlements and/or a reassessment of conventional wisdom about the goals and functions of legal rules and institutions associated with development. This is a live possibility, especially in a context of heightened attention to democratic participation and greater emphasis on social concerns. However this has not happened, suggesting that it is also possible that the emphasis on law for itself could serve a conservative function, entrenching rather than destabilizing or subverting the institutional project associated with first generation reforms. This is a judgment, rather than an argument that such a result is in anyway entailed by invocations of the importance of the rule of law. But given that considerable substantive content had already been embedded in the legal reform project, one possibility is that elevating law's place in development agenda may simultaneously strengthen the current direction of institutional reform.

Third, one of the results of the different iterations of the law and development movement is that there is now an archive of arguments about the relationship between law and economic growth and an array of competing and conflicting justifications for legal reforms, all of which carry some resonance at the discursive level.[111] Because they are used in both predictable and arbitrary ways, it is difficult to do more than suggest the directions such arguments might take. As a consequence of the conclusion that governance activities can encompass anything that reasonably bears on prospects for economic growth, the IFIs now have a series of 'enabling' arguments for focusing attention on issues of social and distributive justice. However, it is important to recall that they retain two basic 'limiting' arguments from

an earlier era. The first is that such issues may be political; as such, they may fall outside the realm of factors that the IFIs are authorized to consider in their lending decisions.[112] Second, the IFIs maintain that they have no independent, free-floating mandate to act as human rights enforcers; they are strictly limited in their decisions to considerations that demonstrably further economic development. As a result, they are only able advance objectives such as human rights or gender equality to the extent that they also contribute to economic growth. These two arguments structure the engagement with human rights, distributive concerns and other social justice claims. On the one hand, the IFIs may invoke constitutional restrictions on interference in political affairs to preclude responses to social, egalitarian or distributive concerns, however desirable such responses might otherwise be. But on the other hand, they also argue that their mandate to further economic development requires reconsideration of standard regulatory and policy approaches to social questions. It is this that accounts for the fact that issues conceived elsewhere as matters of human, women's or workers' rights are either missing from second generation reforms altogether or have become the subject of soft non-regulatory initiatives rather than entitlements backed by the state.

Second generation reforms appear to create common ground among market reformers and their critics, as calls for the rule of law and human rights all sound in the register of greater social justice. However, clear conceptual and normative differences around the social agenda are visible. As they are absorbed into the development agenda, a range of social objectives are being disaggregated and fragmented, reinterpreted and reorganized, repositioned both in relation to each other and to economic objectives, or simply rejected, usually on the basis that they are inappropriate in market-centered societies.

There are also clear conflicts at the level of strategy. The conclusion we are invited to draw by the IFIs is that the achievement of social objectives requires no necessary legal and institutional reforms apart

112. IBRD Articles of Agreement, Article 10, Section IV (as amended 1989). See also S**hihata**, Political Activity Prohibited, T**he** W**orld** B**ank** L**egal** P**apers**, supra

from those that are necessary for market societies to thrive in general; the corollary is that the governance and legal frame also has no adverse impact upon the possibilities of achieving social objectives either. Here is an important fault line. The protection of private rights and a correlative disenchantment with the regulatory, protective and redistributive state remain foundational to the governance agenda. However, regulations that alter the structure of private rights and resource reallocations through the welfare state have been the primary institutional means for furthering social, egalitarian and distributive goals in non-kinship based societies

One possibility, the one that is implicit in second generation reforms, is that to the extent that changes are required in the realm of governance, the answer lies in non-regulatory, non-institutional solutions. Constituencies explicitly committed to social justice and progressive social change are also increasingly interested in alternative, non-, or post-regulatory modes of norm generation. The result is an important contemporary debate over soft law and its capacity to substitute for hard law and to effect social change. Soft law initiatives may be preferred for a variety of reasons other than simply an aversion to state-based regulation. For example, the impossibility of reaching consensus on regulatory reform may push parties to explore alternatives. Similarly, the diversity of pre-existing rules and institutions may make regulatory harmonization or convergence unlikely or simply unavailable. Or the solutions to problems may be so varied and context sensitive that the most that would be desired are either process norms and entitlements or general agreement about the direction of reforms.[113] Incentives and voluntary

