

HUMAN RIGHTS ACCOUNTABILITY OF THE IMF AND THE WORLD
BANK: A CRITIQUE OF EXISTING MECHANISMS AND ARTICULATION
OF A THEORY OF HORIZONTAL ACCOUNTABILITY

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(2004). The author would like to thank Professor David W. Kennedy, Anu Piilola and
Jane Fair Bestor for their valuable guidance in the course of writing this article.

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I. INTRODUCTION

Recent years have seen a remarkable expansion in the economic and political power of non-state actors in both domestic and international settings. The increase in private power at the municipal level in the form of corporations and other associations is surpassed only by the increase in power of international intergovernmental organisations like the International Monetary Fund,¹ the International Bank for Reconstruction and Development,² and transnational corporations³ at the international level.

While there exists literature to support the idea of coercion even in the exercise of private power,⁴ public power as comprised in the state and state agencies is by definition coercive. Societies governed by the 'Rule of Law' recognise the need for restraint of power. In the case of ordinary private power this translates into a need for regulation,⁵ while in the case of coercive public power it translates into a need for accountability.

In this article, I describe the World Bank and the IMF's coercive use of the conditionality arrangement in determining the fiscal and monetary policies and shaping the development decisions of debtor

¹ Hereinafter the IMF. The IMF's role as 'lender of last resort' to bail out countries in situations of crises has made it a permanent part of life in the developing world. JOSEPH E. STIGLITZ, *GLOBALISATION AND ITS DISCONTENTS* 14 (2002).

² Hereinafter the World Bank. The World Bank's position as the pre-eminent creditor for developing countries enables it to exercise considerable leverage over countries. In the fiscal year 1999 alone, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) collectively extended capital commitments amounting to US\$29 billion. The overwhelming majority of these capital commitments went to developing States. John D. Ciorciari, *The lawful scope of human rights criteria in World Bank credit decisions: An interpretive analysis of the IBRD And IDA Articles Of Agreement*, 33 CORNELL INT'L L.J. 331, 332 (2000).

³ The immense power of these multinational corporations is evident from a comparison between the economic wealth generated by corporations, measured by sales as compared with a country's gross GDP. For example, 'the combined revenues of just General Motors and Ford...exceed the combined GDP for all of sub-Saharan Africa and fifty one of the largest one hundred economies are corporations.' WORLD BANK, *WORLD DEVELOPMENT REPORT 1996* (1997).

⁴ Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003). The authors describe how situational factors affect supposedly consensual actions. They also describe 'deep capture' of government regulation as an instance of exercise of coercive power by certain private actors.

⁵ This explains the need for antitrust regulation to prevent the creation of monopolies, and for holding contracts unenforceable on such grounds as duress and unconscionability.

countries as constituting not an expansion but, in fact, a transfer of 'public decision making' power from states to these non-state actors. Given the acknowledgement of the role of coercion even in democratic states⁶, it is evident that the actions of intergovernmental organisations like the World Bank and the IMF, which are independent of states, have a significant coercive impact on the lives of the people within these developing countries. When such coercion results in severe deprivation of basic human rights, the need for accountability becomes imperative.

Before I proceed further, I would like to explain what I mean when I talk of accountability of the World Bank and the IMF. Accountability is a concept that has traditionally meant the answerability of someone who performs a duty or who works in an official capacity.⁷ In the context of international intergovernmental organisations, which undeniably are part of the international superstructure over the state, there is only indirect accountability to individuals. This is because most of these organisations merely monitor state behaviour and facilitate international regulation; they do not exercise public power over individuals directly. That as I will demonstrate in this article is not the case with the World Bank and the IMF. My claim is that that these institutions are exercising "governing" power directly over individuals within their member states. The use of such governing power justifies direct human rights accountability of these institutions.

Both institutional and non-institutional mechanisms can be used for establishing direct human rights accountability. Institutional accountability mechanisms include self-regulatory and quasi-independent accountability mechanisms to ensure that both the World Bank's and the IMF's operations and policies are consistent with the human rights of the people. Non-institutional accountability mechanisms on the other hand imply independent human rights accountability at the municipal and international levels.

⁶ Theorists of Deliberative Democracy have argued that well-functioning democracies involve a significant amount of coercion primarily to take action against the *status quo* when conflicts cannot be settled by deliberation. Democracies, however, constrain their coercive power through institutional safeguards of individual rights and 'Rule of Law' as well as through viable formal and informal opposition. Attempts to legitimise the use of coercion have relied upon claims of direct and indirect hypothetical consent, appeals to substantive justice, etc. Jane Mansbridge, *Using Power/Fighting Power: The Polity, in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 47-48 (Seyla Benhabib ed., 1996).

⁷ See, e.g., Wikipedia definition of "Accountability," at <http://en.wikipedia.org/wiki/Accountability> (last visited Apr. 27, 2006).

The importance of international human rights accountability must be understood in the context of the increasing power of non-state actors (in general, and that of the World Bank and the IMF in particular) as presenting a normative challenge to the existing vision of international law today as being primarily a vertical order that governs the rights and obligations of sovereign states.⁸ Hitherto states have been perceived as the only major sources of power in the international realm. The increasing power of non-state actors challenges us to rethink the international human rights arrangement, which is the only realm where international law directly protects individuals against political absolutism and state power.⁹ Today, when power has both expanded and in some measure shifted from state to non-state actors, there is a need to expand international human rights protection against these other actors.

The argument for international human rights accountability of the World Bank and the IMF is not new, and various scholarly attempts have been made to establish direct international human rights accountability.¹⁰ Perhaps the most comprehensive analysis has been

⁸ INTERNATIONAL LAW: CASES AND MATERIALS 2, 3 (Louis Henkin et al. eds., 4th ed. 2001) [hereinafter DHPSS]. This widely used textbook starts with the idea that the international system is an inter-state system. While the state is recognized as an increasingly artificial category in public international law, international law still remains the law of nations. The difference now is that contact exists not just at the top but throughout the length and breadth of the pyramids. *See also*, PHILIP C JESSUP, THE FUNCTIONAL APPROACH AS APPLIED TO INTERNATIONAL LAW (1928).

⁹ Arts. 55 and 56 of the United Nations Charter, 1945 impose upon the United Nations and its members legal obligations to promote respect for and observance of human rights. *See*, UNITED NATIONS CHARTER, signed June 26, 1945, 59 Stat. 1031, T.S. 993 (entered into force Oct. 24, 1945) [hereinafter UN Charter]. The Universal Declaration on Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), 3 U.N. GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948) reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter UDHR], followed by various multilateral and regional human rights treaties, has established the view that customary international law status prohibits at a minimum violation of any of the rights set out in the UDHR. HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 408 (1973); LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518-520 (1973).

¹⁰ There are those who argue that those human rights that constitute *erga omnes* obligations, bind all non-state actors. Ciociari, *supra* note 2, at 357. There are others who argue that States that are members of these institutions and are also party to the various human rights treaties have an obligation to seek implementation of these treaties not only in their bilateral relations with other parties, but also through their actions in international organisations. This in turn imposes an indirect obligation upon the World Bank and the IMF to comply with human rights norms while implementing their policies and projects. *See*, Francois Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund* (2002),

made by Sigrun Skogly.¹¹ Skogly elaborately examines the international legal personality of the World Bank and the IMF and concludes that as international legal persons, they are bound by rules of public international law.¹² She argues further that since human rights law is part of customary international law, the World Bank and the IMF are bound to comply with international human rights law even when it conflicts with their internal mandate.¹³ This argument is convincing inasmuch as it applies customary international law norms directly to the World Bank and the IMF because of their status as international legal persons. However, it does not necessarily follow from this argument that customary international human rights law binds these international institutions. The reason is because, *pace* Skogly, international law is not an undifferentiated body of law, but rather it is an area of law comprised of various subfields that have their own internally evolved conventions regarding scope and application.¹⁴ In the case of customary international human rights law, as evolved and presently understood, such law affords protection only against states.¹⁵ Therefore, a field-specific justification must be provided for the application of customary international human rights law to non-state entities. My paper provides such a justification, and hence

<http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> (last visited Apr. 27, 2006).

¹¹ SIGRUN SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE IMF* 78-105 (2001).

¹² *Id.*

¹³ *Id.* at 80.

¹⁴ Most subfields of international law only bind States even though the effectuation of their rules in municipal law invariably affects the activities of private entities like individuals and corporations. Examples of this include international economic law, international human rights law and international environmental law. On the other hand international criminal law is directly applicable to individuals, and the law relating to international institutions governs the activities of international institutions.

¹⁵ The Preamble to the UDHR imposes an obligation upon member States to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. Art. 2 of the International Covenant on Civil and Political Rights, 1966, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR], requires each state party to the Covenant to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” Similarly, Art. 2 of the International Covenant on Economic, Social and Cultural Rights, 1966, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR], imposes an obligation upon state parties to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

supplies the missing link to Skogly's argument by articulating the normative framework for the transplantation of the doctrine of 'horizontal application of rights' from the realm of constitutional protection of rights to international human rights.

In its most extensive form, the doctrine of horizontal application of rights allows direct enforcement of constitutional rights against all private parties. In its more common and restricted form, it allows enforcement of such rights against private parties that either in the course of their activities and functions begin to resemble state power or assert private law rights which infringe upon constitutionally guaranteed rights.

There are two schools of thought behind the horizontality thesis. The first comprises those who, in continuation of the legal realist tradition, argue against the assumption of classical liberalism that there exists a pre-political private sphere that precedes the state. The second school comprises those who, while acknowledging the existence of a public-private distinction, argue that with the onset of privatisation there has been a significant blurring of the public and the private sectors and therefore rights should be available against private parties.

In this paper, I examine the existence and prevalence of horizontal application of rights in liberal democratic constitutional orders and argue for its extension to the international level in order to curb the state-like power of non-state actors such as the World Bank and the IMF.

My argument involves five steps. First, I describe the evolving role of the World Bank and the IMF from institutions entrusted with the role of 'monetary cooperation' and assisting/facilitating 'development,' respectively, to institutions engaging substantively in the 'development process' as 'global policy makers' for the debtor states. Next, I examine three kinds of criticisms made against these institutions, namely against their policy prescriptions, against the manner in which they conduct their business, and the nature and extent of their power. These criticisms form the basis of my argument in favoring the need for human rights accountability of these two institutions.

Second, I examine existing institutional accountability mechanisms for the World Bank and the IMF. I discuss measures of self-regulation taken by these institutions in the form of the World Bank's adoption of operational policies and procedures having human rights implications and the IMF's recognition of human rights concerns in its Art 4 consultations with member states. Following an analysis of the effectiveness of these mechanisms, I discuss quasi-independent accountability mechanisms for these institutions such as the World Bank Inspection Panel and the IMF's Independent Evaluation Office.

I demonstrate the inadequacies of these accountability mechanisms to justify the need for non-institutional mechanisms of accountability.

Third, I examine non-institutional mechanisms of accountability at the municipal and international levels. To do this, I first establish that both the World Bank and the IMF possess municipal and international legal personality. Next, I demonstrate the inadequacies of municipal legal accountability as a result of the express immunity provisions in the articles of agreement of these institutions and the doctrine of jurisdictional immunity in international law. Finally, I argue in favour of international human rights accountability of these institutions and describe the attempts that have been made so far to develop this theory of accountability. The incompleteness of the existing theory of international accountability leads me to look to the horizontality thesis to articulate a comprehensive theory of international human rights accountability.

Fourth, I make a normative argument in favour of the application of international human rights law to non-state actors like the World Bank and the IMF based on the doctrine of horizontal application of rights in constitutional law. I justify the need for transplanting a constitutional rights doctrine of accountability to international human rights law by means of an argument about the 'nature' of rights as protection against power. I demonstrate the prevalence and growing popularity of the horizontality doctrine via a comparative constitutional law analysis of this doctrine in various constitutional systems including Ireland, India, South Africa, United Kingdom, Germany and Canada thereby concluding that horizontal application of rights is an accepted doctrine of comparative constitutional law.

Finally, I argue for the normative extension of horizontal application of rights on the international plane to ensure that international human rights law binds the World Bank and the IMF in their activities and operations. I give some preliminary ideas about how rights would be horizontally applied to constrain the actions of the World Bank and the IMF. I conclude by raising certain questions that must be addressed in order to make this model of accountability more meaningful. These questions investigate the possible fora where these rights might be enforced and explore the possibility of extending this doctrine to other intergovernmental organisations and non-state actors.

II. THE IMF AND THE WORLD BANK: THE NEED FOR ACCOUNTABILITY

The World Bank and the IMF were established with very different

mandates. While the World Bank was primarily set up as an institution for the ‘reconstruction and development’ of a war torn Europe¹⁶, the main objective behind the creation of the IMF was to create a permanent institution that would promote international monetary cooperation¹⁷ in the interests of international economic stability¹⁸ that would come to the aid of member countries when they faced short term balance of payments and exchange crises.¹⁹ The World Bank however, has mainly concentrated on the ‘development’ part of its purposes throughout its years of operation.

Initially, the difference between the operations of the World Bank and the IMF was that while the latter gave short term bridge loans in response to a country’s failure to access normal channels of international finance either because of internal policy failures or external changes in the international economy, the World Bank gave long-term loans for financing certain capital-intensive projects like dams, irrigation control for promoting agricultural development, and electricity generation for industry. Yet, over the years the operations of the World Bank and the IMF have largely converged as both institutions have adopted comprehensive policies for promoting economic development in debtor countries.

A. The evolving role of the World Bank and the IMF

1. The World Bank

At the time of accepting membership, each member of the World Bank subscribes shares of the Bank’s capital, and makes certain

¹⁶ World Bank Articles of Agreement art. 1 § 1, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> (last visited Mar. 5, 2006). Art. 1 describes the purposes of the World Bank.

¹⁷ IMF Articles of Agreement art. 1 § i, (entered into force Dec. 27, 1945), available at <http://www.imf.org/external/pubs/ft/aa/aa.pdf>, (last visited Mar. 5, 2006). Art. 1 describes the purposes of the IMF.

¹⁸ IMF Articles of Agreement art. 1 § iii lists amongst the purposes of the IMF the promotion of “exchange stability,” maintenance of “orderly exchange arrangements among members” and avoidance of “competitive exchange depreciation.”

¹⁹ IMF Articles of Agreement art. 1 § v states, “To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with the opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.” See also, Joseph Gold, *The Relationship Between the International Monetary Fund and the World Bank*, 15 CREIGHTON L. REV. 499, 501-02 (1981-82).

payments thereon.²⁰ The World Bank carries out its purposes principally through loan operations.²¹ These loans may be made either to a member of the Bank or to a public or private entity or enterprises within the territory of a member. When the borrower is not a member government, the loan must be fully guaranteed by the member government in whose territory the project to be financed is located.²² Consequently, every lending operation of the Bank leads to a loan or guarantee agreement with a member government. Such agreements generally incorporate by reference standard provisions embodied in so called Loan Regulations, which are adopted by the Bank from time to time. These agreements are entered into in accordance with the World Bank's Articles of Agreement and its Loan and Guarantee Regulations.²³

Until 1968, the Bank had been engaged in purely sectoral lending for projects. But under the leadership of Robert McNamara, who introduced the 'Basic Human Needs' approach, the central focus of the Bank's operations shifted from placing a few selected loans in developing nations to tackling the issue of poverty and other intractable development objectives.²⁴ By the late 1970s, the Bank had assumed the role of providing guidance and implementation for development programmes in developing countries by instituting the Structural Adjustment Loan (SAL) programme.²⁵ In essence, a SAL is granted not to pursue a particular project, but to change national economic policies in a particular desired direction. Once a SAL has been arranged, funds are disbursed over time in a conditional manner,

²⁰ World Bank Articles of Agreement art. 2., available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040600~menuPK:34625~pagePK:34542~piPK:36600~theSitePK:29708,00.html> (last visited Apr. 27, 2006).

²¹ However, the Bank also renders important non-financial services to its members, ranging from economic and financial advice to mediation in such matters as compensation for the nationalisation of the Suez Canal Company and the Indus river water dispute between India and Pakistan. See, ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 10 (1995).

²² World Bank Articles of Agreement art. 3 § 4.

²³ BROCHES, *supra* note 21, at 12.

²⁴ Nicole Wendt, III, *The World Bank and the IMF Respond to Criticisms: Symposium, The E-Book on International Finance and Development*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 165, 170 (1999).

²⁵ Enrique R. Carrasco, *Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System: Can the IMF, World Bank, and the GATT/WTO Promote an Enabling Environment for Social Development*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* i, xii (1996).

depending on the rate of success of the recipient state's economy in making fundamental changes in pre-selected policy areas. The most frequent conditions imposed required improvement of export incentives, reform of the government's budget or taxes, improvement of financial performance of public enterprises, revision of agricultural prices, and strengthening of the state's capacity to formulate and implement public investment programmes.²⁶

As a result of the SAL, countries had to share, if not altogether relinquish, decision-making powers over a vast array of economic policy matters, which had theretofore been considered strictly within the province of independent nations' sovereignty. Even apart from economic policies, the World Bank ventured into territory which had long been the sole domain of borrowing governments such as the size of the public administration apparatus, the organisation of the civil service, and the general structure of the public sector, labour regulations and public investments.²⁷ Under the Bank's integration policy, all Bank policies within a nation were coordinated in order to ensure consistency under the umbrella concept of SAL. In light of growing criticism of the Bank's operations during the 1990s, the Bank adopted the Sustainability Approach, which focusses on poverty, environment, and population control. Under this Approach, however, the Bank has deepened its commitment to SALs by bringing more things under the umbrella of the Comprehensive Development Framework.²⁸

2. The IMF

Each country that is a member of the IMF (currently 184)²⁹ contributes a deposit that is held by the IMF. This 'contribution', which earns interest for the member, is called a quota, the size of which depends on the size of the member country's economy. Each member's quota is expressed in terms of Special Drawing Rights (SDRs), its size being determined by the IMF's Board of Governors.³⁰

²⁶ JAMES CYPHER & JAMES DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 517 (2d ed. 2004) [hereinafter CYPHER & DIETZ].

²⁷ *Id.*

²⁸ *Id.* at 521.

²⁹ Official IMF Website, *The IMF at a Glance*, at <http://www.imf.org/external/np/exr/facts/glance.htm> (as of Apr. 4, 2006).

³⁰ IMF Articles of Agreement art. 3 § 1. The quota in turn determines each member's share of votes. Most IMF decisions require a majority although some major decisions, such as adjusting a country's quota, require 85% majority. IMF Articles of Agreement art. 1 § 2(c).

The quotas are divided up into five tranches that the members can draw on in case of financial need. The members have virtually assured automatic access to a specified initial amount—the gold tranche. The IMF may allow access to other tranches under the IMF's arrangements, though this access is subject to progressively rigorous standards through the IMF's imposition of conditionality on member states. The IMF has instituted at least three arrangements that involve conditionality, including the Stand By Arrangement³¹, the Extended Fund Facility³² and the Poverty Reduction and Growth Facility.³³ Apart from these arrangements, the IMF has recently introduced the Supplemental Reserve Facility in 1997³⁴ and the Contingent Credit Line facility in 1999.³⁵

The purpose of the conditionality is to ensure that IMF resources are provided to members and used by them to resolve their balance of payments problems in a manner that is consistent with the IMF's Articles and in a manner that establishes adequate safeguards for the temporary use of the Fund's resources. Conditionality is also an important element in the IMF's overall strategy of helping members strengthen their social and economic policies.³⁶

³¹ Under the stand-by arrangement (instituted in 1952), the IMF assures a member country that it can draw up to a specified amount of money, usually over twelve to eighteen months, to deal with a short-term balance-of-payments problem. John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521, 527 (2004).

