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GOOD GOVERNANCE AS A COUNTER INSURGENCY AGENDA TO OPPOSITIONAL AND TRANSFORMATIVE SOCIAL PROJECTS IN INTERNATIONAL LAW

*James Thuo Gathii**

I. INTRODUCTION

In this paper I examine the policy implications of the position adopted by the World Bank to the effect that human rights goals cannot be achieved at the cost of its economic and financial mandate under its Articles of Agreement. This view of the Bank on the role of human rights in its work has made it difficult for human rights advocacy to position itself as lending independent critiques of the World Bank's development policies, such as those associated with the New International Economic Order (NIEO), or post second world war efforts to give international law a 'new' social character. Instead, through the good governance agenda, human rights advocacy has, far from adopting an outsider or independent critique to the neo-liberal

* Assistant Professor, Graduate School of Management, Rutgers University, S.J.D. Candidate, Harvard Law School, 1999; LL.M. Harvard Law School, 1995; LL.B. University of Nairobi, 1992; Crowe and Dunlevy Visiting International Professor, University of Oklahoma College of Law, Fall 1997. I would like to thank Celestine Nyamu, Antony Anghie, Balakrishnan Rajagopal, David Kennedy, Nathaniel Berman and Wayne Eastman for their comments on various drafts of this paper. I would also like to thank Robert Baumol for his research assistance. This article is one in a series in my current research project that critically examines a variety of post-debt crisis legal and economic reform proposals imposed upon sub-Saharan African economies resulting in two outcomes: first, in disabling governmental capacity to enhance social justice, and second, that in seeking to improve well being in Africa, proposals such as human rights are not effective because they do not challenge the underlying distribution of wealth and power in national and international society -- which I identify as the most significant problems facing African countries. Other articles in the series include: *Corruption and Donor Reform: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, CONN. J. INT'L L. (1999); *Representations of Africa in Good Governance Discourse: Policing and Containing to Neo-Liberalism*, THIRD WORLD LEGAL STUD. (1999) and *The Limits of the New International Rule of Law*, in LEGITIMATE GOVERNANCE IN AFRICA INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES: (E.K. Quashigah & Obiora Okafor eds., 1999)[hereinafter LEGITIMATE GOVERNANCE IN AFRICA].

economic policies of the World Bank and the International Monetary Fund (IMF), adopted an approach based on finding complementarity and compatibility between human rights advocacy and the economic and financial policies of the World Bank and the IMF.

This new approach is popularized for desirably abandoning hostile or uncompromising opposition to neo-liberal economic policies in particular, and the ascendancy of capitalist economic policies internationally in general. Neo-liberal economic policies are mainly preoccupied with displacing statist regulatory interventions in the market place while integrating national economies into the international market economy with little or no constraints on the flow of international capital. Neo-liberal economic reform is also characterized as an antidote to previous approaches to development policy that acknowledged the centrality of welfare concerns alongside the imperatives of growth in development policy. In sub-Saharan Africa, neo-liberal economic policy had been experienced under difference labels including structural adjustment. Today, however, good governance is the contemporary label for this expanding agenda.

In this article I argue that good governance serves as the World Bank's short hand for measuring which parts of the human rights agenda are compatible or consistent with its financial and economic mandate. This requirement, I argue, severely constrains the possibilities within the good governance agenda that prior development policies offered human rights advocates and activists. Prior development policies offered those who supported a human rights agenda in development to demand welfare concerns defined in terms of basic needs from the state and institutions of development. The good governance agenda however, has changed this post second world war growth/distribution welfare state compromise through its stigmatization of protective governmental interventions in the economy as necessarily inimical to economic growth and freedom. Good governance policies are thus based in at least three contestable assumptions: first, that reducing governmental interventions in the economy would automatically lead to increases in economic growth and personal freedom; second, that governmental interventions in the economy including those intended to redress social division, hierarchy and inequality in society are inefficient or profit-

constraining; and third, that a redistribution of income in favor of profit or capital by the removal of such profit-constraining regulations including those that support welfare needs or rights is a necessary cost that a society must bear in order to produce a higher rate of investment, productivity, growth and profit.

It is therefore my argument that the explicit reference to human rights and democratization in the good governance agenda needs to be understood in the context of good governance or neo-liberal economic restructuring, particularly its concern with demonstrating the adverse effects of governmental interventions in the economy. In this sense, the explicit reference to human rights in the good governance agenda invariably lends credence to the anti-statist neo-liberal agenda: Granted the history of abuses committed by sub-Saharan African states, the World Bank's instrumental co-option of rights within the good governance agenda lends moral credibility to the World Bank in general. While the good governance agenda does not itself constitute a legally binding commitment that the World Bank would independently use to promote human rights, it could use its economic leverage on developing countries to withhold extension of credits to governments that default on internationally recognized human rights principles. However, violations of human rights do not automatically trigger exercise of this leverage, instead, there has to be a connection to the Bank's economic and financial mandate before this leverage could be exercised.

Finally, I argue that good governance proposals may also be regarded as a political compromise or avenue through which those who continue to lose out under the stringent neo-liberal economic programs can consent to their control by the owners of the means of production. Human rights and political democracy in so far as they have become a part of the conservative economic commitments of neo-liberal economic reform are some of its primary instruments of legitimization that permit individuals and groups that lose out in the economic reform process to press their claims to the allocation of resources and the distribution of output, even when the economic and political system is being shut out from addressing these claims. The good governance project, in short, plays a major role in managing and soothing the injustices and antagonisms of daily life now exacerbated

by the implementation of neo-liberal economic restructuring. Yet, paradoxically the liberties protected by the commitments to human rights and political democracy in the good governance agenda also give these politically disenfranchized citizenry liberties that they were often denied under the authoritarianism that accompanied the developmentalism of the 1970s and the 1980s.

In part II of this article, I critically examine various initiatives to revitalize international law in the post World War II period especially in the 1960s and 1970s. At the outset, I contrast the initiatives launched to give international law a social dimension with the more radical goals of the NIEO. I then trace the rise of the basic needs critique of development defined as economic growth within the framework of the World Bank and national economic policies particularly in sub-Saharan Africa. I then trace the attempts of international human rights advocacy to radicalize the basic needs agenda by seeking to replace its needs language with what they perceived to be the compelling and authoritative discourse of rights.

In part III, I critically evaluate how the rise of the good governance agenda in the 1990s eclipsed the initiatives to give international law a social character. In seeking to so eclipse the gains of the growth/distribution compromise of the post World War II period, I demonstrate how the institutional mandate of the World Bank and the IMF have become the template for justifying only those rights claims that are consistent with a development policy that gives priority to returns to investment, growth, productivity and profit at the expense of social welfare entitlements.

In part IV, I conclude by arguing that the good governance agenda as well as the weak version of the basic needs/rights critique of development defined in terms of economic growth, unfortunately share a belief in the positive potential of their present national and international arrangements and their commitment to development. I question this faith by point into the limited possibilities offered by their reform proposals: that all that needs to be done is to minimally tinker with these institutions, redesign their priorities without giving up the priority of growth over equity concerns or to merely rearrange the implementation of their pre-designed development programs by seeing citizen participation and consultation. I call for a thorough re-

examination of this institutional fetishism as a pre-condition for the emergence of development programs that are truly emancipatory granted the deep inequalities of wealth, gender, sex, race, power and influence in national and international society.

II. CONTRASTING POST WORLD WAR II INITIATIVES TO REVITALIZE INTERNATIONAL LAW

After World War II, international lawyers committed to political and social issues, such as environmentalism and the protection of human, political, and economic rights, became involved in projects to advance these causes. That is, international law became increasingly more pragmatic, deployed to serve social causes beyond its traditional focus of avoiding war, advocating peace and international cooperation on technical issues.¹ International law was

¹ These efforts were diverse and varied. For example there was the social democratic vision of Louis Sohn. See Louis Sohn, *The Stockholm Declaration on Human Development*, 14 HARV. INT'L L. J. 423, 461 (1973). Professor Sohn says the following of the Stockholm Declaration: it stresses the "new social character of international law, which no longer protects the lucky few, but instead provides for more distributive justice." *Id.* at 461. Then there was the pragmatism of Wolfgang Friedman, who expressed this new pragmatism (requiring international cooperation among nations to help solve potentially disastrous problems such as pollution and nuclear destruction and population explosion) and concern for the individual as being necessary to ensure survival (and as such to avoid the extinction) of the international order. Friedman is also concerned to sensitize international law to the needs of the then newly independent countries of Asia and Africa. Unlike Louis Sohn, Friedman did not fully endorse the socialist implications of Sohn's liberal democratic vision. Argued Friedman, "the concept of planning still evokes instinctive opposition on the part of nations, groups, and individuals who for a variety of reasons identify planning with socialism (which is in turn equated with communism) and the destruction of human freedom." Wolfgang Friedman, *The Reality of International Law – A Reappraisal*, 10 COLUM. J. OF TRANSNAT'L L. 59 (1971). Wolfgang sums up his pragmatism as follows:

It is in this direction rather than in blueprints for a worldwide military security force that the main hope lies for the development of an international legal system that will correspond to the needs of a society which is anachronistically

becoming infused with a 'new' sense of social character. This shift is often represented as a clash between a 'set of forms or legal

divided into more than one hundred and thirty 'sovereign' states, but which is, for the fateful questions of survival or extinction, indivisible. Unless social and legal organization catches up with the physical and technological realities of our time, the prospects for survival are indeed slender.

Id. at 60. In another article, Friedman expressed this view as follows:

Human welfare cannot be dealt with on a national level any more than protection against nuclear destruction . . . The greatest challenge to contemporary mankind is presented by the realization that a minimum level in the conservation of human resources is no less a matter of survival than the prevention of nuclear war...and that in both respects the organization of international society based upon the national sovereign state is disastrously inadequate.

Wolfgang Friedman, *Half A Century of International Law*, 50 VA. L. REV. 1354 (1964). He goes on to state: "But the greatest development of the postwar era lies in the concept of international economic development aid as a permanent and inevitable feature of contemporary international organizations." *Id.* at 1355. See also WOLFGANG FRIEDMAN, *THE CHANGING CHARACTER OF INTERNATIONAL LAW* (1964); *The Relevance of International Law to the Processes of Economic and Social Development*, 60 AM. SOC'Y OF INT'L L. PROC. 8 (1966). Richard Falk's work also fits within this tradition although he is perhaps more to the left of Louis Sohn's social democratic vision, and Friedman's Frankfurt school liberalism. For example, Falk argued that international law was shifting away from being merely concerned with avoiding war to *improving* the world by reducing economic inequality. In so doing, international law would thus indirectly help avoid war and revolution. He quotes from a papal encyclical to argue that it is the imbalance between the objective requirements of human welfare and the stark realities of national power that account for the dramatic culmination of the Pope's encyclical, *Pacem in Terris*. See RICHARD FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* (1970). For a contemporary third world critical initiative to give legitimacy to international law by re-orienting the source of international law's legitimacy to 'ordinary' people. See Obiora Okafor, *Is There A Legitimacy Deficit in International Legal Scholarship and Practice*, 13 INT'L INSIGHTS 91 (Special Issue); *The Global Process of Legitimacy and the Ideology of Global Governance*, 14 ARIZ. J. INT'L COMP. L. 117-24 (1997). See also LEGITIMATE GOVERNANCE IN AFRICA, *supra* note 1.

constructs,' such as sovereignty and the non-interference norm, on the one hand, and a 'set of sociological and political sensitivities' such as environmentalism and human rights, on the other.² This new social character of international law can be seen through the debates, during the post-World War II era, on the reformulation of international law from a state-centered agenda, focused on the classical doctrines of state sovereignty and territoriality, and the regulation of relations between states, to an individual-centered concept, that is more concerned with the identification and protection of the social, political, and economic rights of the individual. With respect to personal rights and liberties, these 'social' objectives were brought into focus by the drafting, accession to, ratification of and the establishment of enforcement procedures of the international bill of

² David Kennedy, *International Law and the Nineteenth Century: History of an Illusion* 64 NORDIC J. OF INT'L L. 418 (1996). According to Kennedy the move from formalism to pragmatism in international law is told as one of progress or social evolution. This replacement of classical international law is told as "a story of modernization, of internationalization and of the left." *Id.* at 387. See David Kennedy, *A New World Order: Yesterday, Today and Tomorrow* 4 TRANSNAT'L LAW & CONTEMP. PROBS. 328-75 (1994) (discussing the various waves of renewal in international law). This theme of renewal and restatement in international law also developed at length by Nathaniel Berman, *In the Wake of Empire*, Address at the 93rd Annual Meeting of the American Society of International Law (March 24, 1999). For one of the latest waves of liberal renewal in international law, see Anne-Marie Slaughter, *The Real New World Order*, 6 EUR. J. INT'L L. 503 (1995); Andrew Tulumello & Stephan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, AM. J. INT'L L. (1998); *Toward An Age of Liberal Nations*, 33 HARV. INT'L L.J. 393 (1992); *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); *Liberal International Relations Law Theory and International Economic Law*, 10 AM. UNIV. J. INT'L L. & POL'Y, 717 (1995). For a critique of Slaughter's liberal international law, see Outi Korhonen, *Liberalism and International Law: A Center Projecting a Periphery*, 65 NORDIC J. OF INT'L L. 481 (1996). For other critiques of various liberal renewal narratives, see Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 466 (1966); Susan Marks, *The End of History?: Reflections on Some International Legal Thesis*, 3 EUR. J. INT'L L. 449, 477 (1997). For a third world critique of liberal renewal in international human rights, see Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

rights; as for environmentalism, this was sought to be accomplished by initiatives calling for moving away from irresponsible, industrial and pro-development policies. These post-war, pro-active, 'social' initiatives fall into two readily recognizable streams; the first emphasizes environmental, social, and economic rights; the second stresses civil and political rights.

The first stream is concerned with the welfare entitlements or the basic needs of groups and individuals. It supports the basic needs approach to economic growth. At first blush, this method appears similar to the more radical Third World agenda of the New International Economic Order (NIEO); however, upon closer inspection, there are marked differences. The basic needs approach largely stayed clear of the radical claims NIEO agenda. The reason is due, in part, to the perception, particularly prevalent in the West, that the NIEO embodies an unacceptable form of international socialism that would undermine the capitalist foundations of the international society.

The second stream, which supports civil and political rights, argues that the concept of sovereignty should not be used as a bar to international intervention in the domestic affairs of the state, especially when dictatorial, authoritarian, and genocidal regimes are abusing the civil and political rights of its people.³ This stream is

³ The civil and political rights stream support interventionary foreign policies among Western industrial powers and by the United Nations in support of protection for human rights. They critique dictatorial third world regimes and scholars of international law who argue that interventionary policies, even in support of a human rights policies, are inconsistent with the Westphalian system of the autonomy of states. Examples of work falling into the civil and political rights streams include: Louis Henkin, *United States and the Crisis in Human Rights*, 14 VA. J. INT'L L. 635 (1974); See generally HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, (Richard Lillich ed. 1973); See Tom Farer, *On A Collision Course: The American Campaign for Human Rights and the Antiradical Bias in the Third World*, in AMERICAN FOREIGN POLICY (Donald P. Kommers & Gilbert D. Loescher eds., 1979); See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); *The Democratic Entitlement*, 29 UNIV. RICHMOND L. REV. 1 (1994); MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER 60-65 (1992). Wolfgang Friedman, *The Reality of International Law - A Reappraisal*, 10 COLUMBIAN J.

associated with a liberal internationalist outlook which highlights the importance of globalizing the legal and moral prerogatives which correspond to the civil and political guarantees made by the international bill of human rights.⁴

In the post-Cold War period, the civil and political rights category has gained a new ascendancy as Western governments, scholars, activists and non-governmental groups, along with their allies in the developing world, have emphatically embraced this approach.⁵ Its adherents argue that traditional conceptions of sovereignty and related doctrines, such as the norm of non-interference, are crumbling or have already broken down and given way to new trans-boundary or universal norms contained in the international bill of human rights.⁶ According to this view, states--

TRANSNAT'L L. 46 (1971), did not focus on justifying interventionary policies to support human rights in other countries. He advocated for the universality of norms of international law so that it was not only applied against 'other countries,' but powerful countries such as the United States as well.

