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WHEN THE PENDULUM SWINGS TOO FAR: STRUCTURAL ADJUSTMENT PROGRAMS IN KENYA

Sylvia Wairimu Kang'ara*

The development pendulum is swinging once again, from over-commitment to the public sector to an over-enthusiasm for the private sector. A "garage sale" of public enterprises is going on all over the world – from New Delhi to Rio, from Moscow to Warsaw – enough to warm the heart of any ideologue [sic] of capitalism. And professional shock therapists roam the globe in search of willing victims, delivering the message of overnight change. This long overdue return to the market is welcome, but the pendulum may once again swing too far.¹

I. INTRODUCTION

An analysis of the relationship between provisions of international human rights law and the processes of macro-economic reform in Kenya, taking place since the 1980s, reveals that structural adjustment programs as presently formulated are double-edged. On the one hand, the freeing of the Kenyan economy from state control and the promotion of private enterprise is important for the country's economic development. The formulation of policies and regulations to facilitate this process are not necessarily inconsistent with respect to international human rights. Additionally, through the good governance framework, attempts have been made to interpret the constitutional mandates of the international financial institutions, at whose instance the reforms take place, as incorporating international human rights. On the other hand, notwithstanding this apparent salutation of international human rights by international financial

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¹ MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT 140 (1995).

institutions, the economic reform experience in Kenya so far demonstrates deep-rooted tensions with respect to human rights.

This paper is an examination of these tensions. I have isolated three interrelated factors to critique the relationship between structural adjustment programs and human rights law: the changing role of the state in the economic sphere; the increased role of international institutions in the economic development of member states; and the place of human rights in this process. In making this analysis, I am confronted by challenges posed by evidence implicating the state in economic mismanagement and the traditional impotence of the human rights discourse in addressing economic, social and cultural rights. I however find that the human rights violations wrought by structural adjustment programs nonetheless provide an opportune basis to strengthen the role of the state in economic development as well as awaken the human rights regime to its self-made pitfalls. The challenge is to navigate between a predatory and intrusive state that stifles private incentives and causes inefficiency in the market place, and a human rights discourse that watches idly as a citizenry's most basic human rights, basic human needs such as food and shelter, are denied in an unmitigated market economy.

In Part II, I discuss Kenya's on-going journey from a statist to a market economy, bringing out the justifications given for structural adjustment programs and revealing their inconsistency with international human rights. To demonstrate this inconsistency, I focus on the right to an adequate standard of living enumerated in the Universal Declaration of Human Rights² and the International Covenant on Economic, Social and Cultural Rights.³ I argue that development programs need to take into account human rights as an inseparable aspect of the economic reform process.

In Part III, I examine how the law relating to international financial institutions (mainly the World Bank and the International Monetary Fund (IMF)) allows the formulation of economic policies that disregard international human rights. I argue that international financial institutions have no binding obligations to incorporate human

² G.A. Res. 217(A) (III) (Dec. 10, 1948).

³ G.A. Res. 2200A (XXI). Dec. 16, 1966, 21 U.N. Gaor Supp. 16, UN Doc. A/6316, 993 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (1967).

rights in their economic development functions, and that in fact they do not do so. This is despite the fact that these institutions have been established for the realization of economic development of member states and indeed, have incrementally continued to make policies that have had far reaching effects on human destiny. I question the justification made for this gap between the objectives of the international financial institution and their persistence in disregarding certain aspects of these objectives.

I conclude, in Part IV, with observations drawn from the provisions and practice of South African constitutional jurisprudence on the justiciability of economic human rights and see in roads to the possibility of writing and reading these rights into the constitutional reform process now being negotiated in Kenya.

II. The Double Edged Sword: Economic or Human Development?

Structural adjustment programs originate from an economic school of thought that assumes the possibility of differentiating economic from human development, or at least prioritizes the former over the latter, by assigning a minimal, merely facilitative economic role to the state.⁴ This is reflected in the post-1980 economic management design of the international financial institutions which is tri-faceted: privatization of government-run entities based on the assumption of the economic efficiency of free market forces in creating economic growth; rationalization of government expenditure to reduce the damaging effect of high budget deficits on the economy; and trade liberalization through the restructuring of foreign trade policies based on the assumption that the exposure of domestic industries to external competition creates private investment incentives, and therefore growth.⁵ The failure by many developing economies to follow this economic reform package has been given as the prime reason for their

⁴ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1994); W. Roepke, *Economic Order and International Law*, 86 *Recueil des Cours* 203 (1954).

⁵ INTERNATIONAL BANK FOR RECONSTRUCTION AND DEV., *ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION* (1981). Although these proposals have been amended, they remain the basis for the adjustment process and have been widely criticized for failing to address the African economic crisis realistically. For a critical analysis of this report see R. H. Green, *The World Bank's Agenda for Accelerated Development: Dialectics, Doubts and Dialogues*, in *AFRICA IN ECONOMIC CRISIS*, 60 (1986).

economic degeneration characterized by balance of payments deficits and slow economic growth.⁶ However economic stagnation in developing countries during this period was not an exclusively internal phenomenon. External factors including the general recession of the world economy, unequal terms of international trade, the oil crises of the 1970s, and loose lending to developing countries with the influx of petro-dollars culminating in the debt crises⁷, played a significant role. The contribution of external factors to the economic crisis in developing countries, reflecting the interdependence of the world economic system, has however been downplayed by international financial institutions.⁸

Post independence economic planning and management prioritized industrial development and cash crop agriculture which consequently perceived an active role for the state in the economy.⁹ Upon attainment of independence, government expenditure, which structural adjustment programs have targeted for contraction, was highly concentrated in human development projects and the provision of such basic human necessities as food, education, shelter, sanitation, clean water, housing and basic healthcare. For the newly independent state, there was also need to concentrate resources in infrastructure such as transportation and communication networks, energy and numerous other forms of infrastructure necessary for commercial and industrial growth.¹⁰ This need to lay down a firm ground for economic growth

⁶ P. Streeten, *A Survey of the Issues and Options, in Structural ADJUSTMENT AND AGRICULTURE: THEORY AND PRACTICE IN AFRICA AND LATIN AMERICA 4* (S. Commander ed., 1989). To achieve these objectives, the IMF and World Bank have sponsored programs that exhibit the following common features: (1) Demand restraint through reduced government expenditure, a ceiling on expansion, increased taxation, limits on wages and public sector employment; (2) Require the switch of resources to tradables by using policy instruments such as devaluation and price reform; (3) Follow policies aimed at improving the medium- and long-term efficiency of the economy, measures that include financial reform and import liberalization. See Khan & Sonko, *A Multidimensional Approach to Designing Effective Adjustment Programs, in ECONOMIC JUSTICE IN AFRICA: ADJUSTMENT AND SUSTAINABLE DEVELOPMENT 8* (G. W. Shepherd ed., 1994), quoting F. Stewart, in *THE IMF AND WORLD BANK IN AFRICA: CONDITIONALITY, IMPACT AND ALTERNATIVES 31* (Havnevik, ed., 1987).

⁷ Among the numerous materials addressing the third world debt crisis are: JOHN LOXLEY, *DEBT AND DISORDER: EXTERNAL FINANCING FOR DEVELOPMENT* (1986); BONNIE K. CAMPBELL, *POLITICAL DIMENSIONS OF THE INTERNATIONAL DEBT CRISIS* (1989); CHERYL PAYER, *LENT AND LOST: FOREIGN CREDIT AND THIRD WORLD DEVELOPMENT* (1991); PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY* (1991).

⁸ WORLD BANK, *ADJUSTMENT IN AFRICA: REFORMS, RESULTS, AND THE ROAD AHEAD* (1994).

⁹ IAN MALCOM DAVID LITTLE ET AL., *INDUSTRY AND TRADE IN SOME DEVELOPING COUNTRIES: A COMPARATIVE STUDY* (1970).

¹⁰ See JEAN-PAUL AZAM, *BYPASSING THE STATE: ECONOMIC GROWTH IN KENYA, 1964-90* (1997).

and human development was met mainly through loans made available by the World Bank and, in the event of temporary economic disequilibrium, by the IMF.

In the wake of structural adjustment programs rationalization of government expenditure was to be achieved through the withdrawal of government subsidies from the economy. Consequently, the costs of these services were transferred to the users, with little or no consideration being made to their ability to meet the increased costs. While government intervention in human development was cut back, international debt servicing had to be maintained – through further reduction in the government's operating expenditure.¹¹

State control of trade did not begin with the independence government as the colonial government also heavily restricted African economic activity in a bid to secure total European control over the economy. The independence government, elsewhere described as the uncritical successor of the colonial government¹², inherited this ubiquitous state control but for two different reasons: to facilitate development and this control of monopolies. This led to the emergence of a price control legal regime¹³ to uphold strict principles of consumer protection.¹⁴ The government also embraced the 'Africanization' policy in trade and the public sector to affirmatively support African entrepreneurs who had been relegated to the abyss of economic activity during the colonial era.¹⁵

The vision for economic development in Kenya as embraced by the independence government soon encountered profound politicization. Policies geared towards protecting consumers against

¹¹ S. San, *Debt, Development and the International Monetary Fund*, in *THE WORLD'S MONETARY SYSTEM: TOWARD STABILITY AND SUSTAINABILITY IN THE TWENTY-FIRST CENTURY* 17 (J. M. Griesgraber & B. G. Gunter, eds., 1996).

¹² Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 *MICH. J. INT'L L.* 1113, 1116 (1995).

¹³ The Price Control Act, Chapter 402 of the Laws of Kenya, now repealed, governed this. It was in 1989 replaced by Part IV of the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya. The replacement, we must however note, was an almost verbatim reproduction of the repealed Act.

¹⁴ LAWRENCE D. SMITH, *RESOURCE ALLOCATION, INCOME REDISTRIBUTION AND AGRICULTURAL PRICING POLICIES IN KENYA* (1969); see also CODA AND PARTNERS, *THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT, 1988 – A CRITIQUE* 49 (1990).

