

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.

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

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

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*

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 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 International Monetary Fund (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. They do seem connected to the stasis in the larger legal and institutional reform agenda, however.

DISPUTE SETTLEMENT 157 (The International Bureau of the Permanent Court of Arbitration ed., 2003).

74. WORLD BANK, INTEGRATING GENDER INTO THE WORLD BANK'S WORK: A STRATEGY FOR ACTION (2002).

75. For one discussion, see UNDP, *Human Rights and Development: An Emerging Nexus*, available at <http://www.undp.org/rbap/rights/Nexus.htm>.

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 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

76. IMF, *supra* note 29, at 104–05.

77. WORLD BANK LEGAL VICE-PRESIDENCY, *supra* note 32, at 55.

78. See the discussion on “One Size Can Fit All—In the Manner of Business Regulation” in WORLD BANK, *supra* note 30, at xvi.

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 WORLD BANK, *supra* note 30; Norman V. Loayza & Raimundo Soto, *On the Measurement of Market-Oriented Reforms* (2003), available at http://econ.worldbank.org/files/37707_wps3371.pdf.

demands of 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. Apart from a nod in the direction of civil and political rights, however, 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 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

80. See, e.g., WORLD BANK, *supra* note 11.

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 This insight, however, 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. This insight, however, 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 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

81. WORLD BANK, *supra* note 12.

82. *Id.*

83. IMF, *supra* note 29.

84. Ravi Kanbur & Nora Lustig, *Why is Inequality Back on the Agenda?*, World Bank: Annual Bank Conference on Development Economics (Apr. 28–30, 1999), available at <http://www.worldbank.org/poverty/wdrpoverty/kanbur499.pdf>.

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 growth⁸⁶; 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 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 de-regulatory 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

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), available at <http://eucenter.wisc.edu/omc/summer03conf/trubekTrubek.pdf>.

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

87. Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, in LEGAL REGULATION OF THE EMPLOYMENT RELATION 29 (Hugh Collins et al. eds., 2000).

88. Wolfensohn, *supra* note 1.

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 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 in 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.

An important part of furthering the social side centers around ensuring broad participation in the market, however, which the IFIs are promoting through a variety of what might be described as “market-centered” agendas for social justice.⁹² These are projects that respond to

89. WORLD BANK, *THE WORLD BANK AND HUMAN RIGHTS* (1998).

90. Sergio Pereira Leite, *Human Rights and the IMF*, 38 FIN. & DEV. 4 (2001).

91. WORLD BANK LEGAL VICE-PRESIDENCY, *supra* note 77.

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 TRANSNAT'L L. & CONTEMP. PROBS. 125 (1998).

issues ranging from gender equality⁹³ to improved corporate social responsibility⁹⁴ and better labor standards in the new economy, 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 "good for growth" while at the same time defending development as good for gender equality.⁹⁵ In the process, however, 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.⁹⁶ 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 International Labor Organization (ILO) identifies as the linchpin of the global labor agenda, freedom of association and the right to bargain collectively.⁹⁷ But

93. WORLD BANK, *supra* note 11.

94. UNITED NATIONS, *THE GLOBAL COMPACT: CORPORATE LEADERSHIP IN THE WORLD ECONOMY* (1999).

95. WORLD BANK, *supra* note 11, at 2. The Bank also argues the obverse, contending that growth is good for gender equality.

96. *Id.*

97. 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, *supra* note 11.

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.⁹⁸ 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 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.⁹⁹ 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.¹⁰⁰

98. WORLD BANK, *supra* note 58.

99. This shift in the language of justification is not confined to the Bank, however; those pushing for reforms from outside now frequently frame their claims in the language of efficiency too. 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, *supra* note 36.

100. Bob Hepple, *Introduction*, in *SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT* (Bob Hepple ed., 2002).

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 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. Paradoxically, 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 broader 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.¹⁰¹ 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,¹⁰² 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.¹⁰³

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.¹⁰⁴ By determining the parameters in which the formerly excluded social and distributive issues could now be legitimately considered, however, it also helped determine the *place* of such

101. Shihata, *supra* note 41, at 219.

102. *Id.* at 245.

