THE INTEGRATION OF HUMAN RIGHTS IN THE WORK OF THE WORLD BANK IN EDUCATION FOR INVESTMENT AND GROWTH

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INTRODUCTION

At least since the establishment of the Bretton Woods institutions and the current international economic system in 1945, international economic law has increasingly included in its concerns human rights. Whilst some commentators argue that convergence between development economics and human rights may be disempowering, others argue that any convergence promotes and furthers the raising of living standards. This paper hopes to contribute to this debate by arguing that longer-term growth and development requires integration between international human rights law and international economic law.

International human rights law focuses on the establishment and maintenance of basic standards in human living and communication, whilst international economic law is concerned with resource and capital transfers. International human rights law can inform the process of what, by whom, how, when and at what cost resource transfers are undertaken. The Bank has been hesitant about adopting human rights standards. At least since Mill economics has divorced itself from the physical and organic and relied predominantly on the mechanical. Yet this psychological turn has not enabled the economic model pursued by the Bank, which reformulates persons as human

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capital, to raise standards of living and reduce poverty as much as expected by the model\(^6\) because of a lack of engagement with the real costs and local realities of economic activity.\(^7\) The Bank model that is heavily reliant on market behaviour based on the autonomy of people being made manifest through their revealed preferences does not concord with the top down imposition of a model that posits humans as capital and holds itself and its borrowers to account with a duty of due diligence.

In order to relieve this tension between the mechanical and determinist model pursued by the Bank and the recognition that persons are autonomous and entitled to negative freedom at least, it is suggested here that the Bank integrate human rights further into their work. The issue that the Bank has highlighted repeatedly in debates concerning the application of human rights to its work has been the issue of how human rights can be applied to its activities. It is acknowledged that the Bank cannot be placed under intolerable information or enforcement burdens with regard to human rights provision, given the dangers of surveillance and interfering in internal affairs of States.\(^8\) However, for the Bank to become more mechanical would be coercive and ultimately destructive and unproductive as capital wealth creation would diminish with the lack of recognition of persons autonomy (this was one of the rationales for the Bank adopting educational activities in its development remit in the first place). The Bank therefore must increase its recognition of person’s autonomy and embrace further human rights norms as procedural norms to increase productive agency.\(^9\)

Concentrating on education as a human right in particular, this paper surveys the spectrum of approaches that have been suggested in order to hold the Bank accountable to human rights standards. This paper does not consider the relationships between human rights and the International Monetary Fund [IMF] or World Trade Organization. The paper then illustrates how human rights approaches, prioritizing a

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\(^7\) World Bank, *From Schooling Access to Learning Outcomes: An Unfinished Agenda, An Evaluation of World Bank Support to Primary Education* (Washington DC: World Bank, 2006), pxvi: “More, better, and more contextualized analytical work is needed on learning outcomes and their determinants at the primary level”.

\(^8\) Supra note 2.

right to education, can apply to the Bank’s economic objectives of growth, investment and development by opening up the process of deciding what constitutes growth and development through enabling a plurality of voices to be heard, which confirms the Bank’s politically neutral or tolerant stance.

EDUCATION AND THE WORLD BANK

The World Bank is considered to be one of the “key institutions in multilateral education” (the other is the United Nations Education, Scientific and Cultural Organisation [UNESCO]). With the support of 185 countries, the Bank is the largest single external lender of educational funds to borrower countries and its prolific database of research and information concerning education and development permits the Bank to claim that it has a comparative advantage in the education field. The World Bank affiliates that are most involved in the provision of loans and technical assistance for education are the International Development Association [IDA], the International Bank of Reconstruction and Development [IBRD] and the International Finance Corporation [IFC] (since 1999). Thus the World Bank ‘group’ that produces research and knowledge about education and development has expanded. Furthermore, as Jones emphasizes, it is undeniable that the Bank is competent in presenting a one-size-fits-all model that has influenced global educational debates and maintained the idea of education as an international right.

Education has been linked to growth in the Bank’s objectives since 1961, when the Bank made a joint loan to Tunisia with UNESCO to construct secondary schools. Dañino, former General Counsel of the Bank, has argued that “the objectives of the institution have been, and should continue to be, dynamically interpreted and applied” in accordance with Article 31 of the Vienna Convention of the Law of Treaties (1969) [VCLT]. This is a teleological, “purposive understanding of