¹⁵ Trade Licensing Act, Chapter 497 of the Laws of Kenya. See also the discussion on Africanization policy [and mark its racist approach] in DAVID HIMBARA, *KENYAN CAPITALISTS, THE STATE, AND DEVELOPMENT* (1994).

potential monopolists, regulation of the trade and industry to achieve both development and promote African entrepreneurship, government-directed marketing and processing of agricultural produce, did not achieve their stated objectives. First, they led to the creation of a strong state which, although perceivably imperative for the development of the newly independent nation, suppressed private economic and political liberty and tended towards inefficiency, poor planning and corruption.¹⁶ Second, the protectionist economic design adopted had counter-productive consequences. For example, while food subsidies were intended to ensure that the low income waged or salaried citizen could afford basic foodstuffs, their cost was borne by the hard-working, also low income, farmers. The result of this and many other government interventions in the economy was reduced food production, persistent famines and the stunted growth of private economic activity.¹⁷ Opportunities to change the course of economic governance was in no small measure lost to the machinations of cold war era politics in which western governments made alliances with the third world prolonging unsustainable and oppressive economic practices.¹⁸

In light of the failure of the State-run economy to spur economic growth, the arguments presented in favor of structural adjustment do, on the face of it, seem to make perfect economic sense. However, the crisis-solving ability of structural adjustment programs has not met consensus even amongst economists themselves. Hence, beneath what appears to be a grand plan for the rehabilitation of the Kenyan economy are serious controversies and disagreements that depict the entire project to be a monumental experiment.

Although the control of the economy by the government registered a considerable degree of inefficiency, the move toward a liberal market economy has led to immense deprivation, entrenchment of poverty and a general decline in the living standards of the majority. Issues of equitable distribution of wealth, gender, ethnic and racial equality, the survival of local entrepreneurship and human resource development arise particularly with respect to privatization and

¹⁶ *Id.*

¹⁷ ROBERT H. BATES, *MARKETS AND STATES IN TROPICAL AFRICA: THE POLITICAL BASIS OF AGRICULTURAL POLICIES* (1984).

¹⁸ WILLIAM SAMPSON KLOCK RENO, *WARLORD POLITICS AND AFRICAN STATES* (1998).

liberalization.¹⁹ Beyond issues of equality and fair opportunity in the economy, a strong argument for a facilitative role of the State in industrial and agricultural development must still be made²⁰, to strengthen the quest for development as a basic human right. The original post-independence vision of state-led growth, though inappropriately executed, should not be lost. At the end of the day, markets are profoundly a social phenomenon, not entirely private, wholly dependent on social and political stability, all requiring stage management by the state to harness investment capital and prioritize specific forms of investments. Peter Evans observes the state in circumstances of structural change as both the problem and solution:

The crux of the problem faced by late developers is that institutions that allow large risks to be spread across a wide network of capital holders do not exist, and individual capitalists are neither able nor interested in taking them on. Under these circumstances, the state must serve as surrogate entrepreneur States that succeed in undertaking the tasks . . . are legitimately called "developmental". They extract surplus but they also provide collective goods. They foster long-term entrepreneurial perspectives among private elites by increasing incentives to engage in transformative investments and lowering the risks involved in such investments. They may not be immune to rent-seeking or to using some of the social surplus for the ends of incumbents and their friends rather than those of the citizenry as a whole. Yet, on balance, the consequences of their actions promote rather than impede economic adjustment and structural adjustment.²¹

¹⁹ REPUBLIC OF KENYA, SOCIAL DIMENSIONS OF DEVELOPMENT IN KENYA: AN APPROACH TO HUMAN-CENTERED DEVELOPMENT AND ALLEVIATION OF POVERTY 4, 5 (1994). In recognition of this, the government addressed itself to social dimensions of development, stating:

Economic growth is however, essential but not sufficient to ensure social development. To reduce and eliminate widespread poverty, to increase productive employment and reduce unemployment, and to enhance social integration requires ensuring that economic growth integrates social considerations. Macroeconomic stability and structural reforms should, therefore, not be pursued at the cost of the needs and interests of poor and vulnerable sections of the population. In fact such an approach may well compromise the very possibility of stability.

²⁰ ALICE H. AMSDEN, THE MARKET MEETS ITS MATCH: RESTRUCTURING THE ECONOMIES OF EASTERN EUROPE (1994).

²¹ P. Evans, *The State as Problem and Solution: Predation, Embedded Autonomy, and Structural Change*, in THE POLITICS OF ECONOMIC ADJUSTMENT: INTERNATIONAL CONSTRAINTS, DISTRIBUTIVE CONFLICTS, AND THE STATE (S. Haggard, ed., 1992).

Vulnerable groups suffering the harsh effects of structural adjustment, including death from starvation and disease and non-attendance or discontinuation from primary education have been identified to include: female headed households, children, rural small-scale farmers, landless rural workers, pastoralists, persons in the arid and semi-arid areas, women, the elderly poor, the handicapped and the unemployed.²² These, it is useful to note, particularly the rural small-scale farmers, comprise the majority of the Kenyan population. Whereas the developed world economies have a substantially developed welfare system and other mechanisms to combat social side effects of economic liberalism, this is not so in the case of third world countries such as Kenya. The World Bank, in its 1990 World Development Report²³, acknowledged the adverse effects structural adjustment programs had on the poor. UNICEF too in its report, *Development with a Human Face*, drew attention to the adverse effects of structural adjustment programs on children and women and advocated for a humane program of economic development.²⁴ The United Nations Economic Commission for Africa in 1989 registered forceful disagreement with the approach taken by the international financial institutions in the formulation and implementation of these programs in Africa. It objected to the effects of austerity measures embodied in these programs and itemized alternative modes of adjustment in what was termed the *African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP)*.²⁵

²² REPUBLIC OF KENYA, *supra* note 19, at 12 para. 2.11. This work also makes an analysis of the incidence of poverty in Kenya at para. 2.10, based on the findings of the 1992 Welfare Monitoring Survey, as follows: (a) About 30% of Kenya households are female headed of whom 53% were poor; (b) 52% of subsistence farmers, 50% of the landless and 43% of the pastoralists were poor; (c) 57% of household heads who had no education lived below the absolute poverty line, and (d) the poor spent 61% of their total expenditure on food as compared to 46% by the non-poor.

²³ WORLD BANK, WORLD DEVELOPMENT REPORT (1990).

²⁴ ADJUSTMENT WITH A HUMAN FACE: PROTECTING THE VULNERABLE AND PROMOTING GROWTH (Giovanni Andrea Cornia et al. eds., 1987).

²⁵ United Nations Economic Commission for Africa, UN Doc. E/ECA/CM.15/6/Rev.3 (1989). J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 Cal. W. Int'l L.J. 1 (1995), makes an analysis of the recommendations and summarizes them thus:

Major policy directions: a) enhanced production and efficient resource use; (b) greater and more efficient domestic resource mobilization; (c) improving human resources capacity; (d) strengthening scientific and technological base, and (e) vertical and horizontal diversification.

These criticisms reflect the inconsistency of structural adjustment programs with development and any notions of economic growth. The human and social cost of implementing the policies casts a dark shadow on the whole process of development, and calls for a discussion on the larger question of human rights in the formulation of economic policies. Arguments for the protection of economic and social rights have often been confronted by the counter argument of non-justiciability. However this particular understanding of human rights remains, like that informing structural adjustment programs, very much based on western liberal, and universalist conceptions which have not gone uncontested.²⁶ Moreover, if justiciability or want of it be the issue here, though it should not be, I argue that structural adjustment programs have even inflicted human rights violations of a civil and political nature.

A. Economic, Social and Cultural Rights

The Bill of Rights under the Constitution of Kenya²⁷ mainly protects civil and political rights without significant provisions for social, economic and cultural rights. The problem of ensuring basic necessities, food sufficiency, adequate healthcare, sanitation and clean water, primary education and minimum infrastructure depends solely on the vigilance and commitment of the government. At best, social but not legal avenues would be available to demand these rights as against the government.²⁸ Save for labor and employment laws, trade union laws and laws on housing standards, there are no specific laws that make it the responsibility of the government to ensure rights to basic necessities and a minimum standard of living. Consequently, the

Income allocation factors: (a) establish a pragmatic balance between the public and private sectors; (b) create an enabling environment for sustainable development; (c) shift resources from non-productive and military expenditure, and (d) improve the pattern of income distribution among different categories of household.

²⁶ See for example, Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

²⁷ The Constitutional history of Kenya is given in YASH P. GHAI, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT* (1970).

²⁸ This is in comparison with, for example, the Constitution of the Republic of South Africa (1996), which specifically confers these rights on the citizens and binds the state to make provision for them. On the basis of these constitutional provisions, individuals have been able to bring legal proceedings in courts of law for the realization of these rights.

age of structural adjustment did not encounter an intact legal framework that could be used to arrest the adverse effects of structural adjustment. With legal avenues seemingly closed, social and political pressure has been mounted to protest heavy taxation, inflation and high interest rates, retrenchment of workers, and lack of basic necessities such as health care, primary education and shortage of basic foodstuffs.

Unlike the Kenyan Constitution, the international legal regime at least makes allowance for social and economic rights indicating an acceptance of the interconnectedness of human and economic development. Moreover, the regime of international social and economic rights is one that continues to grow despite the failure of international consensus on treaties pertaining to them.²⁹ Kenya has ratified most international human rights treaties.

The Kenyan judiciary has not actively applied provisions of international law not expressly incorporated in national laws. Moreover, even the enumerated rights under the Kenyan Bill of Rights have proven extremely difficult to enforce in court against the State.³⁰ This perhaps clearly demonstrates that provisions of international human rights law, especially those on economic and social rights, would equally be difficult to enforce in Kenya. Nonetheless, it is possible to deduce from the government's compliance with the supervisory power of the United Nations organs that Kenya acknowledges international human rights obligations and these need not be expressly provided for in Kenyan laws to be applied by the courts. However, to do this, the courts would need to be independent, willing to give a broad and generous interpretation to rights and commanding effective enforcement machinery.

²⁹ These have been called the 'emerging human rights' which are primarily focused on social and economic rights and the right to development. They seek to establish international responsibility upon states to pursue or at least observe practices that are consistent with the development of the less developed nations. See: F. V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* (1990); GEORGE W. SHEPHERD, *EMERGING HUMAN RIGHTS: THE AFRICAN POLITICAL ECONOMY CONTEXT* (1990); VED P. NANDA, *WORLD DEBT AND THE HUMAN CONDITION: STRUCTURAL ADJUSTMENT AND THE RIGHT TO DEVELOPMENT* (1993).