³² The Extended Fund Facility (dating from 1974), allows a member country to draw up to a specified amount over a longer term, usually three or four years. This helps it tackle structural economic problems that are causing weaknesses in its balance of payments. *Id.*

³³ The Poverty Reduction and Growth Facility was introduced in 1999. It replaced the Enhanced Structural Adjustment Facility under which the IMF gives low-interest financing to help the poorest member countries facing protracted balance-of-payments problems. This facility is financed with resources raised through past sales of IMF-owned gold and with loans and grants provided to the IMF for this purpose, mainly by wealthy countries JAMES RAYMOND VREELAND, *THE IMF AND ECONOMIC DEVELOPMENT* 10 (2003).

³⁴ This facility provides additional short-term financing to a member country experiencing exceptional balance-of-payments difficulty because of a sudden and disruptive loss of market confidence reflected in capital outflows. This was the case in the Asian financial crisis of the late 1990s. *See supra* note 31.

³⁵ Under this facility, the IMF provides a precautionary line of defence. This enables a member country pursuing strong economic policies to obtain financing on a short-term basis when faced by a sudden and disruptive loss of market confidence because of contagion from difficulties in other countries. Head, *supra* note 31.

³⁶ IMF Guidelines on Conditionality, available at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf> (last visited Mar. 5, 2006).

Under conditionality, the IMF disburses money to a borrowing country only on a piecemeal basis (rather than in a single lump sum) and only if the country can demonstrate that certain economic and financial policies which the borrowing country's government committed to in advance are in fact being implemented and are having the desired results.³⁷

The IMF also exercises control over member states through surveillance and technical assistance. Although surveillance can take several forms, the most important form is that of country surveillance.³⁸ Under Art. 4, § 3 (b) of the IMF's Articles of Agreement, the IMF conducts regular consultations, normally once a year, with each member country, regarding its economic and financial policies. These consultations typically culminate in the issuance of observations and recommendations by the IMF regarding each member country's economic and financial policy performance. In addition, the IMF undertakes frequent monitoring of economic and financial factors in those countries that have borrowed funds from the IMF. The IMF also engages in technical assistance to help member countries design and implement financial policies (both monetary and fiscal), draft and review legislation, and build institutional capacity.³⁹

B. The use of conditionality as a coercive expression of power

Both the World Bank and the IMF have used their conditionality arrangements to impose a series of measures on the debtor states. The two institutions have also implemented the cross-conditionality arrangement under which nations can only receive SALs if they have stand by arrangements with the IMF and *vice versa*. Skogly has distinguished these imposed measures into economic and political conditionality. Economic conditionality refers to a series of measures designed to enable a recipient country to repay its loans and to overcome the difficulties that made loans necessary in the first place.⁴⁰

³⁷ Clause 11 of the *Guidelines on Conditionality* provides that the IMF will monitor the borrowing country's performance under agreements entered into with the IMF on the basis of prior actions, performance criteria, program and other reviews, and other variables and measures established as structural benchmarks or indicative targets. *Id.*

³⁸ IMF Articles of Agreement art. 4 § 3(a) empowers the IMF to oversee the effective functioning of international monetary system in general as well as each member's compliance with its obligations under Art. 4 § 1. Art. 4 § 3(b) requires each member to furnish the IMF with information necessary for such surveillance, and, to be available for consultations as required by the IMF.

³⁹ *Policy Statement on IMF Technical Assistance, 2001*, at <http://www.imf.org/external/pubs/ft/psta/index.htm> (last visited Mar. 5, 2006).

⁴⁰ Skogly, *supra* note 11, at 23.

These measures include trade liberalisation, abolition of subsidies, devaluation of local currency, privatisation, and reduced public expenditure. Political conditionality has been defined as non-economic conditions that are a prerequisite for receiving loans and credits. Political conditionality seen mainly though not exclusively in the conditions established by the World Bank, includes democratic elections, environmental issues, and the concept of governance.⁴¹

I believe that a distinction between economic and political conditionality is necessarily artificial. The economic measures imposed by the World Bank and the IMF for getting the debtor countries out of poverty and on the path of development reflect one of several competing viewpoints in economic theory⁴², each of which is grounded in a certain political ideology. Therefore, the so-called economic measures are also political.⁴³

There is an extensive body of literature debating the soundness of the measures imposed by the World Bank and the IMF. While there are those who argue that these measures represent neocolonial measures by the West to maintain its hegemony over the developing world,⁴⁴ there are others who defend these measures as economically-sound and characterise the chaotic economic situation in many developing countries as a product of unsound economic policies, rampant corruption and systemic economic inefficiencies.⁴⁵ Traditionally, three kinds of criticisms are presented against the conditionality arrangements of the World Bank and the IMF.

⁴¹ *Id.* at 24.

⁴² The IMF's and the World Bank's approach to economic development is based on the neo liberal theory of economic development that a free market economy independent of internal and external state controls is a precondition for achieving development. This theory, however, represents only one strand of development economics and is often associated with the Far Right.

⁴³ There is growing recognition among scholars that it is difficult to draw a clear distinction between 'politics' and 'economics'. The concept of 'political economy' suggests that the state profoundly influences the outcome of market activities by determining the nature and distribution of property rights as well as the rules governing economic behaviour. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 10 (1987) cited in Herbert V. Morais, *The Globalisation of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 *GEO. WASH. INT'L L. REV.* 71, 90 (2000).

⁴⁴ Joseph E. Stiglitz, *Dealing with Debt: How to reform the Global Financial System*, 25 *HARV. INT'L. REV.* 54 (2003).

⁴⁵ ANNE KRUEGER, *POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* (1993). Krueger uses the insight of public choice theory to argue that the idea of state led development is inherently flawed because of the rent seeking behaviour of individuals and groups that constitute the state.

1. Criticisms directed against policy prescriptions

It is widely argued that the World Bank and the IMF have prescribed economic and financial policies that not only fail to cure, but that in fact lead to a deterioration of aggregate economic conditions in the debtor countries and the entire world economy.⁴⁶

A related criticism is that even if these policies result in improvements in macro-economic indicators, they create social and distributional inequities.⁴⁷ The mandated abstinence from state intervention further accentuates these inequities and creates a vicious cycle of stagnation. Using a one-size-fits-all approach, the structural adjustment policies promoted by the World Bank and the IMF have involved reduction in public expenditures including those on social services like health services,⁴⁸ elimination of subsidies,⁴⁹ restriction of credit, privatisation of state enterprises,⁵⁰ trade liberalisation, devaluation, tax reform, removal of barriers to foreign investment and reduction in wages⁵¹. IMF policies in several instances have been seen to have contributed to the country's problems, undermined meaningful

⁴⁶ Joseph E. Stiglitz, *Whither Reform? Ten Years of Transition in ANNUAL WORLD BANK CONFERENCE ON ECONOMIC DEVELOPMENT 27-56* (B. Pleskovic & J.E. Stiglitz eds., World Bank, Washington, 2000), available at http://www2.gsb.columbia.edu/faculty/jstiglitz/download/1999_4_wither_Reform.pdf (last visited Mar. 5, 2006). Joseph E. Stiglitz, *Failure of the Fund: Rethinking the IMF Response*, 23 HARV. INT'L REV. 14 (2001). Stiglitz argues that some of the IMF's policies actually contributed to instability, in that the IMF's premature call for "capital and financial market liberalization throughout the developing world" has been "a central factor not only behind the most recent set of crises but also behind the instability that has characterized the global market over the past quarter century."

⁴⁷ Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577 (2003).

⁴⁸ For example, in Argentina, reduction of the budget deficit required across the board reductions in primary expenditures including wages, pensions, and purchases of goods and services. *Id.* at 599.

⁴⁹ For instance, following implementation of the structural adjustment program in India, the Public Distribution Scheme which was meant for meeting the food needs of the poorest sections of the population was modified and converted into the Targeted Public Distribution Scheme which restricted the access of this scheme to only the poorest of the poor by changing the eligibility criteria.

⁵⁰ Under the structural adjustment program in Chile, by the 1980s, more than 600 state owned enterprises had been privatized. Walden Bello, *Structural Adjustment Programs: Success for Whom? in THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL 285, 289* (Jerry Mander & Edward Goldsmith eds., 1996).

⁵¹ Carlos Heredia and Mary Purcell, *Structural Adjustment and the Polarisation of Mexican Society. Id.* at 283.

democratic participation, and led to further breakdown of social cohesion.⁵²

While I am ambivalent about the contention that these institutions have intentionally imposed disastrous economic policies on the debtor states, I agree with the criticisms made insofar as they berate the World Bank and the IMF for their callous disregard of the individual circumstances of each debtor state in imposing one-size-fits-all policies and for their unquestioned devotion to a particular politico-economic theory of development that has over the years failed to create development in a majority of the debtor states. For the purposes of my article, this critique is particularly useful inasmuch as it demonstrates how the combined effects of the measures imposed, by exacerbating poverty and unemployment have led people to a state of destitution, thereby violating their human rights to food and an adequate means of livelihood.⁵³ Moreover, the large-scale displacements of people without effective rehabilitation under various projects funded by the Bretton Woods twins have violated people's rights to freedom of residence⁵⁴ and housing.⁵⁵ Policies advocating a roll-back of subsidies

⁵² It is argued that privatisation in Russia has not resulted in an effective market economy, and has in fact increased inequality without any compensating increase in productivity or wealth. Rather than providing incentives for wealth creation, it provided incentives for asset stripping with huge movements of private capital abroad. Moreover, the way that privatisation was carried out resulted in media concentrations that undermined the viability of broad, informed public participation. Joseph E. Stiglitz, *Participation and Development: Perspectives from the Comprehensive Development Paradigm in DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT: AN ASIAN PERSPECTIVE* (Farukh Iqbal & Jong-II You eds., 2001).

⁵³ Art. 23(1) of the UDHR guarantees to all people the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Art 6 of the ICESCR imposes an obligation upon States to take appropriate steps to safeguard the right to work, including the right of everyone to the opportunity to gain their living by work, which he freely chooses or accepts.

⁵⁴ Art. 13(1) of the UDHR provides everyone with the right to freedom of movement and residence within the borders of each state. Art. 12(1) of the ICCPR provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." The construction of large-scale dams like the Sardar Sarovar Project in India and the Arun III project in Nepal has caused displacement of the indigenous population without effective rehabilitation.

⁵⁵ Art. 11(1) of the ICESCR provides,

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential

and an elimination of social security benefits have violated people's rights to an adequate standard of living⁵⁶ and social security⁵⁷.

2. Criticisms directed against the manner of operation of the World Bank and the IMF

These criticisms focus attention on the lack of transparency and the democratic deficit inherent in the IMF's operations. The hypocrisy of the two institutions is highlighted when they are witnessed carrying out their operations in secrecy even as they insist on transparent governance in imposing conditionalities upon their members. The IMF in particular enters into discussions with its member states with its views of the country's economy and policy proposals already decided and with limited willingness to make adjustments to these proposals. This practice not only contradicts the principles of participation and the need for transparent governance procedures that the IMF preaches to its member states, but the resulting lack of relevant information creates unresponsive policies that worsen conditions instead of bettering them.⁵⁸

The argument relating to 'democratic deficit' is based on the fact that at least in the case of the IMF, the funds are provided by the G-7

importance of international co-operation based on free consent.

In its General Comment 7 on the Implementation of the Right to housing, the Committee on Economic, Social and Cultural Rights has clarified that this includes in particular the right against forced evictions. The Committee has defined 'forced evictions' to mean 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.' In giving instances of forced evictions, the Committee has included 'internal displacement' caused in pursuance of development and infrastructure projects. 149 States are parties to the ICESCR. See, *The Right to Adequate Housing (Art.11.1): Forced Evictions: 20/05/97, CESCR General Comment 7 (General Comments)*, [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument) (last visited Mar. 5, 2006).

⁵⁶ Art. 25 of the UDHR provides,

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

⁵⁷ Art. 9 of the ICESCR provides, "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."

⁵⁸ Daniel D. Bradlow, *Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF*, 94 AM. SOC'Y INT'L L. PROC. 152, 155 (2000).

states and other industrialized countries, yet the policies are imposed on people in the debtor states who have no ability to influence the decision making process. The non-representative and non-transparent decision making process within these institutions violates the right of the people to participate in the governing of their country either directly or through freely chosen representatives.⁵⁹ Further, people in consumer states have no adequate mechanism for holding the IMF accountable for its decisions because the IMF has neither an adequate set of publicly available operating rules that could be used to challenge its actions nor an adequately independent process or entity through which such a challenge could be mounted.⁶⁰ The power of the IMF's Executive Board to interpret the IMF Charter (and hence to judge the legality of its own actions under it) also prevents any formal external accountability or democratic influence. The fact that the chief management of the World Bank and the IMF is selected through a non-transparent, non-representative process enhances the democratic deficit.⁶¹

The democratic deficit and lack of transparency outlined above violate people's civil and political rights to information, representation, and participation in the decision-making process.

3. Criticisms directed against the nature and extent of power of the World Bank and the IMF

It is argued that the policies imposed by the two institutions exceed their mandate⁶² and constitute a diminution of the economic and political independence of the debtor states. The criticism of the

⁵⁹ Art. 21(1) of the UDHR provides, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." Art 21(3) of the UDHR further emphasises, "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Art. 25(a) of the ICCPR guarantees to all people the right, without distinctions, "to take part in the conduct of public affairs, directly or through freely chosen representatives." 152 States are parties to the ICCPR.

⁶⁰ This is discussed in greater detail in the next chapter.

⁶¹ Traditionally, the United States of America appoints the head of the World Bank and the head of the IMF is appointed by the European Union, even though the boards of the two institutions formally make the appointments. Developing countries of Asia, Africa, Latin America and Eastern Europe have no input in appointing the leaders of institutions that exert such tremendous "government" power over them. The recent unilateral nomination of Mr. Wolfowitz by the US President Mr. Bush to head the World Bank aptly demonstrates this democratic deficit.

⁶² Corrado Pirzio-Biroli, *Making Sense of the IMF Conditionality Debate*, 17 J. WORLD TRADE L. 115, 117-118 (1983).

IMF for its “mission creep” must be further understood as constituting a broad heading for two distinct sets of critics. The first comprises those who criticise the Bretton Woods twins for the way they have gone about expanding their mission, rather than criticising the fact that they have chosen to do so. This is a criticism about the direction and content of the mission creep. The second set of critics is comprised of those who oppose any mission creep at all because of its tendency “to politicise the two organisations in ways that will ultimately undermine their efficacy.”⁶³ Defenders of the World Bank and the IMF counter the first argument by stating that the mandate of these institutions is sufficiently broad to allow the arrangements that they have ultimately instituted.⁶⁴ The exquisite vagueness of the mandate of the World Bank and the IMF as contained in their Articles of Agreement shows that there is some merit on both sides of the debate. For this reason, it would be superfluous to enter that debate. In addition, that question has little bearing on the merits of my thesis.

The second criticism under this category focusses on the coercive use of conditionality by the World Bank and the IMF⁶⁵ to mandate, not simple economic measures, but rather long-term structural economic and political changes which amounts to interference in the internal affairs of sovereign states, thereby undermining their political and economic independence.⁶⁶ The response to this second criticism is that member states have the choice to not avail themselves of loans made by these institutions; therefore, any reduction of sovereignty comes with the consent of states themselves. Regarding this second criticism, my claim is that diminution of the sovereignty of member states is, by itself, not a problem. This is because the growth of international

⁶³ Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U KAN. L. REV. 695, 710 (2002).

⁶⁴ Robert Hockett, *From Macro to Micro to "Mission-Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153, 156-57 (2002).

⁶⁵ Mary C. Tsai, *Globalisation and Conditionality: Two Sides of the Sovereignty Coin*, 31 LAW & POL'Y INT'L BUS. 1317, 1318, 1329 (2000). She argues that globalization, conditionality and global economic integration represent a threat to state sovereignty.

⁶⁶ Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 193, 206 (1999). This article recounts in the context of anti-corruption initiatives, the criticisms “that the World Bank and IMF are perpetuating 'new colonialism,' where Western economic and cultural values are imposed upon emerging economies in the name of economic reform at the price of their sovereignty.” See also, GRAHAM BIRD, *IMF LENDING TO DEVELOPING COUNTRIES: ISSUES AND EVIDENCE* 214 (1995).

institutions necessarily involves some cession of power and diminution of sovereignty. My argument however, is that diminution of sovereignty, when related to the coercive exercise of power⁶⁷, creates the need for accountability.

The most important right implicated in the measures taken by the World Bank and the IMF is the right to self-determination which involves the right of all peoples to freely determine their political status and freely pursue their economic, social, and cultural development.⁶⁸ The right to self-determination also includes a people's right to freely dispose of their natural wealth and resources.⁶⁹ Inasmuch as the World Bank and the IMF deprive lawfully elected governments of ownership and control over programmes and policies meant to achieve economic development, the conditionality arrangements imposed by the World Bank and the IMF violate the human right to self-determination.

C. Conclusion

The above discussion reveals the boundless public power being exercised by the World Bank and the IMF and necessitates the demand for their direct human rights accountability. The remaining part of this article is devoted to an exploration of the most effective mechanism for establishing such direct human rights accountability. To this end, I examine both institutional and non-institutional mechanisms of accountability. In the next chapter, I evaluate existing institutional accountability mechanisms for the World Bank and the IMF.

III. INSTITUTIONAL ACCOUNTABILITY OF THE WORLD BANK AND THE IMF

The institutional response of the World Bank and the IMF to demands for greater human accountability was initially that of denial. But as the criticism became more vociferous, the Bretton Woods twins were forced to recognize in some measure the human rights consequences of their policies. But both the World Bank and the IMF expressed their inability to address human rights issues on two grounds. The first ground was that under their constituent documents, they were not empowered to take human rights considerations into account while designing their policies and programmes. The second

⁶⁷ When power is exercised in a non-transparent and non-representative manner, it is necessarily coercive.

⁶⁸ Common art. 1(1) of the ICCPR and the ICESCR.

⁶⁹ Common art. 1(2) of the ICCPR and the ICESCR.

ground was that, in the case of the World Bank, there is an explicit prohibition on interference in the political affairs of any member of the organisation.⁷⁰ The IMF has also interpreted Art. 4 § (3)(b) of its Article of Agreement⁷¹ as prohibiting it from being influenced by political (that is non-economic) considerations in its dealings with its member states. This supposed inability to deal with human rights issues has translated into the two institutions' failure to recognise the human rights consequences of their actions and to deny responsibility for the same.

This argument, however, has not gained acceptance among critics. Indeed, it is hardly convincing for organisations that attach non-economic conditions to their funding that relate to governance, corruption, budgetary allocations, and the relationship between the state and markets, to argue that they are not influenced by social and political considerations.⁷² Further, the two institutions' own inconsistent practice on this issue reduces this argument to mere rhetoric. For instance, there are cases when the IMF has taken human rights into account, like in Indonesia in 1997.⁷³ But there are also occasions when it has not done so, for example, in Mexico in 1994 or in Venezuela in 1989.⁷⁴

Continuous and unceasing criticism of their policies has prompted some efforts by the World Bank and the IMF to devise institutional accountability mechanisms for taking human rights concerns into account. I have classified these measures under the headings of self-regulation and quasi-independent accountability mechanisms.

A. *Self-Regulation*

Self-regulation has been defined as a regulatory activity carried out by specific organisational units in order to avoid or eliminate incorrect behaviour within their internal structures, or within the structures from which they operate.⁷⁵ Thus, self-regulation may occur at the level of standard setting, or at the level of monitoring and

⁷⁰ Skogly, *supra* note 11, at 77.

⁷¹ The provision stipulates that in its surveillance activities, the IMF shall "respect the domestic social and political policies of members and in applying these principles...shall pay due regard to the circumstances of members."