⁴ For a very candid critique of liberal internationalism in international human rights, *see generally*, RICHARD FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY (1981). Falk argues that liberal internationalists who support an activist American foreign policy on human rights are "unduly innocent about the imperial tendencies of big, dominant states whatever their rhetoric and their domestic record of observance." Falk also notes that liberal internationalists give insufficient attention to "the influence and sorting of the mixed motives in interventionary settings." *Id.* at 4.

⁵ *See, e.g.*, Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 YALE J. INT'L L. 249 (1994). Henkin argues that while when the cold war broke the international human rights movement was at its infancy. Half a century later with the end of the cold war, the international human rights agenda was established beyond challenge. *Id.*

⁶ *See* THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995). Franck states that sovereignty "has historically been a factor greatly overrated in international relations." *Id.* at 3. Franck buttresses this assertion with examples of rules of international law that have traditionally imposed restrictions on government actions, such as those regarding national treatment of aliens and their property. However, Franck argues that in view of the growing sense of global community and moderate scarcity of resources in the international context, the need to rethink 'notions of sovereignty' has never been greater. *Id.* at 3-12. Franck supports the democratic control of governments by people through mechanisms such as elections - However, he fails to address the possibility that loss of

especially those from sub-Saharan Africa-- no longer have exclusive control of their territory and population and, as such, they cannot violate internationally recognized human rights with impunity, lest they subject themselves to legitimate international censure. Its advocates argue that the statist conception of international law is only concerned with relations between states and the view that other states cannot interfere in the "internal" affairs of other countries is no longer an acceptable interpretation of this norm in all cases, especially where gross violations of human rights such as genocide is involved. In fact, they argue that sovereignty is in the process of being dissolved completely. As a result, the protection of people's freedom and their human rights is no longer contingent upon the extent to which their particular state chooses to enforce its laws to protect its citizens. Rather, it has become the obligation of the entire international community to be the watchdog for everyone's rights. This 'new' responsibility follows logically from the recognition that international law gives to the rights of individuals -- a departure from the era when international law only recognized the rights of states.⁷

sovereignty from global processes also simultaneously erodes his desire for popular control in cases where international institutions have assumed larger and larger powers that assume decision making power over issues that popular processes that he advocates would best be able to have control over in a democracy. See Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1949 (1997) (reviewing THOMAS FRANK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

⁷ See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982). Professor Sohn states that the:

[M]odern rule of international law concerning human rights are the result of a silent revolution of the 1940's, a revolution that was almost unnoticed at the time. Its effects have now spread around the world, destroying idols to which humanity paid obeisance for centuries . . . States have had to concede that individuals are no longer mere objects, mere pawns in the hands of states.

Id. at 1. Similarly, Wolfgang Friedman argues that the "most basic significance of this new phase is that the human being, singly, in groups, or through the state of his nationality, has become the direct concern of international law." Friedman, *The*

Between the 1950s and 1970s, international law scholars--especially those from the then, newly independent Asian and African states--launched another initiative. However, this one went further than previous efforts to breathe a new sense of social consciousness into international law--in part by combining both streams of rights while going beyond them at the same time. This initiative, referred to as the New International Economic Order (NIEO), comprised a range of proposals to revise various rules of international law, especially those relating to international, economic, and trade law. It was by no means universally accepted by Third World leaders and scholars because it intersected, in contradictory and yet complementary ways, with the prior initiatives intended to give international law a 'new' social character. The NIEO was designed to restructure the unequal relationships between the developing and developed countries in specific contexts, such as trade, foreign aid and foreign investment. Similar to the efforts to infuse a sense of social character into international law, the NIEO confronted and tried to change those established principles of international law that were detrimental to developing countries. However, because the consent of the developed countries was needed to effectuate these changes, this could not be accomplished.⁸

Unable to mobilize the consent or even acquiescence of developed countries to change these specific doctrines of traditional or classical international law, the advocates of a NIEO, among others, settled on an intermediate position. Those who supported the passage of new, legally binding principles, such as those contained in the NIEO's Charter on Economic Rights and Duties of States ("the Charter"), settled for the recognition of their new proposals as declaratory statements or principles rather than as laws. In international discourse, these declaratory statements or principles,

Reality of International Law, *supra* note 1, at 10.

⁸ "[T]raditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper." MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 81 (1979).

often referred to as 'soft' law (as opposed to 'hard' law) are non-binding on states and individuals because they do not contain any positive, legal obligations or assertions. Nevertheless, they are still of significant value because they put political pressure on governments, their people, and international institutions, often inspiring and guiding them to act in accordance with these 'soft' principles or laws. However, the characterization of the NIEO as soft law diminished its re-distributive ability at the international level.

Several reasons have been advanced to explain why the NIEO became soft law rather than hard law. These reasons also explain why the redistributive potential of the NIEO was diminished. First, the Program of Action on the Establishment of the NIEO, unlike the Charter, was not voted upon by the United Nations General Assembly ("U.N.G.A.").⁹ Since U.N.G.A. resolutions were disputed as sources of international law to begin with, critics argued that the Program of Action ("the Program") was *a fortiori*, a questionable source of international law, because there was not even a vote on it. Second, the United States Ambassador to the U.N. argued that, without a vote, the Program represented the views of only 'one faction' of the U.N.G.A.. Therefore, those views had not obtained international consensus.¹⁰ Third, the efficacy of the Program was questioned by several Western countries which expressed their disagreement by entering several reservations to it.¹¹ Fourth, it was argued that although the Charter was intended to establish norms for obtaining a just and equitable international economic order, there was no legal authority for its notion of collective economic security for development or its international re-distributive proposals. In addition, developed countries argued that the Charter established a double standard by giving systematic preferences in favor of developing countries at the expense of developed countries. The result was a separate legal

⁹ Jonathan Dubitzky, *Recent Developments: The General Assembly's International Economics* 16 HARV. INT'L L.J. 670, 671 (1975).

¹⁰ 13 I.L.M. 745 (1974). Japan welcomed the declaration on the New International Economic Order. *See id.*

¹¹ *See id.* at 744-766. Those countries that entered reservations included the United States, Japan, the United Kingdom and West Germany. *See id.*

regime under which developed countries would not benefit from the same rights and privileges enjoyed by developing countries in their relations with other developed countries.¹² Fifth, the Charter attempted to establish norms that are inconsistent with prevailing international legal norms. For example, the Charter proposed that nationalization, expropriation, and transfer of foreign property were rights held by the state and as such, controversies would be settled by the law of the nationalizing state. The prevailing international norm requires that when foreign property is nationalized, full and prompt compensation must be made. The Charter's proposal for restitution and compensation for damages to territories and injury to people affected by colonialism and apartheid was also opposed to as inimical to prevailing international law. Sixth, it has been argued that even though the Charter was approved by a majority of the members of the U.N.G.A., it was opposed by many important and powerful countries, such as the United States, Belgium, Denmark, Germany, Luxembourg and the United Kingdom.¹³

Because the NIEO was considered to be soft law, it established qualified rather than binding norms, with a sufficient normative character capable of generating specific legal effects. Similarly, it has been argued that the international bill of human rights and various environmental treaties have gone beyond the conceptual confines of the norms of sovereignty and non-intervention in furthering political liberty on the one hand, and social and economic objectives on the other. These objectives go well beyond the traditional conception of international law as securing peace.

The efficacy of the international bill of rights and in environmental treaties can be found in the *de facto* manner in which they have enhanced human rights and environmental protection as part of shared inter-governmental commitments. Consequently, advocacy for these soft norms is aimed at establishing principles to

¹² Developed countries argued that these proposals were inconsistent with the General Agreement on Trade and Tariffs' non-discriminatory principle as embodied in Article 1, *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, Art.1, T.I.A.S. 1700, 55 U.N.T.S. 194 (1948).

¹³ *See* Dubitzky, *supra* note 9, at 673-674.

inspire and guide governmental and public action. Moreover, groups and individuals who create political pressure that draws attention to human rights abuses or environmental protection are empowered by these soft norms. In addition, advocates of these soft norms argue that they constitute declaratory statements of a universal nature which serve the important purpose of educating and informing people around the world about the importance of safeguarding human rights and environmental protection.

One factor that distinguishes the NIEO from other soft law norms -- such as human rights and environmentalism -- is the overriding presumption in international legal opinion that the NIEO violates the very character of international economic relations. Its proposals seek to undermine the implicit assumption that the economic sphere is self-regulating and should therefore not be subject to regulatory intervention. Consequently, although the various proposals of the NIEO are often referred to as soft norms of international law, they have attracted opposition from Western governments, while other soft law norms, such as the international bill of human rights and international guarantees of environmental protection, have attracted the hostility of Third World governments.

A. Giving International Law a Social Character: From Basic Needs to Good Governance

Although traditional conceptions of sovereignty and statism are said to be eroding, they are still defended by international financial institutions ("IFI") such as the World Bank ("the Bank"). The Bank bases its position on its constituent instrument, the International Bank of Reconstruction and Development (IBRD) Articles of Agreement, to support the view that human rights are a political issue which fall outside the Bank's mandate unless it can be defined in a technical or functional mode, to fit within the economic and financial goals of the Bank. This means that the Bank, as well as human rights supporters working within and outside the Bank, must reconcile human rights initiatives with the Bank's economic and financial goals. Because human rights activists have been left with little choice other than to reconcile their agenda with the economic

and financial mandate of the Bank, this has resulted in “sully” their otherwise idealistic positions, and in this sense they have lost some of their credibility as an independent critic of the Bank and its development policies.

While this new approach is praised for abandoning a hostile or uncompromising opposition to international economic policy, unfortunately, it abandons previous approaches which permitted citizens and groups to demand welfare concerns be defined in terms of basic needs and rights from the state and institutions of development. In short, the requirement that the human rights agenda within the Bank must be consistent with the financial and economic mandate severely constrains the Bank’s initiatives in the arena of human rights. It has also resulted in limiting the efficacy of opposition to the Bank’s financial and economic mandate in so far as the execution of this mandate is inconsistent with guarantees of human rights.

This, I argue, reflects the conservative nature of the good governance agenda, very much like the ‘soft’ or declaratory law approach developed in the 1970s was used to defeat proposals to reformulate international politics, economics, and society. It is conservative to the extent that it is based on establishing links between human rights and development policies of the World Bank that may themselves be inimical to the protection of social and economic rights in particular. By emphasizing the mutually reinforcing character of human rights and economic policy, assuming they are always supportive of each other, human rights activists have found a foothold to negotiate with the Bank. In my view, this has only served to legitimize the economically disastrous programs of neo-liberal economic reform embraced by the World Bank.

The good governance agenda recasts the neo-liberal economic policies of the World Bank in the guise of a new lingo compatible with, rather than opposed to, human rights. This conception gives preference to economic policy over human rights, unless these rights can be conceptualized within this economic logic, such as openness in international trade, finance, commerce, and reduced social spending in education and health, for example. The World Bank has, therefore, tended to support only those rights that fit within its

ascendant laissez-faire commitments. Ultimately then, it is civil and political rights--those most compatible with neo-liberal economic reform, such as private property and freedom of contract -- that have received the most support in the good governance agenda.

This article addresses the manner in which the good governance agenda has emerged as a counter-insurgency discourse to reformist projects such as the NIEO and those intended to give international law a 'social character.' The good governance agenda is a careful integration of human rights and growth-driven economic policy, not as incompatible projects but as a necessary alliance for democratic and economic reform. This approach involves justifying rights within a laissez-faire economic and political framework. I stress that by emphasizing the compatibility between human rights and laissez-faire economic policy, the good governance agenda underplays the constraints neo-liberal economic policy imposes on the realization of social and economic rights (or welfare entitlements/basic needs) in particular, and third generation rights associated with the NIEO, such as the right to development. Inasmuch as human rights are an instrumental component of the good governance agenda, the focus on rights, such as protection of private property, enforcement of contracts, and a minimalist notion of the universal franchise, limits its potential to address the systemic inequalities, social division, and hierarchy in national and international society.

B. The 'Basic Needs' Critique of Development as Economic Growth

The basic needs critique arose as an approach to development in the late 1960s and early 1970s to criticize the dominant paradigm of development adopted at that time in developing countries by post colonial governments with the support of international financial institutions. This dominant paradigm defined development primarily in terms of economic growth and focused on increasing per capita output, specifically in industrial production. This goal was consistent with the theme of modernization embraced by post-colonial governments in the Third World generally, and in sub-Saharan Africa

in particular.¹⁴ In Kenya for example, this goal of pursuing economic growth was stated in a government blueprint as follows :

The most important [policy] is to provide a firm basis for rapid economic growth. Other immediate problems such as Africanization of the economy, education, unemployment and welfare services and provincial policies must be handled in ways that do not jeopardize growth. . . Growth then is the first concern of planning in Kenya.¹⁵

Critiques of the “development as growth” paradigm pointed out that, because its primary emphasis was increasing per capita income, it downplayed or ignored the provision of basic needs such as formal education, public health, utilities, and other similar social amenities. In market oriented countries like Kenya, which had adopted an official policy of African Socialism in its development planning, critics referred to the incongruity of its development as growth economic program with its declared official policy on African

¹⁴ Modernization was also thought of as a process of institutionalizing “other forms of institutional and structural change such as ‘state building’ (i.e. the expansion of state power conjointly with the introduction of parliamentary and democratic institutions), and the inculcation of a particular set of development-enhancing ‘modern’ (i.e. Western’) values and habits of among the people of traditional societies.” Tariq Banuri, *Development and the Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World*, in DOMINATING KNOWLEDGE 29 (Frederique & Stephen Marglin eds., 1990).

¹⁵ GOVERNMENT OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA 18 (1965). Kenya then, unlike Tanzania which adopted a socialist route to development under Nyerere, was regarded either as dependent economy in the international capitalist system with a class of local comprador bourgeoisie or as an example of a vibrant indigenous entrepreneurial class leading a periphery economy into capitalist development contrary to the predictions of dependency and neo-Marxist theorists. For a review of this debate, see Colin Leys, *Learning From the Kenya Debate*, in DAVID D. APTER & CARL G. ROSBERG, POLITICAL DEVELOPMENT AND THE NEW REALISM IN SUB-SAHARAN AFRICA 220-243 (1994). On Tanzania’s alternative route see generally POLITICS AND PUBLIC POLICY IN KENYA AND TANZANIA (Joel D. Barkan, ed., 1984).

Socialism which underscored that traditional African cultures provided a ready foundation for socialism, especially in the provision of subsidized public services such as education and health.¹⁶

The basic needs approach arose as a critique of the paradigm of development as economic growth. International organizations, such as the International Labor Organization (ILO), the United Nations Development Program and the United Nations Children's Fund (UNICEF), sponsored research projects to buttress the critiques of the development as growth model.¹⁷ Debates on international human rights within various United Nations bodies and within the scholarly community provided an additional impetus for popularization of the basic needs strategy as discussed below. These bodies argued that the paradigm of development as growth was in crisis for a variety of reasons.¹⁸

¹⁶ Countries such as Ethiopia under Emperor Haile Selassie, Ghana under Nkrumah, Guinea under Sekou Toure and Tanzania under Nyerere initially adopted a philosophy of African socialism that presumed traditional African societies would accommodate socialism 'naturally' without conflict or tension, only to revise this approach and adopt variations of scientific socialism (such as Leninist Marxism) as experience proved them wrong. See SOCIALISM IN SUB-SAHARAN AFRICA: A NEW ASSESSMENT (Carl G. Rosberg & Thomas M. Callaghy eds., 1979).