³⁰ G. Imanyara, *The Judiciary on Focus Once Again*, 52 *THE NAIROBI LAW MONTHLY* 8 (1995).

B. The Right to an Adequate Standard of Living

Before the advent of structural adjustment, poverty and the want for basic necessities was far from being eradicated in Kenya, and indeed in many nations of the world. In fact, one of the reasons that led to Kenya's unfavorably high credit account balance, cited as one of the reasons necessitating the implementation of structural adjustment programs, was the famine of 1979-80 and the subsequent massive food imports.³¹ Consequently, to say that the implementation of structural adjustment programs has resulted in the lowering of standards of living is not to suggest that previous living standards were good. The assertion here is that structural adjustment programs introduced radical change in national economic policies, which though acclaimed to be corrective of inefficiency, resulted in lowering already appalling standards of living and further entrenching the high levels of poverty.

The question, what comprises an 'adequate standard of living', finds an answer in the enumerations of international human rights instruments, which make specific guarantees including the right to food, health, social security, work, education, shelter, and clothing, among others.³² It is that minimum standard that is commensurate with human dignity and well being, without which freedom, justice and peace cannot be realized nor civil and political rights enjoyed.

The realization of economic, social and cultural rights requires an integrated national economy and a fair international economic system. The right to food depends to a great extent on the ability of an economic system to sustain food production. However, State responsibility does not end with creating an atmosphere conducive for production. The challenge is to sustain private production while at the same time ensuring availability to all. Though an economy may get the prices right, and though high production levels may be registered at the end of each production cycle, mass deprivation and famine deaths may persist because of the configuration of market systems and legal regimes. Amartya Sen has stated:

³¹ I WORLD BANK, KENYA: GROWTH AND STRUCTURAL CHANGE (1983).

³² A discussion on the International Covenant on Economic, Social and Cultural Rights including the meaning of an adequate standard of living is given in MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT (1995).

The point is not so much that there is no law against dying of hunger. That is, of course, true and obvious. It is more that the legally guaranteed rights of ownership, exchange and transaction delineate economic systems that can go hand in hand with some people failing to acquire enough food for survival...And that can result in serious deprivation - possibly even starvation death. In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.³³

Notwithstanding the assumptive justifications for structural adjustment programs, abrupt as opposed to gradual withdrawal of government subsidies from the agricultural sector was ill-timed considering the already prevailing harsh economic conditions. Food shortage, coupled with reduced economic ability to purchase, all of which are substantially the result of the implementation of structural adjustment programs, have led to extensive starvation and malnutrition.³⁴

Structural adjustment programs were designed to make a complete overhaul of ailing economies, presumably for the reason that economic growth could only be realized if reform is integrated, as all sectors of the economy are interdependent. A backlash in one sector undermines progress in another. This probably is the nature of human institutions, they are interdependent. Similarly, the unavailability of food works to undermine health, affect productivity, and education, breeds inequality and entrenches poverty. The logic informing extensive economic reform under structural adjustment does not, however, seem to have been extended to the problem of human development.

The reduction of government expenditure on health as another strategy for economic growth under the structural adjustment programs has left the already impoverished Kenyan health system in a deplorable condition. With the food sector also reeling under similar pressure, coupled with increased levels of poverty and poor sanitation,

³³ AMARTYA SEN, HUNGER AND PUBLIC ACTION (1999), as quoted in HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 270-71 (1996). See also AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981).

³⁴ Republic of Kenya, *supra* note 19, at 53, 61 (an analysis of child malnutrition) and at 59 (an analysis of famine cites market liberalization as one of its causes).

poor housing, pollution and lack of adequate or any medical treatment, standards of health have acutely deteriorated. Curable sanitation related diseases that were hitherto reasonably under control such as typhoid fever, dysentery, cholera, tuberculosis and malaria have increased. The situation worsens with the failure or inability of the government to stock the requisite drugs and the inability of the people to afford medical treatment.³⁵

The retrenchment of the public sector labor force resulting in the lay off of low-wage workers has resulted in high unemployment levels. The assumptions underlying the public sector reform program are that with the growth of the economy following privatization and liberalization measures, sufficient or significant employment opportunities will be created, absorbing the laid off workers. These assumptions on economic growth and increased employment opportunities have not been realized, leaving many without a source of livelihood. Those outside the public sector have been no less affected. The exposure of the local informal sector, otherwise known as the *Jua Kali* sector³⁶, to external competition has led to its weakening and the crippling of locally-owned industries. Though intended to create a competitive commercial environment, economic liberalization assumes that local industries are endowed with sufficient ability to compete with external forces, and with forces that enjoy greater institutional support. The fact that the Kenyan informal sector and small industries do not have significant institutional support could only indicate that external competition should not be full-fledged until institutional capacity is created. It is only then that competition would be fair for both local and foreign investors and it is on this that international financial institutions should focus.

In addition to the above constraints, increase in taxation, basic commodity prices, interest rates and escalating inflationary trends have fundamentally lowered the real value of wages or income, thus

³⁵ Republic of Kenya, *supra* note 1, at 12, para. 2.13.

³⁶ *Jua kali* is a Swahili phrase that means "hot sun". When referring to Kenya's informal sector, it describes the fact that individuals in the sector, who are comprised mainly of metal artisans, work under very harsh economic and physical conditions. They carry out their trade and craftsmanship in the open under the hot tropical sun because they cannot afford to rent workshops. See KENNETH KING, *JUA KALI KENYA: CHANGE & DEVELOPMENT IN AN INFORMAL ECONOMY 1970-95* (1996).

diminishing the significance of the right to work and the ability to strive for and attain an adequate standard of living.³⁷

Liberalization of an economy raises the question of just how much the country should open its borders to foreign investment and international competition. Legally, the question would be whether the right to engage in economic or life sustaining activity should be protected from any and all factors that threaten to extinguish it. "Privatization and parastatal divestiture plus retrenchment of the civil service may lead to the control of key sectors of the economy by non-indigenous interests with the subsequent loss of jobs for local people".³⁸

Proponents of the macroeconomic reform process argue that the market is well able to manage this problem and any interference with the process is uncalled for. They see that the only impact the state can have on the economy is to cause distortions in the market which would impinge on the smooth operation of the market. Powell, advocating for what he terms "self-determination through unilateral free trade" says:

The time has come to recognize that foreign influence is a source of prosperity because it means people are free to gain the advantages of ideas, products, capital and talent that may not be available at home The future belongs to countries that take their destiny in their own hands, open their borders, force their companies to be more competitive, and make purchasing goods and services easier and cheaper for millions of working people who deserve nothing less than complete freedom of choice.³⁹

A countervailing argument has been made that many developed economies today, including what have been termed the East Asia miracles of South Korea and Taiwan, began with stringent protective economic policies.⁴⁰ It has also been suggested that the role of the government in a regulated economy is often necessitated by the lack of

³⁷ Republic of Kenya, *supra* note 19, at 12, para. 2.14.

³⁸ Kenya, National Development Plan For the Period 1994-96 (1993).

³⁹ J. Powell, *Self Determination through Unilateral Free Trade*, in PERPETUATING POVERTY: THE WORLD BANK, THE IMF, AND THE DEVELOPING WORLD (Doug Bandow & Ian Vasquez eds., 1994).

⁴⁰ Alice H. Amsden, *Taiwan's Economic History: A Case of Etatism and a Challenge to Dependency Theory*, in TOWARD A POLITICAL ECONOMY OF DEVELOPMENT: A RATIONAL CHOICE PERSPECTIVE 143 (Robert H. Bates ed., 1994).

alternative market-based regulatory mechanisms within the developing countries, which mechanisms are fully developed in industrialized nations.⁴¹ In addition, developing states adopt protective economic strategies as their only means of survival in the global economic system, which is itself neither liberalized nor receptive to commodities manufactured in these developing countries.⁴²

C. The Right to Participation in Development and Economic Self Determination

It has been observed that one shortcoming of development agencies, particularly the international financial institutions, is their preoccupation with abstractions and total disregard for human beings for whose benefit, or at whose peril, their work revolves.⁴³ One manifestation of the denial of popular participation in Kenya's economic adjustment process is the confinement of the process to government bureaucrats and the international financial institutions' economists. Local economists have not been involved and this has raised concern about the apparent exaltation of international "experts".⁴⁴ The failure to involve local populations and experts in the formulation and implementation of structural adjustment programs has been manifested in unrealistic reform policies. This factor has not only exacerbated their harsh effects on human conditions but has also contributed to their limited success.⁴⁵

The adoption of the *Africa Charter for Popular Participation in Development and Transformation* (ACPPDT)⁴⁶ followed and embodied the concerns of the AAF-SAP,⁴⁷ most notably, the apparent imposition of economic policies on the peoples of Africa. The right to

⁴¹ *Id.*

⁴² See STEVEN D. KRASNER, *STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* (1985).

⁴³ Joseph Gold, *Natural Disasters and other Emergencies Beyond Control: Assistance by the IMF*, 24 INT'L LAW. 621 (1990), as quoted by Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft Law of the IMF and Human Rights*, in 11 B.U. INT'L. L.J. 81 (1993).

⁴⁴ IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES* 4-15 & 44-68 (1995).

⁴⁵ G. B. N. Ayittey, *Aid for Black Elephants: How Foreign Assistance Failed Africa*, in *PERPETUATING POVERTY*, *supra* note 39.

⁴⁶ UN Doc. E/ECA/CM.16/11, Arusha, Tanzania, 1990.