⁷² Bradlow, *supra* note 58, at 157.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Koyn de Feyter, *Self Regulation, in* WORLD BANK, IMF AND HUMAN RIGHTS 79 (Willem van Genugten et al. eds., 2003).

enforcement of standards, or both.⁷⁶

There are both advantages and disadvantages to self-regulation. The advantages of self-regulation include flexibility in the evolution of rules, as well as the revision of rules based on experience and internalisation of rules within the relevant target group, thereby creating a sufficient target base.⁷⁷ But there are also negative effects associated with this. Flexibility may undermine the authority of the relevant external rules, domestic or international, and it may also result in *ad hoc*, selective, and arbitrary revision of rules in pursuit of organisational self-interest, to the complete neglect of external social concerns. In addition, processes or motives leading to the adoption and rejection of internal rules may not be transparent to the outside world.⁷⁸

1. World Bank Operational Policies and Directives

As the World Bank's Articles of Agreement fail to mention human rights, we have to search for the Bank's commitment to human rights in the internal standards of conduct that the Bank has established for itself, namely the operational policies. The World Bank's operational policies are short, focused statements that follow from the Bank's Articles of Agreement and the general conditions and policies approved by the Board. Operational policies (OPs) establish the parameters for the conduct of operations; they also describe the circumstances under which exceptions to policy are permissible and spell out who authorises exceptions.⁷⁹ The World Bank's OPs are supplemented by the Bank Procedures (BPs) and Operational directives (ODs). The BPs explain how Bank staff carry out the policies set out in the OPs by spelling out the procedures and documentation required to ensure Bank wide consistency and quality.⁸⁰ ODs contain a mixture of policies, procedures, and guidance, but are gradually being replaced by OPs/BPs/GPs, which present

⁷⁶ *Id.*

⁷⁷ This advantage of self-regulation manifests itself in cases where the regulatory capacities of the State are limited, and cooperation from the target group is necessary to achieve the desired result. In addition, regulation by the relevant professional group may be more specific than state law approaches, as it draws on expertise that can only be contributed by the participants themselves. *Id.* at 80.

⁷⁸ *Id.* at 81.

⁷⁹ *Operational Manual Definitions*, at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/definitions?OpenPage> (last visited Mar. 5, 2006).

⁸⁰ *Id.*

policies, procedures, and guidance separately.⁸¹

Despite there being no legal impediments to the adoption of an operational policy on a specific topic, an operational policy on Human Rights does not exist.⁸² The World Bank has, however, adopted some OPs and ODs concerned with the human rights implications of its operations. These include OP 4.01 on Environmental Assessment⁸³, OD 4.20 on Indigenous Peoples,⁸⁴ OP 4.12 on Involuntary Resettlement⁸⁵ and BP 4.20 on Gender and Development.⁸⁶ OP 4.01 on Environmental Assessment requires the Bank to undertake environmental screening of each project to ensure that each state has conducted an environmental assessment of the project to ensure protection of the natural environment, human health and safety, and social aspects of development.

It is interesting to note that in OD 4.20 on Indigenous Peoples, while articulating the importance of informed participation of the indigenous people in the development process and ensuring them socially and culturally compatible economic benefits, the World Bank acknowledges that ensuring full respect for human rights for all people in its member countries is part of its broad objective.⁸⁷ OP 4.12,

⁸¹ *Id.*

⁸² However, even if an operational policy is adopted, inevitably the human rights standards would be self-defined. They would predominantly reflect the views of the Bank management and staff, even if an electronic consultation forum for stakeholders is established. Feyter, *supra* note 75, at 96.

⁸³ OP 4.01 on Environmental Assessment, at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/OPolw/9367A2A9D9DAEED38525672C007D0972?OpenDocument> (last visited Mar. 5, 2006).

⁸⁴ OD 4.20 on Indigenous Peoples, at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (last visited Mar. 5, 2006).

⁸⁵ OP 4.12 on Involuntary Resettlement, at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> (last visited Mar. 5, 2006).

⁸⁶ BP 4.20 on Gender and Development., at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> (last visited Mar. 5, 2006).

⁸⁷ OD 4.20 on Indigenous Peoples, para. 3, *supra* note 84.

The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness. More specifically, the objective at the centre of this directive is to ensure that indigenous peoples do not suffer adverse effects due to the development process, particularly from Bank financed projects, and that they receive socially and culturally compatible economic benefits. (emphasis added)

recognising the impoverishment of people caused by involuntary resettlement, requires the Bank to ensure that displaced persons be consulted and be given the opportunity to participate in planning and implementing resettlement programmes as well as assistance in improving or at least achieving the same level of livelihood that they had before displacement.

Several operational policies bind the Bank to insisting or recommending legal or institutional reform, and/or to providing assistance for that purpose. An instance of this is BP 4.20 on Gender and Development, where the bank assists its members to “review and modify legal and regulatory frameworks to improve women’s access to assets and services, and take institutional measures to ensure that legal changes are implemented in actual practice, with due regard to cultural sensitivity.”⁸⁸

In the area of civil and political rights, a number of provisions of the operational policies pertaining to required levels of participation of project-affected groups are relevant. Clauses vary considerably, ranging from general encouragements to actively involving beneficiaries and NGOs⁸⁹ to fairly specific requirements that insist on regular consultations by the borrower.⁹⁰ Similarly, while references to natural resources appear sporadically in the operational policies⁹¹, there is no express right of the people to their natural resources and to control the terms of their exploitation.

The Bank’s operational policies and directives have been criticised for their selective application to a specific group or to a specific issue,

⁸⁸ BP 4.20 on Gender and Development, *supra* note 86.

⁸⁹ OP 4.15 on Poverty Reduction, para. 39 at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/ODirw/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (last visited Mar. 5, 2006).

⁹⁰ OP 4.01 on Environmental Assessment, para. 15, *supra* note 77. See also OD 4.30 on Involuntary resettlement, para. 8, *supra* note 85, and OD 4.20 on Indigenous Peoples, paras. 8 and 14, *supra* note 84.

⁹¹ BP No 4.04 on Natural Habitats, at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/BProw/62B0042EF3FBA64D8525672C007D0773?OpenDocument> (last visited Mar. 17, 2006) recognizes that conservation of natural habitats and precautionary approach to natural resource management by the Bank and the borrowing countries is necessary to ensure environmentally sustainable development. BP No 4.36 on Forests, at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/BProw/0AE075DC916559D985256C79000BDEF0?OpenDocument> (last visited Mar. 5, 2006) requires detailed environmental impact assessment for all projects involving forests, particularly those which involve commercial harvesting and have the potential for conversion or degradation of natural forests or natural habitats with significant adverse environmental impacts.

which creates an *ad hoc* approach to human rights.⁹² Further, the language of these internal policies only exists in the nature of guiding principles, and does not impose a binding obligation upon the Bank to take these interests into account while planning and implementing these measures. At the same time, while a number of operational policies of the Bank refer to the need to cooperate with other international organisations and agencies, human rights organisations are missing. The non-binding Good Practices involving non-governmental organisations in bank-supported activities do not refer to human rights organisations either.⁹³

2. IMF: Art. 4 Consultations with Member States

Under Art. 4 of the IMF's Articles of Agreement, the IMF undertakes regular consultations with member states to ensure that each country is adhering to the Articles of Agreement under which the IMF was established. Yet in reality, the report is really the IMF's grading of the nation's economy.⁹⁴ While initially the focus of these consultations was limited to issues like interest rates, money supply, government debt, inflation, and the current account of the balance of payments, the IMF in the past has been known to engage the member state in discussions of its policies relating to health care, environment, welfare, housing, unemployment, labour markets, military expenditures, and certain aspects of management of the state's public sector.⁹⁵ Thus, it is evident that the IMF does in fact recognise the necessity to engage with international human rights within its mandate. Certainly, as argued by Bradlow, "There is...no obvious reason why the IMF, when it 'descends' into the national policy-making process, should be less accountable to those people affected by its decisions than other actors in this process."⁹⁶

Recently, the IMF has undertaken certain initiatives in an attempt

⁹² Feyter, *supra* note 75, at 98.

⁹³ The absence of references to international human rights law is all the more striking given the presence of references to international environmental law. *Id.* at 99.

⁹⁴ STIGLITZ, *supra* note 1, at 48

⁹⁵ SOCIAL DIMENSIONS OF THE IMF'S POLICY DIALOGUE, (IMF Pamphlet Series No. 47), excerpted in IMF SURVEY, Apr. 3, 1995, at 97 <http://www.imf.org/external/pubs/ft/pam/pam47/pam4701.htm> (last visited Mar. 5, 2006). See also, Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights: Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 70 (1996).

⁹⁶ Bradlow, *supra* note 95, at 156.

to increase participation in decision-making by those affected by its measures. First, the International Monetary and Financial Committee has been given broader authority, thereby providing “greater direct involvement of governments in the policy-making process within the [IMF].”⁹⁷ Secondly, the IMF has introduced the Poverty Reduction Strategy Paper (PRSP) process, a procedure by which written plans for reducing poverty are prepared by low-income countries in a participatory process involving domestic stakeholders and external development partners. These plans are then endorsed by the World Bank and the IMF.⁹⁸

While any attempt at developing institutional accountability for human rights must be welcomed for it enables internalisation of a commitment towards human rights, the attempts at self-regulation made by the World Bank are too *ad hoc*, too piecemeal, and too inadequate to be considered an adequate accountability mechanism. As the IMF persists in its denial mode, it seems to have made even less effort at internalising human rights concerns and therefore a similar, *albeit* stronger, criticism is applicable in its case.

B. *Quasi-independent accountability mechanisms*

By a quasi-independent accountability mechanism I mean bodies set up by an institution to evaluate its policies in order to ensure compliance with its mandate. The advantages of quasi-independent accountability mechanisms are that they provide a semi-independent check on the activities of the institution and they hear grievances from external sources. Their disadvantages stem from the fact that they are only semi-independent because they function within the structure of the institution and their powers are strictly limited by the terms of their mandate.

In this section, I discuss the World Bank Inspection Panel and the IMF’s Independent Evaluation Office as mechanisms that establish quasi-independent accountability for the World Bank and the IMF, respectively.

1. The World Bank Inspection Panel

Established as it was in the light of increasing criticism of the World Bank, which was intensified after the publication of the Morse

⁹⁷ Francois Gianviti, *The Reform of the International Monetary Fund (Conditionality and Surveillance)*, 34 INT’L LAW 107, 115 (2000).

⁹⁸ Head, *supra* note 31, at 561.

Report,⁹⁹ the Inspection Panel process can be triggered by any two or more people living in an area affected by a World Bank project who believe that they have been, or are likely to be, harmed as a result of the Bank's violation of its policies and procedures.¹⁰⁰ Claimants should have already raised their concerns with the Bank staff or management and have failed to receive a satisfactory response. After the panel submits its report,¹⁰¹ the Bank management has six weeks to prepare a report for the Board indicating its recommendations for how to respond to the panel's findings.¹⁰² It is then up to the board to announce what remedial measures, if any, the Bank will undertake.¹⁰³ Though the panel members are appointed by the President of the World Bank and approved by the Board, the requirement that panel members can never again work with the Bank after their appointment and that they cannot have been employees of the Bank up to two years prior to their appointment are factors contributing to the independence of the panel.¹⁰⁴ Nevertheless, the Inspection Panel has failed to provide an effective accountability mechanism for the following reasons:

Limited mandate: The panel can only review Bank compliance with loan agreements and OPs, BPs and ODs, not compliance with Guidelines and Best Practices that are explicitly excluded by the Panel's constituent resolution. The panel is also not competent to establish violations of international law.¹⁰⁵

⁹⁹ The Morse Panel was set up by the Bank in light of the intense campaign by the Narmada Bachao Andolan advocates against the construction of the dam as part of the Sardar Sarovar Projects, to constitute an independent team to review the working of the project. The Panel concluded that the Sardar Sarovar Projects as they stood then were flawed, that resettlement and rehabilitation of all those displaced by those projects was not possible under prevailing circumstances, and that the environmental impacts of those projects had not been properly considered or adequately addressed. The Panel also concluded that the Bank shared responsibility with the borrower for the situation that had developed. See, Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 216-217 (2002).

¹⁰⁰ Inspection Panel, *Panel Operating Procedures*, para. 4 (a), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html#Annexes> (last visited Mar. 5, 2006).

¹⁰¹ *Id.* para. 30.

¹⁰² *Id.* Annex 1: "The World Bank Inspection Panel" Resolution No. 93-10 and Resolution No. IDA 93-6, para. 23.

¹⁰³ *Id.* para. 25.

¹⁰⁴ Dana L. Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 1, 10 (Dana L. Clark et al. eds., 2003).

¹⁰⁵ The Panel thus found that a claim that the Bank violated UN resolutions

Interference by the Bank: A study of the claims brought before the Inspection Panel shows that the Bank's response to the claims tends to be defensive, denying violation of any policies, challenging claimants' eligibility, and in some cases challenging the panel's findings.¹⁰⁶ Panel findings of policy non-compliance and proof of harm have resulted in attempts by both the Bank management and the borrowing countries to obstruct the truth, and discredit the panel's work. Claimants have also been dissatisfied by the presence of bank officials in field visits conducted by the panel.¹⁰⁷

Unequal access to panel procedures: Once claimants file their request for inspection, they largely lose control of the panel process.¹⁰⁸ There is no opportunity for claimants to comment on management's response, nor do claimants have access to information before significant decisions are made about their claim. There is no right for the claimants to appeal either the panel recommendation or the Board's decision about how to respond to their claim. Moreover, once the panel has submitted a final report to the Board, the Bank management has the opportunity to provide recommendations to rectify the policy violations, but the claimants do not have a similar right to suggest remedial measures.¹⁰⁹

Structural obstacles to claim making: Apart from the limited scope of the Panel's jurisdiction and various eligibility hurdles for filing claims, the technical nature of the process also creates methodological hurdles for the panel's operation.¹¹⁰ Another structural constraint is

imposing economic and trade sanctions on South Africa was clearly outside its mandate. *Id.*

¹⁰⁶ Before the second review of the Panel's operations, the Board accepted the Panel's recommendation to investigate only once, in the Arun III case. After that first claim, the board either rejected the Panel's recommendation to investigate or limited the Panel's terms of reference. After initial denials, the Bank management acknowledged the failure to comply with policies in four cases, even though there were fourteen cases in which the Panel found evidence that at least some of the claimants' allegations of policy violations were valid. Management and the World Bank's legal department also routinely challenged the eligibility of claims. And before the second review, in several claims the board accepted borrower and management generated action plans to pre-empt investigations. KAY TREACLE ET AL., *Lessons Learned*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 254 (D. Clark, J. Fox & K. Treacle eds., 2003).

¹⁰⁷ In the first land reform case, the Panel was accompanied by World Bank officials, and in Singrauli, the National Thermal Power Corporation officials were present during the field visit. *Id.* at 268.

¹⁰⁸ Indeed, their only formal point of engagement after filing a claim is to meet with the panel if it comes to the field. *Id.* at 267.

¹⁰⁹ *Id.*

¹¹⁰ The lack of information for local people and the technical nature of the process,

that the panel cannot investigate projects where the loan has been more than 95% disbursed.¹¹¹ “But many problems with projects do not show up until years after funds are disbursed,” thereby leaving large numbers of claimants without a remedy.¹¹²

Exclusion of claims on procedural grounds: The standard of harm excludes claims by people affected by projects where policies may not appear to have been directly violated, but which may nevertheless have negative effects. This is because “claimants are required to link the harm that they have experienced to violations of specific policies.”¹¹³

Limited powers to grant relief: The Panel does not possess any power to order remedial measures once it concludes that there has been a policy violation by the Bank.¹¹⁴ All the “panel can do is to produce a public report with the impartial findings of its investigation. It is up to the Board, after reviewing the panel’s report of its investigations, to announce whether remedial measures will be undertaken.”¹¹⁵ Resistance by borrowing countries, as demonstrated by their objecting to and blocking panel investigations and resentment toward the Bank management’s scrutiny of the panel, which is demonstrated by the Bank management’s tendency to deny policy violations and deny responsibility for problems identified in the claim by shifting the blame on borrower governments, has resulted in widespread failure by the board to take effective remedial measures.¹¹⁶ “One result of the absence of effective solutions has been the resubmission of claims as conditions on the ground have worsened.”¹¹⁷

means that claimants have often relied upon the assistance of experts – national and international NGOs and lawyers. *Id.* at 266.

¹¹¹ The reason behind this is that the Bank ostensibly loses its leverage to influence government implementation, once it no longer controls the finances. *Id.*

¹¹² *Id.* at 267.

¹¹³ In the claim brought on the Lesotho Highlands Water Project, claimants alleged that Black townships of Johannesburg, South Africa, were negatively affected by the project. The main complaint was the dramatic increase in water prices caused by Africa’s largest ever dam project. The claimants argued that the project, and the bank’s technical advice to the South African government, resulted in a distortion of water management policies, and placed a disproportionate cost on poor townships. While expressing sympathy, the panel did not recommend an investigation because it determined that the claimants had not made a link between the conditions that they had complained of and the specific bank policy violations. *Id.* at 267-268.

¹¹⁴ The panel has no power to grant either injunctive relief or compensation to the victims. *See supra* note 100.

¹¹⁵ KAY TREAKLE ET AL., *supra* note 106, at 258.

¹¹⁶ Clark, *supra* note 99, at 218.

¹¹⁷ KAY TREAKLE ET AL., *supra* note 106, at 266.

Due to these limitations, it is hardly surprising that only eleven of the twenty-eight claims filed before the panel have had some positive impact on the project or the institution more broadly. The panel's lack of independence, as demonstrated by the extraordinary amount of power exercised by the Bank management during the filing and processing of claims and the absolute power that the Board exercises in recommending remedial measures, renders the panel rather ineffective as an independent accountability mechanism. The panel is designed to present findings to the board of directors, not to prescribe or oversee the development and implementation of solutions to problems raised by claimants.

2. The IMF Independent Evaluation Office

In response to the "democratic deficit" criticism, the IMF established an Independent Evaluation Office¹¹⁸ in July 2001¹¹⁹ in order to conduct objective and independent assessments of issues of relevance to the mandate of the IMF. The IEO is expected to "enhance the learning culture within the IMF, strengthen the institution's external credibility, promote greater understanding of the IMF's work throughout the membership, and support the Executive Board's institutional governance and oversight responsibilities."¹²⁰

The IEO has already completed several evaluation projects,¹²¹ including an evaluation of the IMF's role in the economic crises in Brazil, Indonesia, and Korea. These reports point out the shortcomings in the IMF's surveillance, understanding and handling of the capital account crises in the three countries, particularly in Indonesia.¹²²

¹¹⁸ Hereinafter the IEO.

¹¹⁹ INTERNATIONAL MONETARY FUND, ANNUAL REPORT 2003 (2003), available at <http://www.imf.org/external/pubs/ft/ar/2003/eng/index.htm> [hereinafter IMF ANNUAL REPORT 2003] (last visited Mar. 5, 2006).

¹²⁰ INTERNATIONAL MONETARY FUND, ANNUAL REPORT 2003 (2003) [hereinafter IMF Annual Report 2003], available at <http://www.imf.org/external/pubs/ft/ar/2003/eng/pdf/file3.pdf> (last visited Mar. 5, 2006).

¹²¹ These evaluation projects include a study of "(1) the prolonged use of IMF financial resources and its implications; (2) the role of the IMF in three recent capital account crisis cases (Brazil, Indonesia, and Korea); and (3) fiscal adjustment in IMF-supported programs in a group of low- and middle-income countries." *See id.*

¹²² For the text of the IEO Evaluation Report on the IMF's operations in those three countries, see generally *International Monetary Fund, IMF and Recent Capital Account Crisis: Indonesia, Korea, Brazil (2003)* [hereinafter the *IEO Report*], available at <http://www.imf.org/external/np/ieo/2003/cac/pdf/all.pdf> (last visited Mar. 5, 2006). For a synopsis of recommendations emerging from that evaluation and the response of the IMF Executive Board to those recommendations, see *IMF Annual Report 2003*, at 37-

However, the IEO has the following limitations, which prevent it from being an effective independent accountability mechanism.