¹⁷ See, e.g., UNICEF, A STRATEGY FOR BASIC SERVICES (1975). The Development Assistance Committee of the OECD also endorsed the basic needs strategy, OECD, DEVELOPMENT COOPERATION EFFORTS OF THE DEVELOPMENT ASSISTANCE COMMITTEES (1977). See LAWRENCE BLOOMBERG & CHARLES ABRAMS, REPORT OF THE UNITED NATIONS MISSION TO KENYA ON HOUSING (1965); See INTERNATIONAL LABOR OFFICE, EMPLOYMENT, INCOME AND INEQUALITY: A STRATEGY FOR INCREASING PRODUCTIVE EMPLOYMENT IN KENYA (1972). Tanzania, which followed a socialist route to development under Nyerere was not spared the scrutiny of the ILO, see INTERNATIONAL LABOR OFFICE, BASIC NEEDS IN DANGER: A BASIC NEEDS ORIENTED DEVELOPMENT STRATEGY FOR TANZANIA (1982).

¹⁸ According to Tariq Banuri, *Development and the Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World*, in FREDERIQUE & STEPHEN MARGLIN, DOMINATING KNOWLEDGE (1990). This crisis or disillusionment with development defined in terms of economic growth arose as a result of:

[T]he extremely uneven record of development: of the persistence of poverty amid increasing affluence, of the increase

Studies performed in Kenya and elsewhere by the ILO in the early 1970's illustrated that although growth driven development had created new wealth, this wealth was not trickling down as intended.¹⁹ It was also associated with absolute and relative decline in average

in unemployment despite increasing production, and in general, of the failure to ameliorate the condition of people in the poorest countries of Africa and Asia. A second reason is the increasing association of modernization and development with ecological disasters: the devastation of tropical rain forests and mountain watersheds, the deleterious (and unanticipated) ecological consequences of large dams and large irrigation schemes, the loss of subsistence agricultural land to desertification in Africa and to water logging and vulnerability of modern technologies. Another contributory factor is a similarly increasing association of development with higher levels of conflict and tension in much of the third world, in almost all parts where the development of project has been under way for a significant period of time, where such conflicts as wars, civil unrest, civic and ethnic violence, political repression, and urban crime appear to have increased tremendously. Responsibility must also be placed at the door of a fourth consideration, namely the onset of period of confusion, muddled groping, and search for new paradigms in economics as well as political science, the two mother disciplines of development theory.

Id. at 30-31.

¹⁹ INTERNATIONAL LABOUR OFFICE, EMPLOYMENT, INCOMES, AND EQUALITY: A STRATEGY OF INCREASING PRODUCTIVE EMPLOYMENT IN KENYA (1972); EMPLOYMENT, GROWTH AND BASIC NEEDS (1976). The ILO's approach to basic needs acknowledged the need for both domestic and international action for its alleviation. *See id.* Its World Employment Program of 1969 expanded its specific focus on employment to include "a concern for the creation of more egalitarian societies via the provision of productive employment for all . . . [which would] require structural transformation of national and transnational economic relations in order to incorporate unorganized and marginal citizens into remunerative activities." RICHARD SANDBROOK, THE POLITICS OF BASIC NEEDS: URBAN ASPECTS OF ASSAULTING POVERTY 9 (1982). *See generally*, INTERNATIONAL LABOUR OFFICE, EMPLOYMENT, GROWTH AND BASIC NEEDS: A ONE WORLD PROBLEM: THE INTERNATIONAL "BASIC-NEEDS STRATEGY" AGAINST CHRONIC POVERTY (1976); *See also* WORLD BANK, KENYA: INTO THE SECOND DECADE (Judith Heyer et al, eds., 1975); *see also* AGRICULTURAL DEVELOPMENT IN KENYA: AN ECONOMIC ASSESSMENT (1976).

incomes,²⁰ and an increase in economic dependence on European and North American technology and markets. Similar studies in countries as diverse as Brazil and the Ivory Coast also showed that development as growth was associated with an increase in gross domestic product and in the levels of poverty and inequality.²¹

Some scholars have argued that those studies supporting a basic needs approach failed to acknowledge the contradictory nature of the development of productive forces in a capitalist setting. In other words, the development of productive forces invariably takes place at an enormous social cost. For example, while the ILO had recommended the extension of the small holder production strategy in Central Kenya to fight unemployment and other measures to accelerate the break up of underutilized large farms, these scholars argued that the ILO's recommendations overstated the considerable human suffering, inequality and social dislocation that accompanied these developments while ignoring the fact that these shortcomings occurred simultaneously and were thus inseparable from an increased economic growth which significantly contributed to satisfying social needs in central Kenya.²²

²⁰ FRANCES STEWART, PLANNING TO MEET BASIC NEEDS 10 (1985). For a debate on the importance of basic needs in the Kenyan context, see Colin Leys, *Development Strategy in Kenya Since 1971*, 13.5 CAN. J. AFR. STUDIES 295, 295-320 (1979); M. Godfrey, *Prospects for a Basic Needs in Kenya*, 9 IDS BULLETIN 4 (1978); Martin Godfrey et al., PLANNING FOR BASIC NEEDS IN KENYA: PERFORMANCE, POLICIES AND PROSPECTS (1979); see also Lionel Cliffe, *Underdevelopment or Socialism? A Comparative Analysis of Kenya and Tanzania*, in THE POLITICAL ECONOMY OF AFRICA (Richard Harris ed., 1975); see also GERALD HOLTHAM & ARTHUR HAZELWOOD, AID AND INEQUALITY IN KENYA: BRITISH DEVELOPMENT ASSISTANCE TO KENYA (1976).

²¹ BEN WISNER, POWER AND NEED IN AFRICA: BASIC HUMAN NEEDS AND DEVELOPMENT POLICIES 31 (1988).

²² Michael Chege, *The Political Economy of Agrarian Change in Central Kenya*, in THE POLITICAL ECONOMY OF KENYA 93, 96 (Michael G. Schatzberg ed., 1987). According to Chege, "the corrosive aspect of populist development strategies - and 'dependency' and 'basic needs,' and allied doctrines are populist - lies in their moralistic conceptualization of development, eschewing secular and rational paradigms of market or Marxian variety. This, in turn, arrests the forces of production, ironically hurting the poor in the process" *Id.* at 115. The contradictory character of capitalism in the African context was invoked in the

The basic needs critique became assimilated within the debates on economic development notwithstanding its shortcoming in failing to acknowledge the contradictory nature of capitalist development. Its almost exclusive focus on the distributive implications and the social suffering of development as growth, failed to acknowledge the positive impacts of capitalist development/or the development of productive forces. In addition, the basic needs approach may be regarded as an attempt to salvage the promises of modernization or the myth of development.²³ This must be the case considering some of the most vocal criticisms of the development paradigm and its accompanying justificatory regime of modernization. According to Tariq Banuri, the single most important reason for disillusionment with development was not so much its negative social and political impact, but rather the “erosion of the

mid-1970's particularly by Bill Warren to discredit dependency and other accounts of development that were skeptical of the possibility of capitalist development in the periphery. See Bill Warren, *Imperialism and Capitalist Industrialization*, NEW LEFT REV. 3-44 (1973). For a further critique of redistribution and socialism as an economic development agenda as promoted by groups such as the ILO in the 1970's, see Michael Chege, *Swapping Development Strategies*, *supra* note, at 280-283. According to Chege, this concern with redistribution, especially in Kenya was an uncritical intellectual effort intended to “fan the political flames than illuminate social realities.” He cites studies to support the proposition that contrary to the unsubstantiated claims of the ILO and like-minded intellectuals that there were widespread falls in incomes in rural areas in Kenya and Tanzania, there in fact increases in general welfare until intervening economic downturns changed these realities. See also Arthur Hazelwood, *Kenya : Income Distribution and Poverty - an Unfashionable View*, 16 J. MOD. AFR. STUD. 81-95 (1978). Hazelwood argues that the basic needs debate put too much emphasis on inequality and less attention to absolute levels of living. *Id.*

²³ Tariq Banuri makes this argument with respect to initiatives other than basic needs which were developed as alternatives to development as economic growth. Tariq Banuri, *Development and the Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World*, in DOMINATING KNOWLEDGE (Frederique & Stephen Marglin, eds., 1990). *Id.* at 51. On political development see also *id.* chapter 5.

myth that development can create a just and human society.”²⁴ This debate is, however, beyond the scope of the present paper.

C. Weak and Strong Versions of the Basic Needs Critique

In the remainder of this section, I will focus on two versions of the basic needs critique: one, weak and the other, strong. In each, the critique argues for a prioritization of the essential needs of the world's poor in development through initiatives such as social insurance against the vagaries of the market through social welfare and publicly funded education, health, and housing. The basic needs approach is also associated with the importance it places on the satisfaction of basic needs such as clothing and nutrition, especially among the poor and economically vulnerable persons within the development process. At the outset, it is significant to point out that the basic needs approach to redistributive justice differs from that embraced within liberal theories of justice. Liberal theories of justice, unlike the basic needs approaches, are mainly concerned with the way in which societal institutions determine the division of benefits and burdens in society.²⁵ By contrast, basic needs approaches are primarily concerned with the sensitivity of the development policy embraced by a government to the needs of the poor, vulnerable and poverty stricken.

The weak version of the basic needs approach attracted the attention of capitalist oriented countries as well as international

²⁴ *Id.* at 31. According to Banuri, the erosion of the myth of development “also permitted the increase and self assurance of non-Western (and often anti-Western) social, cultural, and political movements in Third World countries.” *Id.*

²⁵ One of the leading statements of this liberal view is JOHN RAWLS, A THEORY OF JUSTICE (1971). For a critique of the nature of the state (one that is neutral among competing conceptions of the good, while maximizing the capacity of groups to maximize their chosen ends) proposed by this liberal vision, see Liberalism and Its Critics (Michael Sandel ed., 1984); see also STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (1996).

financial institutions for a variety of reasons.²⁶ First, it represented a means of addressing emerging social movements and unrest in developing countries during the 1950-1960 period, the high point of the 'development as growth' strategy. These movements not only questioned the limits of the 'development as growth' approach, but have been thought of as challenges to "the very concepts of the centralized, impersonal, and bureaucratically organized nation state."²⁷ Both versions of the basic needs approach cushioned popular challenges both to the capitalist state and also to capitalist development by providing prospects for social amenities that the growth oriented development model overlooked. Secondly, a weak approach to basic needs was consistent with the contradictory nature of capitalist development, which requires the provision of welfare entitlements as a "means of exercising social control over the working class and subsidizing capital's profit making."²⁸ The contradictory nature of the welfare state is embodied in its simultaneous tendency to provide for basic needs such as housing, food and health through regulation of their provision or through taxation or social security systems,²⁹ while at the same time

²⁶ For the variety of reasons that led to adoption of basic needs as part of American foreign development assistance policy, see Rolf H. Sartorius & Vernon W. Ruttan, *The Sources of the Basic Needs Mandate*, 23 J. OF DEVELOPING AREAS 331-362 (1989).

²⁷ Tariq Banuri, *Development and the Politics of Knowledge*, *supra* note 24, at 51.

²⁸ CHRISTOPHER PIERSON, BEYOND THE WELFARE STATE? THE NEW POLITICAL ECONOMY OF WELFARE 57 (1991).

²⁹ Some scholars have argued that although in the short run inequality helps to maintain political stability through extraction of rents from the disorganized rural poor to buy off the organized urban labor force, in the long run it militates against "labor intensive and efficient development paths." MICHAEL LIPTON, WHY POOR PEOPLE STAY POOR: URBAN BIAS IN WORLD DEVELOPMENT 42-43 (1977); *See generally*, ROBERT BATES, THE POLITICAL ECONOMY OF RURAL AFRICA (1983). Bates questions the presumption that "urban and industrial areas were determining the fundamental character of the African continent." *Id.* at 1.

displaying tendencies “to repress and control people, to adopt them to the requirements of the capitalist economy.”³⁰

In the strong version, the basic needs approach criticized development as growth for failing to question national maldistribution of wealth, power, and resources.³¹ In addition to questioning the class structure in national economies, the strong version of the basic needs approach requires “a reorientation of the productive system away from the provision of non-essential goods for a small, high income category, and towards the satisfaction of the basic needs of the low income category.”³² In a study of Kenya in the early 1970s, the ILO concluded that only far reaching changes such as land reform and economic distribution would suffice to address poverty and provide jobs to the huge unemployed workforce. These reforms are considered prerequisites for enabling the poor to have control of their own development needs.³³ They call for self-reliant and self-governing forms of development which are transformative and thus do not take for granted the hierarchies in the sphere of production and reproduction. They seek to challenge the market as well as the social relations which promote hierarchy and division as a means of enabling all people to realize their needs freely. In general, they challenge the view embodied in development as economic growth—that if an economy is growing, wealth will automatically trickle down to the poor.

In contrast, the weak version of the basic needs approach embraces a view of development that takes for granted the existing

³⁰ CHRISTOPHER PIERSON, BEYOND THE WELFARE STATE? THE NEW POLITICAL ECONOMY OF WELFARE 57 (1991), *quoting* GOUGH I., THE POLITICAL ECONOMY OF THE WELFARE STATE 12 (1979).

³¹ See SANDBROOK, *supra* note 20. He advocates a radical (as opposed to conservative) approach to basic needs that “would prescribe for a mutually reinforcing set of policies entailing structural change at the national and international levels.” *Id.* at 7.

³² *Id.* at 229.

³³ ILO, Follow-up of the World Employment Conference: Basic Needs, International Labor Conference, 65th Session. Report 7, Geneva, 1979 notes that the participation of rural populations in the development process is important to enable them to safeguard their interests, at 59.

distribution of wealth, power and resources. It focuses on meeting basic needs—mainly for survival and minimum income.³⁴ The poor tend to be seen as helpless and disconnected from the underlying structures of wealth and power distribution. While it is doubtful that any fundamental changes took place at the World Bank as a result of the critique of development as economic growth, McNamara's tenure as President of the Bank (1968 - 1981) best exemplifies the attempt to institutionalize basic needs as part of the Bank's lending portfolio.³⁵ Its attraction for the Bank was the fact that, unlike in the strong version, in the weak version, basic needs did not question the existing distribution of wealth, power, and resources in society in ways that would require market intervention.³⁶ This view presumes

³⁴ See Reginald Green, *Basic Human Needs: Concept or Slogan, Synthesis or Smokescreen?*, 9 IDS Bull. 10 (1978).

³⁵ See ROBERT L. AYRES, *BANKING ON THE POOR: THE WORLD BANK AND WORLD POVERTY* (1983). However, Teresa Hayter and Catherine Watson doubt that the Bank changed significantly under McNamara. TERESA HAYTER & CATHERINE WATSON, *AID: RHETORIC AND REALITY* (1985). They note that the "concern in the Bank's 'policy dialogue' about the effects of government policies on poverty is, as it was in the 1960's, and as it is in the programmes of the IMF, an afterthought, something that should be attended to in the future, after the government has dealt with the more immediate problems of debt, deficits and inflation." *Id.* at 98. See also *id.* at 227-236.

