

Rethinking the World Bank's Approach to Human Rights

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Earlier this month, here in Washington DC at Howard University, World Bank President Jim Yong Kim gave a speech entitled "Boosting Shared Prosperity". He spoke of the far-reaching reorganization of the Bank over the past two years and explained that this is designed to enable it to better achieve its twin goals of ending extreme poverty by 2030 and boosting shared prosperity among the poorest 40 percent in developing countries. This is, he noted, the first time in the Bank's history that the reduction of global inequality has been set as a goal. It was impressive, even if a little worrying, that he relied primarily on reports by Oxfam International and the work of Thomas Piketty rather than on the Bank's own much vaunted research capacity to illustrate just how skewed income and wealth inequality became during the long period of dominance of the Washington consensus.

He did not speak of the need for redistribution, nor of the need for fair and equitable taxation systems, nor about tackling international tax avoidance. Instead he called for an increase in individual incomes through economic growth. And finally, he called for "improving gender equity and low income people's access to food, shelter, clean water, sanitation, health care, education and jobs."

Although he made no mention of rights, let alone human rights, he ended his speech with a lengthy tribute to the Reverend Martin Luther King, Jr., whom he called a childhood hero of his. After recalling some of King's eloquent but unsettling comments about the horrors of poverty, President Kim observed that the Bank's "two main goals stand in lockstep with the agenda Dr. King laid out ...". He concluded by saying: "To paraphrase Dr. King, we will bend the arc of history toward justice."

The implication of this analysis seems to be that poverty eradication can be severed from the struggle for rights that defined everything that Martin Luther King, Jr. stood for and spoke about. It is as though King's 'dream' was about the creation of a large and benevolent bureaucracy, perhaps based here in Washington DC, which could, by working through governments and not talking about rights, bring prosperity and dignity to the poorest in our societies.

A very different message emerges from the Bank in certain other contexts. In 2011, the *World Development Report* examined the crucial interlocking issues of 'Conflict, Security and Development'. The report uses the term 'human rights' dozens of times, and makes clear that progress on these three fronts is closely linked to respect for human rights. It does not carve out an exemption for the Bank when it argues that "[p]ersuading stakeholders to work

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collaboratively requires signals of a real break with the past—for example, ending the political or economic exclusion of marginalized groups, corruption or human rights abuses—as well as mechanisms to ‘lock-in’ these changes and show that they will not be reversed.”¹ The following year’s *WDR*, on ‘Gender Equality and Development’, is replete with phrases such as agency, political representation, economic representation, enhancing women’s voices, ensuring property rights, promoting inheritance rights, “shifting norms and behavior”, putting laws in place, and “making rights effective”. It ends by arguing that “[b]esides improving the substance of the law, measures also need to be taken not only to empower women to demand that their rights are effective but also to make justice systems more responsive to women’s needs.”² In other words, legal rights and human rights are critically important in terms of unleashing the potential of women to live self-empowered and productive lives in dignity.

How do we reconcile these apparently divergent messages about the Bank’s work, one which recognizes no role for human rights, and the other which seems to put immense store in the role that rights, grounded in law, can, and should, play in relation to one of the Bank’s central concerns? In other words, what is the position today in terms of the Bank’s relationship with human rights, and how should it evolve in the future? I will not describe here the tortuous history, spread over several decades, of the Bank’s reluctance to take a stance in relation to apartheid, in what it felt was a political struggle in which it could not take sides. Nor will I rehash the debates of the past forty years or so during which human rights proponents have called upon the Bank to develop a coherent and strong human rights policy, with varying but consistently inconsistent results. Nor will I seek to distill what seems to be the official policy line for 2014 and the years ahead.