While the IEO's terms of reference call for it to 'be independent of IMF management and staff',¹²³ since the Director of the IEO is appointed by the IMF Executive Board and may be dismissed at any time by the Executive Board, hires other IEO officers on terms and conditions determined by the Board, depends on the Executive Board for budgetary funding, and reports to the Board,¹²⁴ the IEO fails to be a fully independent accountability mechanism for evaluating the policies and decisions of the IMF.

The IEO can only make recommendations based on its evaluation of the projects but it has no power to give binding decisions if it judges the IMF's actions to be *ultra vires* or improper.¹²⁵ The IEO's mandate is limited to a determination of the IMF's compliance with its mandate and the IMF has consistently maintained that protection or promotion of human rights is outside its mandate and a factor not to be considered while designing its policies. Therefore, the IEO has very little utility for the purpose of establishing human rights accountability of the IMF.

While establishment of the IEO is a good first step in the direction of greater oversight and accountability of the IMF, it fails to constitute the independent accountability mechanism that is needed to prevent the improper exercise of the IMF's enormous power resulting in human rights violations.

C. Conclusion

The absence of independent accountability mechanisms in the case of the World Bank and the IMF implies that these institutions are the sole arbiters of the compliance of their actions with their Charter mandates, even when they recognise an obligation to respect certain human rights while carrying out their operations. Yet the above

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¹²³ IEO Annual Report, *id.* at 27. This requirement is given some force by the fact that a majority of IEO personnel must be appointed from outside the IMF and the prohibition on the IEO Director from being appointed to a regular IMF staff position at the end of his or her term of office.

¹²⁴ *Id.*

¹²⁵ According to the IEO's terms of reference, the IEO's purpose is to complement the review and evaluation work within the Fund and thereby improve the institution's ability to draw lessons from its experience and more quickly integrate improvements into its future work. It has no power to direct IMF policy on issues based on its evaluations. Official IMF Website, *Independent Evaluation Office of the IMF*, at <http://www.imf.org/external/np/ieo/tor.htm#rev> (last visited Mar. 28, 2006).

analysis has also demonstrated the very limited acceptance by these institutions of the far-reaching human rights implications of their policies. There is recognition of the need for greater participation in making development decisions about individual projects and that such projects must be environmentally sustainable with limited human costs. But the development process is still viewed in isolation from human rights. Macroeconomic policy adjustments are considered independent of their massive human rights implications. The idea is to “consult the people about the dam and see that they are not displaced” and not to “consult the people about how to lead their country to development, while ensuring their rights to food, work, housing, social security, and environment.” The need is to establish accountability of the latter kind, and the institutional responses of the World Bank and the IMF, for achieving the same must be dismissed as woefully inadequate.

IV. NON-INSTITUTIONAL ACCOUNTABILITY OF THE WORLD BANK AND THE IMF

In this chapter, I will examine the possibility and efficacy of establishing independent non-institutional mechanisms of accountability for the World Bank and the IMF at the municipal and the international level. But municipal and international accountability of these non-state actors can only be established if they possess both municipal and international juridical personality. The first section examines the legal personality of the IMF and the Bank. In the next two sections, I examine the merits and demerits of municipal and international accountability of the two institutions respectively.

A. Legal Personality of the World Bank and the IMF

Both the World Bank and the IMF have been expressly conferred with municipal juridical personality. However, while both are international intergovernmental organisations, they have not been granted express international personality by their Articles of Agreement.

1. Principles for determining international legal personality of international organisations

It is a settled principle that international organisations are subjects of international law, possessing international legal personality like

states, though possessing characteristics different from states.¹²⁶ In the *UN Reparations case*,¹²⁷ the International Court of Justice laid down the following propositions relating to the international personality of international organisations. First, there is a distinction between municipal juridical personality and international juridical personality. Either, or both, may be conferred on an organisation by the express terms of its constituent instrument. Second, where the grant of 'juridical personality' is by its terms limited to the territories of members, such a grant must at least *prima facie* be taken as conferring only juridical personality on the municipal plane. Finally, the fact that a charter confers only municipal juridical personality does not mean that international personality of the organisation may not be implied from the character of the organisation as described by its Charter.¹²⁸

Art. 1 S. 1 of the Bank's Articles of Agreement seems to limit the juridical personality of the Bank to the territories of member states,¹²⁹ which would seem *prima facie* to imply that the Charter confers only municipal juridical personality on the Bank. Also, while Art. 9 S. 2 of the IMF's Articles of Agreement confers full juridical personality upon the IMF, it does not grant the Fund express international legal personality. Therefore, it is necessary to discuss the powers and operations of the two institutions to determine whether they possess *de facto* international legal personality.

¹²⁶ In *Reparation for Injuries suffered in the Service of the United Nations*, 1949 I.C.J. 174, (Apr. 11), at 178, [hereinafter *Reparations case*] the International Court of Justice [hereinafter ICJ] held, "Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by entities which are not states." The ICJ further stated, "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the need of their communities." *Id.*

¹²⁷ In this case, the ICJ concluded that the UN has international legal personality in the absence of an express provision in the UN Charter to that effect and in the face of legislative history of the UN that pointed to a contrary conclusion. See BROCHES, *supra* note 21, at 20.

¹²⁸ In *J. H. Rayner (Mincing Lane) Limited v Department of Trade and Industry*, [1990] 2 A.C. 418 [hereinafter *International Tin Council case*], the House of Lords discussed in detail the possibilities of assuming international personality by an international organization separate from its members, and concluded that in spite of this status not being expressly recognized by the treaty establishing the organization, such a separate international personality did exist.

¹²⁹ Art. 1 § 3 of the Bank's Articles of Agreement provides, "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."

2. International legal personality of the World Bank

An international organisation can be said to possess international legal personality if it satisfies the following conditions: (1) It is independent in functioning from its member states; (2) It possesses the capacity to create international rights and obligations;¹³⁰ (3) It possesses the capacity to bring or defend international claims.¹³¹

The World Bank is an international intergovernmental organisation performing the important public function of assisting in the reconstruction and development of the member states.¹³² In this section, I will demonstrate that the Bank possesses all the above attributes of international personality.

Functional and financial independence: The World Bank is independent from its member states both financially and with respect to its functions and activities. Art. 1 S. 2 of the Agreement between the United Nations and World Bank¹³³ states, “*By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to function as an independent international organisation.*”

The financial independence of the Bank stems from the fact that it uses its capital funds and money raised from private investments to finance its loan activities and administrative expenses and therefore does not depend on annual appropriations by national legislatures for funds. The Bank’s financial independence is also expressly acknowledged in the Bank’s agreement with the UN.¹³⁴

The functional independence of the Bank is evident from Art. 5, S.

¹³⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. 73, 89-90 [hereinafter *Interpretation of Agreement between WHO and Egypt*]. The Court held, “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions, or under international agreements to which they are parties.”

¹³¹ BROCHES, *supra* note 21, at 18.

¹³² World Bank Articles of Agreement art. 1 § 1.

¹³³ Agreement Between the UN and the IBRD, *entered into force*, 1946, 16 U.N.T.S. 346. [Hereinafter UN-World Bank Agreement].

¹³⁴ Art. 8 § 4 of the UN-World Bank Agreement provides,

UN agrees that in the interpretation of Art. 17, para. 3 of the Charter, which provides that the General Assembly shall examine the administrative budgets of the specialized agencies with a view to making recommendations to those agencies, it will take into consideration that the Bank does not rely for its annual budget upon its members, and that the appropriate authorities of the Bank enjoy full autonomy in deciding the form and content of the Bank’s budget.

5 (c) of the Bank's Article of Agreement, which provides that the officers and staff of the Bank shall be completely independent of the influence of member states in performing their activities and shall owe their duty entirely to the Bank to the exclusion of any other authority.

Capacity to create international rights and obligations: It is clear from the World Bank's Articles of Agreement that the members regarded the Bank as an entity that would have rights and obligations with respect to them. The final paragraph of Art. 1 of the World Bank's Articles of Agreement states, "The Bank, *and not the members*, shall be guided in all its decisions by the purposes set forth above (alteration in original)." The remainder of the Articles of Agreement is largely devoted to the mutual rights and obligations of the Bank and member states in respect of capital subscriptions, use of funds, and financial operations of all kinds.¹³⁵ Further, S. 7.01 of Loan Regulations No. 3,¹³⁶ provides that state parties to agreements with the World Bank cannot invoke municipal law to avoid their international obligations. Thus, the loan and guarantee agreements are international agreements governed by international law.

Capacity to bring and defend international claims: Art. 9 (c) of the World Bank's Articles of Agreement provides that cases of disagreement between the World Bank and its members must be submitted to arbitration before three arbitrators—one appointed by the Bank, another by the member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the ICJ. This clearly shows the Bank's capacity to bring and defend international claims.

3. International legal personality of the IMF

The IMF is also an international intergovernmental organisation whose primary purpose is to promote international financial stability. The case for international legal personality of the IMF is, however, not as clear as that of the Bank.

¹³⁵ Art. 2 § 1 of the World Bank Articles of Agreement provides that membership shall be open in accordance with such terms "as may be prescribed by the Bank." Art. 2 S. 2(b) provides that the capital stock of the Bank may be increased when the Bank deems it advisable by a three-fourths majority of the total voting power. Art. 2 S. 3(b) provides that the Bank shall prescribe rules laying down the conditions under which members may subscribe shares of the authorized capital stock of the Bank in addition to their minimum subscriptions.

¹³⁶ "The rights and obligations of the Bank and the Borrower under the Loan Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political division, thereof, to the contrary." Skogly, *supra* note 11, at 42.

Functional and financial independence: The IMF's Articles of Agreement also indicate active independent functioning of the IMF from its member states. In enumerating the purposes of the organisation, Art. 1 of the IMF's Articles of Agreement clearly stipulates that the IMF shall be guided in all its policies and decisions by the purposes set out in the article. Art. 1 (2) of the IMF's agreement with the UN also provides that "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent organisation."¹³⁷

Article 12, S. 5(c) of the IMF's Articles of Agreement is worded similarly to Art. 5(c) of World Bank's Articles of Agreement, indicating independent functioning of the staff and management of the IMF. Further, under Art. 9 the IMF enjoys a series of immunities including comprehensive immunity from judicial process,¹³⁸ immunity of archives,¹³⁹ freedom of assets from restrictions,¹⁴⁰ privilege for communications,¹⁴¹ immunities and privileges of Officers and Employees,¹⁴² and immunities from taxation.¹⁴³

Capacity to create international rights and obligations: Art 9. S. 2 of the IMF's Articles of Agreement confers full juridical personality upon the IMF including the capacity to contract, acquire, and dispose of immovable and movable property, and to institute legal proceedings. This provision clearly shows the capability of the IMF to enter into agreements with other organisations, and is the basis of the agreement between the IMF and the UN.¹⁴⁴

However, while all the IMF agreements are entered into with member states, there is some doubt as to whether these constitute binding international obligations, primarily because of a statement in the "Guidelines for Conditionality for the use of the Fund's resources or Stand By arrangements," that these arrangements are not to be interpreted as a treaty between the IMF and the member states. It is further stated that any deviation from the performance criteria of the

¹³⁷ Art. 1(2) of the Agreement Between the United Nations and the International Monetary Fund, *entered into force* Nov. 15, 1947, 16 U.N.T.S. 328. <http://www.imf.org/external/pubs/ft/sd/index.asp?decision=DN21> (last visited Mar. 5, 2006) [hereinafter IMF-UN Agreement].

¹³⁸ IMF Articles of Agreement art. 9 §§ 3 and 4.

¹³⁹ IMF Articles of Agreement art. 9 § 5.

¹⁴⁰ IMF Articles of Agreement art. 9 § 6.

¹⁴¹ IMF Articles of Agreement art. 9 § 8.

¹⁴² IMF Articles of Agreement art. 9 § 9 (b).

¹⁴³ IMF Articles of Agreement art. 9 § 9 (a)(c).

¹⁴⁴ IMF-UN Agreement art. 1(2).

economic programme in the member states is not to be interpreted as a breach of obligation.¹⁴⁵ Thus, it has been argued that agreements between the IMF and the member states are not legally binding¹⁴⁶ but are in fact governed by 'soft law'.¹⁴⁷ This notion, however, does not take away from the fact that these agreements must be interpreted in the light of international law.

Capacity to bring and defend international claims: As discussed above, Art. 9 S. 2 of the IMF's Articles of Agreement confers full juridical personality upon the IMF to, *inter alia*, institute legal proceedings. Article 29 (c) of the IMF's Articles of Agreement¹⁴⁸ contains a provision, almost identical to Art. 9 (c) of the Bank's Articles of Agreement, which pertains to the submission of disputes between the IMF and the member states to arbitration. Therefore, it is evident that the IMF possesses capacity to bring and defend international claims.

Though the case for international legal personality for the IMF appears perhaps less convincing as compared to the Bank, it may be noted that apart from considerable literature that presumes the international legal personality of the IMF, the General Counsel of the IMF has also recognised that the IMF possesses international legal personality and is a "subject of international law".¹⁴⁹

Based on the above discussion, it may be concluded that the World Bank and the IMF possess both municipal and international juridical personality such that it is possible in principle to devise accountability mechanisms for these institutions both at the municipal and international levels.

B. Municipal legal accountability of the World Bank and the IMF

While the possibility of bringing claims against the World Bank and the IMF for human rights violations at the municipal level appears attractive because of greater enforcement at the municipal level, there are several impediments that exist to prevent the bringing of such claims. The most significant among these is the international law

¹⁴⁵ JOSEPH GOLD, *INTERPRETATION: THE IMF AND INTERNATIONAL LAW* 352 (1996).

¹⁴⁶ E. DENTERS, *LAW AND POLICY OF IMF CONDITIONALITY* 101 (1996).

¹⁴⁷ Skogly, *supra* note 11, at 31.

¹⁴⁸ Art. 19(c) of the IMF-UN Agreement provides that cases of disagreement between the IMF and its members must be submitted to arbitration, before three arbitrators, one appointed by the Fund, another by the member and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the ICJ.

¹⁴⁹ Gianviti, *supra* note 10.

doctrine of jurisdictional immunity of international organisations.

1. The Principle of Functional Immunity of International Organisations

The theory of jurisdictional immunity of international organisations rests on the assumption that an international organisation can only truly operate in the common interest of all member states participating in it, if it is not subject to the control or jurisdiction of any individual member state.¹⁵⁰ To achieve true independence, however, an international organisation must not only be protected from individual governments but also be protected from prejudice and inconsistent judgments by independent national courts.¹⁵¹ Finally, there may be a threat to the independence of international organisations from individuals.¹⁵²

In *Broadbent v. Organisation of American States*¹⁵³, the United States Court of Appeals clarified that the immunities of international organisations, as opposed to sovereign states, were limited by the principle of functional necessity.¹⁵⁴ According to this principle, since an international organisation possesses functional legal status, or

¹⁵⁰ DHPSS, *supra* note 8, at 1295.

¹⁵¹ *Id.*

¹⁵² K. AHLUWALIA, THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE SPECIALISED AGENCIES OF THE UN AND CERTAIN OTHER INTERNATIONAL ORGANISATIONS 120 (1964). The doctrine of functional immunities of international organisations evolved in recognition of the fact that the common benefits to be achieved from organised cooperation would not be attainable if individual members were permitted to apply their own laws at will to the functions and activities of international organisations. Gordon H. Glenn *et al.*, *Immunities of International Organisations*, 22 VA J INT'L L 247, 266 (1982).

¹⁵³ *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980).

¹⁵⁴ In distinguishing between the immunities of organisations and states, it was held that while states can protect themselves from undue intrusion from other states by their ability to retaliate; international organisations cannot retaliate against any violation of their integrity. More particularly, states can grant or withhold immunity from each other, and generally do so on the basis of agreements or principles of comity embodied in international law. However, international organisations normally do not exercise jurisdiction over anyone except their own officials, and this is generally only to a limited extent. Thus, they are not in a position to grant to or withhold immunity from states. While states are protected from interference by international organisations in their affairs by provisions in the constitutions of those organisations (e.g., Article 2 § 7 of the UN Charter) and by the fact that representatives of states constitute the political organs and control the administrative organs of these organisations, international organisations are protected from interference by states principally by the immunities provided for in international law. *Id.* at 34.

functional competence only,¹⁵⁵ to enjoy immunity all acts of an international organisation- its acts *jure imperii* as well as its acts *jure gestionis* must be compatible with the purposes that the organisation is supposed to pursue.¹⁵⁶ Unless a particular privilege or immunity is necessary for the entity's functions or the achievement of its purposes, there is no reason for deviating from the normal rules of judicial competence.¹⁵⁷

International organisations may, however, waive immunity either expressly or by implication based on the provisions contained in their constituent document. The term "constitutive waiver" refers to a waiver that is deemed to exist by virtue of a provision within the international organisation's constituent instrument permitting suits against the organisation in municipal court. International law allows suits against international organisations to the extent of the provision, which may be restricted to particular types of suits and to particular municipal courts. The municipal laws of the organisation's member states normally reflect the provision and deny jurisdictional immunity to the organisation in suits falling within the terms of that provision.¹⁵⁸

2. Functional Immunities of the World Bank and the IMF

While Article 9 Section 3 of the IMF clearly provides the IMF with immunity from any form of judicial process unless it expressly waives this immunity¹⁵⁹, Article 7 Section 3 of the World Bank's Articles of Agreement permits judicial proceedings against the Bank in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.¹⁶⁰ However, it further provides that members or persons

¹⁵⁵ H. F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANISATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* 21 (1994).

¹⁵⁶ *Id.* at 45.

¹⁵⁷ Thomas J. O'Toole, *Sovereign Immunity Redivivus: Suits against International Organisations*, 4 *SUFF. TRANSNAT'L L. J.* 1, 3 (1980).

¹⁵⁸ Michael Singer, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns*, 36 *VA. J. INT'L L.* 53, 80 (1995).

¹⁵⁹ Art. 9, § 3 of the IMF's Articles of Agreement provides, "Immunity from judicial process: The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

¹⁶⁰ Art. 7, § 3 of the World Bank Articles of Agreement provides,

acting for or deriving claims from members may not bring action against the World Bank. Thus, while no states can bring actions against the World Bank and the IMF, there is a constitutive waiver of immunity in the World Bank's Articles of Agreement with respect to suits brought by individuals.¹⁶¹

This provision has been utilised mostly by employees of the World Bank to bring employment discrimination suits. It has not been used for bringing claims for human rights violations against the World Bank.¹⁶² Moreover, such actions have rarely been successful because municipal courts have been hesitant in diminishing the scope of the immunity available to these organisations.¹⁶³

It is my argument that there exists some scope for bringing claims for human rights violations against the World Bank in municipal courts. However, it must be noted that apart from the immunity provisions contained in the Articles of Agreement of these institutions, the Bretton Woods twins have succeeded in getting member states to pass laws granting them express jurisdictional immunity. For instance, the Bangladeshi Parliament is considering the enactment of a law that would grant the World Bank absolute immunity from all judicial proceedings like the IMF.¹⁶⁴

Position of the Bank with regard to judicial process: Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

¹⁶¹ This constitutive waiver of immunity has been prompted by the fact that the World Bank is often engaged in transactions with private actors. Bekker, *supra* note 148, at 46.

¹⁶² I could not find reference to a single case brought against the World Bank in a municipal court for alleged human rights violations caused during implementation of a particular project or broad imposition of the structural adjustment program.