⁴⁷ United Nations Economic Commission for Africa, *supra* note 25.

popular participation in development⁴⁸ counters this imposition in at least two ways. Firstly, it requires that the people fully and effectively participate in the determination of decisions that affect their lives at all levels and at all times. Secondly, it institutionalizes people-based development founded on their free will to undertake sacrifices, make commitments and expend their social energies for its execution.⁴⁹

The assumption by the international financial institutions of roles influencing or directing law reform, governance, and economic policies, has been challenged for fostering undemocratic development. Notably, the implementation of structural adjustment programs has been confined to policy-making, as opposed to law-making levels, based on dialogue with the government bureaucrats as opposed to engagement with elected representatives. The purpose of this has been, as much as possible, to avoid entanglement with parliamentary processes as these are considered time consuming and even impeding. This, it has been noted, has not been accompanied by the attendant accountability that should follow any law or policy making discretion.⁵⁰

Two examples may help to illustrate the development problems that the right to popular participation in development and economic self-determination seek to address. The first is the economic plunder and injustice that has accompanied privatization of parastatals. The on-going privatization of government run entities is, to any keen observer, reminiscent of the plunder and injustice that was Kenya's decolonization process. Those holding the reins of political power amassed large portions of land, as the colonialists departed, leaving thousands of people landless.⁵¹ At the time, little or no serious

⁴⁸ The ACPDPT was, however, not the first to make provision for the right to participation in development. In 1986, similar guarantees were charted out in the Declaration on the Right to Development (DRD) UN G.A. Res 41/128, (1986). Article 1(1) states, "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Article 2 further provides, "The human person is the central subject of development and should be the active participant and beneficiary of the right to development." Indeed, the bedrock of this right seems to be the right of self-determination whose standard content is the right of all peoples to "freely determine their political status and freely pursue their economic, social and cultural development" and to "freely dispose of their natural wealth and resources".

⁴⁹ Republic of Kenya, *supra* note 19, at part I, para. 10.

⁵⁰ Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 Harv. Hum. Rts. J. 159, 187 (1993).

⁵¹ This fact is attested to in Himbara, *supra* note 15; Bates, *supra* note 17.

consideration was given to equitable distribution of national resources. The political dimension of the current privatization process, which is not appreciated by the present configuration of structural adjustment programs, is that it lays ground for public institutions to continue to be owned by the government "privately". Corporations previously managed by the government are, upon privatization, being acquired by the same politically connected individuals who run them down. Popular participation is inhibited, ordinary citizens are unable to participate in the sales of public enterprises. Moreover the "political" purchasers of these enterprises do not necessarily assure the efficiency intended, since they are the very same people who mismanaged the enterprises in the first place.⁵²

The second problem emanating from the denial of the right to popular participation in development is the economic alienation of minority groups whose social, cultural and economic lifestyle has been less inclined to adopt market liberalism. There are ethnic groups in Kenya that have historically be marginalized in the development endeavor and which have been acknowledged by the government to have "very little linkages to the rest of the economy, facing a deteriorating natural resource base, declining food security and deepening poverty".⁵³ To most of these groups, which practice communal property ownership, capitalism as embodied in privatization measures is not conducive to their circumstances. No matter how important market liberalism is to economic growth, it is equally important to note that it takes time, even assuming its necessity, for different societies to be assimilated into it. Therefore economic reform policies must accommodate the right to a different economic and cultural lifestyle and protect the survival of all in a market economy. If these communities have been alienated in the government-controlled economy, their circumstances could only get

⁵² T. Mkadawire, *The Political Economy of Privatization in Africa*, in FROM ADJUSTMENT TO DEVELOPMENT IN AFRICA: CONFLICT, CONTROVERSY, CONVERGENCE, CONSENSUS? 192, 198 (Giovanni Andrea Cornia & Gerald A. Helleiner eds., 1994); JOHN M. COHEN, ETHNICITY, FOREIGN AID, AND ECONOMIC GROWTH IN SUB-SAHARAN AFRICA: THE CASE OF KENYA 31 (1995), gives an account of this problem and describes the 1994 sale of Kenya Cashew Nuts Limited, a state-owned enterprise, which was bought for undervalued prices by senior officers and resold at a markup to a Kenyan firm owned by Asian nationals. This description exposes two forces at play against the right to popular participation in development, namely, the government forces, which more often than not represent an ethnic force, and the force of foreign investors.

⁵³ Republic of Kenya, *supra* note 19, at 11.

worse in an indiscriminately liberalized economy.⁵⁴ Helleiner correctly observes:

If the state is seen as fragile, incompetent or corrupt, as it frequently is in Sub-Saharan Africa, there is an obvious rationale for "offloading" many of its responsibilities to the private sector, however weak it may also be. The problem is that those with the greater private capacity to respond to market incentives are frequently foreign firms and/or ethnic minorities. Giving them 'full rein' can create problems of a different kind. Moreover, particularly in small/or poorly integrated markets, private monopolies can emerge, with consequences no less serious than those in public ones.⁵⁵

D. Civil and Political Rights

An intimate link exists between civil and political rights and social, economic and cultural rights. Both categories of rights form the foundation of the human ideal of freedom, justice and peace. In enumerating the right to work for example, the ICESCR requires that remuneration for work be made sufficient as to be consistent with the need for dignity in living conditions. While the right to work is often categorized within social, economic and cultural rights, the right to dignity of the human person is often seen to be within the ambit of civil and political rights. Nonetheless the failure to ensure social and economic rights amounts to the violation of the right to human dignity generally. This linkage is not just in theory. Every day, millions of

⁵⁴ These are particularly the pastoralists who include the Maasai, Turkana, Samburu and Karamajong, who, besides failing to be absorbed into the market economy, suffer numerous other disadvantages by reason of dwelling in arid and semi arid regions of Kenya. Various accounts have been made on the effects of land privatization on their economic, social and cultural survival. See ELLIOT FRATKIN, *ARIAAL PASTORALISTS OF KENYA: SURVIVING DROUGHT AND DEVELOPMENT IN AFRICA'S ARID LANDS*, (1998); M. M. E. M. RUTTEN, *SELLING WEALTH TO BUY POVERTY: THE PROCESS OF THE INDIVIDUALIZATION OF LANDOWNERSHIP AMONG THE MAASAI PASTORALISTS OF KAJIADO DISTRICT, 1890-1990* (1992).

International law makes provision for the protection of the rights of minorities and indigenous groups and guarantees the right to self determination. See for example, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO No. 107), adopted June 26 1957, 328 U.N.T.S. 247; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, adopted 18 December 18, 1992, G.A. Res. 47/135, reprinted in 32 I.L.M. 911 (1993), 14 HUM. RTS. L.J. 54 (1993).

⁵⁵ *From Adjustment to Development in Sub-Saharan Africa: Consensus and Continuing Conflict*, in *FROM ADJUSTMENT TO DEVELOPMENT IN AFRICA*, *supra* note 52, at 16.

people the world over die of starvation, treatable diseases, lack of shelter, poor sanitation and clean water. While these grave circumstances are often attributed to natural catastrophes, many may be blamed on policy failures.

In recent times, severe deprivation of social and economic rights, such as death by starvation, has been equated to subjection to inhuman and degrading treatment. In the case of *Francine van Volsen v. Belgium*⁵⁶ the European Commission on Human Rights addressed the question whether the notion of inhuman and degrading treatment may be applied to violations of socio-economic rights. In this case, the complainant brought a claim against Belgium challenging the disconnection of electricity supply in her residence, despite her being in poor health and demonstrating a clear case of inability to make payments. She alleged that she had been subjected to living in an unheated, unlit and poorly constructed apartment. The Commission did not make a complete finding on the issue, as the claim failed on other grounds. However, it did state that, "in the case at issue, the cutting off or the threat of cutting off electricity did not reach the level of humiliation or debasement needed for there to be inhuman or degrading treatment".⁵⁷

This decision appears to suggest that it is possible to depart from the traditional understanding of the concept of inhuman and degrading treatment to cover socio-economic rights violations provided that a certain level of debasement is proved. This would have to be determined on a case by case basis. Although the argument is still very undeveloped, the European Commission's ruling may have opened a door that makes it possible to argue that the disadvantageous effects of structural adjustment programs constitute inhuman and degrading treatment. Economic policies that lead to death from starvation or treatable disease, cause suffering, debasement and humiliation severe enough to amount to inhuman and degrading treatment may be found to constitute human rights violations.

⁵⁶ Quoted in Antonio Cassese, *Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?*, 2 EUR. J. INT'L L. 141 (1991). It is there stated that the decision has been published in 2 REVUE UNIVERSELLE DES DROITS DE L'HOMME 384-5 (1990). The claim was brought under Article 3 of the *European Convention on Human Rights* that states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

⁵⁷ *Id.* at 143.

It is no longer possible or realistic to attribute blame for human rights violation to states only, since international financial institutions are centrally involved and have in fact, through their lending conditionalities, curtailed states' capacity to act. While the responsibility of the state to safeguard human rights should not be reduced, present realities demand that we address the question whether and to what extent international financial institutions should be held accountable for human rights concerns arising from their policies. This inquiry does not mean that the past inefficiency of the government in the economy is to be overlooked, nor that there is no need for macro-economic reform to address the prevailing economic crisis and make better human conditions. The call is for the integration of human and economic development, an appreciation of the complexities and necessities of postcolonial or late development, and a case specific approach to policy formulation.

III. Negotiating Between Rigidity and Elasticity within Autonomous International Financial Institutions

Unlike most other specialized agencies, the international financial institutions exist and function autonomously from the United Nations. They have no legal obligation to take mandatory cognizance of decisions and resolutions of the United Nations. Although the Relationship Agreements between the United Nations and the international financial institutions state that the reason for their establishment is the performance of economic functions within the meaning of article 57 of the Charter of the United Nations, by virtue of the nature of their international responsibilities and terms of their articles of agreement, international financial institutions are treated as autonomous organizations.⁵⁸ The Relationship Agreements go to great lengths to safeguard the independence of the international financial institutions by requiring that the United Nations refrain from making any recommendations to the international financial institutions with respect to the allocation of loans.⁵⁹ Such matters are to be left to the

⁵⁸ Art. I, § 2 of the Agreements Between the United Nations and the International Bank for Reconstruction and Development and the International Monetary Fund, Resolution No. 92 (V) adopted by the Economic and Social Council, during the fifth session, August 16, 1947, E/558 and E/559/Rev. 2.

⁵⁹ *Id.* at Art. IV, § 2.

independent exercise of judgment of the international financial institutions in accordance with their articles of agreement.⁶⁰

The extent of the independence of international financial institutions is amplified by the fact that even in matters pertaining to international peace and security, they are simply exhorted to pay "due regard" to the decisions of the Security Council. This, depending on interpretation, does not necessarily bind the international financial institutions to the decisions of the Security Council. Again depending on interpretation, the obligation does not include "paying due regard" to the decisions of the United Nations General Assembly. Moreover, article VI of the Relationship Agreement merely states in extremely non-committal terms that the international financial institutions should "take note" of the obligations assumed by member states to carry out the decisions of the United Nations Security Council.⁶¹

Such is the magnitude of the independence of the international financial institutions that, in the context of the objectives of the United Nations, particularly those governing human rights, it presents a problem. Even though international financial institutions are the main international development agencies, their obligation to the ideals envisioned by the United Nations system as a whole is limited to their articles of agreement, which have been interpreted rather rigidly, though with a few exceptions in recent times.