12 From the IBRD and IDA (the Economist, 1944), to the IBRD, IDA and IFC.
13 Supra note 10, pxxii.
‘development’
 and privileges outcomes over process. Educational quality is an important focus for the Bank because its research has shown that high levels of cognitive skills are related to greater economic growth through efficiency savings. Without contradiction, the Bank also advocates equitable access to educational opportunity through integration of education throughout Country Assistance Strategies [CAS] using the Comprehensive Development Framework [CDF]. This is despite the fact that “most countries” find the “simultaneous pursuit of both goals [access and quality or equality and liberty] extraordinarily difficult”. This has been attributed to a lack of “fiscal space” for countries to make the relevant “long-term investments in education that will yield long-term economic returns”. The original justifications for the Bank adopting an education profile in its development work included criticism that the Bank was concentrating too much on foreign currency disbursements in potential dereliction of its “duty of promoting economic development”. Additionally, the Bank was coming under increasing pressure to cooperate with other United Nations [UN] agencies and support education either through funds or through provision of technical assistance. Senior staff at the Bank were originally hostile to the idea of the Bank becoming involved in education promotion. The main concern seemed to be and remains that it is hard to measure returns to educational investment, so it is hard to view education as a productive investment and therefore it is not easily conceived as bankable. The traditional argument that “compulsory education was an attempt to ensure that people could

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18 The Bank States on its Education For All website: “Poor learning outcomes and low quality of education remain an over-riding concern”:


20 Supra note 7, p99.

21 Ibid p104.

support themselves after leaving school rather than becoming a financial burden on public authorities.” 23 was an awkward one during the Cold War and before libertarian audiences in Western States. An apparently politically and economically neutral argument that viewed people as capital and “an object of investment if the rate of return was satisfactory”, 24 quantifying their value in a fixed and universal production process 25 won out. 26

Human capital theory reinvigorated the theory of production. 27 Schultz argues that human beings are capital because of their “capacity”. 28 Investment in consumption entails investment in human capital. Although human capital theory concerns itself with the “qualitative” dimension to human resources, 29 people are considered out of their cultural 30 and to some extent social contexts. Furthermore Becker showed how traditionally non-economic issues could be considered economic. 31 This is reflected in the Bank’s use of the ‘social capital’ concept (“the norms and networks that enable collective action”) in its Social Development Strategy 32 to promote the Millennium Development Goals [MDGs] in the implementation of a new business model.

The Bank promotes a mixed model of education. As the IFC strategy States: “The appropriate role for the public and private sectors in the provision and financing of education should depend on conditions specific to each country”. 33 Currently, the IFC invests more in the private sectors of emerging markets than any other multilateral

24 Ibid.
25 Supra note 5, p5.
27 Schultz, T.W. ‘Investment in Human Capital’, The American Economic Review, Vol. 51, No. 1. (Mar., 1961), pp. 1-17, p6: “The observed growth in productivity per unit of labor is simply a consequence of holding the unit of labor constant over time although in fact this unit of labor has been increasing as a result of a steadily growing amount of human capital per worker.”
28 Ibid.
29 Ibid, p8. Schultz makes the distinction between “quantitative and qualitative dimensions. The number of people, the proportion who enter upon useful work, and hours worked are essentially quantitative characteristics. To make my task tolerably manageable, I shall neglect these and consider only such quality components as skill, knowledge, and similar attributes that affect particular human capabilities to do productive work.”
30 Supra note 27, p15. Schultz States “much education is cultural and in that sense it is consumption.”
investor. Privatisation of education may relieve concerns about tyrannical social control by government unless the choice to privatize education is no choice at all due to the colonizing effect of the neo-classical economic model.

The World Bank has expanded its activities in education, evidenced by a shift from project to programmatic lending and the integration of educational conditions throughout CAS and Economic and Sector Work [ESW], in accordance with the CDF approach to development and the recognition that “labor [sic] is the main asset of the poor, making it more productive is the best way to reduce poverty”. Bank evaluation takes place through a CASCR (Country Assistance Strategy Completion Report). In this way the Bank has responded to criticisms from its borrowers, donors, UN bodies and other interested parties. The Bank’s six Education For All goals include “free and compulsory primary education of good quality”, gender equality “ensuring girls’ full and equal access to and achievement in basic education of good quality”, and respond to the MDGs (Goals 2 and 3) agreed by donors in New York in September 2000.

The Bank’s individualistic approach to education can be seen in its narrow view of education – which is mainly focused on basic education. This typically includes primary and lower secondary education, thereby collapsing secondary education down into primary. Basic education affords attractive rates of return and it is easily evaluated in order to persuade investors to fund projects. The Bank has promoted basic education as a development objective since the late 1990s by promoting its Education For All vision. The Bank’s understanding of basic education amounts to teaching basic literacy, numeracy, self-discipline, self-confidence and perseverance. Whereas post-basic education refers to thinking skills, risk management skills (though not explicitly risk assessment skills), vocational skills and specific knowledge. This is coupled with the Bank’s conception of the self or human agent as someone who is

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considered to be ‘capable’ if he is informed, resourced, responsible and can define his goals and act on them.

