

The Way Forward

Human Rights and the World Bank

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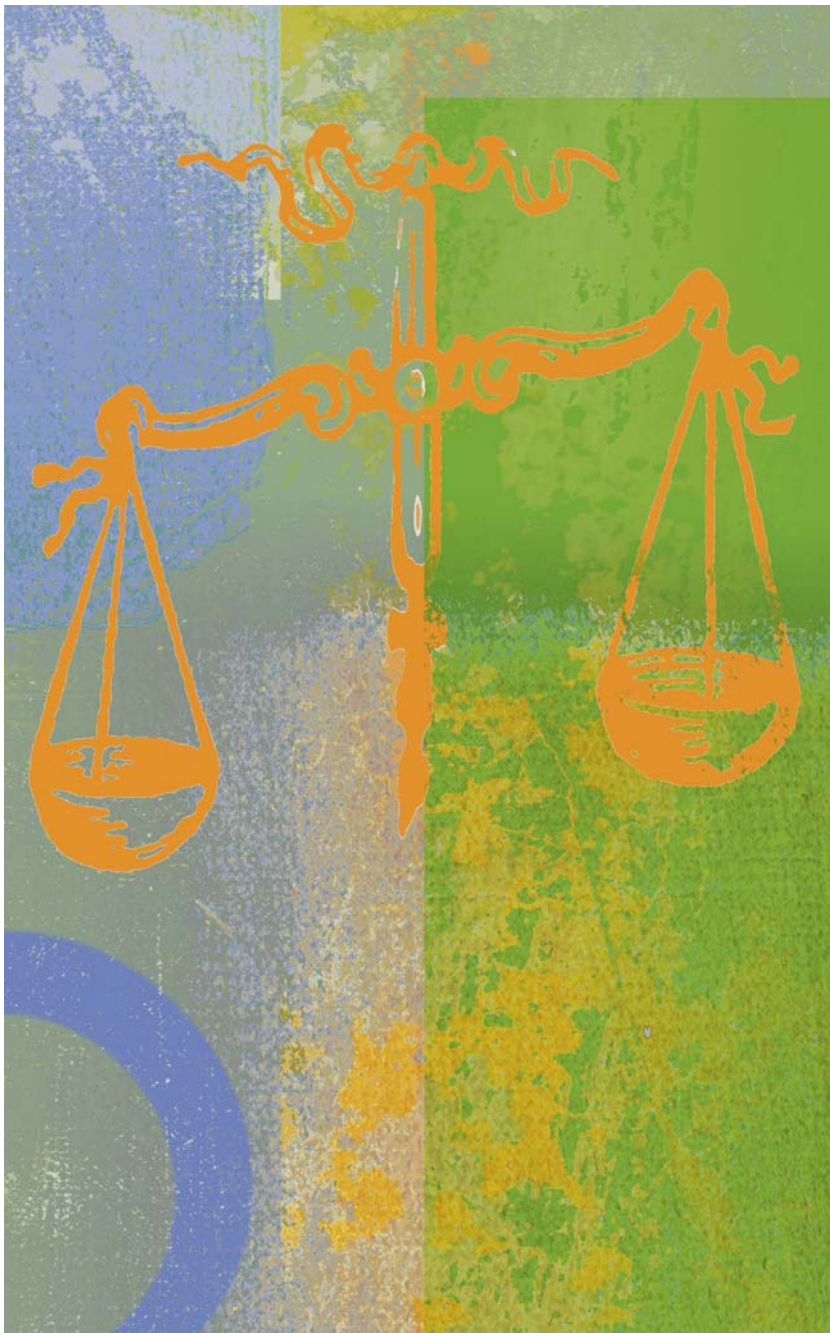
Introduction

HUMAN RIGHTS now constitute defined legal standards of the international constitutional order. Seven core international human rights treaties have been ratified by the majority of the world's countries.¹ A significant body of international legal obligations and jurisprudence now exists with respect to a core of civil and political as well as economic, social and cultural rights.

How this body of law and principle relates to the World Bank is an issue ripe for analysis, in light of the evolving connection between human rights and development in the international context, in international law, and in the World Bank.

It is now widely recognized that human rights have relevance for several other international goals, including development.² These linkages are evident in 2003 *UN Common Understanding on a Human Rights-Based Approach to Development Cooperation*³, in the 2005 *UN Millennium Project Report*⁴ and more recently, in the Secretary General's 2005 Report *In Larger Freedom*⁵. Each of these highlighted the relevance of human rights to development, and the latter affirmed the connections between these two areas and security.

For the World Bank, several dimensions of human rights and development create the need for a careful approach. Human rights have an unavoidable political content and embody value commitments which are not uniformly interpreted,⁶ yet the World Bank has limitations on strictly political activities. Furthermore, the concept of universality underpinning the international human rights framework is a complex one,⁷ which must be assessed in progressive terms, and



interpreted according to its current legal, political and historical context.⁸ World Bank Members have diverse views about how human rights should be integrated into development approaches⁹ that could lead to diverse views about the role for an international financial institution like the World Bank. Political human rights in particular have traditionally been considered to lie beyond the permitted range of considerations under the Articles of Agreement,¹⁰ which bar decisions based on political considerations or political systems, as well as interference in domestic political affairs of its members.¹¹ The World Bank's role is a facilitative one, in helping our members realize their human rights obligations. In this sense, human rights would not be the basis for an increase in Bank conditionalities, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.