¹⁶³ In *Mendaro v. World Bank*, 717 F.2d 610 (C.A.D.C., 1983), the court upheld the Bank's claim of immunity against allegations of sexual harassment and discrimination by the plaintiff on the ground that the diversity in local employment policies rendered it impossible for the Bank to adopt the policies of its member states. Similarly, in *Morgan v. International Bank for Reconstruction and Dev.*, 752 F. Supp. 492 (D.D.C., 1990), the court granted jurisdictional immunity to the World Bank against a claim for alleged wrongful arrest, false imprisonment and intentional infliction of emotional distress.

¹⁶⁴ Following pressure from the World Bank, the Bangladeshi Cabinet has drafted a law called the International Financial Organisations (Amendment) Act, 2004, which

3. Evaluating Mechanisms for Enhanced Municipal Accountability of the World Bank and the IMF

Even if it may be assumed that there exists some scope to bring claims against the World Bank at the municipal level, the success of legal accountability would largely depend upon the efficacy of municipal legal remedies. It would be almost impossible to bring a direct claim for a human rights violation against these institutions because the state is seen as the sole actor implementing various policy measures at the municipal level. However, it may perhaps be possible for affected persons to bring a claim in tort against both the World Bank and the borrowing state as joint tortfeasors. Claimants could allege harm caused by the complicity of the World Bank in the wrongful act or omission committed by the borrower state. The claim against the Bank would be one for negligence or breach of duty of care for not contemplating the injurious effect on the affected persons, when deciding not to insist on the implementation of the loan agreement, or on compliance with operational policies, or on compliance by the borrower of its international human rights obligations, as the case may be.¹⁶⁵ Thus, while the state would be the primary tortfeasor, the World Bank could be held responsible for aiding and assisting the state in the commission of a wrongful act. If the IMF's provisions relating to immunity were amended to make the scope of the IMF's immunity limited, as is the case with the World Bank, then it would be possible to bring similar claims against the IMF.

However, these actions are likely to have only limited success at the municipal level because a large number of the debtor countries have dictatorial regimes that deny human rights to their people. Even for tort law based mechanisms of responsibility, since the state is the primary actor on whom responsibility may be affixed for human rights violations and the World Bank/IMF is responsible only as an aider or abetter of human rights violations, it is doubtful that such a mechanism for relief would be successful in countries with authoritarian set ups.

Further, even in those countries which guarantee rights to their people, the immunities granted to these institutions in their constituent instruments, the principle of functional immunity in international law and the existence of express municipal laws denying people the right to

will be considered by the Bangladeshi Parliament in its next session. The Act grants the World Bank blanket immunity from any legal proceeding that may be brought against it. IFI Watch – Bangladesh, *The World Bank and the Question of Immunity, 1 (2004)*, at http://www.unnayan.org/Other/IFI_Watch_Bangladesh_Vol_1%20No_1.pdf (last visited Apr. 27, 2006).

¹⁶⁵ Feyter, *supra* note 75, at 130.

bring suits against these institutions may collectively severely limit individuals' ability to bring human rights claims against these institutions.

C. International legal accountability of the World Bank and the IMF

In light of the absence of municipal legal accountability of the World Bank and the IMF and the gross inadequacies of institutional accountability mechanisms, there is a need to explore alternative mechanisms of accountability. This Section examines the merits of international legal accountability of these institutions and discusses attempts to establish such accountability that have been made so far.

1. Why Do We Need International Accountability of the World Bank and the IMF?

In Section IV. A of this chapter, I established that the World Bank and the IMF possess international legal personality. International legal personality confers upon intergovernmental organisations the right to make claims and enter into treaties, and imposes legal responsibility for acts of a delictual or contractual character. If an international organisation can be a 'plaintiff' on the international plane, it must also be a 'defendant' when circumstances warrant it.¹⁶⁶

Yet if our objective is to achieve greater accountability, would not that be achieved more efficiently by getting rid of the doctrine of jurisdictional immunity to allow suits against these institutions in municipal courts? Certainly, municipal law guarantees more effective enforcement as compared to international law, whose limited enforceability¹⁶⁷ in a decentralised system have led to questioning of its status as binding law.¹⁶⁸

The necessity for jurisdictional immunity seems to have arisen from the perceived vulnerability of these institutions to political interference from the mighty states. However, as I have demonstrated in this paper, the power of these organisations arising from the financial clout they possess may often surpass that of the borrowing states such that they might in fact not require protection.

While the above analysis may prompt a rethinking of the merits of

¹⁶⁶ DHPSS, *supra* note 8, at 359.

¹⁶⁷ It is argued that international law is enforced if horizontally and is followed, if voluntarily. *Id.* at 22-29. Yet no one would deny that the enforceability of international law is more limited than the enforceability of municipal law.

¹⁶⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §101 (1987), introductory note *cited in* DHPSS, *id.* at 22.

application of the doctrine of functional immunity to the World Bank and the IMF, I am against any weakening of the doctrine of functional immunity in international law. Most international institutions do not possess the kind of power that creates the need for the kind of non-institutional accountability that is being argued for with respect to the World Bank and the IMF. Moreover, other reasons lead me to abandon the quest for greater accountability of these institutions by whittling down the protection afforded to them by the doctrine of functional immunity.

The argument for greater accountability of the World Bank and the IMF has been made with a view towards safeguarding the human rights of those whose lives are affected by actions taken under the policies and programs recommended by these institutions and implemented by the borrowing states. Yet the problem with municipal legal accountability for human rights violations, as described in the previous section, is that it would bring relief to citizens of only those states that guarantee human rights to their people. But, a large number of IMF and World Bank member states have dictatorial regimes, whether overt or covert. This problem however, is not encountered in the case of international accountability. This is because international human rights law, as a part of customary international law, transcends the barrier of state sovereignty to ensure fundamental rights and freedoms even to nationals of dictatorial regimes whose governments fail to guarantee them this protection. For this reason, I strongly support attempts to establish international legal accountability of these non-state actors.

2. Existing arguments establishing international human rights accountability of the World Bank and the IMF

Sigrun Skogly argues that the World Bank and the IMF are bound to comply with international human rights law even when it conflicts with their internal mandate. She argues that the World Bank and the IMF possess international legal personality and are therefore bound by the rules of public international law. Since human rights law is part of public international law, the World Bank and the IMF are bound to comply with international human rights law even when it conflicts with their internal mandate.¹⁶⁹

The principle that an international organisation may not invoke its internal rules and regulations as defense for failing to meet, or indeed for violating, its international obligations is embodied in Article 46(2)

¹⁶⁹ Skogly, *supra* note 11.

of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.¹⁷⁰ This principle is also reflected in Article 3 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, 2001,¹⁷¹ and supported by judicial¹⁷² and academic opinion.¹⁷³ Thus, Skogly concludes that since the Articles of Agreement of both institutions are part of the present regime of international law, where their policies and decisions potentially conflict with the provisions of international law, they would be obliged to change those policies.¹⁷⁴

She supports her thesis with two additional arguments. The first argument is based on the status of the World Bank and the IMF as specialised agencies of the UN.¹⁷⁵ Under Article 63 of the UN Charter, specialised agencies of the UN have been brought into a relationship

¹⁷⁰ Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, G.A. Res. 129/15, U.N. Doc. A/Res/129/15/Annex (Mar. 21, 1986). Art. 46(2) provides, "An international organisation may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organisation regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance."

¹⁷¹ The provision states, "Characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law. A.N.M. Nurul Haque, "Blanket Immunity for the World Bank" <http://www.bangladeshobserveronline.com/new/2004/11/06/editorial.htm> (last visited Apr. 27, 2006). See also, Skogly, *supra* note 11, at 79.

¹⁷² Interpretation of Agreement between the WHO and Egypt, *supra* note 130.

¹⁷³ Amerasinghe says there is some authority for the view that customary international law principles can be hierarchically superior to the written law of an organisation, although case law does not consistently support this view in all instances. C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL L. OF INT'L ORGANISATIONS 208 (1996). Schermers and Blokker state, "As international organisations have been established under international law, these rules of international law apply directly as part of the legal order of the organisation in question, obviating the need for transformation." SCHERMERS AND BLOKKER, INT'L INSTITUTIONAL L. 822 (1995). Skogly compares this with the obligations of a state under international law. She talks about the monist and dualist systems and says that in terms of a monist system, where the internal rules of the system are linked to the international legal system, international law would get priority over internal rules in case of conflict. Skogly, *supra* note 11, at 78.

¹⁷⁴ Skogly, *supra* note 11, at 80.

¹⁷⁵ *Id.* at 100. In addition to the core UN organs, there are a number of specialised agencies that have been brought into a relationship with the UN. According to art. 57 of the UN Charter, these specialised agencies are established by inter governmental agreement and have wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields.

with the ECOSOC, subsequently approved by the General Assembly. The World Bank and the IMF have entered into such relationship agreements with the UN. Skogly argues that the creation of this formalised relationship with the UN grants them both legal and practical rights and obligations in relationship to the UN.¹⁷⁶ While she acknowledges that the relationship agreements of the World Bank and the IMF stress their independent status as compared to other specialised agencies of the UN,¹⁷⁷ she emphasises that this does not in any way lessen their obligation to cooperate with the Economic and Social Committee under Art 63(2) of the UN Charter¹⁷⁸.

The second argument is based on the fact that these international intergovernmental organisations are composed of states as members, who have obligations under international law in general, and in relation to human rights specifically.¹⁷⁹

The theory of accountability of international organisations like the World Bank and the IMF as sketched by Skogly is incomplete. While it

¹⁷⁶ Skogly, *supra* note 11, at 101.

¹⁷⁷ Art. 1(2) of the IMF's agreement with the UN provides,

The IMF is a specialised agency established by agreement among its member governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Art. 57 of the Charter of the UN. By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, *the Fund is, and is required to function as, an independent international organisation.* (Emphasis added).

There is an identical provision in the agreement with the World Bank. Further, under Art. 3 of the IMF Agreement with the UN, it is provided that in preparing the agenda for the meetings of the Boards of Governors, the IMF will give due consideration to the inclusion in the agenda of items proposed by the UN. Art. 4 of the Agreement provides that the UN and the IMF shall consult together and exchange views on matters of mutual interest. The World Bank Agreement with the UN has an identical provision in Art. 4, but Art. 4(3) of the Agreement reaffirms the independent status of the Bank by providing in express terms that, "The UN recognizes that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement."

¹⁷⁸ Art. 63 § 2 of the UN Charter also provides that the Economic and Social Council may coordinate the activities of the specialised agencies through consultations with and recommendations to such agencies and recommendations to the General Assembly and to the members of the UN. The aim of this cooperation has not been specified, but Skogly argues that it is logical to assume that the motive was to gather all possible resources for the promotion and fulfillment of the purposes of the organisation. The independent status of the World Bank and the IMF does not lessen the obligation to engage in such cooperation. Skogly, *supra* note 11, at 105.

¹⁷⁹ *Id.* at 106.

is possible to argue that as subjects of international law, these organisations are bound by international law, one cannot automatically infer from this that international human rights law binds these institutions. Customary international human rights law, as contained in the International Bill of Rights, while articulating the inalienable rights of human beings, was essentially carving out a sphere of human rights protection against the power of states.¹⁸⁰ Therefore, customary international human rights, as presently understood, afford protection only against states. Any extension of the application of international human rights law from states to non-state actors must be normatively propounded and cannot be assumed.

D. Conclusion

Based on the above discussion, it may be concluded that while the World Bank and the IMF possess both municipal and international legal personality, any attempt to establish independent human rights accountability at the municipal or the international level would require a change in the existing international law doctrines and the charters of the two institutions. I have explained the limits of municipal human rights protection to justify changing the law in the direction of establishing international human rights accountability. However, as discussed above, existing theories of international human rights accountability are incomplete. In the next chapter of this paper, I discuss the doctrine of horizontal application of constitutional rights in different jurisdictions and argue for its importation into international law in order to supply the missing link for establishing direct international human rights accountability of the World Bank and the IMF to individuals in their member states.

V. THE HORIZONTALITY THESIS

In this chapter, I describe the articulation of the horizontality thesis in rights jurisprudence across different constitutional orders. I argue in favour of the transplantation of the doctrine of horizontal application of rights from the realm of constitutional law to international law. My argument rests on the idea that both constitutional and international human rights have common origins and common effects inasmuch as they protect the individual¹⁸¹ against political absolutism and power.

¹⁸⁰ *Id.*

¹⁸¹ Even group rights may ultimately be understood as safeguarding the rights of individuals within that group.

A. Human Rights as Protection Against Power

Human rights as we understand them today can be described as the descendants of a marriage between “natural rights” and “political theory”. The origins of the idea of human rights may be traced to ancient Greece and Rome, where they were closely connected to the pre-modern natural law doctrines of Greek stoicism and to the Roman law ideas of universal rights that extended beyond the rights of citizenship.¹⁸² However, changes in the beliefs and practices of society from the thirteenth century to the Peace of Westphalia (1648), as manifest in resistance to religious intolerance and political bondage, began the long transition to liberal notions of freedom and equality. This is particularly true in relation to the use and ownership of property,¹⁸³ which resulted in the shift from natural law as duties to natural law as rights.

In the seventeenth and eighteenth centuries, thinkers like Locke, Montesquieu, Voltaire and Rousseau brought the idea of natural rights within the realm of political theory by arguing that certain rights self evidently pertain to individuals as human beings because they existed in a state of nature before humankind entered civil society.¹⁸⁴ This position appears in the articulation of rights in the Declaration of Independence proclaimed by the thirteen American colonies on July 4, 1776, the French Declaration of the Rights of Man and Citizen, 1789

¹⁸² Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 258 (1984).

¹⁸³ This shift was due to the failure of rulers to meet their natural law obligations and the unprecedented commitment to individual expression and worldly experience of the Renaissance. The teachings of Aquinas (1224/25-1274) and Hugo Grotius (1583-1645) in the European continent; and the Magna Carta (1215), the Petition of Rights of 1628, and the English Bill of Rights (1689) in England were testimony to the view that all human beings are endowed with certain eternal and inalienable rights. This right was never renounced when humankind “contracted” to enter the social form of the primitive state and was never diminished by the claim of “divine right of kings”. *Id.* at 258-259.

¹⁸⁴ It was believed that chief amongst these rights were the rights to life, liberty, and property. Upon entering civil society, pursuant to a “social contract”, humankind surrendered only the right to enforce these natural rights, and not the rights themselves to the state. The state’s failure to secure these reserved natural rights gives rise to a right to a responsible, popular revolution. The Philosophers (including Montesquieu, Voltaire and Rousseau) sought to discover and act upon universally valid principles, harmoniously governing nature, human beings and society, including the theory of the inalienable ‘Rights of Man’ that became their fundamental ethical and social gospel. *Id.* at 259. Louis Henkin, *International Law: Politics, Values and Functions*, 216(4) HAGUE RECUEIL DE COURS 13 (1989) at 208. Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, in HUMAN RIGHTS 3 (Robert McCorquodale ed., 2003).

and the United States Bill of Rights, 1791.

Fear of state power informed constitutional discourse paving the way for bills of rights in modern constitutions- starting from the Constitution of the United States of America, in the eighteenth century, to several constitutions all over the world.¹⁸⁵ It further provided the foundations of the international human rights order in the twentieth century. However, it was the rise and fall of Nazi Germany, which gave impetus to the establishment of human rights as part of international law.¹⁸⁶ In the treaty establishing the UN, all members pledged themselves to take joint and separate action for the achievement of “universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, language, sex or religion.”¹⁸⁷ The UDHR, the ICCPR and the ICESCR together came to constitute the International Bill of Rights.

Thus, it can be argued that rights emerged in opposition to power and absolutism both in the municipal and international sphere. At that time, the state was understood as the repository of power, both in democratic constitutional orders as well as in the international human rights order. Therefore, these rights were available against states. However, there has been a change in the understanding of the application of rights in democratic constitutional structures. This may be attributed both to a rethinking of the public/private distinction as well as recognition of the fact that the state is no longer the only entity that individuals may fear and require protection against. The next section of this article traces these developments in constitutional orders that have recognized various degrees of horizontal application.

I use the intuitively obvious correlation between constitutional rights and international human rights as emanating from a common discourse in political theory of protection of the individual from power to argue for the importation of a procedural doctrine of accountability from constitutional law to international human rights law.

The considerable diversity in the kinds of rights and the content of rights that are protected across different constitutional orders¹⁸⁸ is only

¹⁸⁵ Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413 (1998).

¹⁸⁶ Weston, *supra* note 182, at 262.

¹⁸⁷ Art. 1 § 3 of the UN Charter.

¹⁸⁸ Most liberal democratic constitutional orders only safeguard civil and political rights while others provide a degree of protection to economic and social rights. Examples of the former are the US, UK and Canada and the latter are South Africa and India. The disagreement about the content of human rights is also reflected in the existence of two separate international covenants dealing with civil and political; and

a natural outcome of the difference in perception of the problems that plague the populace in those countries¹⁸⁹. This diversity does not detract from the basic premise that rights are universal because they define the universal interests of the people, that power be exercised over them in a way that respects their autonomy as agents.¹⁹⁰

B. Mapping the Horizontality Debate

In this Section, I briefly examine the theoretical basis for vertical application of rights in political and legal theory and the critiques of the same by the proponents of the horizontality thesis. I proceed to examine the different but related ideas that underlie the horizontality thesis, discuss degrees of horizontal application and the response of “horizontalists” to criticisms made against the horizontal application of rights.

1. Vertical Application of Rights

Classical liberal theories of rights, derived from the writings of Thomas Hobbes¹⁹¹ and John Locke¹⁹² and developed in modified form

economic and social rights.

¹⁸⁹ Developing countries recognise that civil and political rights can only be meaningfully exercised when the minimum economic and social needs are met.

¹⁹⁰ Michael Ignatieff, *The Attack on Human Rights*, in HUMAN RIGHTS, *supra* note 177, at 214.

¹⁹¹ Hobbes argued that people in the state of nature would act in their own self-interest, which would lead to the constant danger of a civil war thereby stultifying all progress. This theory was based on the normative assumption that each person in the state of nature has the “right of nature” to preserve herself, but as individuals are self-interested, this theoretically limited right of nature becomes in practice an unlimited right to potentially anything; or, as Hobbes puts it, a right “to all things”. The right of every person to all things invites serious potential conflict. However, since individuals are also rational beings, they will realize that constant war of all against all is inimical to the satisfaction of individual self interests. Therefore, individuals mutually agree to delegate their right of nature to a common authority, empowered to secure them against physical attack and other severe deprivations of the state of nature. Even though Hobbes argued for near absolute authority of the sovereign, he recognized certain actual and prudential limits on the sovereign’s power. The sovereign could not make laws to take away people’s right to life which implied not just physical safety but a modicum of well being beyond survival and the right to freedom of thought and belief. See ROUTLEDGE ENCYCLOPAEDIA OF PHILOSOPHY vol. 4, 470-73 (1998).