I would note, however, that there has been widespread concern expressed by a diverse array of civil society groups over what they see as considerable backtracking in the proposed revised Environmental and Social Framework. While the Safeguards are not *per se* human rights standards, they have played a very important role in ensuring minimum respect for human rights obligations in the Bank’s operations since the 1980s and they emerged in response to the first sustained round of demands that the Bank become rights conscious. The proposed draft will soon be the subject of an official communication to the Bank from a group of UN Special Rapporteurs, of whom I will be one. I will thus refrain from commenting upon them here.

Suffice it to say that in 2014 there are strong indications that the Bank’s longstanding reluctance to engage with human rights has again come to the fore, and this time with seemingly renewed vigor. In addition, there are expectations that this policy will soon find new and authoritative expression in a statement prepared under the auspices of the Legal Counsel.

In response to these concerns, it is tempting to go over well-trodden ground by rehearsing the debates over the legal constraints, or even of examining the more interesting and challenging

¹ World Development Report 2011, p. 13. The report can be found here: http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf

² World Development Report 2012, p. 312. The report can be found here: <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf>

sociological explanations proffered by Galit Sarfaty in her stimulating work on *Values in Translation: Human Rights and the Culture of the World Bank* (2012).

What is needed, however, is new thinking on both sides of the debate. In too many respects the Bank and the human rights community have become like old and comfortable sparring partners who have settled into a familiar and predictable jousting routine. Sadly, the arguments on both sides are getting a little stale and there seems to be a shared reluctance to open the debates up and let some fresh air in. In the remarks that follow I want to try to provoke at least a little of that new thinking. These thoughts are premised on my view that the World Bank is a crucial actor in the whole debate over both the eradication of poverty and the promotion of human rights. Its policies matter a great deal, and its lack of policies matter every bit as much. I believe that the anti-poverty and human rights agendas must complement one another and that neither the Bank nor any other development actor in the twenty-first century can afford to neglect that complementarity.

If I had more time, and you had more patience, I would be happy to recall the arguments of Amartya Sen in *Development as Freedom* (1999), honed in his presentations here at the World Bank in 1996, and those of William Easterly in *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (2014). But this is not the place to rehearse those arguments. Instead, I want to look forward and suggest the main considerations that I think should shape the twenty-first century debate over the nature of the Bank's human rights policy. The question is not whether it should have such a policy or not, because either way it has one. Not having a policy, or having one that insists on neutrality in such matters, makes a very clear statement and is a position that will be highly influential at both the national and international levels.

1. The changed external environment

The world has changed dramatically since the days when the World Bank's then Legal Counsel, Ibrahim Shihata, and I and others debated these issues.³ It was Shihata, more than any other person in the Bank, who shaped the institution's thinking about human rights through his prolific scholarly writings as much as through his official legal opinions. But when he was writing, in the 1980s and early 1990s, international human rights law was in its infancy. There were relatively few human rights treaties and many states had ratified none of them. It was not, for example, until 1984 that the United States ratified its first major human rights treaty, which was the Convention on the Prevention and Punishment of Genocide that had been adopted 36 years earlier. A relatively small number of states had signed on to the key treaties, the Cold War dominated and distorted discussions, and human rights debates were all too often largely synonymous with major political struggles against particular political regimes, such as that of General Pinochet in Chile, or the condemnation of China's response to the Tiananmen Square demonstrations. Milton Friedman and his friends dismissed out of hand the idea that corporations could or should concern themselves with human rights impacts. And even the human rights policies promoted by President Jimmy Carter, which soon found their way via Congress into legislation governing the approach to be adopted by the U.S. Executive Director, were based not on standards contained in treaties ratified by the United States or by target

³ See, for example, *Proceedings of the Eighty-Second Annual Meeting of the American Society of International Law*, 1988, Panel on "Environment, Economic Development, and Human Rights: A Triangular Relationship", pp. 40-62.

countries, but on general claims that seemed to some of us at the time to be expected to carry more weight than they could readily bear.⁴ In short, Shihata's approach to human rights was a product of his times, as well perhaps of his culture.