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113. The exemplary case is the use of the 'open method of coordination' in the European Union. For a basic introduction, see David M. Trubek & James S. Mosher, New Governance, Employment Policy and the European Social Model, in **Governing Work and Welfare in a New Economy**: **European and American Experiments**, 33 (Jonathan Zeitlin & David Trubek eds., 2003). See also **Building Social Europe through the Open Method of Co-ordination** (Caroline de la Porte & Philippe Pochet eds., 2002). For an analysis of these trends in the context of labour regulation in the

standards may be more effective in some contexts than sanctions alone. Both goals and methods for reaching them may be unstable; for this reason, some explicitly endorse 'rolling rule' regimes as the preferred mode of regulation in the contemporary context.[114] In short, the diversity of pre-existing regulatory regimes, the complexity of issues and the variability of adequate responses may militate in favor of a range of approaches to regulation and norm generation rather than reliance upon traditional top-down modes of regulation by the state. This suggests that there is no reason to assume that progress on the social front will occur only in reliance upon the traditional regulatory instruments and practices of the state.

However, institutions continue to matter, especially for distributive purposes.

1. Soft Law

One of the central questions is the interaction between the institutional structures that form the core of the legal reform agenda and the soft strategies that seem to be a favored method to further social goals. Soft law strategies may well be a strategy for transformative change in a progressive direction. However, there is no particular reason to assume that they will have this effect, or that they will be the most effective means of achieving such goals, especially in the face of competing norms and incentives. Soft norms and processes, especially those that are designed to address distributive questions in the market, operate within and against a set of background rules and institutions in any event. Thus, any evaluation of their prospects would need to take account of the effects of the broader regulatory context.

To query the power of soft norms is not to fetishize formal legal rules. The idea that legal rules operate in the mechanical and functionalist manner imagined in much development discourse is surely a

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European Union, see Diamond Ashiagbor, "Flexibility" and "Adaptability" in the EU Employment Strategy, in **Legal Regulation of the Employment Relation** (H. Collins et al. eds., 2000).

114. For a review of this literature, see William Simon, Solving Problems v. Claiming Rights: the Pragmatist Challenge of Legal Liberalism, 46 **Wm. & Mary L. Rev.** 127 (2004).

fantasy; it remains equally mistaken when it comes from those on the left who are concerned about the alleged defects of the current order and hope to remedy those defects with other formal rules. There are myriad reasons, from the presence of competing social and legal norms and the vagaries of adjudication to the distribution of assets on the ground, that formal legal norms will produce varied rather than predictable outcomes. Reformers should be alert to the way in which formal and informal norms work in tandem, whether the object of regulation is economic or social.

But these observations also suggest why investing all of one's hopes in soft law may be chimerical too. What matters for present purposes is that, as a consequence of the larger legal reforms that are now afoot, that background context may itself be shifting in ways that are significant to the success, failure or simply the impact of soft approaches. It seems particularly significant to pay attention to these possibilities where hard and soft strategies are deployed at the same time in respect of the same field or issue, or where hard rights are available to advance the interests of one of the parties involved in a dispute, while the other relies on soft norms to further its case. For example, environmental disputes may engage conflicts between capital holders with new means to challenge environmental protections through investment protections on the one hand and consumers or citizens invoking human rights on the other.[115] Disputes in the workplace or struggles over global labor standards may involve employers who both recognize core labor rights but also enjoy 'deregulated' labor markets that leave workers with diminished power, little social protection and no alternatives to work except on whatever terms are offered.[116] Efforts to address health crises may, amongst other scenarios, pit patent holders newly enriched by the extension of the terms of their patent protection against either individuals in need of the protected, and therefore

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115. See, e.g., Mexico v. Metalclad Corp., [2001] B.C.J No. 950, May 2, 2001.

