

The Legal Aspects of the World Bank's Work on Human Rights

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In one of his endless incarnations, Roberto MacLean did some pioneering work at the World Bank in the area of judicial reform. His seminal contribution has now evolved into a major undertaking of the institution. Building on the important platform established by MacLean, I formulated a new way of looking at the role of human rights in the work of the Bank during my tenure as the Bank's General Counsel. It is thus fitting to honor Professor MacLean on this occasion by presenting this new line of analysis.

In my view, human rights are at the very core of the World Bank's mandate. Because of this, one of my first acts as General Counsel was to establish a Work Group on Human Rights within the Legal Vice-Presidency. I did this because of my personal conviction that work in this area is a moral imperative and also because of my sense that human rights are progressively becoming an explicit and integral part of the World Bank's work, just as the environment has become over the last twenty years and anti-corruption has become in the last few years.¹ After two years of hard work by many in the Legal Vice-Presidency and intense consultations inside and outside the Bank, I am pleased that one of my last acts as Senior Vice President and General Counsel was to issue a legal opinion on the work of the Bank and human rights. This article reflects my thoughts on the nature of the Bank's legal boundaries and addresses three broad aspects of the issue: (1) the Articles of Agreement; (2) the evolution of the Bank's role; and (3) the way forward.²

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1. See World Bank, *Making Sustainable Commitments: An Environment Strategy for the World Bank*, Chapter 2 (July 17, 2001), available at [http://Inweb18.worldbank.org/ESSD/envext.nsf/41ByDocName/MakingSustainableCommitmentsAnEnvironmentStrategyfortheWorldBank2001FullDocumentinColor5MBPDF/\\$FILE/EnvironmentStrategy2001FullDocument.pdf](http://Inweb18.worldbank.org/ESSD/envext.nsf/41ByDocName/MakingSustainableCommitmentsAnEnvironmentStrategyfortheWorldBank2001FullDocumentinColor5MBPDF/$FILE/EnvironmentStrategy2001FullDocument.pdf).

2. For a more in-depth version of this analysis, see Roberto Dañino, *The Legal Aspects of the World Bank's Work on Human Rights*, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* (Mary Robinson & Philip Alston eds., 2005).

I. Articles of Agreement

A. PURPOSES

Article I of the Articles of Agreement (Articles) sets out the purposes of the World Bank.³ Drafted as it was sixty years ago, its provisions have stood the test of time. Nevertheless, as the challenges of development have changed, the Bank's mission has also evolved to serve a broader concept of development. The Bank's mission as currently defined consists of the alleviation of poverty through economic growth and social equity.⁴ This conception of the alleviation of poverty has an especially strong human rights dimension.

The Bank's approach understands poverty as multidimensional. As Nobel Laureate Amartya Sen has argued, we must view development in terms of freedom and the removal of obstacles to it, including poverty, tyranny, poor economic opportunities, systemic social deprivation, the neglect of public facilities, and intolerance.⁵

Social equity, at the heart of my conception of poverty alleviation, includes fighting inequality, giving the poor and marginalized a voice (i.e., empowerment), freeing the poor from hunger and fear, and providing access to justice. Social equity has, therefore, an obvious human rights content. In our interpretation of the Articles, we must therefore maintain a focus on the purposes of Article I and the overall mission of the Bank.⁶

B. ECONOMIC CONSIDERATIONS

The Articles provide that only the economic considerations of economy and efficiency shall be relevant to the decisions of the Bank and its officers, and these must be weighed impartially.⁷ What, then, constitute economic considerations for these purposes?

Let me start by emphasizing that the World Bank, although a development institution, is primarily a financial institution. In making decisions about the investment of limited public resources, the Bank—like its private sector equivalents—must evaluate the wisdom of proposed investments. It must rely upon analysis of all the factors that can affect the investment, one of which is the investment climate in the recipient country. The Bank has already accepted the fact that issues of governance are relevant for purposes of the economic analysis,⁸ but, in my view, additional factors that may affect economic growth, other than a host of political and institutional factors, are in play.⁹ Research has shown

3. Articles of Agreement of the International Bank for Reconstruction and Development art. I, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 [hereinafter Articles].

4. See generally World Bank, *World Development Report 2000/2001: Attacking Poverty* (2001), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20195989~pagePK:148956~piPK:216618~theSitePK:336992,00.html>; see generally World Bank, *World Development Report 2006: Equity and Development*, (2006), available at <http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1127230817535/082136412X.pdf>.

5. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* xii (1999).

6. See Articles, *supra* note 3.

7. *Id.* art. IV § 10.

8. See generally THE WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE* (1994); Daniel Kaufmann et al., *Aggregating Governance Indicators* (World Bank Policy Research Working Paper No. 2195, 1999); Daniel Kaufmann et al., *Governance Matters* (World Bank Policy Research Working Paper No. 2196, 1999).

9. See generally Alberto Alesina & Roberto Perotti, *The Political Economy of Growth: A Critical Survey of the Recent Literature*, 8 WORLD BANK ECON. REV. 351, 352 (1994); Janine Aron, *Growth and Institutions: A Review of the Evidence*, 15 WORLD BANK RES. OBSERVER 99, 99 (2000).

that substantial violations of political and civil rights are related to slower economic growth.¹⁰

Similarly, it has long been recognized in the Bank that political considerations can have direct economic effects. For instance, in making the judgment of country creditworthiness that the Articles require, the Bank has to consider the degree of political stability of the government. In my opinion, therefore, it is consistent with the Articles that the decision making processes of the Bank incorporate social, political, and any other relevant input that may have an impact on its economic decisions.