Today, the situation is dramatically different. Every country in the world has officially signed on to multiple international human rights treaties. They all engage voluntarily in international forums in which they are systematically called upon to explain and justify their human rights policies and practices. Some of these forums are political in nature, such as the UN Human Rights Council. Most, however, are not. They are independent expert bodies or mechanisms, such as the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, or the Special Rapporteur on violence against women.

In the days when Shihata was locking in World Bank resistance to engaging with human rights in any meaningful fashion, his approach was remarkably consistent with that adopted by the United Nations and many of its specialized agencies. When I was employed by UNICEF in 1986 to advise on its response to the drafting of what became the UN Convention on the Rights of the Child, human rights were considered to fall clearly outside its mandate and its Executive Director evinced a deep skepticism about getting involved. In a relatively short space of time, UNICEF became the leading proponent of the Convention and subsequently proclaimed that the agency is guided by the Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.⁵

Until 1999, UN peacekeeping forces, unlike any other military force in the world, were not subject to the rules of international humanitarian law, much less human rights law. In that year, Kofi Annan declared that humanitarian law would apply whenever UN forces, for any reason, resort to the use of force in armed conflict.⁶ And it was only in 2011 that the UN quietly adopted a policy, published two years later, to ensure that its peacekeepers would not be complicit in human rights violations committed by national forces that they were assisting.⁷ In 2012, a UN Internal Review Panel evaluated the role of the UN system in the last stages of Sri Lanka's brutal civil war as a "systemic failure". Based on that report, the Secretary-General adopted the "Rights Up Front" policy which calls upon the UN proper, as well as its agencies, funds and programs to act in a human rights aware way in such situations.⁸

Many other examples could be cited. The World Health Organization has moved from its longstanding reluctance to engage with human rights to embracing the concept and championing the right to health in the context of its campaign to promote universal health coverage. In 2012 the International Labour Organization, which had historically avoided references to human rights

⁴ Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, General Principles", 12 *Australian Year Book of International Law* 82 (1992).

⁵ See http://www.unicef.org/about/who/index_mission.html

⁶ UN Secretary General's Bulletin on the Observance by UN Forces of International Humanitarian Law, (ST/SGB/199/13 (1999)).

⁷ "Human rights due diligence policy on United Nations support to non-United Nations security forces", UN doc. A/67/775-S/2013/110 (5 March 2013) ("Support by United Nations entities to non-United Nations security forces must be consistent with the Organization's ... obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law.")

⁸ See <http://www.un.org/sg/rightsupfront/>

in its own instruments, adopted the Social Protection Floors Recommendation (No. 202), which recognized social security as a human right and, in doing so, invoked both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Earlier this year, UNDP approved new Social and Environmental Standards which explicitly state that “UNDP shall both refrain from providing support for activities that may contribute to violations of a State’s human rights obligations and the core international human rights treaties, and seek to support the protection and fulfillment of human rights.”⁹

And, finally, the UN’s endorsement of the Guiding Principles on Business and Human Rights has resulted in a great many international institutions endorsing the principles and incorporating them into their own internal standards processes. Suffice it here to mention only the International Finance Corporation and the OECD’s Guidelines for Multinational Enterprises.¹⁰

Thus while the World Bank was in good company in the 1980s in being wary of incorporating human rights standards into its work, it now stands almost alone, along with the International Monetary Fund, in insisting that human rights are mere matters of politics, rather than an integral part of the international legal order.

2. Incoherence of continuing rejectionism

The resistance to engaging with human rights, based upon the position originally promoted by the Bank’s Legal Department, is repeated often by Bank officials from departments across the whole spectrum of its activities. The irony is that this approach is increasingly not just out of step, but deeply incompatible, with the Bank’s positions on a great many other issues. Especially since the end of the Cold War, the Bank has systematically acknowledged in its policy analysis the de facto centrality of human rights concerns to many of its core activities.¹¹ Here is an almost random selection of issues that the Bank has linked directly to human rights:

- Governance¹²
- Corruption¹³
- The rule of law as an indispensable ingredient for development¹⁴
- Gender equality¹⁵
- Child labor¹⁶

⁹ UNDP, Social and Environmental Standards, para. 20. The Standards can be found here:

<http://www.undp.org/content/undp/en/home/operations/social-and-environmental-sustainability-in-undp/feedback/>

¹⁰ While neither of these initiatives constitutes an ideal model, they at least have the virtue of grappling openly with the issue of human rights.