116. ILO, Report of the Director General: Decent Work, 87th session (1999), at http://www.ilo.org/public/english/10ilc/ilc87/rep-i.htm.

more expensive drugs, or states attempting to either respond to health crises or provide basic health services to their populaces[117].

Both previous and current experiments with decentralized and alternative modes of norm generation point to the importance of the background institutions in any event. Collective bargaining might be taken as a paradigmatic historic example. Negotiations between workers and employers have often required institutional structures of a distinctly hard character; in their absence, employers are inclined to rely upon their default entitlements under property and contract law to unilaterally impose the terms and conditions of employment. In the most important current laboratory of new governance in the social realm, the Open Method of Coordination (OMC) in Europe, soft norm generation takes place against a backdrop of norms and practices that are well-elaborated and well-entrenched in national institutions. The OMC is not intended to displace these institutionally entrenched entitlements, but rather to chart a path for their evolution in the future. It is possible that the soft process of the OMC may erode rather than strengthen those social norms in some states; however, the prospect that the overall outcome will be socially progressive rather than regressive seems greater precisely because the idea is not to dismantle these institutional underpinnings. Whether, and to what extent, that turns out to be true seems inseparable from the larger institutional context in which the OMC operates.

As these examples suggest, soft and hard norms are likely to intersect in a variety of ways. Indeed, ideas of good governance, best practices, and optimal legal reforms may be directly implicated in the relative positions of the parties in conflict. For this reason, it may be quixotic to seek solutions that bracket the regime building now underway; rather, simultaneous attention to the larger governance frame seems crucial to assessing the prospects of any soft initiatives.

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117. For an effort to address this problem, see WTO, Draft Declaration on the TRIPS Agreement and Public Health (Nov. 12, 2001) available at http://www.wto.org/english/tratop_e/trips_e/mindecdraft_w312_e.htm.

2. Human Rights

A related question is the extent to which it is safe to vest hopes for transformative change in human rights and other public law norms. Whatever the hopes of reformers, the recognition of human rights has not paved the way toward a smooth incorporation of social issues into the larger economic project; nor has it bridged the distance between the IFIs and their critics and interlocutors, including those in other international institutions, on how to accommodate social and distributive issues within the architecture of the new economy. Rather, the debate has merely shifted to two issues: which human rights should be recognized and what it means to incorporate them into the development agenda.

Here, human rights have not proved to be the trump their proponents often hope for. If human rights have become a powerful, popular counter-discourse to globalization and to the policies and activities of the international financial and economic organizations in particular[118], then the counter-reformation is already well underway. Not only have the IFIs resisted the pressure to adopt a rights-based approach to development. They also have a series of arguments about the 'right to trade'[119] and have elevated transactional freedom, property rights, and the entitlement to participate in markets to the level of basic human rights.[120] This suggests that in second generation reforms, human rights are better understood not as the answer to the social deficit but as the terrain of struggle.

Part of the reason is that normative agreement does not foreclose disagreement on other levels. The Bank's policy research report on gender equality demonstrates why it is necessary to follow the

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118. For a discussion of the uses of human rights in the resistance to globalization, see **Margaret E. Keck and Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics** (1998)

119. On this see, Ernst-Ulrich Petersmann, Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 132 **Eur. J. Int'l L.** 621 (2002).