Other educational projects are subsumed under ‘Early Child Development’, Health and ‘Education for the Knowledge Economy’. Education became the lead sector in the application of Knowledge Bank principles, creating thematic networks within a “knowledge community” dispersed throughout the Bank. This was in addition to the creation of a matrix involving regional and thematic staff in the Human Development Network. Early Child Development is linked to the Bank’s interest in promoting good citizenship, whereby a right to free education and a legal identity can be claimed and a second chance in contributing to social cohesion.

Donors are encouraged to evaluate learning outcomes and educational quality on behalf of the students and societies the education projects are conceived for and “because the knowledge generated is a public good”. Similarly, donor harmonization in the conditions of their assistance is urged by the Bank.

The Bank’s view seems to be that education should be oriented to the occupational market, so the focus is clearly on employment. This is in potential opposition to human rights activists who argue for support for a right to education in part because it can help prevent child labour. It is to the articulation of a right to education and a more humanist model of economics to which we now turn.

**A RIGHT TO EDUCATION**

A rights-based approach to development, whereby primary education is compulsory and free, enables the quality of education to be improved because a stable number of

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38 Supra note 10, p208.
41 Ibid, p160.
42 Supra note 40, p224.
people being educated allows stable resources to be used to improve quality. This is in addition to preventing small children from being involved in hazardous work and premature marriage. Ensuring access to improve quality of education brings to light the importance of the process of education in human socialization and thus the importance of education not just for skills training but also the development of the personality and self-awareness. In this way, the right to education is a “multiplier” right and can protect other rights and eliminate poverty. A right to education has long been recognised under international law, and particularly under Article 26 of the UN Declaration of Human Rights (1948) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966).

The content of a right to education has proved controversial. Tomasevski explains that some of the controversies in the drafting of a right to education after the Second World War focussed on whether or not the right could be said to be compulsory and whether parental choice had a role in its protection. This issue is strongly related to the differences between opinions of experts and opinions of parents and local employment conditions. Parents may want their children to work rather than be at school, particularly if the parents are ill. Alternatively, parents may want their children to be at school and aspire to employment far from home rather than develop economic opportunities closer to home. Arguably a compromise has been formulated by a judicial body employing human rights as minimal standards. The Supreme Court of India has accepted the ‘learn and earn’ scheme, where employers guarantee time and funding for education to their child employees.

All human rights entail obligations “to respect, protect and fulfil”. Undoubtedly the State or public organ has a positive responsibility to fulfil the free and equal access to primary education. Education should be available, accessible, culturally

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44 Supra note 23, p23.
49 Supra note 47, paragraph 2.
acceptable and adaptable to dynamic needs of changing societies\textsuperscript{50} and States need to take “deliberate, concrete and targeted” steps towards “full realization” of the right.\textsuperscript{51} Importantly “the right to education can only be enjoyed if accompanied by the academic freedom of staff and students”.\textsuperscript{52} In this way, learning outcomes imposed through loan conditions by donors and the World Bank may work against the right to education. Furthermore, they may also incur on the sovereignty of the State since “States parties are obliged to prioritize the introduction of compulsory, free primary education.”.\textsuperscript{53} Under paragraph 60, the Bank is held to have a specific obligation to take account of “the protection of the right to education”.

Education as a human right serves broader purposes than education as a process of securing human capital. If education can serve development, more broadly conceived, then as the Bank is continually expanding its understanding of development there could be more institutional space to consider a right to education as a tool to facilitate minimal and prioritized standards in development practices.

**THE WORLD BANK AND HUMAN RIGHTS**

Sometimes it seems that for as many arguments proposed to link World Bank activities to human rights principles, the Bank can provide as many arguments to defend themselves against these claims. The Bank’s position on human rights will be considered by looking at the arguments attempting to link (i) general principles of human rights to the Bank’s development economic work; (ii) human rights principles to specific projects and programmes of the Bank’s development policy lending and loan conditionality; and (iii) human rights principles to internal Bank procedures. The last section will build from these arguments in advocating for integration of human rights principles in the Bank’s investment and growth activities.

\textsuperscript{50} Ibid, paragraph 6.
\textsuperscript{51} Ibid, paragraph 43.
\textsuperscript{52} Supra note 47, paragraph 38.
\textsuperscript{53} Ibid, paragraph 51.
GENERAL APPLICATION OF HUMAN RIGHTS PRINCIPLES

Calls for the World Bank to be made accountable to human rights standards are regularly made; most recently at the seventh session of the UN human rights council in Geneva in March 2008. Arguments for linkages between human rights and development economics fall under four main approaches.

The first approach argues that human rights principles have evolved into customary international law and as part of public international law can be applied to the World Bank as an international and public organisation to make the Bank accountable for its policies and actions. Salomon argues that customary international law imposes “negative obligations on all participants in the international legal system capable of impacting on their exercise.”