³⁶ RICHARD SANDBROOK, *THE POLITICS OF BASIC NEEDS*, *supra* note 20. Sandbrook reminds us that the World Bank is not monolithic and there are in fact employees of the Bank who subscribed to the strong version of the basic needs approach. He notes, however, that it is the views of President Robert McNamara at the Bank which defined the Bank's approach. Sandbrook is critical of the McNamara approach since it regards poverty as arising largely "from factors internal to each developing country, and that its eradication therefore largely depends upon governmental policies and actions directed towards those internal barriers to development. Moreover, the Bank's propensity for developing and prescribing policy on a sectoral basis (rural, urban, education, health and so on) lends itself to a conception of poverty amelioration as isolated, piecemeal reforms. Particular policy reforms and projects are designed to assist 'target groups' among the poor to escape absolute depravation; but an unreformed modern business sector will continue business as usual." *Id.* at 7-8. For a critique of the World Bank's social safety net programs initiated in the era of SAPS starting in the mid-1980s another program justified as part of the basic needs policy, see WISNER, *supra* note 21, at 130-147.

that the economic sphere ought to be self-regulating and therefore beyond regulatory intervention by the state in favor of distribution short of a complete break with a market economy. As such, as conceived by the World Bank, the weak version of basic needs posed no challenge to the growth as development model that was the subject of the basic needs critique in the first place. The weak version of basic needs in essence separated the pursuit of equality which was the goal of the strong version, from its goal of meeting basic needs such as those of food, nutrition and education.

The Bank's weakened version of the basic needs approach was in part embodied in the concept of redistribution with growth.³⁷ Redistribution with growth was promoted as an alternative development strategy to development as economic growth, since the latter did not incorporate distributional goals as part of its agenda. This weakened version of basic needs proceeded from an acknowledgment that "the distribution of income and the creation of employment opportunities would not be approached separately from the achievement of economic growth."³⁸ According to the World Bank, in societies with very low standards of living, meeting basic

³⁷ See generally HOLLIS B. CHENERY ET AL., REDISTRIBUTION WITH GROWTH (1974); HOLLIS CHENERY, STRUCTURAL CHANGE AND DEVELOPMENT POLICY (1979). See also Gavin Williams, *The World Bank and the Peasant Problem*, in RURAL DEVELOPMENT IN TROPICAL AFRICA (Robert Heyer and Gavin Williams eds., 1981). Other discussions of redistribution with growth include: EMPLOYMENT IN DEVELOPING COUNTRIES (E.O. Edwards, ed., 1974); see also THIRD WORLD EMPLOYMENT (Richard Jolly et al., eds., 1973).

³⁸ Tony Killick, *Trends in Development Economics and Their Relevance to Africa*, 18 J. of Mod. Afr. Stud. 373 (1989). For statements in support of the proposition that employment and distribution of income should be pursued as part and parcel of development policy, see MICHAEL P. TODARO, ECONOMICS FOR A DEVELOPING WORLD: AN INTRODUCTION TO PRINCIPLES, PROBLEMS AND POLICIES FOR DEVELOPMENT 98 (1977); MEASURING DEVELOPMENT: THE ROLE OF AND ADEQUACY OF DEVELOPMENT INDICATORS (Nancy Baster ed., 1972); Dudley Seers, *What Are We Trying Measure*, in DEVELOPMENT THEORY: FOUR CRITICAL STUDIES (David Lehmann ed., 1979). For my assessment of how structural adjustment reform has resulted in disabling governmental involvement in furthering distributive goals, see James Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence To Neo-Liberalism* THIRD WORLD LEG. STUD. (1999).

needs was more equitable, moral and important than reducing inequality, which was considered to be of secondary concern to poor people. Moreover, from an operational standpoint, the Bank had a difficult time dealing with the issue of inequality, especially because its definition was complex and abstract.³⁹

In addition, the World Bank's concept of participation (as set forth in its 1990 World Development Report), is limited to voluntary enrollment in Bank projects and services, and issues such as cost effectiveness or productivity and investment,⁴⁰ rather than the myriad ways in which people can actively transform their dependent status. According to the report, poverty alleviation involves encouraging broad based economic growth that takes advantage of the lower class's abundant labor resources. Easing indigence is also associated with "the provision of goods and services that may or may not alleviate the very poverty that conventional development funding provokes."⁴¹

D. Functionalism and the Basic Needs Approach in International Law

Another reason why international institutions, such as the World Bank, became interested in the basic needs model was because of its grounding in the functionalist theories of international cooperation that were adopted in the post- Second World War period. David Mitrany, for example, argued that the role of international institutions was the provision of services rather than the enumeration of states' rights. In his view, such functionalism would in turn secure international peace; though people may applaud and idealize the declarations of rights, they cared more about the reality of having food on their table. The satisfaction of these basic needs was a call

³⁹ P. STREETEN ET AL. FIRST THINGS FIRST: MEETING BASIC NEEDS IN DEVELOPING COUNTRIES 17 (1981).

⁴⁰ S. Horton & T. King, Labor Productivity: Un Tour d'Horizon, World Bank Staff Working Paper No.497, Washington D.C. (1981).

⁴¹ WISNER, POWER AND AID IN AFRICA, *supra* note 21, at 41. WORLD BANK, WORLD DEVELOPMENT REPORT (1990).

for action that had to be turned into an 'historic opportunity.' This also involved transforming the role of international agencies from the esoteric function of elaborating juridical rules to the more essential function of meeting those demands or needs.⁴² For example, as an acknowledgment of their role in meeting the fundamental demands of the hungry, the sick, and the homeless, the ILO and specialized U.N. agencies such as the World Health Organization (WHO) and the United Nations Educational, Scientific, and Culture Organization (UNESCO) actively participated in the drafting process of the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.⁴³

Other functionalist thinkers at the time argued that classical international law had broken down because it had lost touch with the dynamics of the real world; and further, that it was mired in the age-old formalistic concept that international society was composed of individual states governed by self-interest and controlled by international rules that were imposed and enforced upon them. International law, they recommended, could only develop on a functional basis by coordinating goals that are evident not just to the individual states but to all individuals.⁴⁴ Such functionalist thinking

⁴² DAVID MITRANY, *A WORKING PEACE SYSTEM* (1943). Mitrany argued that the League of Nations, the UN charter, proposals for world or regional federation and for an enforced peace as in the tradition of the 18th century were out of favor and harmony with our time whose "trend is to organize government along the lines of specific ends and needs...in lieu of the traditional organization on the basis of a set of constitutional division of jurisdiction of rights and powers so that the rise of specific administrative agencies and laws is the peculiar trait and indeed foundation of modern government." *Id.* at 7, 20-21.

⁴³ Philip Alston, *Making or Breaking Human Rights: The UN's Specialized Agencies and Implementation of the International Covenant on Economic Social and Cultural Rights*, in *HUMAN RIGHTS AND DEVELOPMENT WORKING PAPERS*, NO. 1, ANTI-SLAVERY SOCIETY 4-5 (1979).

⁴⁴ GERHART NIEMEYER, *LAW WITHOUT FORCE* (1941). According to Niemeyer, society was not made up of individuals, but rather by the connectiveness in their behavior. The role of law in this context was thus to accomplish the ends desired by those being governed. At international level, he argued that it was not world charters but rather administrative agencies that are responsive to the needs of social security, food rationing, public utility regulation, fair employment practice

was prevalent not only within the basic needs approach, but also among international lawyers and organizations, such as C. Wilfred Jenks, Inis Claude, and E. B. Haas, who were among the leading functionalist thinkers of the time whose work sought to link basic needs and human rights.⁴⁵ However, these scholars rarely, if ever, addressed the colonial legacies or the ethnocentric assumptions of international institutions, politics, and law. Unlike discussions of functionalism, and indeed of international law and politics, which fail to take into account these issues of power, hierarchy, history, and identity, which this article does in a small way.⁴⁶

E. Linking Human Rights and Basic Needs - Rights As an Integral Part of Development

In the 1970s, international human rights lawyers sought to ground the basic needs approach within the framework of rights as opposed to needs. In effect, they sought to substitute *rights* for *needs* and as such transform the basic needs doctrine from an apolitical concept into a legal entitlement. In the words of one international human rights scholar at the time, to “assert that a particular social claim is a human right is to invest it emotionally and morally with an especially high degree order of legitimacy.”⁴⁷

Human rights activists also argued that while meeting welfare needs of citizens through beneficial or remedial programs was

commissions, public health authorities that were necessary to meet these demands.

⁴⁵ C. Wilfred Jenks, *The United Nations Covenants on Human Rights Come to Life*, in RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 68 (1968); THE WORLD BEYOND THE CHARTER (1969); E.B. HAAS, BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964); INIS CLAUDE, SWORDS INTO PLOWSHARES (4th ed., 1984) argues that international organizations are functional responses “to the complexities of the modern state system rather than an optional experiment fastened upon it.” *Id.* at 6.

⁴⁶ For my own reflections on these questions, see James Gathii, *International Law and Eurocentricity: A Review Essay*, 9 EUR. J. OF INT'L LAW 184-211 (1998).

⁴⁷ Richard Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1 Wis. L. Rev. 174 (1969).

important, "policies and programs that were based on a perception of need and powerlessness, reinforced the powerlessness of the recipients who are being given justice rather than as receiving their rights. Recognition of entitlement is itself an act of empowerment," these activists argued.⁴⁸

A central feature of international human rights advocacy at the time was therefore aimed at demonstrating that "respect for human rights *must* be an integral part of the development process and that economic, social and political factors cannot be treated in isolation."⁴⁹ In furtherance of this position, it was advanced that these human rights would best be realized if linked to the basic needs development strategy. This involved campaigning for the recognition that the delivery of donor agency and multilateral development bank assistance programs could affect the realization of human rights in developing countries. It also challenged the widely accepted belief that human rights and economic development were two separate or distinct spheres, and that the scope of development was restricted to economic growth. On the contrary, development now had to be recast in order to be accommodated within the prevailing notions of

⁴⁸ HUMAN RIGHTS COUNCIL OF AUSTRALIA, INC., *THE RIGHTS WAY TO DEVELOPMENT: A HUMAN RIGHTS APPROACH TO DEVELOPMENT ASSISTANCE* 30 (1995). The power of this argument has also been emphasized in the context of the African American minority struggle against White supremacy in the United States. According to Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Reconstructed Rights* 22 HARV. C.R.-C.L. L. REV. (1987) the critical legal studies (CLS) disutility for rights was an inappropriate strategy for minorities like African Americans to adopt. Williams notes that the CLS disutility for rights arose from the view that rights "may keep one at a permanent distance from situations which could profit from closeness and informality," (which for example requires an abandonment of 'rights to shelter for the homeless into arguments about the 'needs' for the homeless'). *Id.* at 412. One CLS example advocating the political disutility of rights claims is Mark Tushnet, *An Essay on Rights* 62 TEX. L. REV. 1363 (1964). He argues that "people need food and shelter now, and demanding that those needs be satisfied strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced." *Id.* at 1394.

⁴⁹ Philip Alston, *Human Rights and the Basic Needs Strategy for Development* HUMAN RIGHTS AND DEVELOPMENT WORKING PAPERS, NO. 2, ANTI-SLAVERY SOCIETY 1 (1979).

development which gave priority to potentially contradictory objectives such as increased productivity, growth and profits.

In short, international human rights advocates may be said to have adopted the slogan that *human rights must be an integral part of the development process*; and they adopted the position that the basic needs development strategy pursued by the World Bank, insofar as it failed to incorporate human rights, was woefully inadequate. In support of their arguments, these activists argued that the incorporation of social and economic rights into the international bill of human rights supported their case for the recognition of social and economic needs as rights.⁵⁰

This 1970s approach that sought to integrate basic needs with rights in international human rights advocacy differs markedly from the approach found in the 1990s good governance agenda, which holds that human rights is only 'relevant' to the extent that it enhances economic growth. As will be discussed below, good governance focuses more on civil and political rights rather than economic and social rights.

Within the basic needs framework, international human rights advocates focused on expanding the meaning of development to include human rights, i.e., to get it on the development agenda, just as basic needs had become part of the development agenda. Accomplishing this objective would involve elevating a specific goal into a human right "above the rank and file of competing . . . goals, [which would in turn give] it a degree of immunity from challenge and generally endow it, with an aura of timelessness, absoluteness and universal validity."⁵¹

By arguing for a linkage between human rights and development, these activists challenged the functional separation of the work of international financial institutions from that of the

⁵⁰ This recognition is embodied in The International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res 220 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1966) 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].

⁵¹ Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, in 1 HARV. HUM. RTS. Y.B. 3, 18 (1988).

political organs of the U.N., the latter, focusing on economic and financial issues to the exclusion of human rights, which was the mandate of the former.⁵² Human rights advocates rejected this separation or sharp distinction between the functions of the political organs of the U.N. and the economic and financial functions of the Bretton Woods institutions. They claimed that within the U.N., there was no aspect of the market (economic and financial) that could exist separately from other organs of the U.N. which had explicit political roles including the protection of international human rights. The drafting, accession, ratification and subsequent initiatives implementing the International Covenant on Civil and Political Rights (ICCPR)⁵³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976 gave further impetus to those who advocated the incorporation of human rights into economic development. In addition, the constitutional documents of the ILO, UNESCO and WHO specifically included human rights as part of their mandate.⁵⁴ This process of incorporation was considered significant in translating the Covenants into 'living instruments.'⁵⁵

Moreover, human rights advocates argued that the basic needs development strategy was very closely related to the purposes and principles of the United Nations, namely in:

- promoting and encouraging respect for human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion;⁵⁶

⁵² *Id.* See also Philip Alston, *Making and Breaking Human Rights*, *supra* note 51. Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, B. U. INT'L L. J. 81 (1993) (repudiating the distinction between human rights and the IMF's mandate as artificial).

⁵³ International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200(XXI), U.N. GOAR 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].

⁵⁴ Philip Alston, *Making or Breaking Human Rights*, *supra* note 51, at 14-16.

⁵⁵ Philip Alston, *Human Rights and the Basic Needs Strategy*, *supra* note 49, at 8-9. See also Philip Alston, *Making or Breaking Human Rights*, *supra* note 51.

⁵⁶ U.N. CHARTER art. 1, para. 3.

- promoting international cooperation in the economic, social cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion;⁵⁷
- promoting 'conditions of stability and well-being which are necessary for peaceful and friendly relations between nations' which includes 'universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.'⁵⁸

In addition to the U.N. Charter, the Universal Declaration of Human Rights (UDHR),⁵⁹ the ICCPR, and the ICESCR provided additional international legal basis for the specialized international agencies involved in development to argue for the incorporation of human rights into their activities.

The process of drafting, national accession to, and enforcement of the norms of international human rights law within the United Nations framework since 1945 has been thought of as a major development in international cooperation on an issue which, under classical international law, belonged exclusively to the state. This traditional position that had previously justified non-intervention in issues that fell within the domestic jurisdiction of a country (such

⁵⁷ U.N. CHARTER art. 13, para. 1.

⁵⁸ U.N. CHARTER art. 55, para. 3. U.N. CHARTER art. 56 requires members of the UN to "take joint action in cooperation with the Organization for the achievement of purposes set forth in Article 55." U.N. CHARTER art. 68 mandates the Economic and Social Council "to set up commissions in economic and social fields for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

⁵⁹ UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 25, para. 1 provides that "Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess. (Resolution, part1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter UDHR].

as human rights) resulted in stultifying the radicalizing potential of the international commitments on social and economic rights contained in the ICESCR. While Western countries largely downplayed the significance of social and economic rights because of their socialist inclinations, critics countered that these rights were indispensable since they promised to make freedom more functional in redressing poverty, inequalities and social hierarchies. The assertion that sovereignty and the non-intervention norm are in the process of breaking down is therefore associated with a radicalizing potential.