¹¹ See generally the papers by World Bank contributors in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005).

¹² See Daniel Kaufmann, “Human Rights and Governance: The Empirical Challenge”, in Alston and Robinson, note 11 above, Chapter 15.

¹³ Ibid.

¹⁴ “Economic growth, political modernization, the protection of human rights, and other worthy objectives are all believed to hinge, at least in part, on ‘the rule of law’.”

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>

¹⁵ See generally World Development Report 2012, note 2 above.

¹⁶ As far back as 1995, Legal Counsel Shihata wrote that the Bank’s “practice at present allows for the inclusion of covenants in loan agreements against harmful child labor when there are grounds to believe that child labor abuses

- Indigenous peoples¹⁷
- Persons with disabilities¹⁸

And at the Bank's Annual Meeting this year its Chief Economist reportedly discussed the economic costs of homophobia and its impact on development.¹⁹

The WDR 2011 rightly observes that developing and “[d]eveloped countries are not immune to corruption, bribery, human rights abuses or failures to account adequately for public finances.”²⁰ But perhaps it should have added a prominent disclosure stating that while the Bank has taken and will continue to take prominent and laudable steps to deal with each of these afflictions and has done so without addressing any matters that are political, the political prohibition contained in its Articles of Agreement require it to say and do nothing about any human rights abuses.

The Bank's failure to engage with human rights law in any meaningful way disables it from encouraging the governments with which it works to design projects which achieve these objectives in accordance with standards that they have already accepted. It puts the Bank outside the discussions about those human rights which are of particular importance to its work, and it helps to dilute the body of human rights law because the Bank needs to develop alternative surrogate formulae for addressing the same issues but in a supposedly sanitized and, of course, apolitical form.

3. Moving beyond the sanctions mentality

Human rights are not well understood by a great many officials within the Bank. They have a passing acquaintance, but no real sense of the overall picture. I vividly remember Jim Wolfensohn more or less admitting that the first time that he had actually read the Universal Declaration of Human Rights was on the night before a major conference that Mary Robinson and I organized, with the collaboration of the Bank, at New York University in 2004.²¹ He stood up and indicated that instead of reading the speech that had been prepared for him by the Legal Department, he wanted to reflect on the amazing formulations that he had discovered in the Declaration.

This lack of familiarity with the concept in turn makes it much easier for the shadow of sanctions to cloud every debate on the subject of human rights. It seems that in the collective mentality of many Bank officials, there is an instinctive association between the words human rights and sanctions. The assumption is that a human rights policy would merely extend, ad infinitum, the

are prevalent.” See “Political Activity Prohibited”, republished in Ibrahim F.I. Shihata, *The World Bank Legal Papers* (2000), p. 234.

¹⁷ The Bank's current Operational Policy on Indigenous Peoples (OP 4.10) begins by stating that it is designed to contribute “to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples.”

¹⁸ The Bank recently appointed a distinguished human rights lawyer as its Disability Advisor. See <http://www.worldbank.org/en/news/press-release/2014/10/27/charlotte-v-mcclain-nhlapo-appointed-new-disability-advisor-for-the-world-bank-group>

¹⁹ See generally: <http://www.worldbank.org/en/events/2014/02/26/the-economic-cost-of-homophobia-how-lgbt-exclusion-impacts-development>.

²⁰ World Development Report 2011, p. 36, note 1 above.