While the World Bank was created to facilitate post second World War economic reconstruction and development through the promotion of private foreign investment and long-range balanced growth of international trade⁶², the International Monetary Fund was to engage in temporary relief of maladjustment in balances of payments of member states.⁶³ Several explicit provisions define the boundaries within

⁶⁰ *Id.* The only permissible recommendations are those on "technical aspects of reconstruction or development plans, programs or projects".

⁶¹ The section states:

The Bank takes note of the obligation assumed under paragraph 2 of Article 48 of the United Nations Charter by such of its members as are also Members of the United Nations to carry out the decisions of the Security Council through their action in the 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.

⁶² Articles of Agreement of the International Bank for Reconstruction and Development, as amended effective February 16, 1989.

⁶³ Articles of Agreement, International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 6748, and April 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937.

which the performance of these obligations is to be undertaken. The international financial institutions must base their decisions on what are termed "economic considerations" and under no circumstances should they manifest "political" considerations.⁶⁴ Article IV section 10 of the Articles of Agreement of the World Bank is explicit in its prohibition of political activity:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

The restriction of the mandates of international institutions to economic issues is viewed as central to their functions and to their relationships with other international organizations. Hence, while section 8 of article 5 of the Articles of Agreement of the World Bank establishes an obligation on the part of the Bank to cooperate with other international institutions having responsibilities in the same field, such cooperation has to conform strictly to the provisions of the Bank's Articles of Agreement. Any cooperation that implicates any provisions of Bank's Articles of Agreement may be effected only upon their amendment.⁶⁵

What constitutes economic or political considerations has not been clearly defined and it remains subject to the good judgment of the international financial institutions. For this reason, the interpretations have changed over time and they have lacked uniformity in application. Generally, the Bank has been willing to cautiously recognize social, economic and cultural rights, without express definition of the latitude of such protection or of the nature of any rights accruing as a consequence. Civil and political rights however,

⁶⁴ Article III §§ 5 (a) & (b) of the World Bank's Articles of Agreement provide:

(a) The Bank shall impose no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members; (b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes 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.

⁶⁵ Articles of Agreement, World Bank, *supra* note 62.

have been resisted quite strongly. The irony of this is obvious. While human rights discourse has challenged the justiciability of social, economic and cultural rights and embraced political and civil rights, international financial institutions have found it easier to maneuver the former and not the later. However, when the good governance framework required the international financial institutions to set standards for states on civil and political rights, the inadequacy of their treatment of social, economic and cultural rights emerged.

The original interpretation of the 'economics only' rule was stringent and narrow. It was based primarily on the notion that economic issues were unrelated to other disciplines such as politics, and that they could be kept separate.⁶⁶ Law, and more precisely human rights, was largely considered to be imbued with such significantly high levels of politics as to be beyond the scope of economics and hence beyond the mandate of the international financial institutions. The entire question of the responsibility of international financial institutions for human rights concerns therefore turns on the issue of interpretation of the international financial institutions' mandate, a negotiation between rigidity and elasticity within an autonomous mandate. The following historical accounts illuminate this assertion.

Between 1967 and 1968 the United Nations General Assembly appealed to the World Bank to cease economic, financial and technical assistance to South Africa and Portugal, which had refused to comply with the decolonization resolutions passed of the General Assembly.⁶⁷ The question whether international financial institutions should incorporate civil and political rights considerations in their lending policies, either as economic issues or in cooperation with the aims of the United Nations, then arose. When Portugal failed to decolonize territories under its administration, the United Nations General Assembly then appealed to the World Bank to withhold financial assistance in order to secure compliance.⁶⁸ A similar request was placed concerning South Africa, which had persisted in apartheid rule,

⁶⁶ EDWARD SAGENDORPH MASON, *THE WORLD BANK SINCE BRETTON WOODS* 590 (1973).

⁶⁷ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), 15 UN GAOR, Supp. (No. 16) U.N. Doc. A/4684, 66 (1960).

⁶⁸ U.N. G.A. Res 2184 (XXI) (1966) entitled "Question of Territories under Portuguese Administration".

contrary to its obligations under the United Nations Charter and in defiance of resolutions of the General Assembly and Security Council.⁶⁹

In rejecting these requests, the World Bank cited Article IV section 10 of its Articles of Agreement which, it claimed, precluded it from making considerations of non-economic matters in evaluating loan applications. The World Bank argued that its Articles of Agreement specifically precluded it from paying regard to the political character of members or interfering with their political affairs.⁷⁰ In both cases, the World Bank construed 'economic' very narrowly. Using this narrow construction, it was unable to identify any economic issue that would justify action as requested. This was in spite of the fact that both issues, colonization and apartheid, are replete with evidence of economic alienation of the affected communities.

The conditionalities attached to structural adjustment lending policies are evidence of a broadened construction of 'economic considerations', an attempt to depart from the stringent conception of development as being confined to economics. The international financial institutions, particularly the World Bank, now require measures such as good governance, human rights and democracy to accompany the macro-economic reform process. All these requirements are justified as being necessary for the 'freeing of the economic growth process', a fundamental mandate of international financial institutions.⁷¹ Thus, although the World Bank prescriptions on good governance, for example, directly interfere with political affairs of member States, perception of them as important to economic development permits their presence in the Bank's development strategies.⁷² The framework of good governance has been taken to include the promotion of democracy and observance of the rule of law, both considered imperative for economic development though perhaps merely incidental to human rights. Forsythe observes:

⁶⁹ U.N. G.A. Res. 2054 A (XX), 2105 (XX) and 2107 (XX) of 15th, 20th and 21st December, 1965.

⁷⁰ For a full account of these facts, see UNITED NATIONS JURIDICAL YEARBOOK 108-132 (1967) and Mason, *supra* note 66.

⁷¹ PAUL MOSLEY, *AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING* (1995). See also Shihata, *supra* note 44, at 4-15 & 44-68.

⁷² For a discussion on the intrusive nature of structural adjustment lending see Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

Under pressure from the United States and others, the Bank has always been overtly political in a strategic and partisan sense More recently the Bank has been clearly political in taking a very broad view of what non-economic factors affect economic performance. Bank practice is highly inconsistent, however; and there is no Bank theory or programmatic statement capable of providing meaningful guidelines that could lead to consistent practice.⁷³

The argument put forward in support of this incidental, as opposed to express, protection of human rights is that though human rights (both civil and political or economic and social) are undeniably essential to development, the international financial institutions should, nevertheless not make such a broad construction of their Articles of Agreement as to include what is expressly forbidden.⁷⁴ The international financial institutions also argue that they do not want to replicate the functions of other organs of the United Nations, which are expressly mandated and better equipped to address human rights violations. The better approach, they suggest, is to strengthen the ability of these human rights institutions to perform their functions, instead of advocating a usurpation of their functions by international financial institutions.⁷⁵

Shihata argues that the role of international financial institutions involves "transforming the ideals of the United Nations' declarations and the covenants into realities that can be physically measured in the member countries". These ideals include freedom from poverty, education, health and environment.⁷⁶ If we adopt this construction of the mandate of international financial institutions, we would conclude that they are bound by their Articles of Agreement not only to require democracy, human rights and good governance of developing countries, but also, on their part, to formulate economic policies, pursue economic projects or design economic adjustment programs that are consistent with development, and not adverse to the affected

⁷³ David Paul Forsythe, *The United Nations, Human Rights, and Development*, 19 HUM. RTS. Q. 334, 347 (1997).

⁷⁴ Ibrahim F.I. Shihata, *Human Rights, Development and International Financial Institutions*, 8 AM. U. J. INT'L L. POL'Y 35, 37 (1992).

⁷⁵ *Id.*

⁷⁶ Shihata, *World Bank*, *supra* note 44, at 568.

peoples' economic, social and cultural rights – notwithstanding the confines of an 'economics only' rule.

Even though international financial institutions acknowledge, to a limited extent, that their mandates cover social, economic and cultural rights (and political and civil rights when these have economic significance), this does not emanate from a clearly stated legal obligation. It depends on the breadth of the interpretation accorded their constitutions, which has changed over time and lacks uniformity in application. This interpretation has not been encapsulated in the rights-duties terminology necessary to found legally binding obligations on the part of international financial institutions. Consequently, the degree to which these rights will be protected is uncertain, and will depend on the political will of the international financial institutions and, to a considerable extent, on that of the leading western financiers.⁷⁷ The promulgation of safety nets under the Social Dimensions of Adjustment Program and the establishment of the World Bank Inspection Panel illustrate this and one other point. The second point is that the economic vision that these institutions have been peddling has its own limitations, not acknowledged at the time of designing and initially implementing the macro-economic reforms. The fact that the earlier, almost fundamentalist, economic formulations by these institutions have been challenged by the hard evidence of severe economic dislocation and massive social instability, has led to a reluctant willingness to rethink their policy prescriptions and its social implications.

Safety net measures involve the release of funds by the international financial institutions and other multinational donors towards the mitigation of the effects of structural adjustment programs to the 'vulnerable' categories of people in the affected communities. In addition, the establishment of the World Bank Inspection Panel, though not specifically for the resolution of the effects of structural adjustment programs, constitutes a fundamental response to important issues of the right to participation in development and the need to

⁷⁷ See Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT'L L.J. 81 (1993), in which he argues that the law of the IMF is considered to constitute soft rules of international law, meaning that "either failure to observe it or observing it cannot, by itself, be dispositive of legal effects".

enhance the accountability and credibility of the World Bank to peoples of the member states.