The significance of the International Bill of Rights infusing international law with a social character in part arises from its utility in justifying the incorporation of human rights as an integral aspect of economic development in general, and in radicalizing the basic needs critique of growth-driven economic development by changing the concept of needs to rights.⁶⁰ Human rights advocates sought to radicalize the weak approach to basic needs by framing them as legal rights or entitlements; however, the approach fell short because it failed to adequately challenge the balance of wealth, power and resources and to treat fundamental needs as 'claims' that were part of a history of injustice and structural disadvantage. Instead, the focus was on justifying the international legal commitments of the organizations within the emerging international human rights framework.

In the context of the World Bank's basic needs strategy, human rights advocates began to inject international human rights into the agenda of economic development. In the 1970s and early 1980s, this approach laid the foundation for human rights groups and activists to lobby the World Bank to convince it to address the

⁶⁰ FRANCES STEWART, *PLANNING TO MEET BASIC NEEDS* 8 (1985). Stewart argues that the basic needs approach to development arose in response to two particular events: first, the failure of 'growth only' development in the 1950's and 1960's; and secondly, the overwhelming success of Socialist countries such as Cuba and China in raising welfare levels.

poverty issue through concepts such as the right to development, in general, and people-centered development in particular.⁶¹

III. GOOD GOVERNANCE - A NEW FRAMEWORK FOR HUMAN RIGHTS IN DEVELOPMENT?

From the late 1980's, U.S. based international human rights non-governmental organizations, such as the Lawyers' Committee for Human Rights, formally began lobbying the World Bank to condition its assistance on the observance of civil and political rights, such as those relating to freedom of expression, assembly and association.⁶² Previously, the Bank had conditioned its assistance, in developing countries, on changes that were consistent with or necessary to implement market reforms. This approach differs fundamentally from the basic needs framework which human rights advocates sought to radicalize. Yet, both the good governance and basic needs/rights strategy began to develop and grow within the World Bank's predefined programs and priorities.⁶³

⁶¹ See Rajni Kothari, *Party and State in Our Times: The Rise of Nonparty Political Formation*, 9 ALTERNATIVES 541-64(Spring). For a sympathetic view of NGO participation at the Bank see generally SAMUEL PAUL & ARTURO ISRAEL, NONGOVERNMENTAL ORGANIZATIONS AND THE WORLD BANK - COOPERATION FOR DEVELOPMENT (1991). For a critical view of the role of NGOs at the Bank see PAUL NELSON, THE WORLD BANK AND NONGOVERNMENTAL ORGANIZATIONS: THE LIMITS OF APOLITICAL DEVELOPMENT (1995). See e.g., Clarence Dias & James C.N. Paul, *Developing Legal Strategies to Help Combat Rural Impoverishment: Using Human Rights and Legal Resources*, in THE INTERNATIONAL CONTEXT OF RURAL POVERTY IN THE THIRD WORLD: ISSUES FOR RESEARCH AND ACTION BY GRASSROOTS ORGANIZATIONS AND LEGAL ACTIVISTS 231, 231-267 (David Dembo ed., 1986).

⁶² Its first report was, LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS (1993). It was revised and updated in August 1995. The Lawyers Committee organized a workshop in 1993 to benefit from the 'successful' efforts of environmentalists to lobby the Bank to consider environmental considerations in its lending programs. *Id.* at 2-3 and 109-117.

⁶³ Human rights NGO's therefore replicated a pattern which humanitarian and development NGO's had completed in the 1970's. Developing NGO/World Bank cooperation resulted in partnerships between these NGO's and the World Bank which included representation and participation of NGO's in World Bank decision

While in the 1970s, the weak version of the basic needs approach provided human rights advocates with a foothold with which to question and therefore seek to expand development defined solely in terms of growth, during the 1990s, the good governance agenda went further by making explicit reference to human rights, especially to civil and political rights. As such, the good governance framework incorporates human rights within its definition. Although the World Bank is prohibited by its Articles of Agreement from interfering in the internal affairs of its member countries, or from engaging in political activities (or non-economic issues) such as human rights advocacy, several complementary connections have been demonstrated between the Bank's economic and financial mandate, on the one hand, and human rights, democratization, and political institutions within developing countries, on the other. These connections justified bringing human rights issues within the scope of the Bank's mandate. One recent Bank publication on governance therefore states:

Although human rights are in a larger sense indivisible, the World Bank, as an international financial institution, deals with those aspects of human rights relevant to its mandate. Except in situations where the violation of human rights has created conditions hostile to effective implementation of projects or has other adverse economic consequences, or where there are international obligations relevant to the Bank, such as those

making forums; joint-funding or co-financing schemes involving World Bank financing together with privately raised capital to undertake projects ranging from education to health. This role conveniently serves the neo-liberal agenda very well today since NGO's often serve the role of making good the deficiencies of state provision and delivery of basic services. Geof Wood, *States Without Citizens: The Problem of the Franchise State*, in NGO'S, STATES AND DONORS TOO CLOSE FOR COMFORT (1997) argues that NGO's have taken over the provision of important services which is a reflection of their privatization and loss of accountability. Wood calls this phenomenon franchising out state functions to NGO's. *See id.* at 79-102.

mandated by binding decisions of the U.N. Security Council, the World Bank does not take into account the political dimensions of human rights in its lending decisions. The World Bank's Articles of Agreement prohibit the institution from taking political considerations into account, interfering in the political affairs of any country, or being affected by the political form or orientation of a country.⁶⁴

Ibrahim Shihata, (the Bank's General Counsel), elaborates this position further when he observes that the World Bank's decisions on lending may be influenced by a country's political situation only where such a situation has a direct effect not only on its economy, but also on the feasibility of the implementation and monitoring of the World Bank's economic reform programs. In these circumstances, human rights may [to some extent] become relevant, but "the degree of respect paid by a government to human rights cannot by itself be considered an appropriate basis for the Bank's decision to make loans to that government or for the voting of its Executive Directors."⁶⁵

⁶⁴ WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE 53 (1994). For much more expansive readings of the Bank's mandate in the area of human rights, see generally Victoria E. Mamorstein, *World Bank Power to Consider Human Rights factors in Loan Decisions*, 13 J. INT'L. L. & ECON. 113 (1978); *Human Rights, Politics and the Multilateral Development Banks* 6 YALE STUD. IN WORLD PUB. ORD. 362 (1980).

⁶⁵ Ibrahim Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39, 47 (1988). In a more recent article, Ibrahim Shihata, *Democracy and Development*, INT'L & COMP. L. Q. 640 seems to note an exception where the World Bank can take into account "pervasive violations of . . . rights to the extent that they have obvious and significant effects on the economy of the country it assists." *Id.* This is in addition to situations in which human rights may be shown to have a direct relevance to the World Bank's mandate of economic reform. IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD (1991). Shihata notes that circumstances that may jeopardize a loan or a Bank project which may threaten the standing of the Bank in financial markets or could lead to adversely affecting its reputation need to be taken into account by the Bank. He gives the example of "the partial or full occupation of a country by a foreign army or civil strife . . . cannot be deemed irrelevant to the Bank's work because they are of a political nature."

In the period prior to the good governance era, the World Bank restricted itself to conditioning its loan and assistance programs only to those economic and financial conditions that fell within its mandate to ensure loan repayment. These conditions could relate to change in tax or commercial laws, but not to explicitly political criteria such as respect for human rights, democratization, or the nature of political institutions. It is argued that the good governance agenda has changed the view of the linkage between political and economic performance within the World Bank's lending programs by explicitly acknowledging that a country's performance on issues such as the nature of its political institutions, elections and democratization constituted an important framework for successful economic adjustment. In this way, the good governance agenda sought to modify the view of economics as a form of mechanics divorced from social structures adopted by economists within the Bank and conservative commentators of the Bank's work.⁶⁶ The importance of this linkage was only secondarily important for human rights or democratization, because, in general, good governance rests on concepts of political economy which link governmental behavior or interference in the market place with dismal economic performance and infringement of rights related thereto. In other words, improved economic growth, not democratization or respect for social and economic rights, is the central commitment of the good governance agenda.

He proceeds to refer to a long-standing World Bank policy paper on this issue which has long recognized that the Bank "cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of a borrower." WORLD BANK, IDA AND IFC, POLICIES AND OPERATIONS 43 (1968). He notes, however, that "it is important to recall that in such situations the Bank would still be taking into account economic considerations; political events would represent only the historical origins or causes which gave rise to such considerations." *Id.* at 76.

⁶⁶ Esker Toyo, *The Return of Political Economy: A Contribution to the History and Typology of Economic Analysis*, in ECONOMIC PAPERS, CENTRAL SCHOOL OF PLANNING AND STATISTICS IN WARSAW, RESEARCH INSTITUTE FOR DEVELOPING COUNTRIES, No. 15, 170 (1987).

Hence, good governance discussions rest on the central premise that governmental intervention can inhibit economic growth through its pervasive powers of sanctions, approvals, licencing, quotas, taxes and subsidies, and public provision of infra-structural facilities.⁶⁷ These debates on good governance argue that economic policy is the outcome of “interactions among politicians, bureaucrats and interest groups operating within a set of institutional constraints,”⁶⁸ rather than “merely a response to economic parameters and concerns with efficiency.”⁶⁹ Good governance is seen, therefore, as an antidote to these interventions (in borrower countries), as a result of its commitment to economic liberalization through reforms in the law, the public sector, and the judiciary.

The good governance agenda has therefore provided the World Bank a window through which to undertake reforms in areas that would otherwise be considered political interventions. The good governance agenda popularizes these reforms as important preconditions (or the *enabling environment* in the World Bank’s jargon) for successful neo-liberal reform, rather than impermissible political interventions in sovereign countries. At the heart of the good governance agenda is the imperative to promote an enabling environment as a prerequisite for successful implementation of the neo-liberal agenda.⁷⁰

Therefore, I argue that the explicit reference to human rights and democratization in the good governance agenda must be understood in the context of this larger debate centered on demonstrating the adverse effects of governmental intervention in the economy. This explicit reference to human rights in the good governance agenda lends credence to this anti-statist agenda in view

⁶⁷ See Subraj B. Gupta, *Why Political Economy*, INDIAN ECON. REV., 286-287 (1992).

⁶⁸ STEPHEN HAGGARD & STEVEN B. WEBB, VOTING FOR REFORM: DEMOCRACY, POLITICAL LIBERALIZATION AND ECONOMIC ADJUSTMENT 3 (1994).

⁶⁹ *Id.*

⁷⁰ For a critical overview of this agenda, see generally Anne Orford & Jennifer Beard, *Making the State Safe for the Market: The World Bank’s World Development Report 1997*, 22 MELB. UNIV. L. R., 195 (1998).

of the history of human rights abuses committed by sub-Saharan African states. It also gives moral credibility to the World Bank in general. While the good governance agenda does not itself constitute a legally binding commitment that the Bank would independently use to promote human rights, it could use its economic leverage on developing countries to withhold extension of credit to governments that default on internationally recognized human rights principles. As already seen, violations of human rights do not automatically trigger exercise of this leverage; instead, there has to be a connection to the Bank's economic and financial mandate before this leverage could be exercised.⁷¹

The Bank boasts that its efforts in alleviating poverty constitute an important human rights role, since 'no other human right could be fully enjoyed' if freedom from poverty was not addressed.⁷² However, there is a simple response to this very opportunistic claim. Poverty alleviation not only features tangentially in its (the Bank's) lending programs, but it is also based on a weak approach to basic needs insofar as it takes for granted and fails to challenge the existing disparities of wealth and power within borrowing countries as well as within the international order.

Moreover, because human rights groups have lobbied the Bank to incorporate 'the human rights component' (civil and political

⁷¹ The selectivity of the Bank's use of its leverage only in cases it considers are directly related to its mandate has been confined to very few cases. Kenya and Malawi are good examples. However, the Bank has continued its lending programs in the overwhelming number of cases where systematic human rights abuses have occurred. These countries include, Indonesia, China, Morocco and Zaire. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WORLD BANK : GOVERNANCE AND HUMAN RIGHTS*, *supra* note 62, at 37-42 (discussing countries receiving World Bank assistance notwithstanding their adverse human rights record); *see also id.* at 56-60 (discussing suspension of aid to Kenya (in 1991) and Malawi (in 1992) through the Paris Consultative Creditors meetings chaired by the World Bank.

⁷² Shihata, *Democracy and Development*, *supra* note 62. This position is recently restated in, WORLD BANK, *DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK* (September 1998). Similarly, the World Bank claims that consistent its Articles of Agreement, "the focus of the Bank's efforts in the area of human rights is on those rights that are economic and social in nature." WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE*, *supra* note 64, at 53.

as well as social and economic rights), into its pre-defined programs, the World Bank has seized onto this fact to claim that it has the backing of these groups without making any serious commitment to them or their cause. Consequently, it is not surprising that the exercise of the Bank's so-called commitments under the good governance agenda to withhold extension of credit to governments failing to meet certain human rights standards cannot be said to have occurred with any regularity or consistency as the prevalence of human rights abuses in sub-Saharan African countries that continue receiving World Bank loans show.⁷³ After all, these commitments under the good governance agenda are, in the World Bank's legal department's interpretation, non-binding.

A. Institutional Specialization - Good Governance Invokes Functionalism to Analogize EBRD and IBRD Mandates

The World Bank's non-binding approach to international human rights norms has also been adopted by the European Bank of Reconstruction and Development ("EBRD"). While the Articles of Agreement explicitly require that in borrower countries, questions concerning the rule of law, democracy, and human rights shall be considered in the EBRD's work, they do not specifically require that human rights violations be taken into account unless they are related to the EBRD's mandate on economic and financial matters. The provisions on the rule of law, democracy and human rights in the EBRD's Articles of Agreement have therefore been interpreted restrictively, as declarations of commitment or intent, which do not constitute enforceable legal obligations.⁷⁴ Herbert Morais, an IMF

⁷³ Against this background, different meanings of governance have proliferated to arrest the possibility of closing the rhetorical politics-economics dichotomy. Hence, for example, governance has according to the World Bank also meant ownership of reforms. The shifting meanings exemplify its centrality as a strategic discursive terrain.

⁷⁴ EUROPEAN BANK FOR RECONSTRUCTION DEVELOPMENT, POLITICAL ASPECTS OF THE MANDATE OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (1997); EUROPEAN BANK FOR RECONSTRUCTION DEVELOPMENT, POLITICAL ASPECTS OF THE MANDATE OF THE EUROPEAN IN RELATION TO ETHNIC

Deputy General Counsel, has also argued that the inclusion of the provisions on democracy, the rule of law and human rights, "reflects an evolution in the thinking of the international donor community that suggests a larger role and responsibility for international financial institutions."⁷⁵ Such statements demonstrate an explicit acknowledgment of the importance of human rights within the development work of international financial institutions, but suggest that human rights play a subsidiary role in the overall goals of these institutions. This restrictive understanding in the context of the World Bank's mandate is epitomized in Professor Reisman's argument that there is a limit to the 'institutional elasticity' to which institutions such as the World Bank could be 'stretched' to justify the assumption of "human rights functions, especially when these functions are accomplished at the expense of their manifest functions."⁷⁶ Shihata adds that the cost of politicizing international financial institutions 'further,' by assuming human rights functions notwithstanding their (i.e. human rights) 'moral purpose,' "could undermine their (i.e., 'the institutions') standing in financial markets and their ability to play the role for which they were established."⁷⁷

Therefore, internationally recognized human rights principles have played and will continue to play a marginal role within the World Bank's good governance agenda and/or within the EBRD, unless they can be defined in a functional or technocratic manner which serves the major goals of economic and financial reform. In Eastern and Central Europe the EBRD promotes these reforms by

MINORITIES (1993). See also IBRAHIM SHIHATA, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: A COMPARATIVE ANALYSIS OF CONSTITUENT AGREEMENTS* (1990). See also Shihata, *Democracy and Development*, *supra* note 65, at 639 (suggesting that the transition to multiparty democracy provisions of the Articles of Agreement of the EBRD are secondary, since the 'economic transition to markets is the first and foremost' purpose of the EBRD).