¹⁹² Locke’s positive theory of government starts with the idea that all individuals have natural rights, including but not limited to a right to survival and the right to the means for survival. Using the social contract theory, Locke argues that people realise that their condition in the state of nature is unsatisfactory, and so agree to transfer some of their rights to a central government, while retaining others. The most important

by Robert Nozick,¹⁹³ are premised on the belief that individuals possess a pre-political sphere of pure autonomy and freedom that precedes the state. Individuals are self-complete entities who interact with others only out of a grudging necessity to better satisfy their self-centred wants and preferences.¹⁹⁴ Thus, this view assumes the existence of a rigid distinction between the public and the private sphere. It presupposes that the purpose of fundamental rights protection is to police the boundary that separates the political and the collective from the pre-political and the individual- to contain the majoritarian state so as to prevent it from intruding upon the “natural realm” of individual liberty.¹⁹⁵ Advocates of the vertical approach to human rights protection generally invoke one or other version of classical liberalism to justify limiting its application to legal relations between the state and individuals.¹⁹⁶

Further, the necessity for application of rights in a vertical as opposed to horizontal ordering lay in the fact that the former governed relationships between fundamentally unequal parties, the state and the individual, while the horizontal relationship was one between equals. As the modern national state became not only the repository of physical and restraining power and the protector of the nation against an external enemy, but also the main directive force in shaping the economic and social life of the nation, fears about individual protection against the state were accentuated.¹⁹⁷

2. The Horizontality Thesis

The proponents of the horizontality thesis pursue two different lines of argument. The first line of argument challenges the tacit assumption behind the vertical approach to rights that *private* power situated in the realm of the “market” rather than in the domain of

amongst these is the right to freedom from arbitrary government. See ROUTLEDGE, vol. 5, 680-82 (1988).

¹⁹³ Nozick described individual human beings as *self-owners*. This self-ownership vests individuals with certain rights; in particular, rights to their lives, liberty, and the fruits of their labour. These rights function, as constraints on the actions of not only other individuals in society but also dictate the kind of control that the state may exercise. Thus, the minimal state is the only morally defensible state. Such a state acts as a “night-watchman”, doing nothing more than protecting individuals via police and military forces from force, fraud, and theft. See ROUTLEDGE, vol. 7, 45-46 (1988).

¹⁹⁴ Allan C Hutchinson & Andrew Petter, *Private rights/Public wrongs: The liberal lie of the Charter*, 38 U. TORONTO L.J. 278, 284 (1988).

¹⁹⁵ *Id.*

¹⁹⁶ D. Dyzenhaus, *The New Positivists*, 39 U. TORONTO L.J. 361 (1989).

¹⁹⁷ W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 321 (1959).

“politics” is not problematic in the way that *public* power is, and should be considered immune from the reach of bills of rights.¹⁹⁸ Deriving from the legal realist critique of law and adjudication¹⁹⁹, this argument rests largely on the insight that the state is constitutive of all legal relations, because law is itself a construct of the state.²⁰⁰ The state is not only present in the enforcement of all law, it is present at the stage of law’s construction and evolution, and such law governs relations among individuals as well as relations between the individual and the state.²⁰¹

Therefore, there is no such thing as a pre-political private sphere, a state of nature that precedes the state. The private sphere itself is constituted by the state in the sense that it is dependent on the state for the provision and enforcement of the norms, which regulate relations within that sphere.²⁰² Thus, this version of the horizontalists’ critique is directed at the types of law, which the state might utilise in order to regulate private relationships in modern society. It seeks to test not just legislation, but common law on the plinth of fundamental rights protection.²⁰³

The second line of argument is made by those who acknowledge the existence of a public-private distinction, but nevertheless make a pragmatic argument for the application of rights against private parties based on two different but related premises. The first premise relates to the emergence of large private institutions like voluntary associations, trade unions, corporations, multinationals, universities, churches etc. wielding enormous power as an example of organised private power in society which is in principle as oppressive and potentially as illegitimate as the power of the state.²⁰⁴ The second premise is that with the onset of privatisation, there has been a significant blurring of the public and the private sectors. Here, privatisation is understood as a shift toward provision by non-state organisations of certain classes of goods and services, or performance by those organisations of certain classes of functions, for the provision or performance of which government offices and agencies are

¹⁹⁸ Andrew Cockrell, *Private Law and the Bill of Rights: A Threshold Issue of Horizontality*, in BILL OF RIGHTS COMPENDIUM 3A-3 (2004).

¹⁹⁹ The legal realists critique the idea that adjudication is about the value-free application of neutral principles, and derived from the same fallacies.

²⁰⁰ C. SUNSTEIN, *THE PARTIAL CONSTITUTION*, Ch. 2, 159-160 (1993).

²⁰¹ Murray Hunt, *The ‘Horizontal Effect’ of the Human Rights Act*, Pub. L. No. 423, 424-25 (1998).

²⁰² *Id.* at 425.

²⁰³ *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836; Cockrell, *supra* note 191, at 3A-4.

²⁰⁴ Cockrell, *supra* note 198, at 3A-4.

exclusively or primarily responsible. Thus, in today's changed circumstances, where the private sector is assuming controlling monopoly power and beginning to look like the state, there is need for these fundamental guarantees to be available against private action. Arthur Miller argues that there is a need for protection against the governing power and this should be available against every entity or sector where the governing power is in fact located.²⁰⁵ Thus, this version of the horizontalists' critique is directed against the institutional nature of the bodies, which exercise social and economic power in contemporary society.

Consequently, there are two issues that are often conflated in the horizontality debate. The first refers to the source of law that is subjected to constitutional scrutiny, i.e. legislation, customary or common law. The second refers to the institutional nature of the body whose actions are subjected to constitutional scrutiny- is this a 'public' body which is part of the state or a 'private' body which has no connection with the state?²⁰⁶

The coercive use of conditionality by the World Bank and the IMF in shaping the economic and social policies of the debtor states has been discussed in great detail in the first chapter of this article. The conditionality arrangement represents a shift in governing power from the states to these international institutions and a contraction of the political and economic independence of the states. Therefore, there is a need to extend the application of human rights against these international institutions.

3. Degrees of Horizontal Application

There are two types of horizontal application of rights: direct and indirect. Direct application implies the use of a Bill of Rights to ground a substantive right held by one private person against another private person. Indirect application means that a bill of rights might only influence a court's interpretation and development of the common law in the equivalent situation.²⁰⁷ However, there is no sharp dividing line between direct and indirect application and different constitutional orders may manifest either or both forms of horizontal application, as discussed in the succeeding section.

²⁰⁵ Arthur S. Miller, *The Constitutional Law of the Security State*, 10 STAN. L. REV. 620, 634-642 (1958).

²⁰⁶ Cockrell, *supra* note 198, at 3A-6.

²⁰⁷ *Id.* at 3A-7.

4. Defence of the Horizontality Thesis

Several arguments have been made against horizontal application. There are those who use the “economy of restraint” idea to argue that the breakdown of the public-private distinction makes the constitution a less effective restraint on government. They begin with the assumption that the power of the government is qualitatively different from the power of any other social institution, which is subordinate to the lawmaking power of the state. They further argue that the constitution performs the special function of providing “a law for the lawmaker.” The second set of critics argue that horizontal application poses a threat to private rights in that we cannot control bad private actors without also controlling good ones. Finally, there are those who argue that the kind of problems that the horizontality thesis addresses can be better resolved by branches of government other than the courts.²⁰⁸

Since I am arguing only for a limited extension of the horizontality thesis on the international plane with respect to entities that exercise the kind of coercive power that the state ordinarily exercises, my thesis sufficiently addresses the first two criticisms. I find the third criticism inapplicable to the construction of my thesis on the international plane.

C. Horizontal Application of Rights in Liberal Democratic Constitutional Orders

In this section, I examine the doctrinal elaboration of the horizontality thesis in the constitutional jurisprudence of a number of countries through a review of their case law in order to trace the presence of direct or indirect horizontal application of rights or both.

1. Direct Horizontal Application

Direct horizontal application of rights implies the direct enforceability of constitutional rights by one private party against another. Ireland is an example of a country where we find direct horizontal application of rights. The Irish Supreme Court has recognized an independent cause of action against private parties for breach of certain constitutionally protected rights.

Article 40 of the Constitution of Ireland²⁰⁹ enumerates the

²⁰⁸ John H. Garvey, *Private Power and the Constitution*, 10 CONST. CMT. 311 (1993).

²⁰⁹ Ir. CONST., 1937, Art. 40.

fundamental rights that vest with the Irish people.²¹⁰ It also imposes an obligation upon the State to guarantee respect for fundamental rights in its laws and to use its laws to defend and vindicate these rights.²¹¹ In *John Meskell v. Coras Iompair Eireann*,²¹² the Irish Supreme Court recognised the possibility of bringing a constitutional tort action for breach of a constitutional right. The Court held:

It has been said on a number of occasions by this Court...that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either the common law or equity and that the constitutional right carries within it its own right to a remedy for the enforcement of it. Therefore, if a person has suffered damages by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right.²¹³

Similarly, it was held in *Hosford v. John Murphy & Sons*²¹⁴ that the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials. The *constitutional tort action* lies for breaches of constitutional rights by private individuals.

In essence, the Irish Supreme Court has interpreted the obligation upon the State to guarantee fundamental rights protection to impose a positive obligation on all state actors, including the courts, to protect and enforce the rights of individuals. This in turn has been taken to require the courts to permit an individual to invoke the Constitution directly as a source of a claim against another individual.²¹⁵ Examples

²¹⁰ These include the right to equality of the person (Art. 40(1)), the right to personal liberty (Art. 40(4)(1)), the right to freedom of expression (Art. 40(6)(i)), the right to assembly (Art. 40(6)(ii)) and freedom of association (Art. 40(6)(iii)), and the right to private property (Art. 43).

²¹¹ Art. 40(3) provides, 1 "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

²¹² *John Meskell v. Coras Iompair Eireann*, [1973] I.R. 121 (Ir.). See also, Stephen Gardbaum, *The "Horizontal Effect" Of Constitutional Rights*, 102 MICH. L. REV. 387, 396 (2003).

²¹³ *Meskell*, *supra* note 205, at 133.

²¹⁴ *PH and Others v. John Murphy and Sons Ltd.*, [1987] I.R. 621 (Ir.).

²¹⁵ Andrew Butler, *Constitutional Rights in Private Litigation: A Critique and*

of particular constitutional rights that have been given full horizontal effect include the right to freedom of association²¹⁶, the freedom from sex discrimination²¹⁷, the right to earn a livelihood²¹⁸, and the right to due process²¹⁹.

2. Direct and Indirect Horizontal Application

This section discusses the constitutional law of three countries, India, South Africa and Germany, that provide for both direct and indirect horizontal effect of fundamental rights. There are two kinds of indirect application of rights. As discussed before, there are two kinds of indirect horizontal application. The first is where fundamental rights are applied against private entities that are seen as wielding public power. This can be seen in the constitutional jurisprudence of India. The second is where a bill of rights might only influence a court's interpretation and development of the common law in the equivalent situation. This can be seen in the constitutions of South Africa and Germany and to some extent in the Indian Constitution.

Comparative Analysis, 22 ANGLO-AM. L. REV. 1 (1993).

²¹⁶ *Meskeil*, *supra* note 205. In this case, the Irish Supreme Court held that a trade union violated an individual's freedom of association by enforcing a closed shop agreement on existing employees.

²¹⁷ *Murtagh Properties, Ltd. v. Cleary*, [1972] I.R. 330 (H. Ct.) (Ir.). In this case, the Court granted an injunction against a trade union for violating an individual's constitutional right to equality by objecting to the employment of women by the plaintiff.

²¹⁸ *Lovett v. Gogan*, [1995] 3 I.R. 132 (Ir.). In this case, a private individual who held licences under the Road Transport Act 1932, to operate certain road passenger services on particular days and routes sought an injunction to restrain another private party, who did not hold such licences, from running a similar service. The plaintiff relied on his constitutional right to earn a living by lawful means, arguing that he was entitled to an injunction to prevent an interference with that right. The defendant argued that, even if the plaintiff made out on the evidence what amounted to an interference with his constitutional rights, it would not entitle him to any remedy other than one which he could frame within one of the causes of action which exist such as breach of contract, inducing a breach of contract, or conspiracy. The Irish Supreme Court held that the plaintiff was entitled to an injunction because he had established that it was the only way to protect him from the threatened breach of his constitutional right to a livelihood.

²¹⁹ *Glover v. B.L.N., Ltd.*, [1973] 1 I.R. 388 (H. Ct.) (Ir.). In this case, the Court awarded damages to a plaintiff for violation by the defendant employer of his constitutional right to fair procedures not provided in the employment contract.

(a) India

Part III of the Constitution of India²²⁰ deals with fundamental rights. Article 13 of the Indian Constitution provides that any law that takes away or abridges the rights under the Constitution is void. Article 12 of the Constitution provides, “...unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.”

The framers of the Constitution accepted the necessity of guaranteeing fundamental rights against private parties, as against the State. However, at the time of drafting the Constitution, this need was perceived to be limited to only a certain class of cases. Thus, the rights against discrimination²²¹, untouchability²²², forced labour²²³ and child labour²²⁴ as well as the rights to freedom of expression and free exercise of religion²²⁵ apply against private parties.

However, even apart from these express textual provisions, the Indian Supreme Court has in many cases applied rights against private parties. It has used the “agency and instrumentality”²²⁶ test to interpret

²²⁰ INDIA CONST.

²²¹ INDIA CONST. art. 15, § 2 guarantees that no citizen shall be discriminated against on the ground of religion, race, caste, sex or place of birth with regard to access to shops, restaurants, hotels and places of public entertainment (owned by private parties). Further, INDIA CONST. art. 29, § 2 guarantees that no citizen shall be denied admission to a State recognised or State aided educational institution on grounds only of religion, race, caste, language or any of them. The fact that protection against discrimination on these grounds is available not just against state aided but also state recognised private institutions clearly shows the direct horizontal effect of this right.

²²² INDIA CONST. Art. 17 abolishes untouchability and declares that its practice in any form is forbidden. Since this practice was a socially institutionalised form of discrimination against the lower castes, this is a right clearly applicable against private parties.

²²³ INDIA CONST. Art. 23 prohibits traffic in human beings and *begar* and other forms of forced labour.

²²⁴ INDIA CONST. Art. 24 prohibits employment of a child in any factory or mine or his engagement in any other hazardous employment.

²²⁵ INDIA CONST. Art. 28, § 3 provides that a person attending an educational institution recognised by the state or receiving aid out of state funds shall not be required to participate in religious instruction without his consent, nor shall he be required to attend any religious worship there without his consent.

²²⁶ *Sukhdev Singh v. Bhagatram*, (1975) 1 S.C.C. 421. Justice Mathew held that a public corporation being an instrumentality or agency of the State is subject to the same constitutional limitations as the State itself. The preconditions of this are two, namely, that the corporation is the creation of the State and there exists power in the corporation to invade the constitutional rights of the individual.

the term “other authorities” in Article 12 to include any entity that was by any reckoning governmental in character but had been given an independent status by the government itself for policy reasons of operational efficiency. Extending this rationale further, in *R D Shetty v. International Airports Authority of India*²²⁷, the Supreme Court held that a private agency that is supported by extraordinary State assistance would be subject to the same constitutional limitations as the State.²²⁸

In *MC Mehta v. Union of India*²²⁹, the Court considered the question whether a private corporation could fall within the ambit of Article 12 so as to be amenable to the discipline of Article 21. Although refusing to make a definite pronouncement on this issue, Justice Bhagwati accepted the argument *prima facie* that a private corporation should be subject to the limitations of Fundamental Rights when the following factors are present: the corporation is subject to the functional control of the State, it is engaged in an activity which is hazardous to the health and safety of the community, it is imbued with public interest and the State ultimately proposes to exclusively run the corporation under its industrial policy.²³⁰

One can infer from the Court’s judgement the proposition that in certain circumstances, “the act of a private party begins to resemble the act of a public authority and private right begins to look like public power. This may happen because of... governmental nexus and assistance to the private act,... concentration of economic power... or the simple fact that the private party has control over something which is indispensable for the [private] living of other individuals.”²³¹

The case law of the Supreme Court shows that the Court has

²²⁷ *Ramana Dayaram Shetty v. Intl. Airports Auth. of India*, (1979) 3 S.C.C. 489.

²²⁸ *Id.* at 513. The Court outlined the following five factors as relevant criteria for determining whether a corporation is an instrumentality or agency of the State or not:

(i) financial assistance given by the State and the magnitude of such assistance; (ii) any other form of assistance whether usual or extraordinary; (iii) control of management and policies of the corporation by the state - nature and extent of control; (iv) state conferred or state protected monopoly status; (v) and functions carried out by the corporation, whether public functions closely related to governmental functions.

The Court clarified that the enumeration was not exhaustive and that it was the aggregate or cumulative effect of all the relevant factors that controlled. *Id.* at 525. The Court also relied upon the United States doctrine of state action, according to which wherever private activity was aided, facilitated or supported by the state in a significant measure, such activity took the colour of state action and was subject to the constitutional limitations of the Fourteenth Amendment.

²²⁹ *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.

²³⁰ *Id.* at 1101.

²³¹ Udai Raj Rai, *Reach of Fundamental Rights*, 36 J.I.L.I. 292, 296 (1994).

occasionally enforced fundamental rights against private parties. Thus, in *PUDR v. Union of India*²³², the Court held that the State could not escape its obligation to workmen to ensure observance of labour laws by private contractors because the right against forced labour was enforceable against private parties. In *Mohini Jain v. State of Karnataka*²³³, the Court upheld the right to education of the plaintiff against a private educational institution. In *Vishakha v. State of Rajasthan*²³⁴, the Court held that sexual harassment at the workplace violated the fundamental right of women to gender equality under Article 14 as well as their rights to life and liberty under Articles 19 and 21 of the Constitution. The right to a clean and healthy environment, which includes the right against pollution held to be a part of the right to life under Article 21 of the Constitution, has been enforced primarily against private industry though it has been couched in the form of the failure on the part of the State to enforce laws against pollution and protection of the environment.²³⁵ Thus, we can see that by articulating the violation of rights by private industry as neglect on the part of the State to prevent such violation the Indian Supreme Court has indirectly applied constitutional rights horizontally between private parties.

(b) *South Africa*

In the case of *Du Plessis v. De Klerk*,²³⁶ which was a defamation suit between private parties,²³⁷ a sharply divided Constitutional Court

²³² (1983) 1 S.C.R. 456.

²³³ (1992) 3 S.C.C. 666. Reading the right to life under Art. 21 of the Constitution as imposing a positive obligation on the state, the Court held this includes the right to education. The State discharges its constitutional duty to provide education to its citizens through private educational institutions. Therefore, when Indian private schools charged exorbitant tuition and kept educational courses beyond the reach of the common man, they were acting in a manner repugnant to the Constitution.

²³⁴ A.I.R. 1997 S.C. 3011.

²³⁵ *M C Mehta v. Kamal Nath (the Span Motels case)*, (1997) 1 S.C.C. 388; *MC Mehta v. Union of India and Others (the relocation of industries case)*, (1996) 4 S.C.C. 750; the Coke and Pepsi rock advertisement cases, "SC directs Coca-cola, Pepsi, other to pay for Rock ads", http://www.cleantechindia.com/eicimage/021003_147/SC.doc (last visited Feb. 25, 2006).

²³⁶ 1996 SACL R LEXIS 1.

²³⁷ In this case, the owner of a private airline sued a newspaper for defamation in connection with a series of news stories asserting that the plaintiff had run guns to participants in the Angolan civil war. The newspaper argued that the Interim South African Constitution's protection of freedom of expression insulated it from liability. *Id.*

of South Africa denied the existence of direct horizontal effect²³⁸ under the Interim Constitution of South Africa.²³⁹ This conclusion was derived from Section 7 of the Interim Constitution, according to which the chapter on rights would bind all legislative and executive organs of the state at all levels of government, thus implying that the judiciary, while applying the common law between private parties, was not bound by the Bill of Rights. However, Justice Kriegler (joined by Justice Didcott) in his forceful dissent interpreted Section 35(3) of the Interim Constitution,²⁴⁰ to imply that the values embodied in the Bill of Rights would permeate the common law in all aspects, including private litigation. He argued that the text of the Constitution revealed that the framers of the Constitution had proclaimed far more sweeping aims than the mere repression of state power and that the primacy of equality in the Constitution's structure compelled horizontality.²⁴¹

The majority ruling in this case was in direct contrast with the decisions by lower courts, which in the context of specific rights alleged before them had found that the Interim Constitution had direct horizontal effect.²⁴² In *Mandela v. Falati*,²⁴³ the Witwatersrand Division of the Supreme Court addressed the issue of horizontal application in the context of whether an injunction to bar the publication of allegedly defamatory material was permissible. The Court held that the Constitution's supremacy clause,²⁴⁴ and Section 7(2)²⁴⁵ implicitly

²³⁸ Justice Kentridge A. on behalf of the majority concluded that the common law, insofar as it is the basis of some form of governmental action, which infringes an entrenched right, is subject to direct constitutional challenge. However, the Bill of Rights did not apply directly to the common law when relied upon by a private party in a private dispute and where no act of government was relied upon to support the action. *Id.* at 80-85.