A. The Social Dimensions of Adjustment Program

The "Social Dimensions of Adjustment" program in Africa aims at reducing the negative social consequences of structural adjustment. Its purpose is to shield the poor from the full impact of the cost of adjustment. The Bank thus [re-introduced] poverty-alleviation concerns into its work. This provides some redress for the harm caused by its own policies.⁷⁸

In formulating the social safety net programs, the World Bank hopes to ameliorate the adverse effects of adjustment on the vulnerable poor populations of reforming countries without deflating the thrust of economic reform and institutionalization of market economies. The objective pursued in these programs is negotiation between market led growth and poverty reduction.⁷⁹ The programs are guided by the realization that, "adjustment programs in Sub-Saharan Africa cannot be sustainable over the long term unless and until poor and vulnerable socio-economic groups can fully participate in the emerging economic opportunities brought about by adjustment".⁸⁰

Although the Social Dimensions of Adjustment Program is broad in its scope, the formulation of social safety nets is premised on the understanding that only the poorest of the poor need life supporting protection from the effects of adjustment. Care must therefore be exercised to ensure no slippage of benefits intended for the poor to the

⁷⁸ KATRINA TOMASEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS REVISIT*, 67 (1993). The Social Dimensions of Adjustment Program was launched in 1987 by the United Nations Development Program (UNDP) Regional Program for Africa, and the African Development Bank with the World Bank as the executing agency. JAMES F. LEVISON, *ADDRESSING MALNUTRITION IN AFRICA: LOW-COST PROGRAM POSSIBILITIES FOR GOVERNMENT AGENCIES AND DONORS* (1991)

⁷⁹ WORLD BANK, *THE SOCIAL DIMENSIONS OF ADJUSTMENT IN AFRICA: A POLICY AGENDA* 8 (1990).

⁸⁰ *Id.* at 23. The following strategies are recommended for social dimensions interventions: (a) Investing in human capital through nutrition, health, and education programs; (b) Increasing productive assets to which the poor have access in order to place them on upward income escalators; (c) Raising the return on these assets through changes in relative prices; (d) Promoting wage employment and reducing labor market impediments to employment for youth, women, and minorities; (e) Empowering the poor to expand their economic and social participating through community based projects. *Id.* at 7.

non-poor.⁸¹ Thus for example, food subsidies, otherwise withdrawn for other foodstuff, are placed on unrefined maize or grain considered to be largely consumed by the poor. However, not all essential foods can be categorized as refined or unrefined, though it is possible to categorize items as luxurious or not luxurious.

The World Bank admits the importance of strengthening public expenditure programs benefiting the poor, particularly those for the delivery of basic services, but insists that not all categories of public expenditure programs need protection. Protection should be accorded only when necessary – at the point when the balance tips to cause adverse effects. To intervene before this point, the World Bank argues, would lead to inefficiency and regression.⁸² In the same breath however, the World Bank also encourages investments from which social returns are the highest such as education and basic health care.

The World Bank has also set up social safety net measures to mitigate the plight of retrenched public sector workers in the reform process. The Kenya government had in the late eighties set up early retirement programs under which employees who retired voluntarily were given a 'golden handshake' – a money package intended to serve as an incentive for early retirement and to help the retiring worker to enter the private sector. The World Bank now views such schemes, including strict retirement age regulations, as inefficient. Instead, the World Bank favors the retrenchment of young workers who, in any event it argues, may not be as valuable to the public sector as the older experienced employees. Voluntary retirements are now also not encouraged because they risk the exodus of the most qualified personnel. Since the young workers are presumed to be more politically vocal, severance packages are given to them to ease their acceptance of redundancy. Enhancement of severance packages through the imputation of value to other allowances such as housing and medical insurance is also encouraged, particularly in circumstances where the ratio of salary levels to allowances is low.⁸³ In some instances, retraining of workers declared redundant has been

⁸¹ WORLD BANK, *ADJUSTMENT IN AFRICA: REFORMS, RESULTS, AND THE ROAD AHEAD* (1993).

⁸² *Id.*

⁸³ WORLD BANK, *FINANCING ADJUSTMENT WITH GROWTH IN SUB-SAHARAN AFRICA, 1986-1990*, at 21 (1986).

recommended despite the fact that thousands of already trained workers and professionals remain unemployed.

The mechanism of social safety nets has several shortcomings, the most fundamental of which is that it often has not gone beyond mere rhetoric. Since the international financial institutions have their minds set on the adjustment, no matter the social cost, the best that has been done is to formulate, not necessarily implement, social safety nets. Thus, even in the face of widespread human suffering, the World Bank has relentlessly stated that the road ahead for adjustment in Africa is clear:

Continue with the macro-economic reforms, complete the trade and agricultural sector reforms, restructure public finances, and provide an environment conducive to private production and provision of goods and services.⁸⁴

The social safety nets approach has been described, for good reason, as a fig leaf, designed by the World Bank to deflect criticism while basically continuing with the same approach.⁸⁵ The approach offers temporary relief while assuming, questionably, that structural adjustment programs when fully implemented, will bring permanent solutions to the difficult issues ensuing from privatization of government enterprises, trade liberalization, deregulation, and rationalization of government expenditure. These issues include inequality, massive unemployment, food shortages, disease, illiteracy, and loss of land and property.

Implementing the social safety nets requires government funds. This points to a contradiction: the creation of social safety nets calls for further external aid and assistance. Why should government expenditure on basic services be cut down, only for the government to take loans to establish social safety nets? Moreover, external aid is scarce and often an inadequate resource to create sufficient social safety net programs. The inadequacy may be attributed to the fact that the Social Dimensions of Adjustment Programs are not formulated as part of the structural adjustment programs, but as external solutions to

⁸⁴ WORLD BANK, *ADJUSTMENT IN AFRICA*, *supra* note 81, at 219.

⁸⁵ Barati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda* 19 HUM. RTS. Q. 630, 646 (1997).

mop up after them, and therefore do not form an important aspect of the structural adjustment budget. Consequently, unless structural adjustment programs, and indeed all other subsequent economic policies, are specifically redefined and formulated to include human rights concerns, it will be difficult to guarantee protection of these rights.⁸⁶ The resources needed to cater for the cost of adjustment must be ascertained beforehand, and their cost must be worked into the design of economic policies.

The problems that caused the debt crisis, such as mismanagement of development aid, have not been addressed in any direct or substantial way. Thus, even though financial assistance may be created for the formulation of 'safety nets', there is no guarantee that the funds will be utilized for the benefit of the so-called vulnerable groups. It is imperative that economic reform is defined to take into account the social and political context which, in the case of Kenya, may be characterized by lack of accountability on the part of government officials to ensure the benefits of the social safety nets reach those for whom they are intended. The importance of popular involvement in governance and economic development projects becomes in these circumstances indispensable.

If human development is to be achieved as part of economic growth, a strong public sector mechanism for the provision of basic utilities, such as a working infrastructure and life sustaining imperatives such as health, education, agricultural support services, sanitation, clean water shelter and a healthy environment, are indispensable. By providing social safety nets in the place of a long-term investment, the international financial institutions are weakening the foundation upon which human development and economic growth depends. This constitutes an inverted conception of the needs of a developing nation.⁸⁷

The formulation of social safety nets was based on the assumption that the need to address the adverse effects of structural adjustment programs would be temporary. Sooner rather than later, the results of macroeconomic reform would be manifested in economic growth and

⁸⁶ *Id.* at 645: "Given the reality of long term social deterioration and poverty consequences of SAPS, there is now increasing concern with the need to integrate social variables into policy analysis at the time the loans are negotiated."

⁸⁷ *Id.*

improved standards of living. It has, however, become abundantly clear that the change in the economic circumstances of the reforming States will take a longer period of time to achieve. Social Dimensions of Adjustment Program should therefore have more long term, if not permanent, solutions to the adverse effects of structural adjustment programs than currently contained in the social safety nets.

B. The World Bank Inspection Panel

The World Bank Inspection Panel was established in response to demands for greater accountability, transparency and disclosure to the public of information regarding the operations of the Bank.⁸⁸ It was created at a time of increased discontent with the Bank's operations. This discontent was expressed by United Nations, member states and non-governmental organizations, with some states threatening to withhold part of their assessed contributions to the United Nations unless an independent inspector general's office was set up to monitor the activities of the Bank. The sense of discontent particularly arose over the environmental and social impact of projects funded by the Bank, some of which had resulted in mass displacement of communities and severe environmental degradation.⁸⁹ Most exceptionally, the United States made an amendment to the International Financial Institutions Act requiring that beginning December 1991, its executive director at the World Bank would refrain from voting in favor of any action that would have a significant effect on the human environment unless an environmental impact assessment had been made available to the Bank, affected groups and local non-governmental organizations "at least 120 days before the date of the vote".⁹⁰ The Bank sought, through its own internal

⁸⁸ The Panel was established by a resolution of the board of executive directors, IBRD Resolution No.93-10, and the identical IDA Resolution No.93-6. For a concise summary of the history and operations of the Panel, see IBRHIN I.F. SHIHATA, *THE WORLD BANK INSPECTION PANEL* 2-3 (1994).

⁸⁹ Among the many accounts made on this discontent are: PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY* (1991), and BRUCE RICH, *MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT* (1994).

⁹⁰ The amendment was effected through the United States 1989 International Development and Finance Act. See Shihata, *Inspection Panel*, *supra* note 88, at 28.

mechanisms to respond positively to these charges of operating without accountability and transparency.⁹¹

The inspection panel faces several limitations. First, the panel does not entertain individual complaints. Its mandate only permits it to examine the Bank's compliance with its own procedures.⁹² The rationale for excluding individual complaints is that allowing them would lead to frequent, frivolous and baseless claims. In any event, it is argued, since the Bank funds projects, it is unlikely that these would affect only one person. Hence, only groups or representative(s) of groups in the territory of the borrower state are eligible to request the inspection procedure. They must show that their rights or interests have been or are likely to be directly, materially and adversely affected by the acts or omissions of the Bank. Inspection can not therefore be requested unless it is shown that the Bank, and not any other party, has failed to follow its operational policies and procedures in carrying out a project.⁹³ Inspection may be requested if the Bank fails to follow up the implementation of a project once it has begun funding it. Inspection cannot, however, be requested if the project has been completed. A project is considered complete when 95% of the loan has been disbursed to the member state or recipient body. The inspection panel is not a judicial, but merely an investigative entity, and it does not, therefore, make any decisions. Its mandate is limited to reporting its findings to the board of executive directors of the Bank for necessary action.⁹⁴

An important question for our purposes is whether claims of violations of human rights through the implementation of structural adjustment programs may be brought before the inspection panel. Most of the inspections that have been carried out by the panel so far have involved investment projects. However in 1996, a group of citizens in Bangladesh, who were shareholders/chief executive officers of private sector jute mills, made a request for inspection with regard

⁹¹ *Id.* at 36. The Panel's stated objective is:

To provide independent judgment that could help resolve major differences in cases where it is asserted that rights and interests of parties are adversely affected because the bank has failed to follow its operating policies and procedures in the design, appraisal and or implementation of bank lending operations.