⁷⁵ Herbert V. Morais, *The Bretton Woods Institutions: Coping With Crisis*, 90 AM. SOC'Y OF INT'L L. 433 (1996).

⁷⁶ W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 395 (1987).

⁷⁷ Shihata, *Democracy and Development*, *supra* note 65, at 642.

providing financing to accelerate the transition from planned to market economies. The World Bank and the IMF promote these reforms through their structural adjustment lending programs that facilitate adoption of a free market as opposed to state allocation of resources in developing countries throughout the world. In the official publications of the World Bank's legal department, the former General Counsel (Ibrahim Shihata) took the position that the institution's special, legal personality or 'non-political' character within the United Nations family of member organizations prevents it from active involvement in human rights issues, since it would be inconsistent with its Articles of Agreement. Other specialized agencies of the United Nations family of organizations, such as the UNDP, UNESCO, and WHO, are mandated under the United Nations Charter and their respective constitutional mandates to cooperate in the realization of the U.N. objectives, such as the protection of international human rights. However, because both the IMF and the World Bank are autonomous, they are supposed to avoid political and other issues that could compromise their effective operation as financial and economic organizations.⁷⁸

The Articles of Agreement of the International Bank for Reconstruction and Development⁷⁹ (the World Bank) and its

⁷⁸ The International Labor Organization, for example is bound to "co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the security council as that council may request including assistance in carrying out decisions of the security council for the maintenance or restoration of international peace and security," Article VI, Agreement between the United Nations and the International Labor Organization. Similar provisions bind other bodies such as the Food and Agricultural Organization and the International Civil Aviation Organization.

⁷⁹ Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), Article V(5)(c) provides that the:

President, officers and staff of the Bank, in the discharge of their offices owe their obligation entirely to the Bank and to no authority. Each member of the bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

relationship agreement with the United Nations,⁸⁰ require the Bank to act as an independent organization in view of the nature of its banking and finance functions.⁸¹ The premise of this independence is that, in order to retain the confidence of the investment market, the conduct of the Bank's activities must remain beyond the political control of the United Nations.⁸² In addition, Ibrahim Shihata, argues that the 'predominantly financial character' of the Bank makes it inappropriate for it to get 'directly' involved in 'politically charged areas' in view of the danger they pose in politicizing the Bank's work and jeopardizing its credibility, not only in the financial markets, but also in 'the member countries where it lends.'⁸³

Like the World Bank, the IMF also claims autonomy from the U.N. under its Articles of Agreement⁸⁴ and its Relationship Agreement with the United Nations.⁸⁵ They both have autonomous control over their membership, and financial, budgetary and policy formulation and implementation. With respect to the IMF, it is debatable whether this autonomy extends to decisions made by the

⁸⁰ Relationship Agreement between the IBRD and the United Nations, Nov. 15, 1947 provides at Article 1 (2) by "reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to act as an independent international organization."

⁸¹ John Eastaby notes that according to David Mitrany's theory of functionalism, upon which the autonomy of the World Bank and IMF is based, it is presumed that: "international organization and transnational activity create and reflect the gradual emergence of a new type of political organization that goes beyond the nation state," JOHN EASTABY, FUNCTIONALISM AND INTERDEPENDENCE: THE CREDIBILITY OF INSTITUTIONS, POLICIES AND LEADERSHIP 1, 3 (1985). He also notes that according to the theory of functionalism, "the development of universal or near universal scientific/economic society means that for decisive purposes the state is obsolete." *Id.* at 9

⁸² See C. Wilfred Jenks, *Co-Ordination in International Organization: An Introductory Survey*, 28 BRIT. Y.B. INT'L. L. 45 (1951).

⁸³ See Shihata, *Democracy and Development*, *supra* note 65, at 642.

⁸⁴ Article X of the IMF's Articles of Agreement requires empowers the IMF to co-operate within the terms of its Articles of Agreement, "with any general international organization having specialized responsibilities in related fields."

⁸⁵ Article 1 (2) of the Relationship Agreement Between the IMF and the UN, requires the IMF by virtue of its nature and international responsibilities the "to act as an independent international organization."

Security Council under the UN's power to safeguard international peace and security as authorized by Chapter VII of the UN Charter.⁸⁶ By contrast, as I noted above, the World Bank acknowledges that Security Council decisions may be binding on it.

Moreover, the World Bank further argues that its obligation to cooperate in the effective protection of international human rights is not legally binding. In its view, its obligation is merely to:

- 'note the obligations' assumed by its members who are also members of the United Nations;⁸⁷
- have 'due regard' for decisions of the Security Council in the conduct of their activities;⁸⁸ and
- assist the Security Council to the 'fullest extent practicable' in the 'exchange of information and publications of mutual interest, and furnishing of special reports and studies upon request.'⁸⁹

⁸⁶ Article X (3) of the IMF-UN Relationship Agreement and Article X (4) of the IBRD-UN Relationship Agreement.

⁸⁷ Article VI (1) of the Relationship Agreement between the UN and the IBRD states that the "Bank takes note obligations assumed, under paragraph 2 of Article 48 of the United Nations Charter, to carry out the decisions of the security council through their action in appropriate specialized agencies of which they are members, and will, in the conduct of its activities have *due regard* for the decisions of the security council under Articles 41 and 42 of the United Nations Charter." See also Article VI (1) of the Relationship Agreement between the IMF and the UN.

⁸⁸ *Id.*

⁸⁹ Article V and VI (2) of the Relationship Agreement between the IMF and the UN. See also Article V and VI (2) of the Relationship Agreement between the IBRD and the UN. Article III of the Agreement between the IMF and UN, provides that in "preparing the agenda for meetings of the Board of Governors, the Fund will give due consideration to the inclusion in the agenda of items proposed by the United Nations. Similarly, the Council and its commissions and Trusteeship Council will give due consideration to the inclusion in their agenda of items proposed by the Fund." See also Article III of the Agreement between the IBRD and the UN. Article V (8) of the IBRD Articles of Agreement stipulates that the "Bank, within the terms of this Agreement, shall co-operate with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such co-operation which would involve the modification of any provision of this

These non-binding requirements form the basis of the World Bank's claim of autonomy from the operations of the United Nations in so far as they relate to questions of international human rights.⁹⁰

In fact, Article IV (3) of the Relationship Agreement between the World Bank and the UN provides that any action to be taken by the Bank on any loan would be determined by the independent exercise of the Bank's own judgement in accordance with its Articles of Agreement. Consequently, although the World Bank's good governance agenda--a non-binding policy agenda--refers to human rights as part of its governance concept, the Bank's legal department asserts that human rights are political issues beyond the Bank's constitutional mandate. In the view of the Bank's former General Counsel, these issues would best be achieved by the institutions that are under the United Nations framework, such as the "regional agencies, courts, commissions and the non-governmental organizations established for this purpose."⁹¹ In essence, the Bank's arguments elevate the virtues of functional competence and institutional specialization to preclude proposals to have the Bank adopt human rights promotion as part of its mandate. In Shihata's view, it is not the role of the Bank to assume human rights responsibilities since the U.N. has been unsuccessful in their promotion. Rather, the international community should empower the U.N. to undertake human rights work more effectively by giving more resources to it. Therein lies the inefficacy of the U.N.'s ineffectiveness in promoting human rights observance across the world. The solution does not lie in substituting the World Bank for the U.N. This view is also based on a view of international

Agreement may be effected only after amendment of this Agreement under Article VIII."

⁹⁰ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1990) identifies three criteria for the autonomy of international organizations, 'a permanent association of states with lawful objectives, equipped with organs; a distinction, in terms of legal powers and purposes, between the organization and its member states' and the existence of legal powers of one or more states' *Id.* at 681-2. This, however, is not the meaning of autonomy I refer to here.

⁹¹ Shihata, *Democracy and Development*, *supra* note 65, at 642.

institutional specialization - that it would not be appropriate to give a job which lies squarely within the U.N. mandate to the World Bank.

Thus, Shihata is in accord with the theories proposed by the founders of the Bretton Woods institutions in the 1940s, who argued for a strict separation of roles between the political organs of the United Nations, on the one hand, and the Bretton Woods institutions as financial and banking organs on the other.⁹²

By contrast, in the late 1980s when the good governance discourse was still a novel idea, Shihata had strongly recommended that the World Bank adopt the good governance agenda without as many caveats. At the time, he defined the meaning of politics relevant to interpreting the Bank's Articles of Agreement as "belonging to or taking a side in politics or in connection with the party system of government . . . as well as the political principles, convictions and opinions or sympathies of a person or party."⁹³ This definition of politics in turn enabled Shihata to advise the World Bank that the adoption of the good governance agenda, with the human rights component, was not inconsistent with the Bank's mandate.⁹⁴

⁹² *Id.* Shihata also argues that the "creation of the office of the UN High Commissioner for Human Rights is a clear recognition of an appropriate allocation of roles in this field." *Id.* at 642. In the inaugural meeting of the establishment of the World Bank and the International Monetary Fund, in March 1946, Lord Keynes is reported to have "warned" that "if these institutions are to win the full confidence and support of the suspicious world, it must not only be, but appear, that their approach to every problem is absolutely objective and ecumenical without prejudice or favor," (*quoted in* R. HARROD, *THE LIFE OF JOHN MAYNARD KEYNES* 623 (1951)).

⁹³ SHIHATA, *THE WORLD BANK IN A CHANGING WORLD*, *supra* note 65, at 69. In this Shihata was following Harry D. White, one of the drafters of the Bank's Articles of Agreement who stated that its impartiality when it came to political ideologies and interests, highlighted its non-political character and universality. The association of secular liberal institutions with universality and above-politics posture disguises the liberal democratic commitment to capitalism.

⁹⁴ *See e.g.*, Ibrahim Shihata, Legal Memorandum of the Vice-President and General Counsel, Prohibition of Political Activities Under the IBRD Articles of Agreement and Its Relevance to the Work of the Executive Directors, World Bank, Document SecM87-1409, December 23, 1987 -Limited Circulation; *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of*

Several hypotheses may be advanced to explain Shihata's later reservations on the consistency of the good governance agenda with the Bank's institutional mission for which support is found in the Bank's Articles of Agreement. First, his unease may be accounted for by the fact that the good governance agenda has shifted away from social and economic rights, or addressing questions of poverty and disadvantage, by giving disproportionate attention to civil and political rights that are necessary to create an enabling environment for market reform. Shihata's modified view seeks to tinker with this preoccupation with creating an enabling environment by arguing that human rights issues within the good governance agenda must not overlap with the functions of the United Nations which is charged with the primary responsibility of fulfilling the human rights mandate in the U.N. family of institutions. Hence by invoking the idea of institutional specialization and the autonomy of the World Bank from the political organs of the U.N., Shihata downplays the argument that a human rights agenda would be inconsistent with the Bank's economic and financial mandate. This is because downplaying the inconsistency between the Bank's mandate and a human rights agenda favors a stronger emphasis on the Bank fulfilling social and economic rights work through its anti-poverty programs - social safety nets as opposed to merely promoting civil and political rights that would create an enabling environment

Achievements 17 DENV. J. INT'L L. & POL'Y 39 (1988); see SHIHATA, THE WORLD BANK IN A CHANGING WORLD, *supra* note 65. In this last book, Shihata embraced the notion of governance notwithstanding its explicit incorporation of human rights. In that book, he argued in part that the prohibition on involvement in political affairs in the World Bank's Articles of Agreement presumed that it was certain what is meant by political affairs, political character and economic considerations in the context of the Articles provisions. He argued that these provisions presumed that political and economic matters were separate from each other and as such wondered if it was realistic for the World Bank to assume that it could insulate its decisions from political considerations. *Id.* at 67. He also remarked that there was no legal remedy or recourse available to the Bank's Board of Governors to challenge a vote made on the basis of unexpressed political motivations. *Id.* at 75. These sort of remarks indicate a willingness to embrace the good governance agenda in this early period.

for market reforms. Second, Shihata's change of views could also be interpreted as arising from the time lag during which the initial excitement surrounding the linkage between human rights and the Bank's work moved from rhetoric to policy - policy could only marginally incorporate an explicit human rights policy, while rhetoric could sell good governance in any formulation since rhetoric, unlike a constitutional mandate would not be considered binding. In fact, the Bank's economic reform programs have benefitted from their association with human rights made as part of the good governance agenda. My argument here is that the good governance agenda is the primary means through which the World Bank has created for itself a favorable public image - by focusing attention away from its socially disastrous economic programs and its profit making lending programs. In so doing, the World Bank succeeded in associating itself with public virtue and initiatives such as human rights which have achieved an acceptable minimum standard of good governance. The point that is rarely noticed though, is that the Bank simultaneously promotes its socially disastrous programs, while successfully creating an image of itself as an international citizen that cares about whether the recipients of its loans uphold the high moral standards international society has come to place on them by their observance of human rights. In this way, the Bank is able to appear to have a positive social consciousness through its publicity of a commitment to the protection of interest in human rights. Consequently, one may read Shihata's more subtle definition of the role of rights in the World Bank's work as part and parcel of a strategy of defusing and appropriating human rights opposition to World Bank policies.

B. The Fallacy and Strategic Utility of the Non-Political Mandate

The foregoing arguments illustrate the decreasing emphasis of the World Bank on the notion that its mandate is non-political as a justification for involvement in human rights issues at all costs. Instead, the World Bank invokes this non-political argument more subtly by arguing that its work in the area of human rights must be consistent with its overall economic and financial mission. Indeed, there are several problems with maintaining a strict separation of

politics and economics. For example, both the World Bank and the IMF are political institutions -- despite the fact that both purport to produce objective economic analysis. As Alice Amsden notes, the World Bank's "middle management is comprised of many highly respected economists while its top management is comprised of political appointees who serve at the discretion of the industrialized countries, especially the United States." The same can be said of the IMF, which implies that the operations of these IFI's are therefore affected by the activities of their contributors, especially the United States and Japan.⁹⁵

It would, therefore, be paradoxical for both the World Bank and the IMF to insist on a strict interpretation of their roles as being essentially *non-political* as required under their respective Articles of Agreement. Article IV (10) of the World Bank's Articles of Agreement provides that the "bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decision by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations are weighted impartially."⁹⁶ The IMF's Articles of Agreement have been interpreted as having a similar prohibition of engagement in the political affairs of its members.⁹⁷

Until recently, when the argument of institutional specialization became popular, this two-pronged argument (that the

⁹⁵ This autonomy can only be regarded as illusory. Alice H. Amsden, *Why Isn't the World Bank Experimenting with the East Asian Model to Develop?: Review of the East Asian Miracle*, 22 WORLD DEVELOPMENT 627 (1994). See also B.S. BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK - ISSUES OF INTERNATIONAL LAW AND POLICY* (1992).

⁹⁶ Articles of Agreement of the World Bank art. IV (10). Article III (5) (b) provides that the "bank shall make arrangements to ensure that the proceeds of any loan are used only for the purpose for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non economic influences or considerations." *Id.* art. 3 (5) (b).

⁹⁷ Joseph Gold, *Political Considerations Are Prohibited By Articles of Agreement when the Fund Considers Requests for Use of Resources*, IMF SURVEY, May 9, 1983 at 146-148.