120. **Sen, Development as Freedom**, supra.

complex institutional navigations that take place around human rights and social justice claims; it also indicates where the protection of rights may stop and equality objectives shade into the zone of policy, and where soft norms or non-legal solutions may be substituted for hard or 'regulatory' ones.[121] In the view of the Bank, gender equality is itself a human right and does require respect for certain rights; in some contexts, this may require changes to legal rules. But while rules on family law, violence against women, property rights and even political participation are identified as essential to gender equality, labor market rules and institutions as well as social protection schemes are not.[122] In the view of the Bank, rather than 'rights' that are intrinsic to the protection of gender equality, they constitute 'policy'. Here, as elsewhere, the distinction between institutions and policy is crucial: institutions are defined as rules, enforcement mechanisms and organizations, in short hard regulatory mechanisms; policies, by contrast, are merely goals and desired outcomes rather than entitlements.[123] Policies must be congruent with the overall institutional scheme for good economic governance. However, in the course of generating good governance norms, the IFIs have already staked out a position on why many labor market rules are counter-productive and why, to the extent that a safety net is necessary, targeted programs are to be preferred over the provision of universal entitlements.

It is not necessary to adjudicate these claims to observe that in this analysis, the norms and institutions that have been classically advanced by human rights and gender equality activists and scholars to enhance women's economic equality become separated from the right to gender equality itself. As this illustrates, it is entirely possible to endorse human rights and objectives such as gender equality in general terms, yet redefine their content and foreclose many of the routes by which they can be realized. This in turn displaces many of the conflicts and struggles that are entailed to the level of institutional design.

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121. This section is drawn from a larger work in progress, **Kerry Rittich, Engendering Development: A new international paradigm for gender justice?**

122. W**orld** B**ank**, E**ngendering** D**evelopment**, supra.

123. W**orld** B**ank**, W**orld** D**evelopment** R**eport** 2002, supra, at 6.

VI. Conclusion

It is clear that the criticisms that marked the first phase of neoliberal policy-based lending and market reform have been absorbed by their authors and reflected in a revamped conception of development. However, the IFIs have also served notice that they hold a different view, if not of the value of the social, structural and human side, then of what these dimensions of development entail in conceptual and practical terms.

The enduring significance of second generation reforms may lie in the fact that a wide range of social concerns are not merely being incorporated and assimilated into market reform and governance projects, they are being transformed at the same time. While the IFIs have conceded a place for social matters within the development agenda, they have also become their arbiters at the same time. They are now deeply engaged in identifying the social, distributive and egalitarian objectives that count, or count most, in the current economic context. In the process, they are altering in both subtle and far-reaching ways the manner in which social objectives are framed and conceptualized, and they are contesting and prescribing the manner in which they should and should not be advanced. The end result is to not merely incorporate social concerns into the world of development. Rather, by articulating their relationship to economic growth and managing the processes by which they are incorporated, the IFIs are effectively ranking and ordering the importance of different social objectives and alternatively legitimating and delegitimating the means and strategies by which they can be pursued.

So far, their efforts to promote market-centered modes of social inclusion and equality are speculative at best and suspect at worst. Because the social and economic agendas are now on the table together, the debates that will now ensue between the IFIs and those that have other ideas about social justice will almost certainly revolve around such questions as the relationship between equity and efficiency. These questions are not simply a matter of having the right ‘values’; nor can they be determined at the abstract or general level, despite the tendency of the IFIs to present economic and social goals as generally coterminous. The content of the social – now certain to be a critical point of contention

– and the possibility of overlap or conflict between economic and social, cultural or political objectives can only be evaluated in more specific ways. To put it another way, the fate of the social initiative can only be analyzed through a nuanced and detailed examination of the norms, rules and institutions that structure the interactions of groups and individuals in particular contexts.

So far, the IFIs largely 'own' the discussion on law and development: they have established an authoritative discourse on law for development and they have formidable mechanisms for disseminating it. So far social justice activists, whether skeptical or enthusiastic about these new developments, have not seriously disturbed this project. But if the larger governance and institutional agenda is implicated in the fate of the social, then engagement with this agenda is indispensable. In centering law in second generation reforms, the IFIs have already invited this engagement. Paradoxically, this involves taking law even more seriously and exploring more fully the effects that have occurred thus far. This in turn requires greatly pluralizing the forms of analysis and scholarship in the field and recuperating the many functions other than the correction of market failures that legal regulation necessarily serves.