Developments within the World Bank relevant to Human Rights

SEVERAL RECENT DEVELOPMENTS *within* the Bank also make this examination apposite. As early as 1998, the Bank had issued statements indicating that the Bank supported the realization of human rights, and that it believed that "creating the conditions for the attainment of human rights is a central and irreducible goal of development."¹² Although the Bank's pronouncements on human rights have always been broadly supportive, they never affirmed in concrete terms that the Bank had a specific role to play in relation to human rights as legal principles, or as legal obligations.

In 2005, the Bank's senior management asked the then General Counsel for a reflection as to whether more explicit work on human rights would be in compliance with the Bank's Articles of Agreement. This review resulted in a January 2006 note entitled *Legal Opinion on Human Rights and the Work of the World Bank*, which concluded that "The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank's mission."

This document marks a clear evolution from the pre-existing restrictive legal interpretation of the Bank's explicit consideration of human rights. It is "permissive": allowing, but not mandating, action on the part of the Bank in relation to human rights. It clarifies "the state of the law," and gives the Bank the necessary leeway to explore its proper role in relation to human rights, updating the legal stance adopted internally to accord with the Bank's practice and the current international legal context. It facilitates a more comprehensive understanding of human rights in development, and enables the Bank to take these issues into account where they are relevant. Finally, it represents a point of departure for future legal analysis on human rights by the Legal Vice-Presidency as well as my own thinking on this matter as General Counsel of the World Bank Group.

The Articles of Agreement, like any legal text or treaty, must be interpreted purposefully and contextually, according to the demands and values of their times.¹³ Consistent with this, the

opinion expressed is founded on a mainstream interpretation of the concepts of legitimate global concerns, and the notion of "interference" under international law. It is now well established that human rights rely on collective monitoring and enforcement, against which the concept of state sovereignty is no longer an absolute shield.¹⁴ The opinion expressed is founded also on a fuller understanding of the types of considerations that the Bank can and should take into account in order to do its due diligence and as part of its decision-making process.

The Bank's Legal Framework for Human Rights: the Way Forward

THE WORLD BANK has a significant role in helping its Members in the substantive realization of their human rights obligations in areas that fall within its mandate, and where development activities and human rights are interrelated. However, in fulfilling this role, the Bank must also respect the legal limits imposed by its Articles of Agreement.

It is now clear that the Bank can and sometimes should take human rights into consideration as part of its decision-making process. The challenge we now face is to clarify *how* these legal concepts should be specifically incorporated into the work of the Bank in order to further its mission of sustainable and equitable development, taking into account the following general considerations:

First, many areas of Bank activity have a *human rights dimension*. There are wide zones of overlap between substantive areas covered by core human rights treaties and areas in which the Bank operates. The Bank contributes to the realization of human rights in these different areas, even though its policies, programs and projects have never been explicitly or deliberately aimed towards the realization of human rights.

Second, there is a need for recognition of the role of human rights as *legal principles*, which may inform a broad range of activities, and which may enrich the quality and rationale of development interventions, and provide a normative baseline against which to assess development policies and programming.

Third, there should be a clear understanding that in certain cases and under certain circumstances, human rights generate *actionable legal obligations*. Such obligations may arise from international treaties, or from rights enshrined in national laws. Here the Bank's role is to support its Members to fulfill those obligations where they relate to Bank projects and policies.

From an internal perspective, the Bank's analytical work can benefit from a systematic inclusion of human rights considerations and the broadened range of legal analysis these require. Areas such as governance or the legal empowerment of the poor are particularly relevant in this respect.

The concept of governance is widely acknowledged to be indispensable to sustainable development. That focus would be significantly strengthened by anchoring it in the international human rights framework. Human rights offer a clear conceptual and legal framework for connecting the supply and demand sides of governance in terms of its basic correlative

notions of rights and duties. Acknowledging the relevance of human rights to the Bank and integrating human rights into its work is an important element in our efforts to step up the Bank's promotion of good governance and its global fight against corruption. Indeed, in substantive terms, these areas share common legal principles.

As an institution focused on fighting poverty and helping the poor, the legal empowerment of the poor must be addressed at a number of levels: international, regional, domestic; formal and informal. Human rights provide an indispensable framework for achieving this. The overarching goal of human rights frameworks is the empowerment of the weakest and most marginalized, including the poor. Human rights can help secure and strengthen their ability to claim rights and entitlements and take advantage of opportunities. From the perspective of the Bank's mandate, the international human rights framework can help inform a broad and comprehensive interpretation of legal empowerment of the poor that encapsulates both poverty reduction and governance initiatives.