IFIs are autonomous from the 'political conflicts' of the U.N. and the prohibition against involvement in the political affairs of member states), has been the foundation for the World Bank's and the IMF's explanation for the marginal influence of international human rights principles in the IFIs' decision-making.⁹⁸ The IMF's Guidelines Regarding Good Governance, adopted by its Board of Directors in July, 1997, is more techno-economic than that of the World Bank.⁹⁹ The IMF defines good governance primarily in terms of its constitutional mandate. It is related primarily to the transparency of the government accounts, the effectiveness of public resource management, and the stability and transparency of economic and regulatory environment for private sector activity. In the IMF's view, good governance refers to those economic reforms which countries have to undertake in order to establish credibility and receive support from IFIs and trading and lending markets. In addition to the view that the IFI's international legal responsibilities (under their Articles of Agreement) require them to function as independent and 'non-political' actors, these concerns form another important basis to explain the marginal incorporation of international human rights as decision-making criteria in the functioning of IFIs.

In view of the Bank's restrictive mandate, the Bank's good governance agenda has been praised for incorporating human rights, albeit in a marginal way, into the World Bank's decision-making

⁹⁸ There is precedent in the history of the World Bank's operations to suggest that it will not comply with the decisions of UN bodies on questions of international human rights involving international peace and security issues. Samuel A. Bleicher, *UN v. IBRD: A Dilemma of Functionalism* 24 INT'L ORG. 31 (1970). In this case, the World Bank refused to follow General Assembly and Security Council Resolutions calling for suspension of lending to South Africa and Portugal. The former for continuation of its apartheid policies and the latter for continuation of its colonial policy in Africa. Both situations were determined both by the Security Council and the General Assembly as constituting threats to international peace and security. *See id.* at 38.

⁹⁹ *See generally* INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE, THE IMF'S ROLE (1997).

process on loans, through the concept of political conditionality.¹⁰⁰ However, human rights advocacy only seems to engage the lending practices in the project cycle after they have already been conceptualized. Therefore, political conditionality or good governance primarily leaves the economic programs promoted by these institutions intact. The project cycle is simply the process of giving practical effect to these pre-conceptualized programs of the IFIs. It consists mostly of the process of disbursement of loan funds from "project identification to preparation, appraisal, negotiation, implementation and supervision and finally evaluation."¹⁰¹

In addition, the Articles of Agreement of the IMF and the World Bank limit the scope of political conditionality to only those considerations that affect the economic factors which justify loan disbursement.¹⁰² Political conditionality, therefore, focuses on the behavior of the borrowing state and primarily leaves the economic programs promoted by these institutions intact.

¹⁰⁰ See WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992); GOVERNANCE: THE WORLD BANK'S EXPERIENCE, *supra* note 64; IMF, *supra* note 90; Pierre Dhonte, *Conditionality as an Instrument of Borrower Credibility: Paper on Policy Analysis and Assessment*, I.M.F. African Dept., PPAA/97/2 (1997).

¹⁰¹ See Jonathan Cahn, *The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. L.J. 160, 170-71 (1993). James C.N. Paul argues that the failure to take rights seriously at every stage of the project cycle could result in development projects inimical to humane development since the "effective, self-reliant participation is essential to the design as well as the implementation, monitoring and regulation of all development projects which affect particular groups in particular ways." James C.N. Paul, *International Development Agencies, Human Rights and Humane Development Projects*, 17 DENV. J. INT'L L. & POL'Y 70 (1988),

¹⁰² This interpretation is confirmed in a recent legal opinion by the World Bank's chief legal counsel to the Bank's Executive Directors. Ibrahim Shihata, *Prohibition of Political Activities in the Bank's Work*, World Bank, U.N. Doc. SecM95-707 (1995). Susan Strange notes that the World Banks' agenda on governance "requires a lot of fancy footwork because the Bank's own charter says it can only deal with economic development, and it must not intervene in the political affairs of its members." Susan Strange, *The World Bank and its Concept of Governance*, in THE DEMOCRATIZATION OF DISEMPOWERMENT: THE PROBLEM OF DEMOCRACY IN THE THIRD WORLD 206 (1995).

Hence, while claims have been made about the erosion of the traditional legal norms of sovereignty and non-intervention, these classical positions in international law are still defended by the IFIs. The World Bank cites its constituent instrument, the IBRD Articles of Agreement, to support the view that human rights are a political issue which fall outside the Bank's mandate unless defined in a technical or functional mode - to fit within the Bank's economic and financial goals.¹⁰³ In addition, the World Bank continues to argue that the political sovereignty of its member countries must still be respected.

The good governance agenda confers the World Bank with flexibility to define those issues which fit within this techno-economic logic and those that do not; and thus to characterize ostensibly political issues as neutral.¹⁰⁴ Here, the agenda proceeds

¹⁰³ David Gillies also notes that there are at least two versions of governance emerging from the World Bank: first, a narrow version that focuses on technical criteria connected to efficiency and excludes consideration of most civil and political rights. See David Gillies, *Human Rights, Governance and Democracy: The World Bank's Problem Frontiers*, 11 NETHERLANDS Q. HUM. RTS. (1993). Here, the Bank is involved in projects considered to be of direct relevance to its mandate such as public sector management and strengthening legal and judicial frameworks; and second, a broader definition that concedes that sovereignty is not sacrosanct and acknowledges that the core characteristics of governance are in large measure driven from or are related to the Universal Declaration of Human Rights. See *id.* at 13. Shihata notes that there are three tests to determining an economic effect of a Bank operation is direct and obvious. Ibrahim Shihata, *Legal Opinion on Governance*, *supra* note 102. The economic effect must be: (i) clear and unequivocal; (ii) preponderant; and (iii) when the issue is associated with political actions or flows from political events, the economic effect "must be of such impact and relevance as to make it a Bank concern." *Id.*

¹⁰⁴ Neo-liberal economic restructuring analytically distinguishes or creates boundaries between a political arena that is formally based in ideals of equality and participation on the one hand, and an economic arena based on the institution of private property and the integration of national economies into an ostensibly neutral international market on the other hand. The falsity of this distinction is less important than the fact that in the context of deep social and economic inequalities of sub-Saharan African countries, the distinction serves to perpetuate very minimalist political enfranchisement, with simultaneous economic disenfranchisement of a whole lot of others. According to Karl Klare, "economists and social theorists have tended to treat the question of precisely how the ground

from two basic and questionable assumptions; first, that economic reform based on a free market model is governed by apolitical, techno-economic logic; and second, that important market reform concepts, such as private property rights and freedom of contract, “connote a fixed set of institutional and legal arrangements, and relatively sharp and precise criteria for distinguishing ‘market’ from ‘non-market’ institutions.”¹⁰⁵

The good governance agenda passes itself off as apolitical since its promoters presume that the promotion of sound development management constitutes technical, administrative, and economic tasks that do not involve political choices. As alluded to above, good governance reform became popular in the 1980s with the rise of neo-liberalism. To implement this type of neo-liberal reform, the World Bank exercises:

[P]ower through its financial leverage to legislate entire legal regimens and even to alter the constitutional structure of borrowing nations. Bank-approved consultants often rewrite a country’s trade policy, fiscal policies, civil service requirements, labor laws, health care arrangements, environmental regulations, energy policy, resettlement requirements, procurement rules, and budgetary policy.¹⁰⁶

These reforms have also been perceived as containing a specific built-in logic, as if the market manifests itself in only one definite identifiable form. This is illustrated by the absolutist idea of private property promoted by the neo-liberal agenda. However, private property connotes at least two simultaneous contradictory

rules [for a market economy] are defined as a technical matter for the attention of lawyers.” Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections in 1989, in A FOURTH WAY? PRIVATIZATION, PROPERTY AND THE EMERGENCE OF NEW MARKET ECONOMIES* 314 (1994).

¹⁰⁵ *Id.* at 313.

¹⁰⁶ Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. L. J. 160 (1993).

meanings: first, the freedom of a property owner to use her property as she wishes notwithstanding potential harm to others (more often than not the idea of property embedded in the neo-liberal agenda); and, second, that such use is subject to the peaceful and unrestricted use of the adjoining property owner. In addition, contract law embodies a “permanent tension between the goal of promoting freedom of action and the goal of protecting interests in security.”¹⁰⁷ Karl Klare concludes that “the project of giving legal definition to market structures involves making an endless series of socially significant choices.”¹⁰⁸ Since markets do not possess such a built-in legal structure, “the process of specifying the law that constructs markets is eminently and inescapably a political project.”¹⁰⁹ However, the good governance agenda defines as apolitical the controversial, political character of the reforms initiated through neo-liberal economic restructuring (such as those mentioned above), so that they can be directly related to the World Bank’s economic (financial and banking) mandate. Human rights must also be defined in this same apolitical way, in order to fit squarely within the Bank’s constitutional mandate.

It is for this reason that human rights advocates (as well as the advocates of the NIEO and the strong version of the basic needs approach), have found it difficult to position themselves as independent critics to the Bank’s policies. This outcome arises in a major way from the Bank’s readiness to have a dialogue on human rights issues unlike in the pre-governance era when human rights issues were considered to be beyond the Bank’s mandate. The good governance agenda has therefore provided human rights advocates an avenue through which to talk about human rights issues with the Bank, albeit in a very limited framework - human rights must be defined in a manner that is consistent with the Bank’s financial and

¹⁰⁷ Klare, *supra* note 104, at 315.

¹⁰⁸ *Id.* at 315. Klare also notes that these “background rules are not socially neutral; they distribute power and frame the possibilities of human fulfillment.” *Id.* at 316.

¹⁰⁹ *Id.* at 313-314. Karl Klare also notes that “legal discourse contains no neutral logic capable of resolving contested questions of determining choices about market structure.” *Id.* at 315.

economic mandate. Consequently, most human rights activists adopted a strategy based on finding common ground between human rights advocacy and the IFI's techno-economic policies rather than seeking to lend outside criticism of the Bank's policies.

This new strategy of finding complementarity between human rights and the Bank's financial and economic mandate is acceptable to the Bank for several reasons. First, it abandons or implicitly rejects the hostile and uncompromising opposition to international economic policy that characterized previous initiatives to open up the Bank to human rights issues in the pre-governance era. Second, it is acceptable to the Bank since it has abandoned the strong version of basic needs or even the demands embodied in the NIEO, which were based in part on welfare demands from the state and development institutions.

Therefore, I have argued in this section that the good governance proposals are part of a conservative agenda for human rights in that it is based on establishing a connection between human rights and the World Bank's development policies which may themselves be inimical to the protection of human rights, and social and economic rights. By emphasizing the supposedly reinforcing character of human rights and economic policy, as if they were always mutually supportive, human rights activists have established a foothold to negotiate with the Bank. In my view, this has only served to legitimize the economically disastrous programs of neo-liberal economic reform embraced by the World Bank and the IMF.¹¹⁰

In this respect, I depart from many scholars and activists of human rights who, in my view, have too quickly praised the World Bank's governance agenda for incorporating ideals of democracy and human rights, even though they are aware that the Bank's central mission remains the extension of its economic programs, regardless of human rights concerns. Embracing the good governance agenda lends legitimacy to these economic programs investing them with the

¹¹⁰ According to the Lawyers Committee for Human Rights, the "governance debate looks to human rights not for their intrinsic value but for their instrumental role in creating an environment in which effective and sustainable development can occur." *Id.* at 61.

'moral' credence that human rights and democracy struggles represent in countries where human rights have been abused for prolonged periods and in an international context where rights have enjoyed preeminence in the discourses of international relations, politics and law.

The argument that classical conceptions of sovereignty and non-intervention are in the process of breaking down or have broken down, or that good governance signals a departure from a previous commitment to political authoritarianism within the economic programs of bilateral and multilateral donors is unhelpful in analyzing the relationship between economic reform and human rights within the good governance agenda. As in the past, neo-liberal economic reform is similarly committed to authoritarian governance in ways that are not always obvious. One of the forms of authoritarianism embodied in the neo-liberal economic agenda is its commitment to a strong state, capable of resisting democratic forces demanding increases in social spending. Human rights advocacy is therefore implicated in promoting consequences adverse to the human rights guarantees of the international bill of human rights. This outcome arises notwithstanding the occasional criticism against some aspects of neo-liberal project of macroeconomic reform leveled by some human rights advocates.

C. Guaranteeing Procedural Rights: The Limited Agenda of the Inspection Panel

In September, 1993, the World Bank created an Inspection Panel to address complaints about Bank projects and its failure to follow its own rules.¹¹¹ Outside pressure for the formation of an independent body to review the Bank's projects and operations resulted in the establishment of the Panel. Environmentalists and

¹¹¹ The World Bank Inspection Panel, *Res No. 93-10* (1993); Operations Inspection Function: Objectives, Mandate and Operating Procedures for an Independent Inspection Panel, 1993. Daniel Bradlow, *The World Bank Votes to Establish Inspection Panel*, *THIRD WORLD DEBT IN THE 1990's*, Issue 6 (1993). See also IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL* (1994).

popular movements in Bank-funded dam projects, such as in the Sardar Sarovar project on the Narmada river in Western India, and forestry projects in the Ivory Coast and Gabon, heightened awareness concerning the Bank's failure to resettle displaced people and to address environmental damages caused by the Bank's projects.¹¹² In fact, independent review of Bank performance confirmed that such "problems besetting the Sardar Sarovar project are more the rule than the exception to resettlement operations supported by the Bank."¹¹³ Although it was formed only in 1993, by end of 1998 the feeble procedural guarantees of the Inspection Panel were in serious doubt for reasons discussed below.¹¹⁴

The Inspection Panel is composed of three members nominated by the Bank President, with the approval of the Executive Directors, who also have the power to fire the Panel members. The Bank has committed itself to providing a sufficient budget for the Panel, as well as access to Bank documents and staff. The Panel's procedure is as follows: After receiving a request and verifying whether it fits within its mandate, the Panel forwards the request to the Bank Management who prepare a response to the allegations which is submitted to the Panel. The Panel makes a preliminary review of the request, conducts an independent assessment of the

¹¹² See E. Christensen, *Green Appeal: A Proposal for An Independent Commission of Inquiry at the World Bank*, (Natural Resources Defense Council, 1990); L. Udall & D. Hunter, *Proposal for an Independent Review Appeals Commission*, (Environmental Defense Fund and Center for International Environmental Law, 1993); P. BOSSARD ET AL., *CREATING AN INDEPENDENT APPEALS COMMISSION AT THE WORLD BANK* (1993).

¹¹³ According to this internal report of Bank operations, the Bank was criticized for failing to fully enforce 78% of financial conditions in loan agreements. Morse Commission, *Sardar Sarovar: The Report of the Independent Review*, 1992. World Bank, 1992. It also found that 37.5% of its recently reviewed projects were unsatisfactory, up from 15% in 1981. *See id.* This decline in project quality was linked to a 'pervasive' 'culture of approval' for loans which encouraged Bank staff to perceive the appraisal process as merely a "marketing device for securing loan approval," such that the pressure to lend overwhelmed all other considerations. *See id.*

¹¹⁴ *World Bank to Seek Comment on a Plan to Leash Watchdog*, FINANCIAL TIMES, February 2, 1999, at A14.

merits of the Bank Management's response to it, and recommends to the Board of Directors, (hereinafter the Board), whether the claims should be investigated. Usually, the Panel will also make a preliminary visit to the country to meet the requesters and to make a preliminary investigation of the facts of the case. If the board approves a recommendation to investigate and the scope of the investigation, the Panel proceeds with the investigation. In those cases where the approval is given by the Board, the Board also releases for public information the request for inspection, the management request and the Panel recommendation. During the investigation phase, the Panel has access to all Bank staff and to the relevant Bank documentation. The Panel can also conduct hearings and site visits as part of the investigation. When the Panel finishes an investigation, it sends its findings to the Board and to Bank Management. Then, before the report can be released to the Complainant, the Directors are given the responsibility of trying to resolve any conflicts between the Panel's reports and Bank staff's response. Bank Management then has six weeks to submit its recommendations to the Board on what actions the Bank should take in response to the Panel's findings. Based on the Panel's findings and the Bank Management's recommendations, the Board takes the final decision on what should be done.¹¹⁵

The Panel may receive complaints from any 'affected party' in the territory of the borrower, as long as it is not a single individual. Such a party must show that its rights or interests have been or are likely to be directly affected by any action or omission of the Bank or where there has been a 'material adverse effect' as a 'result of a failure by the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank.'¹¹⁶ An investigation may also be commenced by the Bank's Executive Directors, or, in special cases of alleged serious violations, by any individual Director.