103. 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 well-established practice of intervention into sovereignty. See Anghie, *supra* note 16.

104. *Id.*

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. With the acknowledgement of the social dimension of development and the effort to elaborate what it does and does not involve, however, 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.

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. What makes this a complex exercise, however, 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. As described above, however, 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. Beyond this, however, few new

legal entitlements appear to be envisioned for those left behind in first generation reforms.

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 other 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. It is important, however, 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 long-standing 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. This has not happened, however, 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.¹⁰⁵ 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. It is important, however, 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.¹⁰⁶ 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

105. Even in first generation reforms, there was a range of competing explanations and justifications for reforms. RITTICH, *supra* note 8, chapter 2.

106. International Bank for Reconstruction and Development, Feb. 16, 1989, Articles of Agreement, art. 10, sec. 4, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/O,,,contentMDK:20049557~menuPK:6300601~pagePK:34542~piPK:36600~theSitePK:29708,00.html>; See also Shihata, *supra* note 41, at 219-244.

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. Clear conceptual and normative differences around the social agenda are visible, however. 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 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. Regulations that alter the structure of private rights and resource reallocations through the welfare state, however, 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.¹⁰⁷ Incentives and voluntary 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.¹⁰⁸ 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. Institutions continue to matter, however, 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. There is no particular reason, however, 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,

107. 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* (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 labor regulation in the European Union, see Diamond Ashiagbor, "Flexibility" and "Adaptability" in the *EU Employment Strategy*, in *LEGAL REGULATION OF THE EMPLOYMENT RELATION* (Hugh Collins et al. eds., 2000).

108. For a review of this literature, see William H. Simon, *Solving Problems v. Claiming Rights: the Pragmatist Challenge of Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

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 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.¹⁰⁹ 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.¹¹⁰ 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 more expensive drugs, or states attempting to either respond to health crises or provide basic health services to their populaces.¹¹¹

109. See, e.g., *Mexico v. Metalclad Corp.*, [2001] B.C.S.C. 1529 (2001).

110. ILO, *Report of the Director General: Decent Work*, 87th session (1999), available at www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.

111. For an effort to address this problem, see WTO, *Draft Ministerial 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.

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 processes of the OMC may work to erode rather than strengthen social norms in some states; indeed, the IMF suggests that the mechanisms of benchmarking and peer pressure to promote competitiveness and job creation may foster the 'deregulatory' structural reforms that, in its view, are needed.¹¹² However, the prospect that the overall outcome will be socially progressive rather than regressive seems greater precisely because the idea is not simply to dismantle these institutional underpinnings and because employment security also remains an objective. But whether, and to what extent, this turns out to be true seems inseparable from the larger institutional context in which the OMC operates, as well as the character of any 'hard' reforms to which the OMC itself leads.

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.

112. IMF, *World Economic Outlook: Advancing Structural Reforms* (Washington, D.C.: IMF, 2004), Chapter III, "Fostering Structural Reforms in Industrial Countries," 129, available at <http://www.imf.org/external/pubs/ft/weo/2004/01/pdf/chapter3.pdf>.

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,¹¹³ 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”¹¹⁴ and have elevated transactional freedom, property rights, and the entitlement to participate in markets to the level of basic human rights.¹¹⁵ 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 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.¹¹⁶ 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

113. 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).

114. 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).

115. SEN, *supra* note 10.

116. This section is drawn from a larger work in progress, KERRY RITTICH, *ENGENDERING DEVELOPMENT: A NEW INTERNATIONAL PARADIGM FOR GENDER JUSTICE?* (Forthcoming).

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.¹¹⁷ 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.¹¹⁸ Policies must be congruent with the overall institutional scheme for good economic governance. In the course of generating good governance norms, however, 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.

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. The IFIs have also served notice that they hold a different view, however, 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

117. WORLD BANK, *supra* note 11.

118. WORLD BANK, *supra* note 48, at 6.

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 legitimizing and delegitimizing 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 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.