From an external perspective, this approach requires us to strengthen collaboration with our partners in the broader UN family and with other international actors who have a comparative advantage in this area. Unlike the World Bank, many of these have mandates that contain explicit commitments to human rights, including, in some cases, monitoring and enforcement roles and capabilities. We have been working with the Office of the High Commissioner of Human Rights on several initiatives; we regularly engage in dialogue with other UN agencies to learn from their experience and we collaborate under the aegis of the OECD on human rights.

Finally, many donors already incorporate human rights considerations into their development programs and we may be able to learn a great deal also from their experience. These are all partnerships we should continue and strengthen. 🐾

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* Although it goes without saying that responsibility for the content is entirely mine, my sincere gratitude goes to Siobhan McNerney-Lankford.

Endnotes

¹ For the purposes of this discussion of human rights, the primary frame of reference is the international human rights framework. Beyond the Universal Declaration of Human Rights, that framework comprises seven "core" instruments: the International Covenant on Civil and Political Rights (156 Parties) (and its Optional Protocol (105 Parties)); the International Covenant on Economic Social and Cultural Rights (153 Parties); Convention on the Rights of the Child (192 Parties); Convention on the Elimination of All Forms of Discrimination Against Women (184 Parties); International Convention on the Elimination of All Forms of Race Discrimination (170 Parties); International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (34 Parties); the Convention Against Torture (141 Parties), in addition to which there are two other significant instruments: the Genocide Convention (138 Parties) and the Convention on the Rights of Refugees (140 Parties).

² See for instance the report of the Secretary-General entitled *Strengthening of the United Nations: an agenda for further change (A/57/387* of 9 September 2002). In that report, the Secretary General stated that "The promotion and protection of human rights is a bedrock requirement for the real-

ization of the Charter's vision of a just and peaceful world". Since that report, the strengthening and mainstreaming of human rights in the UN has come to be known as "Action 2" after Action 2 of the report, which related to Strengthening UN Support for the Promotion and Protection of Human Rights Worldwide.

³ http://portal.unesco.org/shs/en/ev.php-URL_ID=7733&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴ <http://www.unmillenniumproject.org/> (the "Sachs Report")

⁵ www.un.org/largerfreedom/

⁶ M. Nowak, *Introduction to the International Human Rights Regime* (2003) discussing the philosophical foundations of human rights held "The Value system manifested in human rights is not a specifically European one, but is found in all major cultures and regions worldwide."

⁷ United Nations World Conference on Human Rights (Vienna 14-25 June 1993) issued the Vienna Declaration and Programme of Action (A/CONF.157/23)12 July 1993, Section 5 of which provides: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." M. Nowak, *supra*, note 6 at pages 12, 14, 24-26. M. Cranston, *What are Human Rights?* (Taplinger Publishing Co. 1973); J. Donnelly, *The Concept of Human Rights* (Croom Helm, 1985); J. Donnelly, *Universal Human Rights in Theory and Practice* Cornell University Press (2003).

⁸ See S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford, 2005) who describe an approach to reconciling universality and diversity as follows: "one way of summarizing this approach [...] is to refer to a distinction that has been drawn between 'universalism' and 'universality'. For this purpose universalism is the attempt to eliminate particularity and achieve uniformity at the global level; 'universality' is the attempt to bring out and develop the global resonance of particular ideas. [...] the universal significance of human rights is a case of universality, not universalism. We speak not of uniformity but of generality, not of doctrine but of critique, and not of the demise of particularity but of its future in relation to the global circulation of human rights ideas," p.398.

⁹ The diversity of approaches to human rights in development cooperation is vividly illustrated in recent study commission by the OECD entitled *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges* (2006) OECD, Paris.

¹⁰ I. Shihata, 'Political Activities Prohibited' in *World Bank Legal Papers* 222 (2000) Martinus Nijhoff.

¹¹ Article IV, Section 10 provides: "Political Activity Prohibited.

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." Similarly, Article III, Section 5 (b) restricts political considerations in Bank financing: (b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

¹² *Development and Human Rights: the Role of the World Bank* (1998) World Bank, Washington DC.

¹³ This interpretative approach has been espoused by successive General Counsel of the World Bank, see e.g., I. Shihata, "Interpretation as Practiced at the World Bank", Introductory Chapter, *World Bank Legal Papers* (2000) XLIV.

¹⁴ "At its very threshold and to this day, the human rights movement has inevitably confronted antagonistic claims based on conceptions of sovereignty. How could its premises coexist with the then reigning concepts of state sovereignty? Or have the nature of the state, and the concept of that protean concept as well as of allied concepts like domestic jurisdiction and autonomy, themselves undergone substantial change over the half century of this movement?" H.J. Steiner and P. Alston, *International Human Rights: Law, Politics and Morals* (2ed.) 573. See also 1993 Vienna Declaration and Programme of Action. See e.g. *Proceedings of the Eighty Eighth Annual Meeting of the American Society of International Law* (1994) "The Transformation of Sovereignty".