Whilst McInerney-Lankford, a member of the current legal Counsel for the Bank, accepts that the Bank may have a negative obligation to respect human rights, she also questions this on the basis that the Bank has not signed any treaties and wonders whether there is any customary international law that can hold the Bank to account. McInerney-Lankford argues that it is not possible to impute to the Bank any positive human rights obligations because the Bank has insufficient control and knowledge to implement rights. The Bank has not explicitly agreed to any positive actions.

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Bank (and the IMF) have been accorded international legal personality, they are therefore subjects of international law, bound by international law (as articulated by treaty provisions to which they are parties, customary international law and general principles of public international law).  

Although World Bank interpretations of its Articles of Agreement claim that the purported political neutrality of the World Bank means that the World Bank may not interfere in the domestic affairs of its member States, and must be “careful” with regard to human rights. Skogly, like the Bank, argues that the limits of State sovereignty have changed. Her argument is based on analogy with Article 2(7) of the Charter of the UN (1945) and the internalisation of human rights under various multilateral agreements; the limiting of State sovereignty through the activities of the specialized agencies of the UN that States have implicitly endorsed by signing the Charter of the UN (1945); and dicta and evidence in the judgements of the International Court of Justice [ICJ] and its predecessor, the Permanent Court of International Justice. The World Bank has Stated that it is mandated to consider the economic effects of human rights promotion, but this will not prevent the Bank from assisting governments with poor human rights records.

However Darrow argues that the Bank is duties under international law to promote the “fulfilment of human rights standards”. Darrow also extends Skogly’s argument by considering the programmatic and policy context of World Bank actions. The duty to promote rights can be allied to the duty to “protect” human rights, which requires measures to be taken to prevent interference with the right concerned.

Accepting that the VCLT (1969) constitutes existing international law as well as a reflection of pre-existing international law (the VCLT (1969) represents research begun by the International Law Commission in 1949), Darrow States that the pre-
eminence of the ‘dynamic-evolutionary’ approach to interpretation (based on contextualism) over the ‘static or textual approach’ is compatible with Articles 31 and 32 of the VCLT (1969).\textsuperscript{69} In this way, the constituting documents of the Bank are living instruments, supporting the interpretive principle of ‘institutional effectiveness’, endorsed by the Bank. Thus, most elements of the Bank, seen as a multifaceted organisation, contribute to interpretation of its mandate in light of the Bank’s institutional effectiveness. If these interpretations are not successfully questioned by the Bank’s members, through the procedures laid down in its Articles of Agreement, then they “are presumptively legal and are generally accepted as constituting ‘precedents’ for interpretive purposes”:\textsuperscript{70} According to Darrow, this approach to interpretation is acceptable because it complies with Article 31 (3) (b) of the VCLT (1969).

Furthermore, Article VI (10) of the IBRD Articles of Agreement (1945) States that it must give “due regard” to Security Council decisions. Additionally, Article 48 of the Charter of the UN (1945) obliges States to give effect to Security Council decisions, which includes through the international agencies to which they belong. Darrow therefore argues that it was envisaged in 1944, when the IBRD was established, that the Bank would be involved at least in respecting human rights. Hence “[t]he independent status of the BWIs under their Relationship Agreements cannot be construed to frustrate [the] objective” of promoting and fulfilling the objectives of the Charter of the UN (1945).\textsuperscript{71} Moreover, as subjects of public international law, possessing international legal personality, the Bretton Woods Institutions [BWIs: the World Bank and IMF] are subject to international human rights law.\textsuperscript{72} Therefore, according to Articles 55 and 56 of the Charter of the UN (1945), the World Bank (to serve its members’ needs)\textsuperscript{73} must promote human rights in cooperation with the UN.

If it is taken that the UN Declaration of Human Rights (1948) is a further elaboration of the Charter of the UN (1945), then under Article 31 (2) (a) and (b) VCLT (1969), the World Bank must carry this obligation through to its agreements and contractual

\textsuperscript{69} Supra note 61, pp. 116-118.
\textsuperscript{70} Ibid, p119.
\textsuperscript{71} Ibid, p125.
\textsuperscript{72} Ibid, p126.
relations with any agent in the “international community”,74 including firms and regional organisations.75 Furthermore, Darrow argues that Article 59 of the Charter of the UN (1945) requires that any new specialized agencies formed after 1948 must promote the purposes within the Charter, and this would include the IFC and ICSID, cited as ‘autonomous’ agencies by the IBRD and IDA.76

The third approach under this heading seeks to establish human rights obligations of the World Bank on the basis of the obligations of its States parties. As a specialized agency of the UN, the World Bank is at least obligated to respect its members’ obligations to the United Nations and thus the Bank is not to obstruct its members in the fulfilment of their obligations. Therefore (applying a teleological approach to interpretation), governments have a right to refuse loan conditions stipulated by the Bank, if those conditions are likely to lead to the deterioration of human rights protection. In this sense, the Bank is under a negative duty to respect human rights. This can translate in practice, according to Salomon as attribution of State responsibility to the acts of the Bank’s Executive Directors.77 Clapham cites an example where the G7 Executive Directors actions accorded with the belief in this duty, concerning China.78