⁹² *Id.* at 93.

⁹³ *Id.* at 96.

⁹⁴ *Id.* at 98.

to the *Jute Sector Adjustment Credit*, of which they were to be beneficiaries as the sector privatized. Their complaint was that a three-year delay in the implementation of the credit had put several of their mills out of business and threatened others. This complaint, the eighth to be handled by the panel, and the first on adjustment credit, affirmed that the panel had jurisdiction over such projects. The panel did not recommend an inspection into the complaint because the Credit was about to close, a fact that was considered to render purposeless any such recommendation.⁹⁵

The important thing to consider about the possibility of invoking the inspection function on matters pertaining to structural adjustment programs is that, first and foremost, the onus of proof lies with the complainants to show that the Bank has failed to act in accordance with its policies in the implementation of its projects. While it would be difficult to challenge the policies guiding structural adjustment under this procedure, it seems possible and practicable to challenge the implementation and effects of specific projects under structural adjustment measures. A hypothetical case may be land privatization policies that have the potential of leading to mass eviction of communities, or to disinheritance of groups holding communal or indigenous land rights.

The strong involvement of institutions, particularly international financial institutions, suggests that the formulation of laws, policies and regulations that affect individuals and groups, their livelihood and economic well being is no longer the preserve of sovereign states, and neither is the responsibility and accountability arising as a consequence. While the sovereignty of states continues to be negotiated and curtailed ostensibly to secure international peace, prosperity and security, the autonomy of international financial institutions continues to be treated as sacrosanct. This autonomy can only be defended, if at all, in circumstances where the mandate of international financial institutions is narrower, rendering them incapable of streamrolling macroeconomic reforms with heavy human rights implications. This notwithstanding, the heavier weight still rests on states to absorb the shock wrought on human rights conditions by

⁹⁵ Richard E. Bissell, *Current Developments: Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 741, 743 (1997).

the invidious economic reforms imposed by international financial institutions.

IV. Conclusion: A Call to Negotiate Between Efficiency and Justice

Democracy is rarely so obliging as to stop at national borders. The gathering forces of participation are likely to affect all institutions of global governance. They may lead to more democratic decision-making in the World Bank and the IMF and to a strengthened socio-economic role for the UN system. The new demands are for the security of people, not just for the security of nation-states.⁹⁶

Scholars have made three arguments or proposals for promoting the synthesization of human rights with the law of international financial institutions. The first is the amendment of their Articles of Agreement to bridge the gap between the so-called 'political and economic considerations' and to resolve the well exploited interpretation ambiguity. The Articles of Agreement of the European Bank for Reconstruction and Development, which expressly accord an open political mandate and require observance of ideals of democracy, pluralism and market economics as preconditions for financial assistance, serve as a showcase for the possible cohabitation of politics and economics in international finance issues.⁹⁷ However the procedure of writing human rights into the constitutions of international financial institutions would still be incomplete if they failed to be inward as opposed to outward looking.⁹⁸

A second option, and by far the more favored, is the broad interpretation of the Articles of Agreement so as to recognize human rights as part of the economic responsibility of the international

⁹⁶ MAHBUB UL HAQ, *supra* note 1, at 37; David Paul Forsythe, *supra* note 73, at 334.

⁹⁷ Moller, *The World Bank: Human Rights, Democracy and Governance*, 15 NETH. Q. HUM. RTS. 28 (1997). This call has been countered by the argument that the European Bank was created under a different set of circumstances than the World Bank and the political mandate it enjoys is specific to the prevailing conditions at its creation which do not obtain for the latter. These special circumstances are *inter alia* that the European Bank was established to assist in the formation of market economies in Central and East Europe and that its focus is on a more homogenous group of states than the World bank. For a comparative analysis of the constituent agreement, see IBRAHIM I. F. SHIHATA, *THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: A COMPARATIVE ANALYSIS OF THE CONSTITUENT AGREEMENT* (1990).

⁹⁸ This argument is well made by Balakrishnan Rajagopal, *supra* note 77.

financial institutions. The broad interpretation option has found greater favor among scholars because it has been considered very unlikely or difficult to secure the successful amendment of Articles of Agreement which requires a three fifths support of member states.⁹⁹ The weaknesses of the interpretation option have already been discussed. This is because, mainly, interpretation over time has not been consistent and it cannot be relied upon for the protection of human rights. It has been correctly observed that international financial institutions have an aversion to human rights terminology, particularly those construed as 'political', and prefer instead expressions such as 'social assessment'.¹⁰⁰ However, even the developments leading to the broader interpretation of the Articles of Agreement of international financial institutions have scarcely been as a result of the international financial institutions own independent will. Many concerted forces have come into play to influence the elasticity of the interpretation and it is possible that, with increased participation of ordinary people in development, this influence could be carried forward to meaningful fruition without the amendment option being chosen.¹⁰¹

The third argument is that if human rights norms are understood as *jus cogens*, international financial institutions are legally obliged to comply, notwithstanding provisions of their constitutions or the possible narrow interpretation that may be accorded them.¹⁰² *Jus cogens* refers to international law norms that are thought to be so fundamental that they invalidate international law rules drawn from treaty or custom.¹⁰³ Such a peremptory norm presupposes an international public order sufficiently potent to control states (and other non-state actors) that might otherwise establish contrary rules.¹⁰⁴

⁹⁹ Articles of Agreement, World Bank, *supra* note 62.

¹⁰⁰ David Paul Forsythe, *supra* note 73, 334.

¹⁰¹ Moller, *supra* note 97, discusses the difficulties that would attend the amendment option for the purpose of requiring that international financial institutions get influenced by human rights in their lending policies and attempts a formulation of a "weak test" that would be more practical and plausible.

¹⁰² M. Bedjaoui, *The Right to Development and Jus Cogens*, 2 LESOTHO L. J. 93 (1986); Shihata, International Financial Institutions, *supra* note 74, at 35. (Discusses this argument and while acknowledging the supremacy of peremptory norms of international law over the laws governing institutions, states that the decision not to make political or human rights considerations in the functions of international financial institutions does not in any way abridge human rights and would in fact serve to protect them).

¹⁰³ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62 (1999).

¹⁰⁴ *Id.*

A *jus cogens* norm, therefore, is one that "prescribe[s] a certain positive or negative behavior unconditionally...[one that] cannot be derogated from"¹⁰⁵, a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".¹⁰⁶ The danger of following this path lies in the difficulty that human rights in general have encountered in seeking recognition as norms of *jus cogens*. Recognized norms of *jus cogens*, namely those capable of 'pricking the conscience' of humanity, are generally in the order of crimes against humanity such as genocide. This provides too strict and narrow a standard to be helpful in the context of financial institutions.¹⁰⁷

Human rights, whether read or written into the mandate of international financial institutions, require a supervisory, advisory or adjudicative enforcement mechanism. An attempt at this is probably the inspection mandate of the World Bank Inspection Panel. However, the Panel is not a judicial body and does not have authority to pass judgment, make declarations or issue directives in response to complaints lodged with it. It is merely an investigative body.¹⁰⁸ It therefore does not satisfy the search for an institution endowed with enforcement mechanisms, able to obtain specific responses from the World Bank. It has been argued that it would be inappropriate to subject the activities of financial institutions to judicial process as these not only enjoy judicial immunity but have also adopted arbitration as the mode of dispute resolution. Furthermore, it is argued, this weakness is mitigated by the fact that the findings and recommendations of the Panel, together with the decisions of the Executive Directors on such findings, are liable to be made public.¹⁰⁹ While this is probably plausible, the World Bank Inspection Panel, constituted and structured to work within the legal framework of the Bank, can hardly answer to what in ordinary legal parlance is

¹⁰⁵ Verdoss, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571-72 (1937).

¹⁰⁶ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 (1969).

¹⁰⁷ See Hilary Charlesworth, *The Gender of Jus Cogens*, in 15 HUM. RTS. Q. 1, 63-76 (1993).

¹⁰⁸ Shihata, Inspection Panel, *supra* note 88, at 98.

¹⁰⁹ *Id.*

considered an arbitration organ. Its affiliation makes it vulnerable to the "conflicts of interest inherent in the Bank's multiple roles as a development agency, lending institution, debt collector, and representative of developed countries interests".¹¹⁰

In addition, the Bank's mandate is limited to the evaluation of the implementation of Bank policy and does not include the determination of the standing of Bank policy or of the interpretation of Bank mandate as against public international law. Moreover, the fact that a complaint can only be filed for an alleged failure of the Bank to follow its own rules and procedures during the design or appraisal or implementation of a Bank-financed project, is a serious limitation on the mandate of the Inspection Panel for two substantive reasons. First, the Panel can only accept cases that relate to problems in the design or construction of Bank-funded operations. This means that the Inspection Panel is limited only to examining those shortcomings in the implementation of Bank projects according to its (the Bank's) own criteria – rather than the general international obligations embodied, for example, by human rights and environmental standards. Consequently, the Panel can only examine the Bank's compliance with its own operational guidelines.

Second, since the Bank has not adopted a human rights policy within these guidelines, human rights concerns appear to be outside the Panel's mandate. Additionally, the Bank's operational guidelines specify certain criteria such as financial, institutional, technical, sociological, and environmental considerations, which may or may not provide some opportunity to accommodate human rights concerns. This is without mentioning that the Panel's mandate is limited to the World Bank and International Development Association, which excludes the International Monetary Fund and other international financial institutions that may have a mandate affecting human rights.¹¹¹ An independent international enforcement agency would therefore be more useful for the purpose of adjudicating the human rights obligations of international financial institutions.

Cahn, in his analysis of the law-making role of the World Bank and the need to ensure accountability, recommends the formation of a

¹¹⁰ Mason, *supra* note 66, 190.

¹¹¹ Shihata, Inspection Panel, *supra* note 88, at 39.