This same line of analysis applies in the discussion of which human rights are relevant in the economic decision making process. Some assert that economic rights are relevant, but that political rights are not. In my view, there is no stark distinction between economic and political considerations; rather, there is a similar connection between economic, social, and cultural rights on the one hand, and civil and political rights on the other. Indeed, it is generally accepted at the political level that all human rights are universal, indivisible, interdependent, and interrelated.¹¹

C. POLITICAL PROHIBITIONS

The other limitations in the Articles relate to politics. There are two general political prohibitions in the Articles which must also be respected.¹² First, Bank interference in a country's political affairs is barred.¹³ This applies to both domestic and foreign partisan politics. Second, Bank decisions cannot be influenced by the political character of the member country.¹⁴ But neither of these limitations would prevent the Bank from considering political issues that have economic consequences or implications so long as such considerations are made in a non-partisan, non-ideological, and neutral manner. Thus, these prohibitions do not bar all political considerations since not all such considerations amount to interference in the political affairs of a member or relate to the political character of a member.¹⁵

As with the way that the prevailing understanding of what can constitute economic considerations has evolved over the last sixty years, it is clear that the concept of interference in the sovereign affairs of a country has also evolved.¹⁶ International law now recognizes that there are issues which traverse national boundaries. The examples abound: corporate or financial crimes, money laundering, corruption, environmental hazards, the work of the International Criminal Court, the work of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and the special jurisdictional rules for crimes against humanity.

10. See ROBERT J. BARRO, *DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY* (1997).

11. See Proclamation of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41 (May 13, 1968), available at http://www.unhcr.ch/html/menu3/b/b_tehern.htm; see also Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc A/Conf. 157/23 (June 25, 1993), available at <http://www.unhcr.ch/html/menu5/wchr.htm>.

12. Articles, *supra* note 3, art. IV § 10.

13. *Id.*

14. *Id.*

15. Yozo Yokota, *Non-Political Character of the World Bank*, 20 JAPANESE ANN. OF INT'L L. 39, 63-64 (1976).

16. Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917, 929 (1991) (reviewing LOUIS HENKIN, *THE AGE OF RIGHTS* (1990)).

The significance of this for the Bank is that, in my opinion, it can and should take into account human rights because, given the way international law has evolved with respect to concepts of sovereignty and interference, the Bank would not run afoul of the political prohibitions of the Articles by taking human rights into account. Globalization has forced us to broaden the range of issues that are of global concern. Human rights lie at the heart of that global challenge.

II. The Bank's Practice

Operating within the legal framework that I have described, it is clear that the work of the Bank, as well as its concept of development, will continue to reflect trends and changes in the world at large. Overall, there has been a marked shift in emphasis from infrastructure lending to human development. Thirty years ago, the Bank had 58 percent of its portfolio in infrastructure; today, this figure is reduced to 22 percent while human development and law and institutional reform represent 52 percent of the Bank's total lending.

Another dimension of the evolving mandate of the Bank is embodied in the world community's commitment to realizing the Millennium Development Goals (MDGs). The Bank has joined other global partners in pledging to attain certain major targets, which include eradicating extreme hunger, achieving universal education, promoting gender equality, reducing child mortality, improving maternal health, combating HIV/AIDS, ensuring environmental stability, and developing a global partnership for development.

All eight MDGs involve more than one human right. One concept that the Bank has taken a leading role in developing is governance. Governance itself has a strong human rights content; indeed, this is an area in which our research has found a rich set of connections in charting the work of the Bank to key international human rights provisions. Governance incorporates transparency, accountability, and a predictable legal framework.¹⁷

All of these principles are clearly linked to the rule of law and its inherent notions of fairness and social justice. But the rule of law must also be supported by a number of other indispensable factors such as public participation, a free press, and a voice for civil society. These factors also relate to important provisions of a number of international human rights instruments, particularly those of the International Covenant on Civil and Political Rights.

III. The Way Forward

I strongly believe that an objective assessment of the work of the Bank leads inevitably to the conclusion that it has made a substantial positive contribution to the realization of human rights, and will increasingly continue to do so. In particular, it has fulfilled and will continue to fulfill an important role in assisting its Members in progressively realizing their human rights commitments.

But there are legal limits that must be respected. We need to interpret these limits dynamically, in a contemporary context, yet in a way that is consistent with the purposes of the Bank, ever mindful that these limits do exist. We must work within the legal framework that I have described to tackle the challenges presented by human rights issues as they

17. 2 IBRAHIM F.I. SHIHATA, *Legal Framework for Development and the Role of the World Bank in Legal Technical Assistance*, in *THE WORLD BANK IN A CHANGING WORLD* 127, 131 (1995).

evolve. There are also institutional limits, for the Bank is a specialized financial agency. We cannot lose sight of the specificity of its function as a financial institution in the development context. The Bank also has finite capacity and limited resources. For now at least, I believe the Bank should embrace the centrality of human rights in its work instead of being divided by the issue of whether to adopt a rights-based approach to development.

As a development institution, the Bank must also ensure that it works in a manner that does not inflict a double punishment on the people of its client countries by turning its back on them because of the human rights record of their governments. It should also be clear that the Bank's role is not that of enforcer. Enforcement belongs primarily to the mandate of the Member Countries and other non-financial entities. The Bank's role is a collaborative one in the implementation of its Member Countries' human rights obligations. The role is also complementary to that of our UN partners entrusted with the job of globally respecting, protecting, promoting, and fulfilling human rights.