²¹ See James D. Wolfensohn, “Some Reflections on Human Rights and Development”, in Alston and Robinson, note 11 above.

range of situations in which the Bank might be called upon to impose sanctions on one country or another by cutting off loans and other forms of assistance.

The problem is that this association is not entirely ungrounded. For many years, the only time the United States and even some civil society groups mentioned human rights in the Bank context was to call for punishment of governments alleged to have violated rights. These days, such exhortations are much reduced and the more sophisticated non-governmental groups no longer focus their attention on this dimension. Nevertheless, the Pavlovian reaction persists on the part of Bank officials. It is perhaps best reflected in the oft-heard comment that the Bank cannot be the ‘cop’, or police officer, who enforces human rights.

But the many other UN agencies that have adopted human rights policies have not been turned into cops, and there are many and varied shapes that a Bank human rights policy might take in practice. Both NGOs and Bank officials need to acknowledge this and perhaps the best way forward would be for a working group to be created which would explore what such a policy might look like.

4. Economic and social rights as the road not taken

Ibrahim Shihata, and his counterparts at the International Monetary Fund, became quite attached to drawing a distinction between the two sets of human rights. While civil and political rights were ill-suited for the work of the Bank, economic, social and cultural rights were almost a natural focus. Indeed, this is where the refrain commonly heard from insiders comes in: ‘almost everything the Bank does is focused on promoting those rights, so where is the problem?’ Sadly, programs to promote economic and social development do not automatically fit into the framework of economic and social human rights. The latter have a number of distinctive elements that need to be addressed, such as legal recognition of rights where appropriate, non-discrimination provisions, priority for those whose rights are being denied (those living in extreme poverty, for example), and—crucially—appropriate accountability mechanisms.

But the refrain nonetheless has much to recommend it. There is much that the Bank could do to take economic, social and cultural rights seriously. A good illustration in this regard is the UN’s Social Protection Floor Initiative, which is premised upon the recognition of a human right to social protection for those living in poverty.

5. Understanding why it matters to use the language of Human Rights

The question that arises is whether it actually matters whether we use the language of human rights or opt instead for surrogates which are perceived to be less politically loaded or contentious. After all, if we advocate for gender equality, does it really matter if we use the language of human rights or not? Or if we want to expand access to water and sanitation, who cares if we call them human rights or not? Or if we think that those living in extreme poverty should be assisted in various ways, why worry if we don’t actually talk about a human right to social protection? Surely, what counts are results, not scoring points for correct language usage?

But human rights language does matter. It provides a context and a detailed and balanced framework, it invokes the specific legal obligations that States have agreed upon in the various human rights treaties, it underscores that certain values are non-negotiable, it brings a degree of

normative certainty, and it brings into the discussion the carefully negotiated elaborations of the meaning of specific rights that have emerged from decades of reflection, discussion, and adjudication. Even more importantly, rights language recognizes the dignity and agency of all individuals (regardless of race, gender, social status, age, disability or any other distinguishing factor) and it is intentionally empowering. Whether in the home, the village, school or workplace, or in the political marketplace of ideas, it makes a difference if one is calling for the realization of agreed human rights to equality or to water rather than merely making a general request or demand. And human rights are inseparable from the notion of accountability. Where rights are ignored or violated, there must be accountability.

Let me apply this to the plight of those living in extreme poverty who continue in most societies to be marginalized, stigmatized, and the objects of condescension and charity. Recognition of their human rights does not guarantee them food, education, or health care, but it does acknowledge their dignity and agency, empower them and their advocates, and provide a starting point for a meaningful debate over the allocation of societal resources in contexts in which their interests have been systematically ignored.