The fourth and final approach to the application of general human rights principles to the Bank in a more personalised way as in the doctrine of State responsibility: “the human rights accountability of international economic actors for their own negative impact on the exercise of basic socio-economic rights by people in recipient member States.”79

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74 Barcelona Traction, Light and Power Co., Ltd. (Belgium v Spain), ICJ Reports (1970).
75 See the reference to the “effective recognition and observance” of human rights and freedoms by all in the Preamble to the UN Declaration of Human Rights (1948).
76 The IFC is not liable for the IBRD: IFC Articles of Agreement (1956), Article IV (6) (b), nor the IDA: Article IV (6) (c). The ICSID enjoys immunity from all legal processes unless it chooses to waive this: ICSID Convention (1966), Article 20 (although paragraph 17 of the Executive Report States that the IBRD will cover the overheads of the ICSID).
77 Supra note 15, p25, fn 125.
79 Supra note 15, p16.
APPLICATION OF HUMAN RIGHTS STANDARDS TO SPECIFIC PROJECTS

There are two main approaches to applying human rights principles to specific projects and programmes of the Bank. Firstly, by virtue of the “overlap” and integration of development policies and human rights perspectives either explicitly or implicitly. Within this is included the MDGs and negative obligations to ‘do no harm’ and in this way the Bank contributes to the realization of human rights and fulfils its obligations under Article 22 of the International Covenant on Economic, Social and Cultural Rights (1966). By focusing on the ‘implied powers’ doctrine (identified broadly by the ICJ in the Reparations case, and narrowly in the WHO case), which is the doctrine that the Bank and IMF have allied their ‘enabling powers’ doctrine to, Darrow argues that it is within the scope of the Bank and IMF to incorporate human rights into their policies and operations. The Bank may also be under a positive duty to protect and fulfil human rights, according to Darrow, in its policies and operations involving subcontractors and human rights organs.

Whilst the Bank resists any enforcement role for itself, the Bank’s human rights matrix furthers the integration of the Bank’s work with respecting its members’ obligations. Clapham has argued that Bank human rights policy should include “carefully organized human rights impact assessments, to be carried out before, during, and after World Bank projects.” There is now increasing awareness within the Bank that borrower countries need to comply with human rights standards. In

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80 For example in the Bank’s Social Development Strategy, supra note 57, p464 (footnotes omitted).
82 Supra note 15, p15.
86 Supra note 14, p524; supra note 63.
87 Supra note 14, p510.
88 Supra note 78, p155.
89 For example, female health and education can drive growth: supra note 15, pp. 10-11.
this the Bank accepts Bank it has a collaborative, “facilitative” role.\textsuperscript{90} As McInerney-Lankford States: “[t]he official position of the Bank therefore highlights what could be characterised as the fortuitous or coincidental human rights dimensions of its policy and practice, outlining the substantive and factual ways in which its activities overlap with the human rights”.\textsuperscript{91} However Rittich has suggested that efficiency considerations are prioritized over distributive ones.\textsuperscript{92} Furthermore, rather than being facilitative, the Bank has been criticized for imposing a neoliberal ideology\textsuperscript{93} since conditionality may act “as a surveillance mechanism” which other lenders follow in the prioritization of development objectives, methodologies and programmes.\textsuperscript{94}

**APPLICATION OF HUMAN RIGHTS STANDARDS TO INTERNAL BANK PROCEDURES**

According to Horta,\textsuperscript{95} the Bank’s “[i]nternal operating rules and procedures must be [consistent] with human rights standards”. Salomon has recently argued that the Bank is responsible for its Board of Executive Directors and any decisions violating human rights since economic decisions affect human rights so human rights “should shape the processes and outcomes of economic decisions in order to render them consistent with international human rights standards”.\textsuperscript{96} As Salomon and Tomasevski explain, the voting structure of the World Bank means that “they set and advance policies that will never apply to them”, possibly facilitating negligence.\textsuperscript{97} Clapham argues that human rights protection can be approached “through the prism of ‘due diligence’”.\textsuperscript{98}

\textsuperscript{90} Supra note 63.
\textsuperscript{91} Supra note 57, p470.
\textsuperscript{93} Supra note 15, p17.
\textsuperscript{94} Supra note 2, p182.
\textsuperscript{96} Supra note 15, p14.
\textsuperscript{97} Ibid, p20.
\textsuperscript{98} Supra note 78, p151. He adds: “Pierre Klein … asserts that an obligation of vigilance (or due diligence) fixes on inter-governmental organizations with regard to activities under their control which can affect the rights of other subjects of international law.”
However whereas McInerney-Lankford discusses the governance of States and States obligations regarding participation and the role of human rights therein, her discussion of Bank governance is limited to discussing how the accountability of the Bank is linked to the use of productive use of funds “through procedures to ensure economy and efficiency. This may also be characterised as a legal or fiduciary duty, and is often accompanied by symmetrical duties on aid recipient governments to ensure they remain accountable to both donors and to their citizens.”