²³⁹ S. AFR. (Interim) CONST. 1993 [hereinafter Interim Constitution].

²⁴⁰ Ch. 3, sec. 35 of the Interim Constitution provided that "[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter".

²⁴¹ *Du Plessis*, SACLR LEXIS at 198-201. See also, Margaret A. Burnham, *Constitution-Making in South Africa: Symposium Article: Cultivating A Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29 (1997).

²⁴² For a detailed discussion of the decisions of the South African courts on the horizontal application of the Interim Constitution and an exhaustive discussion of the *Du Plessis* case, see Delisa Futch, *Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application*, 22 N.C. J. INT'L L. & COM. REG. 1009, 1027 (1997).

²⁴³ 1994 SACLR LEXIS 290.

²⁴⁴ Ch. 1, Sec. 4 of the Interim Constitution provides, "(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall ... be of no force and effect to the extent of the inconsistency. (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

supported the direct horizontal application of the Bill of Rights. Again in *Holomisa v. Argus Newspapers Ltd*,²⁴⁶ the Witwatersrand division of the Supreme Court applied the constitutional principle of freedom of speech and expression in developing the common law of defamation applicable between private parties.²⁴⁷ The Eastern Cape Division of the Supreme Court enunciated the rationale behind horizontal application of rights in *Gardener v. Whitaker*.²⁴⁸ The basic idea is that the Constitution should not be limited to the sphere of public law because the foundation of society is to be found in the Bill of Rights, which would be undermined if it were to be ignored in private law relationships. In *Motala v. University of Natal*,²⁴⁹ the Durban and Coast Local Division of the Supreme Court upheld a challenge to a university's admissions policy,²⁵⁰ as constituting unfair discrimination in violation of Sections 8 and 32 of the Bill of Rights.²⁵¹ The Court held that the rights in question were capable of direct horizontal application.²⁵²

In keeping with the spirit of the lower court decisions, the 1996

²⁴⁵ Ch. 3, Sec. 7(2) of the Interim Constitution provides, "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."

²⁴⁶ 1996 SACLX LEXIS 13. This was a defamation case brought by a military general, a public functionary (according to the case, he was the current Deputy Minister of the Department of Environmental Affairs and the former military ruler of Transkei) against a newspaper on the ground that its report contained false allegations accusing him of having committed racial violence. The Court held that a defamatory statement which relates to "(sic)free and fair political activity is constitutionally protected, even if false unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made." *Id.* at 90.

²⁴⁷ The Court proposed the balancing test of reasonableness as a defence to a common law action of defamation as opposed to the existing test of *animus injuriandi*. *Id.* at 33-40.

²⁴⁸ 1994 SACLX LEXIS 284. See also, Lourens M Du Plessis, *The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court's Approach to Constitutional Interpretation*, 62 SASK. L. REV. 299 (1999).

²⁴⁹ 1995 SACLX LEXIS 256.

²⁵⁰ The policies in question instituted an affirmative action program that contained a quota for the admission of Indian students to the medical school at the University of Natal and a non-uniform system for reviewing applicants.

²⁵¹ § 8 (2) of the South African Charter of Fundamental Rights provides that "no person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision", on one or more of the stipulated grounds. S. 32(a) provides "Every person shall have the right to basic education and to equal access to educational institutions."

²⁵² *Id.* at 22-23.

South African Constitution,²⁵³ which replaced the Interim Constitution, seems to have marked a departure from the *Du Plessis* position by expressly providing for the horizontal application of rights.²⁵⁴ Those who support this interpretation of the South African Constitution base their argument on Section 8(2) read with Section 173 of the South African Constitution. Under Section 173, the power to develop the common law has been extended to the Constitutional Court. Further, Section 8(2) of the Constitution provides that the Bill of Rights binds a natural or juristic person "...if, and to the extent that any of its provisions are applicable to such person taking into account the nature of the right and the nature of any duty imposed by the right." This, combined with the express inclusion of the judiciary as one of the bodies bound by the Bill of Rights, leads them to the conclusion that the South African Constitution ensures direct horizontal application of rights.²⁵⁵

Dennis Davis subscribes to this view and argues that here applicable means "capable and suitable." In determining whether the right is capable of application to private persons, the Court will look at the text and determine whether or not the provisions explicitly or implicitly apply to natural or juristic persons.²⁵⁶ There are instances of explicit application of rights against private parties, like the right against unfair discrimination²⁵⁷ and the right to be free from all forms of violence.²⁵⁸ The Court will then examine whether such application is suitable²⁵⁹ by carrying out a four-stage analysis in light of Section 8(3).²⁶⁰ In line with this interpretation, the Constitutional Court in

²⁵³ S. AFR. CONST. 1996 [hereinafter South African Constitution].

²⁵⁴ Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67 (1999).

²⁵⁵ Jeremy Sarkin, *The Common Law in South Africa: Pro Apartheid or Pro Democracy?*, 23 HASTINGS INT'L & COMP. L. REV. 1, 18 (1999).

²⁵⁶ DENNIS DAVIS, DEMOCRACY AND DELIBERATION 108-109 (1999).

²⁵⁷ S. 9(3) of the South African Constitution explicitly prohibits unfair, privatised discrimination; S. 15(2) imposes obligations on state aided institutions in respect of religious observance; and S. 29(3) places obligations on private schools.

²⁵⁸ S. 12(1)(c) states that the right to freedom and security of the person includes the right to be free from all forms of violence from either public or private sources.

²⁵⁹ Davis, *supra* note 249.

²⁶⁰ The four stages are as follows: (1) The court must satisfy itself that there is no legislation that gives effect to the right as between private persons; (2) It must then determine whether there exists a common law rule that gives effect to such a right; (3) If there is no legislation or common law rule that gives effect to this right, the court must develop rules of the common law to give effect to that right; (4) In applying or developing a common law rule, the court may limit the right provided that the limitation is in accordance with S. 36(1).

Minister of Public Works v. Khayalami Ridge Environmental Association,²⁶¹ applied the right to have access to housing against a private environmental organisation that attempted to block a government plan to create a temporary camp for flood victims.²⁶²

However, there are those who contest this view and argue that the South African Constitution only provides for indirect horizontal effect. Osborne and Sprigman argue that Section 8 of the 1996 Constitution does not mandate horizontal application, it only allows it.²⁶³ They further contend that the provisions of the Constitution read together only preserve the indirect horizontal application of rights recognized by the Court in *Du Plessis*. They cite Section 8(3)(a) of the Constitution, which requires courts, when applying a right to a private party, to give effect to the right by applying, or if necessary by developing the common law, as being inconsistent with the scheme of direct horizontal application. They further argue that Section 39(2), which requires courts when developing the common law to promote the spirit, purport and objects of the Bill of Rights. Section 173 makes sense only against a background assumption of indirect application. They draw attention to the fact that Section 8(3) of the Constitution confines even indirect application of the Bill of Rights to those instances where legislation does not give effect to a right. They argue that this is an unmistakable indication of the drafters' intention that even the indirect judicial enforcement of the Bill of Rights would go forward only if the legislature has defaulted on its own constitutional duty to operationalise the Bill of Rights through appropriate legislation.²⁶⁴

Further, with respect to the idea of explicit horizontal application of provisions like Section 9(4) and Section 12(1)(c), they argue that since Section 9(4) directs that national legislation be enacted to prevent or prohibit unfair discrimination, that the drafters intended Section 9(4)'s prohibition against unfair discrimination to be enforced in the first instance by the legislature, not the courts. This is because such legislation would be redundant if the courts enforced Section 9 directly in private disputes. A similar argument is made with respect to

²⁶¹ 2001 (7) B.C.L.R. 652 (CC).

²⁶² The Constitutional Court held that the government's obligation to provide access to adequate housing outweighed the countervailing considerations that there was no legislation authorizing such a use and that the camp violated the municipal-planning scheme and environmental laws.

²⁶³ Chris Sprigman & Michael Osborne, *Du Plessis is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15 S.A.J.H.R. 25, 30 (1999).

²⁶⁴ *Id.* at 37.

Section 12(1)(c).²⁶⁵ Their argument with respect to these express textual provisions is that the drafters have seen fit to provide a clear indication in the text that certain rights bind private parties. They have also made it clear in several instances that vindication of rights is in the first instance, a legislative responsibility. Judicial responsibility is secondary.²⁶⁶

While the debate about the direct horizontal application of rights in the South African Constitution is an ongoing one, we may safely conclude that there exists a measure of direct horizontal application of certain rights and indirect horizontal effect with respect to other rights in the South African Constitution.²⁶⁷

(c) *Germany*

The first nineteen articles of the Basic Law for the Federal Republic of Germany²⁶⁸ enumerate the guaranteed rights and liberties of the individual. These include *inter alia*, the rights to human dignity, life and personal inviolability,²⁶⁹ equality under the law,²⁷⁰ freedom of expression,²⁷¹ freedom of assembly and association²⁷² freedom of movement²⁷³ and property.²⁷⁴ Article 19 emphasises the value of these guaranteed rights by declaring, “in no case may the state encroach upon these rights.”

In the famous *Lüth* Case,²⁷⁵ the German Constitutional Court

²⁶⁵ *Id.* at 39.

²⁶⁶ *Id.* at 40.

²⁶⁷ Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 407-08 (2003) .

²⁶⁸ Grundgesetz, 1949 [GG] [Constitution] (F.R.G.) [hereinafter Basic Law].

²⁶⁹ Arts. 1 and 2.

²⁷⁰ Art. 3.

²⁷¹ Art. 5.

²⁷² Arts. 8 and 9.

²⁷³ Art. 11.

²⁷⁴ Art. 14.

²⁷⁵ *Lüth*, 7 BVerfGE 198, 223 (1958), excerpted in DONALD P KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361-362 (2nd ed., 1997). As per the facts, a public official who was also a civic activist organized a boycott of a film made by a director who had, under the Nazi regime, made a notorious anti-Semitic film. The director obtained an injunction barring the official from attempting to persuade theatres not to show the new film. The civil court relied on a provision in the civil code stating that a person who intentionally causes damage to another "in a manner offensive to good morals" must compensate the victim. The defendant challenged the injunction before the Constitutional Court on the ground that it violated his constitutional right to free speech. The Court held the injunction to be unconstitutional as violating the defendant's right to free speech.

recognized the horizontal application of the rights contained in the Basic Law by holding that the Basic Law established “an objective order of values” that “must be looked upon as a fundamental constitutional decision affecting all spheres of law” and that private law should therefore be interpreted in the “spirit” of the Basic Law.²⁷⁶ Thus, the Court recognized the indirect horizontal effect of rights in the German Constitution as applicable to private law governing the relations between private parties.

However, even before *Luth* had been decided, the Federal Labour Court had adopted a similar position in an important line of decisions. For example, in one group of cases the Labour Court stated that an employee could assert constitutional rights of free speech against an employer.²⁷⁷ In other decisions the Court indicated that the constitutional provision requiring equal rights for women might prohibit wage discrimination by private employers.²⁷⁸ The Labour Court has also found that certain other basic rights—such as the right of marriage²⁷⁹ and the right to the free choice of employment,²⁸⁰ could invalidate provisions in employment contracts that unduly burdened an employee’s ability to exercise those rights.²⁸¹ Finally, the Court has held that an employee’s constitutional rights of human dignity and

²⁷⁶ *Id.* at 363.

²⁷⁷ 1 BAGE 185 (1954) cited in Peter E Quint, *Free Speech and Private law in German Constitutional Theory* 48 MD. L. REV. 247, 259 (1989). In this case, the Court held that the employer’s firing of an employee for political speech violates Art. 5 of the Basic Law under some circumstances.

²⁷⁸ 4 BAGE 240 (1957); 1 BAGE 348 (1955); 1 BAGE 258 (1955) cited in Quint, *id.* In these cases, the Federal Labour Court invalidated industry-wide labour agreements providing lower wages for women than for men as violating the right to equality under Article 3 of the Basic Law.

²⁷⁹ Art. 6 of the Basic Law provides, “Marriage and family enjoy the special protection of the state.”

²⁸⁰ Art. 12 of the Basic Law, provides, “All Germans have the right freely to choose their trade or profession their place of work and their place of training.”

²⁸¹ 4 BAGE 274 (1957) cited in Quint, *supra* note 270, at 259. In this case, the court invalidated a contractual provision that terminated the employment relationship upon an employee’s marriage. Although the employer in this case was a state hospital, and a government official had ordered the agreement prohibiting marriage, the decision apparently rested on the applicability of the constitutional right of marriage to private contracts, without consideration of governmental involvement. In 13 BAGE 168 (1962) cited in Quint, *id.*, which was decided after Lüth, the Labour Court found that the constitutional right of occupational choice under Art. 12 limits contract provisions that require a departing employee to repay costs incurred by the employer for the employee’s education; under some circumstances such provisions could unreasonably impair the employee’s freedom to choose another place of employment. In this case, however, the Court found that the specific provision was reasonable.

personality are violated if an employer fails to provide the employee with productive work during the employment period.²⁸²

In reaching these conclusions the Labour Court emphasized that some constitutional rights were so important that they should be viewed as general rules for the governance of all of society, including the private law relationships of individuals and private groups, and not only as rules for limitation of the government.²⁸³ The Labour Court also noted the relevance of the “social state” provisions of the Basic Law,²⁸⁴ which can be read as approving (or requiring) the active intervention of the state, presumably including the active intervention of the judiciary, to ameliorate various forms of societal, rather than governmental, oppression.²⁸⁵

The Federal Labour Court’s holding has in certain decisions resulted in the creation of a constitutional tort action by one private person against other, amounting to direct horizontal effect. For instance, the Federal Labour Court found that an employee’s right to freedom of conscience must be balanced against the interests of a private employer in running its business.²⁸⁶

In the *Blinkfuer* case,²⁸⁷ the German Constitutional Court not only

²⁸² 2 BAGE 221 (1955); 28 BAGE 168 (1976) *cited in* Quint, *id.* at 260. In a recent decision the Labour Court also held that the constitutional right of privacy created by the same provisions of the Basic Law requires an employer to destroy a personal questionnaire submitted by an applicant whose application for employment had been denied. 46 BAGE 98 (1984), *cited in* Quint, *id.*

²⁸³ 1 BAGE 185, 193 (1954) *cited in* Quint, *id.* The Court held that under the Basic Law, certain fundamental values have entered into the basic legal framework, such that these basic rights affect not only the relationship of the individual citizen to the state, but also the interrelationship of the citizens as legal equals.

²⁸⁴ These include Articles 20 and 28 of the Constitution. Art. 20(1) of the Basic Law provides, “The Federal Republic of Germany is a democratic and social federal state.” Art. 28(1) provides in relevant part, “The constitutional order in the Länder must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law.”

²⁸⁵ 4 BAGE 274, 276, 279-80 (1957) *cited in* Quint, *supra* note 270, at 262.

²⁸⁶ 47 BAGE 363 (1984) *cited in* Quint, *id.* at 263. In this case, a press operator in a private printing shop refused on grounds of conscience to print an advertisement for books that he believed glorified war. The press operator was fired, and he sued in the labour courts to have the discharge set aside. The court upheld the employee’s right to freedom of conscience and set aside the discharge.

²⁸⁷ *Blinkfuer*, 25 Bundesverfassungsgericht 256 (1969) KOMMERS, *supra* note 268, at 372-374. *Blinkfuer*, a newspaper dealer, challenged the threatened boycott by Springer, an important newspaper publisher, of news dealers who carried publications listing East German television program on the ground that it had illegally injured its business and demanded compensation under S. 823(1) of the Civil Code. Springer however, contended that it possessed a constitutionally protected right to call for the boycott. Upholding *Blinkfuer*’s damage claim, the Court found that Springer’s call for a boycott

found that Springer, a private concern, had violated the constitutional speech rights of Blinkfuer, an individual, it also indicated by its ruling that the failure of the lower courts to issue a judgment for plaintiff Blinkfuer perpetuated that constitutional violation.²⁸⁸ This is another instance of direct horizontal effect.

Following this ruling, in the *Soraya* case,²⁸⁹ the Constitutional Court expressly approved the creation of what is in effect a constitutional cause of action in damages by one private individual against another to protect a general constitutional right of personality, derived from Articles 1 and 2 of the Basic Law. The BGH found that the influence of Articles 1 and 2 of the Basic Law overrode the clear statutory command and established a damage remedy by one private individual against another for the invasion of the constitutional right of personality.²⁹⁰ The BGH found that the impact of the Constitution on private law required this result because otherwise the values of Articles 1 and 2 would not be adequately protected against the actions of individuals.

Subsequently, in the *Mephisto*²⁹¹ case, the Court acknowledged that there was a constitutional right not to be libelled, which was a component of a broader constitutional right to be free of invasions of personality. It also recognized that these constitutional rights could be asserted not only against the state, but also (and indeed more commonly) against individuals such as writers and others who were engaged in the expression of opinion or artistic expression.²⁹²

actually violated Blinkfuer's right to publish information about East German television programs guaranteed under the right to freedom of the press, under Article 5, Section 1 of the Constitution.

²⁸⁸ *Id.*

²⁸⁹ 34 Bundesverfassungsgericht 269, 286 (1973) *cited in* Quint, *supra* note 270, at 301.

²⁹⁰ *Id.*

²⁹¹ 30 Bundesverfassungsgericht 173 (1971) extracted from Kommers, *supra* note 268, at 301. In this case, the complainant, a publisher, challenged the injunction obtained by the sole heir of Gustaf Gründgens, an actor and theatre director, against the printing, distribution, or publication of a book by Klaus Mann, which portrayed the rise of an actor, whose life history was modelled on that of Gründgens. Upholding the injunction, the Court held that the decision in the case must preserve a delicate balance between the right to freedom of expression and the right to personality under the Constitution. The Court found that if a work of art threatens human dignity by using (or misusing) details of an individual's life history, the Basic Law may require that the protection of personality be given greater weight than the guarantee of artistic expression. The decision of which competing constitutional protection should prevail can be determined only "through a weighing of all the circumstances of the individual case." KOMMERS, *id.* at 302-303.

²⁹² *Id.*

3. Indirect Horizontal Application

In this section, I discuss the United Kingdom and Canada as examples of countries manifesting the second type of indirect horizontal effect, i.e., where a bill of rights binds private parties inasmuch as it influences a court's interpretation and development of the common law.

(a) *United Kingdom*

Historically, rights in the British system were residual in that they existed to the extent that they were not restricted by statutory or common law rules.²⁹³ The incorporation of the rights and freedoms guaranteed under the European Convention on Human Rights, 1950 into the UK Human Rights Act, 1999 was a consequence of changes in the civil libertarian thinking in the UK. These changes were prompted by a perception of changed political conditions²⁹⁴ that weakened the rationale for the residual nature of rights.