6. Explicit engagement with the underlying concerns

There is no doubt that the Bank is under pressure to reform. These pressures are the result of a complex range of factors including internal governance changes, the evolving assumptions informing the international community's approach to development assistance, and enhanced competition resulting from the emergence of new lenders on the international scene. A recent analysis has concluded that "the confluence of these factors has created an environment in which the Bank is increasingly placed under pressure, particularly from donor member countries, to innovate so that it can retain its prominent role in setting the agenda for development".²²

Human rights and safeguards policies seem to have been put under special pressure as a result. It is not clear, however, how much in-depth analysis has been undertaken of the specific bottlenecks attributed to the Safeguards.²³ There would seem to be a range of factors that might explain why the Bank is perceived to have lost its nimbleness, to labor under burdensome and unsustainable procedural requirements, and to have unduly extended the time required for project approval.

A major driving force both in the human rights and safeguards debates seems to be the dramatic expansion of China's bilateral lending program, its proposed new infrastructure bank, and the advent of the BRICS New Development Bank. There are many ways in which the Bank can respond to these pressures, but the least desirable and convincing would seem to be to compete in a race to the bottom in terms of various types of standards. In so far as it might influence human rights policy, the assumption would seem to be that China is made more competitive

²² Report to the World Bank Inspection Panel: 'The Changing Role of the World Bank Inspection Panel: Responding to Contemporary Challenges at the World Bank', New York University School of Law International Organizations Clinic Team, 17 September 2014. <http://chrgj.org/international-organizations-clinic-publishes-the-changing-role-of-the-world-bank-inspection-panel-responding-to-contemporary-challenges-at-the-world-bank/>

²³ In 2010 the Bank's Independent Evaluation Group undertook a cost-benefit analysis of the Safeguards, based on two stylized Bank projects. It concluded "that the estimated benefits from the environmental safeguards far outweigh the incremental costs. In the case of social safeguards the benefits do not exceed the costs, but a number of benefits cannot be quantified." IEG, *Safeguards and Sustainability Policies in a Changing World* (2010), p. 78.

because of an absence of human rights-related conditionality in its lending. This assumes that the Bank's lending has been subjected to these conditionalities, but that is not in fact the case. Moreover it assumes that those social and environmental conditions the Bank has imposed, in the form of the Safeguards (even if they fall short of human rights standards) are a net cost or burden on the administration of loans or implementation of projects. But, the Bank's own internal analyses have suggested otherwise.

It would be a very useful contribution to the overall debate if a study were to be undertaken of the approach adopted by China as a lender. There would appear to be very little reliable information available as to the terms and conditions of many of the major agreements signed between China and a wide range of developing countries. Such a lack of transparency is deeply problematic, especially given the consequences that such large-scale and long-term agreements can have in terms of a wide range of public policy options within the borrowing states. Developing countries themselves need to know more about the consequences for their development of replacing what may be seen as rights-type conditionality with what might be termed natural resources conditionality.

Perhaps, at the end of the day, the World Bank needs to compete on the basis of its own strengths, rather than moving to mimic problematic policies being pursued by its competitors.

In looking ahead, it will be essential for the human rights community to acknowledge that despite the emphasis here on the Bank the proliferation of major international lenders will require an approach that is less World Bank-focused. At present, some of the Bank's critics risk being seen as stuck in the debates of yesteryear rather than looking ahead to a more complicated future. The rapidly growing importance of private capital investment, as well as the role of private aid from sources such as the Gates Foundation that have effectively dwarfed the World Health Organization's role in some areas, will also demand greater attention from those seeking to ensure that the major international actors are human rights sensitive in their work.

Let me close by noting that, as the Bank moves forward in relation to human rights, process and transparency are important, just as it recognizes in much else of what it does. The way in which human rights policy has traditionally been made is not optimal. The vehicle of a Legal Opinion for dealing with an issue that is as complex, multifaceted, and contentious as the Bank's relationship to human rights is not just an odd choice. It is an inappropriate one. Let us hope that there can be a new beginning in which the Bank recognizes the indispensability of a nuanced policy on human rights, and its critics acknowledge the range of different challenges that will require the Bank to work in different ways in the future.