Although the Poverty Reduction Strategy Paper [PRSP] process benefits from participation, human rights obligations attach to States, not the Bank. This is in spite of the criticism that States are instructed to accept predetermined desirable outcomes.

IS THE BANK’S APPROACH INCOHERENT?
There are “tensions”, “competing tendencies”, and “paradox” within the Bank’s approach to the integration of human rights in development economics. This paper will briefly consider one aspect to this conundrum: the Bank’s professed political neutrality through economic neutrality before suggesting three ways of integration that will open up the knowledge base on which this conundrum is based.

THE INCOHERENCE OF ECONOMIC NEUTRALITY
The Bank has claimed that there are legal limits to its embracing of human rights in its work, not least the political prohibitions in its Articles of Association. However, economic policies are implemented through political processes. According to Clapham, human rights are not explicitly within the objectives of the World Bank “because the use of the vocabulary of human rights is seen to politicize the debate, and in part, because of the focus on economic considerations”. Although, Clapham argues that the prohibition itself was designed to protect self-determination. Indeed,

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99 Supra note 57, pp. 473-475.
100 Ibid, p476.
102 Supra note 92, p448.
103 Supra note 15, p18.
104 Supra note 2, p187.
105 Supra note 78, p138 (footnotes omitted).
106 Ibid, p144.
McNeill highlights how the Bank has noted “that economics are inseparable from politics” in its flagship publication.  

McInerney-Lankford argues that the political restriction in the Bank’s mandate refers to:

“‘political’ in sensu stricto, referring to members’ systems of government, partisan politics and elections, or political ideology, on the one hand, and to ‘political’ in a more general sense. Under such an interpretation, the former are barred by the Articles, and the latter are not.”

Thus human rights can be considered if there is an economic impact, for example, the inability of the borrower to repay. Therefore a “permissive interpretation” opens the door, but “it does not set the outer limitations of what is currently understood to be prohibited by Article IV, Section 10”. The issue with this approach to the legal competencies of the Bank is that it infringes the requirement of legal certainty and may reduce investor confidence and the Bank appears to have exempted itself from the rule of law. Furthermore, development and education are framed “in terms that are technical, mechanical and scientific” rather than addressing the political issue of “how to balance benefits and burdens”. Pahuja argues that the lack of designated scope of delegated power to the Bank allows a reduction in political and fiscal space for States and “also assists in the emasculation of the potentially international effects of those concepts.” All behaviour can be perceived in technical terms, so the focus is on what constitutes the “optimal market” and effective State within the ideology already provided by the belief in revealed preferences oriented “to the generation of profit”. Assuming that technical and mechanical procedures of

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108 Supra note 57, p493.
110 Supra note 2, p187.
111 Supra note 23, p70.
112 Supra note 57, p498.
113 Supra note 23, pp. 75-76.
114 Supra note 2, p185.
115 Supra note 40, p61, p47.
116 Supra note 92, pp. 448-449; supra note 5, p139.
market economics will optimally allocate the benefits and burdens in development ignores local realities and emerging economic models based on survival economics or solidarity economics.  

There exists a tension between the Bank’s functional conception of education in a predetermined economic model and the core component of human rights of recognition of dignity and autonomy. The Bank proposes morally neutral claims about economics but supports a colonizing economic model that includes all life activities. This is a hangover from the historical shift from classical to neoclassical economics in European thought. To resolve this tension, the Bank can either recognize a difference between economy and other spheres of life, as was customary in classical economics and thus draw economic development much more narrowly whilst accepting the validity of other life spheres and subsuming economics within those. Alternatively, the Bank can accept that its position on development economics is not morally neutral and the values to inform its economic practices and policies can be decided through procedures that conform to human rights standards: a right to education being critically important as the key to unlock other rights. How the Bank can integrate positive duties in the realization of a right to education follows.

THE INTEGRATION OF A RIGHT TO EDUCATION WITH GROWTH AND INVESTMENT

The Bank’s growth and investment agendas and its mandated power to promote economic development can be more efficient through greater protection of a right to education.

GROWTH AND CHALLENGING HUMAN CAPITAL

The Bank could adopt a broader view of the human subject from the perspective of human rights rather than human capital. This would allow the Bank to consider the

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118 Supra note 2, p188.
production process more broadly. Education and growth could then be viewed “as a relational construct”, rather than technical development objectives and thus policies may seem more relevant to borrowers as constraints come to light since exchange terms are not neutral. By promoting participation through education, the Bank enables people to drive shared growth agendas into the future for purposes perceived as relevant to them.