“watchdog agency to address the problems raised”. He proposes that the agency should have the capacity to “monitor, report on, and intervene in the World Bank lending process”. He designs a watchdog agency that would report to both the taxpayers in developed countries, who underwrite much of the development program, and citizens of developing countries, who bear the heavier burden of failed efforts. The agency would also have consultative mechanisms with participation by the supposed beneficiaries of national adjustment programs and development projects, and an enforcement mechanism empowering it to intervene in and reassess projects and programs with the possibility of restructuring them.¹¹²

Comparing this proposition with the mandate of the World Bank Inspection Panel, there is no shadow of doubt that an independent body, endowed with sufficient enforcement mechanisms, would be better placed to monitor the human rights obligations of the international financial institutions. Yet, the age-old enforcement problem prevalent in international law would undoubtedly haunt this process as well. Nonetheless, the formulation of a watchdog agency would have the advantage of drawing from past experience, and the specific successes that have been achieved in addressing this problem to date.

Because reliance on international enforcement mechanisms is likely, at best, to result in haphazard and inadequate responses to the human rights violations that result from the economic policies of international financial institutions, measures that provide better protection for human rights at the domestic level are imperative. I believe that it is essential that the Constitution of Kenya protects social and economic rights. There are two important advantages in taking this course. First, the wasteful state and individual plunder that have drained the economy, aggravated the debt crisis and created huge disparities between the rich and the poor, would no longer go unquestioned under the law. Even while admitting that laws have a greater propensity to serve the interests of the privileged before or instead of those of the less privileged¹¹³, laws once spelt out can have a

¹¹² Jonathan Cahn, *supra* note 50.

¹¹³ D. Trubek, & M. Galanter, *Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062.

life of their own and have the potential to out-do powerful interests to embrace justice. Second, too often economists and lawyers tend to speak conflicting languages:

Economists have been reluctant to commit themselves to this type of thinking: for them justice is a notion that defies scientific analysis and also there is the problem of setting up a social welfare function which is inconsistent with the efficiency assumptions which as we have seen, are central to their thinking.¹¹⁴

The law and economics school attempts to inform law making with neoclassical economics sense.¹¹⁵ The analysis made here would suggest a less instrumental use of law and an approach that answers to the exigencies of the circumstances and brings economics and law together to yield economic justice. Legal provisions for social and economic rights would be the product of this intercourse.

In thinking about the challenges of treading the path of economic justice, I find Anthony Marx's *Making Race and Nation*¹¹⁶ and Barrington Moore's *Social Origins of Democracy and Dictatorship*¹¹⁷ quite instructive, though of course they could be read in many different ways. Both describe the set of circumstances and the nature of interests that have conglomerated to change the course of history. The intensity of the South African anti-apartheid movement, like the resilience leading to the 'myth of racial democracy' in Brazil, were programmed by the level of formally institutionalized injustice and oppression. Moore traces the rise of communism to peasant revolution, clearly defining the dangers of economic oppression of one group by another. The rise of democratic societies in England and America is attributed to the rise of a powerful working class and that of fascism to the pervasive reign of the ruling class.

While both these authors present historical accounts of considerable periods, macroeconomic reform programs present to us

¹¹⁴ DENNIS LLOYD BARON, INTRODUCTION TO JURISPRUDENCE 376 (5th ed. 1985).

¹¹⁵ See Duncan Kennedy, *Law and Economics from a Critical Legal Studies Approach* in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 465 (Peter K Newman ed., 1998); Kerry Rittich, *Recharacterizing Restructuring* (1998) (unpublished S.J.D. Dissertation, Harvard Law School).

¹¹⁶ ANTHONY MARX, MAKING RACE AND NATION, A COMPARISON OF SOUTH AFRICA, THE UNITED STATES AND BRAZIL (1998).

¹¹⁷ BARRINGTON MOORE, THE SOCIAL ORIGINS OF Dictatorship and Democracy: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD (1966).

immediate problems. If history is to be of importance to us in dealing with these problems, it is to indicate that the negotiation between state and market, efficiency and justice, private and public is inevitable. It is from this premise that I would consider the incorporation of economic, social and cultural rights in the South African constitution a major achievement and would recommend the same for the Kenyan constitutional reform process. Hard line opposition, such as that taken by Sunstein, should be negotiated:

Some positive rights establish government interference with free markets as a constitutional obligation. For countries that are trying to create market economies, this is perverse. A constitution that prevents the operation of free labor markets may defeat current aspirations in Eastern Europe...With constitutional rights, as with much else, less may be more. A constitution that purports to guarantee a decent society may, in the process, guarantee nothing at all.¹¹⁸

After confronting the economics-justice stand off we find that we are beset by the legal challenge that social, economic and cultural rights are non-justiciable.¹¹⁹ The challenge of non-justiciability implies that writing these rights into the constitution would adversely affect the importance and significance of the promises of a constitutional document that a government must fulfill to its citizens. In addition, the respect owed to the courts would be eroded if they were required to adjudicate over rights that they would not enforce. The difficulty of enforcing economic, social and cultural rights as against the state emanates from the possible lack of sufficient or any resources to provide these rights. Moreover, even though it might be possible to prove that the State has sufficient resources to provide these rights to those deprived of them, it has been considered improper for the

¹¹⁸ Carl Sunstein, *Against Positive Rights: Why Social and Economic Rights don't Belong in the New Constitution of Post-Communist Europe*, 2 E. EUR. CONST. REV. 35 (1993). It is even arguable whether this stance reflects the United States position in view of the two famous cases of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *United States v. Darby*, 312 U.S. 100 (1941) upholding as constitutional the National Labor Relations Act and the Fair Labor Standard Act of 1938 respectively.

¹¹⁹ Steiner, *supra* note 33, at 298-306. See also Sunstein, *id.*

judiciary to interfere with government budgetary allocations, this being the province of the legislature.¹²⁰

The claim of non-justiciability of economic, social and cultural rights refuses to acknowledge that within market economies, governments collect taxes to provide public goods and perform welfare functions as a matter of their responsibility. Making written provisions on these rights would only be a short list of the range of functions that governments should perform. The quest for economic, social and cultural rights therefore transcends political ideology. It refuses attempts to be attributed to socialism and communism. Also, if the test of justiciability is whether governments can be confronted with negative rights requiring them to desist from doing one thing or another, then political and civil rights cannot pass the test. The list of political and civil rights that governments both in the North and South continue to flout is endless.

Practice has challenged theory on difficulties of the justiciability argument. The Indian Constitution has been interpreted by the judiciary to include economic and social rights in its provision for the right to life.¹²¹ The South African Constitution has made express provisions requiring the government to take up the challenge of steering toward economic, social and cultural guarantees that were, for a long time, suppressed under the apartheid regime.¹²² Institutional support for constitutional democracy has been created with a specific mandate to ensure the realization of social, economic and cultural rights. In addition, regional human rights institutions, such as the European Commission on Human Rights have adjudicated individual claims of economic and social rights.¹²³ This has been done even though the concerned States have a liberal market or mixed economy.

¹²⁰ The South African Constitutional Court faced this limitation in the *Soobramoney Case*, *infra* note 122, in which it decided a claim for the right not to be denied emergency medical treatment, guaranteed under the South African Constitution.

¹²¹ See Steiner, *supra* note 33, at 306.

¹²² In a number of key provisions, the South African Constitution guarantees social and economic rights. Most notably Section 26 guarantees the right to adequate housing while Section 27 makes provision for the right of access to health care services, including reproductive health care, sufficient food and water, social security and social assistance. The South African Constitutional Court has, further, given generous interpretations to these provisions. See, for example, the celebrated case of *Thagraj Soobramoney v Minister of Health (Kwa Zulu-Natal)* Case CCT 32/97, (unreported) where the Court affirmed the right to emergency medical treatment in circumstances of scarce resources.

¹²³ Casese, *supra* note 56.

This essay has been an attempt to negotiate between the two polarized economic policy prescriptions in mainstream development scholarship. The first is that held by the Post-independent State in Kenya as in most other developing countries before 1970, which is one of heavy government presence in the marketplace to regulate the pace and direction of investment, trade and growth. With time, this led to egregious inefficiency, demoralized civil service and stunted growth caused by lack of political space and lack of incentives to invest. Since this economic vision was marked by severe protectionism to cushion national industries from competition and was informed by import substitution philosophy often funded by loans from multilateral agencies and foreign governments, it led to crushing debt burdens on the developing countries. This ushered in the second economic prescription: That of the international financial institutions especially in the post-1970 period. This is marked by an excessive prejudice against State participation in the development process and an almost dogmatic bias in favor of foreign creditors, 'free' trade and foreign investment no matter the consequences. This vision dictates that whenever there is an economic problem, the government is the cause – and the market is the solution. The structural adjustment programs imposed by the international financial institutions on the developing countries to 'rescue' their economies, therefore, is in the form of a uniform prescription: cut government spending on health and education, raise taxes and liberalize the rules for foreign investment and trade. The result has been that while the developing countries urgently need to increase spending on health care, education and sanitation, structural adjustment programs have forced such countries to reduce such spending. I have here impugned the propriety of international financial institutions to manage and direct the economic policies of developing countries in light of the human rights obligations of States to their citizenry. This is in view of the fact that the international financial institutions have often literally dictated economic policies whose effects have been to grossly violate the human rights of the citizens of developing countries. In the ultimate, I suggest that there is an urgent need to re-evaluate the efficacy of structural adjustment programs in view of the human costs that they have exacted. While I urged that international financial institutions

should be obligated by one of three formulations to incorporate human rights in their economic prescriptions to developing countries as a way of giving structural adjustment programs a 'human face', I expressed general skepticism that this is likely to occur soon. In any event, most of those whose rights are most adversely affected by the structural adjustment programs are the weak sectors in the society: The poor, women, children and pastoralists who are the "perennial losers in the political struggle"¹²⁴ and who do not have sufficient political influence to lobby the international financial institutions through their governments. I therefore end with a proposal that would, in effect, compel the State to take human rights including social and economic rights seriously – and which might involve not only the curbing of the mindless plunder of public resources currently taking place and encouraged by a corrupt and rent-seeking ubiquitous State, but also encourage a re-negotiation and/or rejection of structural adjustment programs with the international financial institutions. This is the writing of the economic and social rights in to the Bill of Rights in the Constitution – by no means an entirely radical step – but still a significant step in the right direction.

¹²⁴ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1454 (2^d ed. 1988).