¹¹⁵ On these procedures see the Panel's website : <http://www.worldbank.org/html/ins-panel-overview.html>

¹¹⁶ World Bank Inspection Panel Resolution, *supra* note 111.

The Inspection Panel has been welcomed as a break with prior Bank practice of maintaining secrecy in its operations and failing to involve external groups and individuals in its decision making processes.¹¹⁷ However, the Panel is not independent from the Bank nor can its work fundamentally influence the Bank's operations, especially with respect to projects whose 'visibility' is not as high as dams or forestry projects. In a sense, the Inspection Panel gives the World Bank an opportunity to act as a judge in its own cause--a clear conflict of interest that contradicts established standards of natural justice. Hence, the Panel may be seen as serving the strategic purpose of containing legitimate protests over the Bank's projects and operations, but only marginally. For example, the Executive Directors must give their approval before the Panel can commence investigations. In addition, the Bank has not made any formal commitment to rectify problems that the Panel may reveal in its work. The Panel is simply another one of the Bank's strategies of opening itself up to scrutiny on its own terms, within its predefined projects and programs and on its own turf.¹¹⁸

Although the Inspection Panel provides a formal avenue for lodging complaints, international human rights activists have found it to be inadequate. The reasons for this are several. First, the Panel can only examine the Bank's compliance with its own operational guidelines. Since the Bank has not adopted a human rights policy within these guidelines, human rights concerns appear to be outside the Panel's mandate. Second, the Bank's operational guidelines specify certain criteria, such as financial, institutional, technical, sociological, and environmental considerations, which may or may

¹¹⁷ Another similar policy heralding in a relative openness on the Bank's operations was the adoption of a new procedure for public disclosure of information relating to Bank sponsored projects in September of 1993. See SHIHATA, *THE WORLD BANK INSPECTION PANEL*, *supra* note 111, at 28-30.

¹¹⁸ A recent review of the Inspection Panel within the Bank has indicated a willingness to weaken its present structure, perhaps to align it with the interests of the United States.

not provide some wiggle room to accommodate human rights concerns.¹¹⁹

The Inspection Panel attracts the same criticism as the good governance agenda. First, it is primarily concerned with the possible shortcomings in the implementation of Bank projects, according to the Bank's own criteria. External pressure and disagreements within the Bank on how to implement these criteria create the space for compliance assessment.¹²⁰ Thus, there is some truth to the claim that involvement of non-state actors and individuals in the workings of institutions such as the Bank are reshaping international politics. However, such participation tends to be procedural rather than substantive and as such, somewhat narrow. It opens up channels of information to non-state actors to facilitate participation in decision-making on specific issues such as the environment, but not on the substantive agenda. Therefore, the role of non-state actors is to seek to enforce the institutions' own internal rules of procedure and at times to seek to enforce external criteria, such as international human rights or international environmental obligations, where the institutions' projects have an adverse impact on the enjoyment of these obligations and where these obligations are directly relevant to the Bank's economic and financial mandate.

Second, the nature of this type of advocacy is 'reactive' rather than 'proactive' to policy choices. It has at times succeeded in

¹¹⁹ See, e.g., Operational Policy/Bank Procedure 10.01 on Economic Evaluation of Investment Operations (April 1994). Notwithstanding the 'overall efficacy' of human rights in the operations of the IFI's they "do not have well developed, publicly available human rights," Daniel D. Bradlow, *The World Bank, the IMF and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 51 (1996). He argues that the IFI's should develop an "explicit human rights policy in order to resolve the human rights problems they face." See *id.* at 52.

¹²⁰ William Fisher, *Development and Resistance in the Narmada Valley, in TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER* 17 (William Fisher ed., 1995). Notes that to "talk of the World Bank as a monolithic actor in the process . . . obscures the differences in opinion and influence that exist among the members of the Bank's staff. Debate among these factions is largely internal to the Bank and not public, but the presence of differing points of view occasionally opens the Bank to external persuasion." See *id.*

blocking policy decisions made by bureaucrats without local community input, which endangers the environment and has adverse social effects on the community.¹²¹ This constitutes a response to a single event and may be an insufficient strategy for sustaining an ongoing commitment.¹²²

Third, the participation of northern NGOs which have the advantages of resources, 'skills' and the experience of negotiating with institutions such as the World Bank, may themselves be 'establishment' groups that have shared commitments in the desirability of market reform, for example. This poses a potential conflict of interest scenario, since these groups may not wish to critique market reforms even when they are inconsistent with human rights guarantees. Hence, where such reforms are inimical to Third World groups there is a danger that the human rights rhetoric of these 'establishment' groups may associate these reforms with virtues of restraining state interference with individual rights in the market place and in the political sphere rather than with the problems associated with capitalist development. In other words, the credence associated with the moral claims of human rights (as restraints against state interference with individual freedom) is used to give legitimacy to establishment causes that may be inimical to Third World interests.¹²³ It seems NGOs of all shades enter into alliances with each other and with powerful institutions on issues or agendas that are not only predetermined, but over which they do not have much control or power to change.

Fourth, even though public participation that results in blocking specific policy choices puts these institutions on the defensive, requiring them to devote resources and attention to justifying projects which have been objected to, these participatory opportunities rarely go beyond questioning the procedural

¹²¹ William Fisher, *Development and Resistance in the Narmada Valley*, *supra* note 120, at 27.

¹²² Smitu Kothari, *Damming the Narmada and the Politics of Development*, in FISHER, *TOWARDS SUSTAINABLE DEVELOPMENT*, *supra* note 120, at 423.

¹²³ See James Gathii & Celestine Nyamu, *Reflections on United States Based Human Rights NGO's Work on Africa*, 9 Harv. Hum. Rts. J. 262, 285 (1996).

shortcomings. For example, they rarely, if ever, question the rationale for the projects, or on a more 'radical' level, question the 'oppressive' nature of the institutions from which they emerge.¹²⁴

Fifth, the powers of the Inspection Panel have been argued to be so broad that they constitute a constraint on the Bank's lending to developing countries at the behest of the countries that control the Bank.¹²⁵ This anomaly is accentuated by the fact that the Inspection Panel does not have the powers to examine broader Bank policies adopted with the blessing of the developed countries, (especially the United States), than any one individual project that the Panel may inquire into. In essence, the Inspection Panel, though established in good faith to address problems in the implementation of Bank projects, ended up giving enormous power to it leading to the investment of enormous time and effort in selecting lending Bank portfolios at the Bank, while Wall Street financiers benefitted from the tightening of access to funds at the Bank.¹²⁶ Obviously, financing

¹²⁴ See FISHER, *supra* note 120, at 18. Fisher also notes that with respect to the Sardar Sarova dam project in the Narmada Valley in India, many "critics of the project share a set of assumptions with the proponents of the project that stress the *positive* potential of development interventions initiated by the existing development 'apparatus' (those formal national and international institutions that plan, fund and implement development projects). See *id.* Criticisms of development that emerge from this perspective assume the positive potential of development interventions and focus on the flaws in the design, implementation or execution, suggesting that development may require its implementers to muddle through, to take two steps forward and one step backward" See *id.* at 18.

¹²⁵ However, supporters of the Inspection Panel point out its successes in at least the following instances : an investigation into a project to build a bridge over the Jamuna Bridge resulted in approximately 70, 000 people, who had initially been excluded, being incorporated into the resettlement plan ; additional money was allocated to deal with the adverse social and environmental consequences of Bank funded projects in Brazil and Argentina; a Panel investigation led to the cancellation of a controversial dam project in Nepal. Letter from Daniel Bradlow, February 23, 1999 (on file with author).

¹²⁶ Letter from Daves Kapur (February 23, 1999) (on file with the author). Robert Wade, *Greening the Bank The Struggle Over the Environment, 1970-1995 in* DAVESH KAPUR ET AL., *THE WORLD BANK: ITS FIRST HALF CENTURY* (1997), notes that the Panel "discourages staff from seeking imaginative and risky solutions and causes management to steer away from projects that are inherently difficult to

from the speculators on Wall Street for developing countries is always a worse option relative to the Bank financing as the debt crisis of the early 1980s illustrated.¹²⁷

Another profound critique of these development programs or projects could proceed in one of many ways—for example, by examining the international development institutions and national governments as ‘structures of power’ whose development programs and projects are often clothed in ‘lofty and humanitarian rhetoric,’ but in effect “help to maintain or fail to ameliorate economic and political inequality.”¹²⁸ As such, an important criticism of focusing on procedural shortcomings is the assumption that problems of social justice and equity can be resolved within these processes which fail to challenge the institutional assumptions and ideological commitments.

A radical alternative to social democracy goes beyond trying to give international law a social conscience and beyond questioning the normative force of concepts of modernity such as sovereignty as markers of individual emancipation and material progress. Rather, it challenges institutions that reinforce social division and hierarchy or

‘panel proof,’ such as dams. It imparts a legalistic thrust to Bank work, eclipsing substance (as in the injunction, ‘Make your projects panel-proof’), and strengthens an existing tendency toward ‘OD [Operational Directive] absolutism,’ with ODs being interpreted by outsiders as legally binding, like laws of nation states Inevitably, task managers have to be selective in deciding to which of these hundreds of ‘requirements’ [referring to ODs] to pay attention, but that leaves them and the Bank open to charges of noncompliance, now with the panel ever ready to investigate. The counter argument is that the larger the organization, the greater the need for rules. The Naramada experience suggests that if something is not put into the rules (the ODs), it will typically be overlooked.” *Id.* at 729.

¹²⁷ James R. Crotty & Don Goldstein, *Do U.S. Financial Markets Allocate Credit Efficiently? The Case of Corporate Restructuring in the 1980's*, in GARY A. DYMSKI ET AL., *TRANSFORMING THE U.S. FINANCIAL SYSTEM: EQUITY AND EFFICIENCY FOR THE 21ST CENTURY* (1993), notes that this speculative search was in the 1980's accompanied by the replacement “production efficiency as the motive force behind the restructuring movement . . . second- contrary to the predictions of the academic conventional wisdom-our deregulated financial markets proved to be shockingly inefficient as credit allocators. A radical departure from this disastrous laissez-faire regulatory philosophy in the coming years is imperative.” *Id.* at 255.

¹²⁸ Fisher, *supra* note 120, at 18.

received and inherited notions of custom, belief, and attitude, such as an inherent human nature.¹²⁹ The goal of this alternative approach is a thorough reordering, remaking and reformulation of every dimension of life and takes nothing for granted. Human rights advocacy simply does not go this far.

IV. CONCLUSION

This article has focused on the limits of human rights advocacy, both in its effort to radicalize the weak strand of the basic needs development strategy of the 1970s, and in its good governance effort to integrate human rights into the growth oriented neo-liberal economic policy of the 1990s. Both of these efforts flow from the belief that international law must be infused with a social conscience and that development programs must be humanized.

However, these initiatives paradoxically seem to share a belief in the positive potential of the present, national and international institutional apparatus and their commitment to 'development,' and in the assumption that these institutions need only tinker with the design, implementation, or procedures in order to humanize development programs and turn them away from their preoccupation with materialistic values such as economic growth.

This institutional fetishism "disconnects the formulation of principles of justice from the problems of institutional design, refuses to acknowledge the effect of established institutions and practices upon desires and intuitions, and treats the social democratic compromise of the postwar period as the insuperable horizon for the pursuit of its ideals."¹³⁰ Human rights advocacy, in both its basic needs and good governance approach, adopts the basic tenets of a 'chastened' social democratic vision. It seeks to humanize society

¹²⁹ ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 27 (1984). Unger postulates a Christian image of the self as one simultaneously endowed with an infinite mobility in always finite conditions, yet always with a longing for others.

¹³⁰ ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 4 (1996).

either through the promotion of basic human needs or human rights as part of the programs of capitalist-oriented economic growth. These approaches to human rights advocacy by and large share an apparent constraining assumption - that established institutions such as the international financial institutions share an intrinsic logic which holds them together, rather than as contingent and historically specific institutions, without any intrinsic logic that would prohibit any attempt to redefine them.¹³¹

Roberto Unger's vision of a radical alternative to social democracy proceeds from this dual observation:

- the absence of an inherent nature of the self which empowers the self with a limitless ability to transcend dependence on collective conformity or schemes of social division, subjugation or hierarchy; and
- solidaristic connection or association of these individual capacities of transcendence into a collective power for context revision. In this Ungerian vision, the individual and solidaristic capacity to transcend or revise inherited contexts ought to be the driving force of history.

Context smashing or transcendence is, however, subject to individual emancipation from collective conformity or schemes of social division, subjugation and hierarchy in the first place. Only after these individual wills are combined together in a solidaristic union, is context-breaking or smashing then possible.

This vision of context-bashing is attractive to the radical democrat. Its utility for both national and international reform is indispensable. The revision of formed routines and institutional contexts, locally and internationally, would however require more than just a vision.

¹³¹ ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK A CRITICAL INTRODUCTION* 6-7, 9, 78-79 (1987).

The humanizing project of international human rights advocacy has gained credibility based on its association with the real struggles of those in poverty, economic disadvantage and against political authoritarianism and repressive social convention. The basic needs/rights strategy is closely connected with a commitment to a 'chastened' social democratic vision¹³² of meeting basic human needs, such as food, shelter, and housing, which ameliorate misery without fundamentally attacking the basic institutional, social, and political contexts that sustain social dependence and inequality. The good governance strategy on its part places priority, in developing countries, on programs of economic reconstruction "overtly intolerant of governmental activism in the economy and hostile to worker and welfare rights,"¹³³ but also committed to civil and political liberties, especially those of property and freedom to contract. Both of these strategies became popular not just because they have proved to be effective allies of the capitalist, international order within which they operate, but also because they have simultaneously and perhaps paradoxically become associated with humanizing commitments. Undoubtedly, they have given this capitalist international order a moral credibility without posing any fundamental challenge to it.

Consequently, I conclude that both the basic needs/rights strategy and the good governance agenda bear the imprint and support of transnational elites and interests, notwithstanding their commitment to visions of humanizing or ameliorating the problems

¹³² Roberto Unger describes chastened social democracy in Western industrial democracies as including: first, "its continuing commitment to the welfare state and to investment in people; second, a desire to rid the regulated market economy of statist, corporatist, and oligopolistic constraints upon economic flexibility and innovation, especially in the transition to a postfordist style of industrial organization, accompanied by sympathy toward bottom-up association and participation by people in local government and social organization; and third, an unabashed institutional conservatism, expressed in skepticism about large projects of institutional reconstruction and in the acceptance of the current legal forms of market economies, representative democracies and free civil societies." See Unger, *supra* note 131.

¹³³ ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 130, at 9.

of our present institutional contexts. As such, divesting ourselves of the notion that these institutions are indispensable is a useful place to begin. However, nothing short of political struggle will realize the vision of a new set of institutions or a redesign of the present ones. The vested interests of transnational elites will, as always, continue to police and constrain challenges to the status quo by allowing only those forms of dissidence that do not go too far, while at the same time accommodating limited visions of social democracy at the fringes.