Section 3 of the Act provides that any statute or delegated legislation must be interpreted to conform to the Convention rights as far as possible. Further, Section 6 provides that any public authority must act compatibly with the Convention rights. A 'public authority' is defined broadly as "any person [whose] functions are... of a public nature." The government's white paper supporting the Human Rights Bill indicates that the Section 6 duty should extend to police, immigration, and prison officers as well as "companies responsible for areas of activity which were previously within the public sector, such as

²⁹³ The reason behind this was the belief that the democratic process, institutional checks and balances, and the vigilance of the opposition in Parliament were the best means of preventing governmental abuses of human rights. Lord Lester of Herne Hill, *European Human Rights and the British Constitution*, *THE CHANGING CONSTITUTION* 34, 38 (4th ed., 2000).

²⁹⁴ The time-honoured system of checks and balances had been weakened by several developments, including the enfeebled position of the House of Lords; the diminished role of members of the House of Commons who were not part of the government ("back-benchers") in scrutinising the actions of government ministers; and the difficulties faced by the opposition in a modern bureaucratic state when it has unequal access to the information necessary to effectively oversee the exercise of governmental power. The reliance on democratic accountability was criticised on the ground that the "tyranny of the majority" could pose as great a threat to liberty as the abuse of power by an authoritarian state. Much of the perception that traditional constitutional checks and balances were failing can be traced to the hegemonic rule of the Conservative Party under Margaret Thatcher and John Major in the 1980s and early 1990s. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 *TEX. INT'L L.J.* 329, 348 (2002).

the privatised utilities”, insofar as they are “exercising public functions”.²⁹⁵ However, inasmuch as private individuals are not personally vulnerable to any of the new remedies created by the Act, this can only be described as limited direct horizontal effect.

Section 6 also provides a gateway for indirect horizontal effect. This is because Section 6(3) defines “public authority” to include “a court or tribunal.” It has been argued that courts would be acting incompatibly with the Convention Rights if they do not give effect to the rights even when they are determining the rights and duties of private parties.²⁹⁶ It would be unlawful for them to make a decision that interferes with or fails²⁹⁷ to protect either party’s rights. Thus, Section 6(3) imposes a “developmental” obligation on the court; an obligation to develop the common law in accordance with the Convention.²⁹⁸ However, rights would apply between private individuals only where the state has a duty under the convention to protect the human rights of one party against another party, whether by way of claim or defence.²⁹⁹ It has also been argued that the Convention rights have a normative character and that the “spirit” of the Act requires application of human rights principles in all areas of the law.³⁰⁰

In *Douglas v. Hello! Ltd.*,³⁰¹ the Court of Appeal accepted that the Human Rights Act gave rise to indirect horizontality, inasmuch as it imposes an obligation upon the courts to ensure respect for the Convention Rights while applying the common law. While the Court made it clear that this obligation does not require the Court to make more than an incremental change to the common law,³⁰² this decision has been heralded as opening the door for greater indirect horizontal application in the UK, where private individuals would be able to sue each other for violations of rights.³⁰³

²⁹⁵ *Id.* at 357.

²⁹⁶ Thomas Raphael, *The Problem of Horizontal Effect*, 5 EUROPEAN HUMAN RIGHTS LAW REVIEW 493, 495 (2000).

²⁹⁷ S. 6(6) provides that ‘act’ includes a ‘failure to act’.

²⁹⁸ Raphael, *supra* note 289, at 495-496. *See also*, Shaun D. Pattinson & Deryck Beyleveld, *Horizontal Applicability and Horizontal Effect*, 118 L.Q.R. 623, 634 (2002).

²⁹⁹ Anthony Lester & David Pannick, *The Impact of the Human Rights Act on Private Law: The Knight’s Move*, 116 L.Q.R. 380, 384 (2000).

³⁰⁰ William Wade, *Horizons of Horizontality*, 116 L. Q. R. 217, 220 (2000).

³⁰¹ [2001] 2 WLR 992 (CA). In this case, the Court accepted that the right to privacy of an individual as embodied in the Human Rights Act would apply against private entities.

³⁰² Justices Sedley & Keene, *id.* at 1002.

³⁰³ Alison Young, *Remedial and Substantive Horizontality: The Common Law and*

Section 32 of the Canadian Charter of Rights and Freedoms³⁰⁴ provides that the charter is applicable to the Parliament and government of Canada and the legislature and executive of the provinces.³⁰⁵ Section 52, referred to as the Supremacy Clause of the Charter, provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

In *Canada-Dolphin Delivery*,³⁰⁶ the Canadian Supreme Court refused to apply the Charter right to peaceful picketing against a private party on the ground that the Charter did not have relevance to private litigation. Rejecting the union’s reliance on the Charter’s “supremacy” clause, Justice McIntyre said that a natural reading of Section 32 of the Charter which omitted courts from its scope, implied that the judiciary, while applying and developing the common law, was not bound to apply the Charter rights in private litigation. The general language of the supremacy clause, with its reference to “any law,” could not overcome this reading.³⁰⁷

Thus, the Court implied that the Charter applied to the common law “only in so far as the common law was the basis of some governmental action” and not in its regulation of relationships among private actors.³⁰⁸ But the Court did state that where the Charter does not apply to the common law, “the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.”³⁰⁹

Douglas v. Hello! Ltd., PUBLIC LAW 232 (2002).

³⁰⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 [hereinafter Canadian Charter].

³⁰⁵ § 32 of the Canadian Charter reads, “Application of Charter (1) This Charter applies

a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

³⁰⁶ *Retail, Wholesale & Dep’t Store Union v. Dolphin Delivery Ltd.*, 33 D.L.R. (4th) 174. In this case, a private company sought and obtained an injunction under the common law of inducing breach of contract to restrain the secondary picketing of its premises by a trade union. The union argued that the picketing was protected speech under the Charter’s guarantee of freedom of expression. The Supreme Court held that secondary picketing was indeed within the Charter right, but denied the injunction in the instant case.

³⁰⁷ *Id.* at 594-599.

³⁰⁸ *Id.* at 599.

³⁰⁹ *Id.* at 603.

The decision of the court has been criticised for wrongly reconciling the provisions in Section 32 and Section 52 of the Charter. David Beatty argues that interpreting the word “government” in Section 32 to refer only to the executive branch is not textually possible if we accept the proposition that the Charter is superior to all other forms and expressions of law.³¹⁰ He argues that Justice McIntyre decision is unacceptable because it allows the exercise of coercive legal authority by the unelected court in ways, which may be completely at odds with the values constitutive of the political character of the community.³¹¹

In the subsequent case of *Hill v. Church of Scientology of Toronto*,³¹² the Supreme Court upheld the decision in *Dolphin Delivery*, that even though the Charter does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with Charter values. The Court elaborated on the differences between Charter rights and values. A person can challenge legislative or executive action on the basis of a Charter right. However, in the context of a legal dispute between private parties, in which the consistency of the common law with Charter values becomes relevant, the Charter creates no new cause of action because private parties owe each other no constitutional duties.³¹³

The Court has applied Charter values in cases involving private parties. In *R v. Park*,³¹⁴ a case involving alleged sexual harassment, Justice L'Heureux-Dubé applied the Charter value of equality between men and women to the common law defence of mistaken belief regarding consent.³¹⁵

³¹⁰ David Beatty, *Constitutional Concepts: The Coercive Authority of Courts*, 37 U. TORONTO L.J. 183, 189 (1987).

³¹¹ *Id.* at 198.

³¹² [1995] 2 S.C.R. 1130. Representatives of the Church of Scientology and a lawyer working for the Church held a press conference on the courthouse steps in Toronto, where the lawyer read from and commented upon allegations in a notice of motion by Scientology intending to commence criminal contempt proceedings against a Crown attorney. At the contempt proceeding where the appellants were seeking a fine or imprisonment against the defendant, the allegations against Hill were found to be completely untrue and without foundation. Thus, Hill launched a lawsuit for damages in libel against the appellants. Both appellants were found jointly liable for general damages and Scientology alone was liable for punitive damages. The question before the Court was whether the common law of defamation was valid in light of the right to freedom of expression in the Charter.

³¹³ *Id.* at 1170.

³¹⁴ [1995] 2 S.C.R. 836, at 839.

³¹⁵ Holding that the current common law approach to consent may perpetuate social

Thus, it may be concluded that there exists limited indirect horizontal effect in the Canadian context. Moreover, the possibility of developing the common law in accordance with Charter values shows that there is some scope for further development of the principle in Canadian Constitutional law.

D. Conclusion

The above review of the application of human rights in diverse constitutional orders shows an acceptance of horizontal application of rights in the modern day context. While receptivity towards horizontal application of rights varies across constitutional orders³¹⁶, ranging from indirect to direct horizontal application, the acceptance of the doctrine is premised on the belief that the state no longer represents the sum total of governing power in society where private parties increasingly exercise power as also a belief in the importance of rights and the need for their respect in all sections of society.

My conclusion that both constitutional rights and international human rights have common origins inasmuch as they seek to protect the individual against political absolutism and power leads me to argue for the transplantation of the horizontality thesis from constitutional law to international human rights law to make non-state actors like the World Bank and the IMF directly accountable to individuals for human rights violations. In the next chapter, I explore how a norm of horizontal application of rights would apply with respect to the World Bank and the IMF.

VI. HORIZONTAL APPLICATION OF HUMAN RIGHTS AGAINST THE WORLD BANK AND THE IMF

In applying human rights horizontally against the World Bank and the IMF, we must determine both the content of the rights available against these institutions as well as the nature of their obligation with respect to these rights. Given that questions relating to the content of the rights protected by customary international law and the nature of the state's obligation in enforcing these rights are still matters of

stereotypes that have historically victimised women and undermined their equal right to bodily integrity and human dignity, she held that there must be an air of reality in that defense which was not substantiated by the evidence in the case and therefore, upheld the conviction of the accused.

³¹⁶ It has been suggested that nations that are comfortable with providing social welfare rights in their constitutions are unlikely to find the problem of horizontal effect a difficult one. Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

considerable controversy in international law, this is a difficult yet pertinent question to ask in light of the horizontality thesis. My attempt in this chapter is to share a few preliminary thoughts on these questions with reference to the three kinds of criticisms made against the World Bank and the IMF, as discussed in the first chapter.

The horizontal application of rights against private parties in municipal law as discussed in the previous chapter does not impose a positive obligation on them to enhance the rights of others. It only prevents the exercise of legal rights by parties, whether conferred by statute or common law, in ways that may infringe upon the constitutional rights of others. This is true even in case of constitutions granting social and economic rights, so called “positive rights” to their citizens.³¹⁷ In extending the thesis of horizontal application of rights to international institutions like the World Bank and the IMF on the international plane, it is submitted that a similar level of obligation must be expected on the part of these entities as is expected of private actors at the municipal level. With this established, it is not within the scope of this paper to discuss with precision what the content of a negative obligation to refrain from infringing upon human rights would mean in the context of the World Bank and the IMF. At this stage, I will give suggestions as to how the World Bank and the IMF could ensure their observance of the three kinds of human rights that they have been criticised for violating, as discussed in the first chapter.

My thesis of horizontality requires that the human rights discourse be part of the development obligations of the World Bank and the IMF. This involves incorporation of human rights concerns at three levels.

A. The Right to Self Determination

The right to self-determination implies a group right of the people to “own” the process of development. Horizontal application of this right against the World Bank and the IMF would involve restructuring the process of “structural adjustment lending”. The World Bank and the IMF possess the technical expertise to conceive policy options. However each individual state alone is aware of its own unique political and socioeconomic conditions. While all long-term and short-term policies and projects must be devised through a process of consultation between the World Bank or the IMF and the borrowing

³¹⁷ For instance, in the South African context, where the Constitution expressly guarantees socio-economic rights including the rights to food, health, water, social security (S. 27) and housing (S. 26), horizontal application of these rights would not translate into a positive obligation on private parties to secure these rights for others.

state, the two institutions must not use conditionality arrangements to coerce borrowing states to toe their line. In other words, people's right to self-determination mandates abandoning conditionality arrangements.

However, this move by itself may not be sufficient for ensuring articulation of people's voice in the development process. Authoritarian regimes are not truly representative³¹⁸ and democratic regimes often oppress minorities. While the World Bank and the IMF cannot independently ensure representative government in debtor countries, they must adopt policies to ensure effective stakeholder participation in the process of development.

B. Civil and Political Rights

The obligation on the part of the World Bank and the IMF to respect people's civil and political rights to information, representation and participation in the development process would require two types of changes. The first type would have to occur at the stage of design and implementation of specific policy measures. The other type would involve institutional restructuring of the World Bank and the IMF.³¹⁹

Design and implementation of projects: The World Bank and the IMF would be required to ensure stakeholder participation in the design and implementation of every project funded by them. The extent of stakeholder participation should be related to the extent an operation directly and substantially affects the group in question. Effective participation would require that the stakeholders possess sufficient freedom of expression and association as well as access to information. If the internal political regime of a country impedes the availability of information or chills freedom of speech and association, then the human rights obligation of the World Bank and the IMF would require them to facilitate informed participation of the people. This may be done through mechanisms whereby the stakeholders or their authorised representatives such as non-governmental organisations could directly communicate with the World Bank and the IMF without having to go through state representatives.

Institutional restructuring: The two institutions must undergo the following institutional changes to ensure compliance with their obligation to respect civil and political rights. First, the two institutions

³¹⁸ Here it must be noted that the idea of a "representative government" does not imply a uniform idea of elected democracy but may include communist governments installed after a popular revolution.

³¹⁹ Bradlow, *supra* note 95, at 85.

need to ensure that their own operating practices and procedures are in conformity with the principles of good governance that they advocate to the borrowing states. Thus, their operating rules and procedures should be transparent, publicly available and easily understood by all interested parties. Secondly, the two institutions need to give stakeholders the opportunity for meaningful communication with the institutions with respect to particular projects in order to help them to adequately protect their interests in the project through timely availability of information. Finally, the two institutions need to provide stakeholders with meaningful and independent accountability mechanisms for their actions. The World Bank Inspection Panel and the IMF Independent Evaluation Office are definite steps in this direction. However, as already discussed, they fall far short of establishing effective accountability.

C. Economic and Social Rights

The World Bank and the IMF must also ensure that they take into account the expected economic and social impact of their operations. This does not mean that the projects and policies of the two institutions should be designed in such a way as to have no human rights impact whatsoever. That is obviously an impossible requirement. This only means that the World Bank and the IMF while designing their projects should conduct a full-scale assessment of the short and long-term human rights impact of their policies and operations. Recognising that any development project necessarily involves some sacrifices, the two institutions would have to engage in a balancing act while deciding to proceed with a particular policy recommendation. Some factors that should be taken into account while deciding to proceed with a particular project include: the existence of less harmful alternatives, the duration of the negative human rights impacts, the adequacy of opportunity for the stakeholders who will suffer the negative human rights impacts to participate in the design and implementation of the project, the availability of a means for the stakeholders to petition the operation's decision makers for redress of any grievances that arise during the course of the operation, and the nature and quantity of compensation available to those who suffer losses as a result of the operation.³²⁰

The incorporation of the three kinds of rights described above in the development obligations of these institutions may not seem as difficult today as it would have a decade ago because of the growing

³²⁰ *Id.* at 89.

realisation by the two institutions, in particular the World Bank, of the serious human rights consequences of their operations and the need for external accountability. The attempts at self-regulation and establishment of quasi-independent accountability mechanisms by the two institutions, as discussed in the second chapter, are testimony to this awareness. Recognition of a moral obligation to respect human rights is the first step towards establishing the kind of legal obligation to protect human rights that I have argued for in this paper.

VII. CONCLUSION: LOOKING FORWARD

In this paper, I have demonstrated the need for accountability of the World Bank and the IMF as arising from their coercive exercise of public power, which not only violates people's right to self-determination but also infringes upon their civil and political and economic, and social rights. I have described how the attempts made by these institutions to fashion accountability mechanisms fail to recognise the centrality of human rights concerns in the process of development, resulting in *ad hoc* and selective attempts at developing human rights accountability. Further, the limited mandate and lack of independence of the institutional mechanisms that have been established greatly limit their efficacy in establishing human rights accountability. Based on this, I have established a case for independent human rights accountability of these institutions.

I have concluded that the World Bank and the IMF possess both municipal and international juridical personality such that it is possible in principle to devise accountability mechanisms for these institutions both at the municipal and international levels. I have also demonstrated that any attempt to establish independent human rights accountability at the municipal or the international level would require changes in existing international law doctrines and the constituent instruments of the two institutions. Based on the limitations of a thesis of municipal accountability to redress human rights violations of people in authoritarian regimes, I have argued in favour of establishing international human rights accountability of the World Bank and the IMF.

Having concluded that the existing theory of international human rights accountability elaborately sketched out by Skogly is incomplete, I have argued in favor of transplantation of the doctrine of horizontal application of rights from the realm of constitutional law into international human rights law to develop a comprehensive theory of horizontal human rights accountability of the World Bank and the IMF. Finally, I have described what the World Bank and the IMF must

do in order to ensure that they do not infringe people's right to self-determination, their civil and political rights and their economic and social rights.

However, incorporation of the doctrine of horizontal accountability in international human rights law raises important questions about its scope and enforcement.

Questions about the scope of the doctrine require us to determine the kind of non-state actors that could be made horizontally accountable under international human rights law. Will the doctrine apply only against the World Bank and the IMF or can we extend its application to other international intergovernmental organisations like the World Trade Organisation, regional development organisations like the African Development Bank and the Asian Development Bank, or regional security organisations like the North Atlantic Treaty Organisation, etc.? What about non-governmental organisations and transnational corporations? It is not within the scope of this paper to provide a comprehensive answer to these questions. Yet, I would like to make some preliminary remarks about the direction that the debate should take. The idea behind the evolution of "rights" is that of protection against political absolutism and power. My argument behind the extension of the horizontality thesis on the international plane to make the World Bank and the IMF directly accountable for human rights violations stems from the premise that these institutions possess international legal personality and that the kind of power that these actors exercise over the lives of individuals within debtor countries is akin to state power. This should be the guiding principle when we seek to extend the horizontality thesis to other non-state actors in international law. Thus, possession of international legal personality and the ability to exercise coercive power similar to state power are the two features that must be satisfied by a non-state actor before it can be made horizontally accountable for human rights violations.

The second question arises with respect to the enforcement of international human rights against the World Bank and the IMF and possibly against other non-state actors. While I am of the opinion that my thesis possesses normative merit even without judicial enforcement, I would like to make some suggestions about the possibility of such enforcement. Although there is no international human rights court or tribunal, there exist three regional human rights courts: the European Court of Human Rights³²¹, the Inter-American

³²¹ The European Court of Human Rights was set up in 1959 under the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened*

Court of Human Rights³²² and the African Court on Human and Peoples' Rights³²³. It would perhaps be a worthwhile exercise to examine how the jurisdictional scope of these institutions can be expanded to allow human rights claims against non-state actors. It must be noted, however, that in the absence of political will, exploration of tribunals will not yield much. The articulation of the principle of individual accountability in international law and the Nuremberg trials, conducted in pursuance of the same, were a radical development in international law. However, this principle came to be accepted quickly because the political will that was necessary for such acceptance existed. It is highly likely that political will exists amongst people of developing countries who have suffered diminution of their political and economic independence at the hands of intergovernmental institutions and transnational corporations. But whether their concerns find an echo in the developed world, and whether, in the absence of such a consensus, it would be possible to construct an enforceable framework, are questions for the future.

for signature Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953), *available at* <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (last visited Apr. 15, 2005).

³²² The Inter American Court of Human Rights was set up pursuant to the Statute of the Inter American Court of Human Rights in 1979, *available at* http://www.corteidh.or.cr/general_ing/statute.html (last visited Feb. 25, 2006).

³²³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III), *available at* http://www.achpr.org/english/_info/court_en.html (last visited on Apr. 15, 2005). *See also*, Nsongurua J. Udombana, *An African human rights court and an African Union Court: a needful duality or a needless duplication?*, 28 BROOK. J. INT'L L. 811 (2003); Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT'L L. 1 (2004).