If education is a driver of growth, then effective participation is important for efficient public aggregate decisions. Effective participation can be realized through promoting peoples capabilities to enable them to become productive agents. Promoting productive agents, conceiving productive agency broadly, can be aligned to the Bank’s power and duty to lend for “productive purposes” in its mandate. Participation will remain relatively ineffective under the current economic model. As Robertson suggests economic constitutionalism over many scales (national, regional and global) transforms education into a commodity, which is then “removed and insulated from popular scrutiny or democratic accountability within the political realm”. The right to choose becomes the most important right. Whereas education was traditionally a site for national State citizen forming, under the current model, multiple scales and sites of knowledge production, consumption and distribution exist without a clear “multi-scalar chain of spaces for claims-making” and governance. Participation is necessary at all levels and scales to improve distribution. As Streeten States: “international distribution is arbitrarily determined by the division of the world into States” and division in resources and skills.

120 Supra note 92, p460.
121 Ibid, p464.
122 Supra note 4, p236.
125 Supra note 9.
126 Ibid, p137.
127 Legal Vice Presidency, World Bank, Review of World Bank Conditionality: Legal Aspects Of Conditionality In Policy-Based Lending (June 29, 2005), paragraph 29.
130 Supra note 4, p233.
Robertson advocates for more “dialogue and debate in order to generate a stronger sense of the conditions for realising social justice and a remix of the boundaries around State, market, family and individual in order to move it away from excessive economism and the poverty of neoliberalism.”¹³¹ This is to achieve education as a liberating process, and not a domination or cultural synthesis by outsiders.¹³³ Tomasevski argues that: “[g]lobal or foreign models require adaptation to the local reality.”¹³⁴ A tailored view is also echoed in recent World Bank documents.¹³⁵

The Bank needs to address the distributive effects of its policies but at the same time avoid imposing ideological dogma onto countries. Questioning Bank policies from a human rights stance can allow debate. As Pahuja States: “it is precisely in the possibility for incompatibility that human rights maintain whatever potentially anti-imperial quality they may possess”.¹³⁷ The Bank’s vision of growth must be allow for incompatibility with human rights and its procedures must allow for those growth objectives to be questioned. This points to a less materialist conception of growth. Contrary to Posner, efficiency is not a technical term but inherently political and debatable. However Streeten highlights the political risks for borrower countries in the face of greater participation: contributions from industrialized countries may fall.¹³⁹

INVESTMENT AND A HUMAN RIGHT TO EDUCATION

During its review in 2005 of conditionality in policy-based lending, the Bank identified for itself and its borrowers the legal obligation of due diligence¹⁴⁰ The

¹³¹ Supra note 128, p9.
¹³³ Ibid, p147.
¹³⁴ Supra note 23, p28.
¹³⁵ Development Committee, Global Monitoring Report 2008 – MDGs And The Environment Agenda For Inclusive And Sustainable Development DC2008-0003, April 4, 2008, piv, p17: efforts are encouraged “to develop a stronger focus on real results on the ground … rather than processes.”
¹³⁶ Supra note 92, p442.
¹³⁹ Supra note 4, p261.
¹⁴⁰ Supra note 127, paragraphs 31, 56: “Adequate constitutional, legal, administrative, and regulatory due diligence is necessary in designing conditionality. The Bank should consider whether a borrower … is reasonably capable of carrying out agreed conditions in a program … The Bank investigates whether the conditions can be undertaken by executive action or if they need parliamentary or legislative approval.”
Bank’s due diligence is mandated by the requirement to “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”. Due diligence is achieved through CAS, country performance, analytic and advisory services, operations policies including safeguard policies, development policy lending and investment projects.

There are two main ways it will be argued here that due diligence is relevant to human rights and human rights to investment. Firstly, the Bank has a duty of due diligence to promote and maintain optimal conditions of capital, including human capital as so identified by the Bank. This duty thus includes investigations to ensure that human capital is so informed and skilled to promote through creation and management further capital. This looks to the modern application of the duty of due diligence and a positive duty for the Bank in protecting the right to education. Secondly, the Bank has a duty of due diligence in its relations with others as (development) partners. This looks to the traditional formation of due diligence in Roman law and a positive duty for the Bank in compensating any borrower who is harmed by the Bank’s policies over which it had no control. In this way, using due diligence to apply as standard to World Bank staff means that the issue of who runs the Bank is acknowledged.

