

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”

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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.

A convenient marker of the second generation reforms is the appearance of the World Bank’s (Bank) *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 States³ as

1. James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework*, RONZENDING INSTUTIONELE ONTWIKKELING (May 1999), available at <http://www.euforic.org/rondzend/may99.htm>.

2. WORLD BANK, *What is CDF: Ten Things You Should Know About CDF*, available at <http://www.worldbank.org/cdf/>.

3. For a description see *The World Bank Group PovertyNet Home*, at <http://www.worldbank.org/poverty/strategies/>.

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 Millennium 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 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 access to services, including courts. It would be a mistake, however, 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

4. United Nations Millennium Development Goals, available at <http://www.un.org/millenniumgoals/>.

5. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); BALAKRISHNAN RAJAGOPAL, *International Law and the Development Encounter: Violence and Resistance at the Margins*, 93d AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 16 (1999).

6. James T. Gathhi, *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 Program; see generally U.N. DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT* (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. GIOVANNI A. CORNIA ET AL., *ADJUSTMENT WITH A HUMAN FACE* (1987); STIGLITZ, *supra* note 5.

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 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 CIS¹³ 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

10. See 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* (2001); U.N. DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 2000* (2000).

11. WORLD BANK, *WORLD BANK POLICY RESEARCH REPORT: 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).

13. Joseph E. Stiglitz, *Whither Reform? Ten Years of Transition*, Keynote Address at Annual World Bank Conference on Development Economics (April 28, 1999), available at http://www.worldbank.org/research/abcde/washington_11/pdfs/stiglitz.pdf.

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 and 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 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

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

15. For a representative selection, see generally THE POST-DEVELOPMENT READER (Majid Rahnema & Victoria Bawtree eds., 1997).

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. & POL. 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. & POL. 513 (2002); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

(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 imagined and made operational 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 the 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 advance; the justifications that underlie them; and their impact on the social objectives to which the IFIs have now committed. It also considers the way that

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).

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 as well as 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 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,

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 IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL* (1994).

19. STIGLITZ, *supra* note 5.

20. SHIHATA, *supra* note 17.

tax reform and fiscal austerity, all as prescriptions that literally came to define the Washington Consensus.²¹ These factors, however, 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 and procedural legal reforms that have been a feature of the development of agenda since the mid-1990s, 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 reforms²⁵ 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

21. John Williamson, *Democracy and the Washington Consensus*, 21 *WORLD DEV.* 1329 (1993).

22. On this position, see JEFFREY SACHS, *POLAND'S LEAP TO THE MARKET ECONOMY* (1993).

23. This provoked a partial rehabilitation, under strictly disciplined conditions, of the state in the processes of economic development. See *WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (1997).

24. *WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* (1989); *GOOD GOVERNANCE: THE IMF'S ROLE* (1997).

25. See, e.g., *WORLD BANK*, *supra* note 2.

26. For an effort to describe the components and the rationale for the legal reform project, see SHIHATA, *supra* note 17.

27. See, e.g., Gerald K. Helleiner, *Markets, Politics and Globalization: Can the Global Economy be Civilized?* UNCTAD 10th Raul Prebisch Lecture (Dec. 11, 2000) (CIS, Working Paper No. 2000-1).

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.

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 With second generation reforms, however, 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.

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,

28. For a more detailed consideration of the logic of the legal reform agenda, see RITICH, *supra* note 8, chapter 2.

29. WORLD ECONOMIC OUTLOOK: ADVANCING STRUCTURAL REFORMS, ch. 3 (2004).

30. WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION (2003); WORLD BANK, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH (2004).

31. WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD (1997).

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 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

32. WORLD BANK LEGAL VICE-PRESIDENCY, LEGAL AND JUDICIAL REFORM: STRATEGIC DIRECTIONS 53 (2003), available at <http://www4.worldbank.org/legal/legalr/GreyBookFinal2003.pdf>.

33. *Id.* at 52.

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, *supra* note 8.

35. WORLD BANK, *supra* note 11. See also the definition of structural reforms in IMF, *supra* note 29.

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 workers³⁷ or women.³⁸ These concerns are often articulated in the framework of human rights: either they are 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 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

36. This was a major focus of the United Nations Summit for Social Development in 1995. See *Report of the World Summit on Social Development*, 14th plen. Mtg. at 4, U.N.Doc. A/CONF.166/9 (1995). It remains a live concern among some of the international institutions. See ILO, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL (2004), available at <http://www.ilo.org/public/english/wcsdg/index.htm>.

37. GUY STANDING, *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE* (1999).

38. Diane Elson & Nilufer Catagay, *The Social Content of Macroeconomic Policies*, 28:7 WORLD DEV. 1347 (2000).

39. See *Report of the World Summit for Social Development*, *supra* note 36; See also U.N. ESCOR, *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*, U.N. Doc. A/CONF.191/BP/7 (2001), available at http://www.unctad.org/en/docs/aconf191bp_7.en.pdf.

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* 245–282 (2000).

42. See Elson & Catagay, *supra* note 38.

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. 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 however, 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 In order to locate the role of law in social and distributive justice, however, 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 or gender equality. But they can also be used to alternatively normalize or delegitimize 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

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. Shihata, *supra* note 41.

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. If legal rules and institutions are inside, rather than outside, social and economic practices, however, 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 real-

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

46. C.B. MACPHERSON, *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS*, INTRODUCTION (1978).

izing 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 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 CIS⁴⁷; 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.

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).

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—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 hold 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 precommitment 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 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

49. WORLD BANK, WORLD DEVELOPMENT REPORT 2003: SUSTAINABLE DEVELOPMENT IN A DYNAMIC WORLD, ch. 6 (2002).

50. David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2000); Deborah Z. Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade Law*, 12 EUR. J. INT’L L. 39 (2001).

51. See, e.g., *Mexico v. Metalclad Corp.*, [2001] B.C.J No. 950 (2001).

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 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. So far supply-side concerns appear to have dominated the funding process, however. 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 Not only does the Bank

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

53. Robert Danino, Senior Vice President and General Counsel, World Bank; Address at the Conference on Human Rights and Development Towards Mutual Reinforcement (Mar. 1, 2004).

54. See, WORLD BANK LEGAL VICE PRESIDENCY, *supra* note 32.

55. *Id.*

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, WORLD BANK, *supra* note 48, and WORLD BANK, *supra* note 49.

recognize that regulation occurs in multiple sites, however; 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 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 complicated 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 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

58. See, 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*, 1972 WIS. L. REV. 720.

59. See, WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD (1995).

60. For a discussion, see WORLD BANK, *supra* note 11.

61. WORLD BANK, *supra* note 48; WORLD BANK, *supra* note 49; 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).

with or even in lieu of political institutions. They are sometimes also recognized as independent sources of normative authority

The third sector also functions as a repository of concerns that are properly excluded from the law and the State, however. 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 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

62. WORLD BANK, *supra* note 11.

63. Indeed, there are increasingly complex blends of different "soft" strategies.

64. See, e.g., WORLD BANK, POLICY RESEARCH REPORT: LAND POLICIES FOR GROWTH AND POVERTY REDUCTION (2003).

65. SHIHATA, *supra* note 17.

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 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 than efficiency

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

67. Page 1 of the WORLD DEVELOPMENT REPORT 2003, *supra* note 49, 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, *supra* note 48.

69. Here, an important contemporary influence is Hernando de Soto; see HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

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 entities⁷¹; 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 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

70. WORLD BANK, *supra* note 48, at 176.

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