In the first place the Bank has a duty of due diligence in ensuring its investments contribute to efficient conditions of capital accumulation. As Salomon States: “the IFIs [International Financial Institutions] are not only immune from responsibility for what might be deemed negligence with regard to their advice but damage tends to increase the importance of the IFIs by requiring a new loan to repair it, creating perverse incentives.” Human rights can be used as incentives to take greater care with a framework recognised by the Bank’s stakeholders: “the Bank is accountable

142 Ibid, paragraph 7.
143 Supra note 1, p709: “The term investment in international law should be understood in a very broad way as it comprises all kinds of assets, including all categories of rights and interests.”
144 See supra note 107.
145 Supra note 15, p23.
for its stewardship of public moneys and has an obligation to be responsive to the questions and concerns of its shareholders.”

Human rights standards can be incorporated into investment and trade disputes under ICSID auspices and applied to corporations and States as “parallel (or even higher obligations)”. If both the Bank and borrowers are subject to due diligence in internationally recognised agreements, then due diligence contributes to the setting of “international good practice standards and principles”, as desired in Annex A, paragraph 5 of the Rome Declaration on Harmonization. The Rome Declaration is an attempt to improve development effectiveness between IFIs, Multilateral Development Banks and partner countries in pursuit of the MDGs. McCaffrey argues that due diligence is an elastic standard that considers the capacity of a State to control a given territory. Yet due diligence creates positive duties in the realization of socio-economic rights. Baxi argues for the use of the due diligence standard and Proposed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights to prevent human rights abuses by looking at the moral nature of an act or duty rather than outcomes. Human rights can be factored into investment plans as costs in promotion of a ‘human rights economics’.

Due diligence is not the same as attribution of State responsibility, but will follow from direct responsibility if a State has failed to prevent harm and fulfil its functions. Hessbruegge identifies a general consensus that due diligence requires prevention, punishment and compensation. The international community of States, like the Roman community of families and tribes, is subject to duties of due diligence. However, given the multi scalar locations of power amongst many non-State actors

147 Supra note 78, p157.
153 Ibid, p296.
then the State cannot be held responsible if it is not in de facto control (even less de jure control). Hessbruegge advocates “more direct obligations resting on non-State entities”. Given that the World Bank community consists of States, banks, multinational corporations and civil society organisations, due diligence is perhaps the standard of good relations and partnership between agents.

Roman law developed the obligation of due diligence in contract and delict to prevent harm, and modern due diligence must take account of standards that signal the minimal protection entitled by humans: human rights standards. In this way, the allocation of the obligation of due diligence to all actors would not be prevented due to lack of clarity about what constitutes “failure to exercise due care”.

DEVELOPMENT AND A RIGHT TO EDUCATION

Development and human rights need to be carefully integrated. McNeill argues against subsuming all ethics under human rights. Additionally Pahuja warns of the risk of delimiting the human subject through human rights integration into development, which constitutes the regulation and emasculation of the human. In this way, “human rights become a means by which society is subordinated to the imperative of economic growth through markets” as political and fiscal space is lost. The Bank is seen to be involved in this narrative by promoting institution building according to liberal values in the CDF.

Whilst accepting that knowledge is relative and an undetermined system, human rights may still be integrated into development by informing procedural norms. Fulfilment of a right to education can provoke alternative narratives and rich debate concerning development methods and objectives. The role of law, and a right to education in particular, in promoting debate cannot be underStated. Greater attention

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156 Supra note 107, p435.
157 Supra note 2, p168, p170.
158 Ibid, p179.
to human rights arguments may lead to acceptance of the view within the Bank that outcomes may not be commensurable or quantifiable\(^{159}\) and lead to a broader knowledge base. The Bank could open up its development gateway further to include a plurality of views about what raises standards of living and how.

**CONCLUSION**

McInerney-Lankford argues that there is a lack of “institutional space for human rights, the lack of a perceived ‘comparative advantage’ and the dearth of ‘in-house expertise’ on the subject”.\(^{160}\) Hopefully this paper has shown how the Bank’s due diligence obligation starts to create the “policy base” for creating the theme of human rights in the Bank. By concentrating on the human subject more broadly than a unit of human capital and more akin to Gewirth’s productive agent, a complex picture of the relational construct between education and economic development emerges. A right to education that is firmly fixed on access to education before learning outcomes becomes prioritized. This necessarily entails public expenditure. Therefore the Bank could perhaps open up to different economic models in order to make sense of political-economic policies that are less directly reliant on market behaviour and allow individuals to be seen as more than mere “pleasure machines”.\(^{161}\) In other words, “[i]nternational economic law can no longer be seen in isolation from other areas of international law.”\(^{162}\) Human rights law and a right to education can open up options for investment and growth. The World Bank plays a pivotal role in this process.

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\(^{159}\) See supra note 123, p69.

\(^{160}\) Supra note 57, 501.

\(^{161}\) Supra note 5, p137.

\(^{162}\) Supra note 1, p715.


Thomas, J.A.C. The Institutes of Justinian, Text, Translation and Commentary (Amsterdam: North-Holland, 1975).


