Should Human Rights Law Play a Role in Development?

Eric A. Posner

Many human rights advocates believe that development agencies—agencies that define their mission as providing economic and technical aid to impoverished countries—should be required to respect and promote human rights law. This style of human rights imperialism should be resisted. While development agencies should obviously comply with domestic law and try to promote good rather than bad outcomes, there is no benefit in holding them to human rights law. Human rights law was designed for states, not for NGOs, and how it would be applied to NGOs is far from obvious. Because of the ambiguity and vast scope of human rights law, the practical effect of these proposals would be to add another layer of bureaucracy to development projects while subjecting those projects to scrutiny by lawyers with little to guide them but their intuitive notions of right and wrong. JEL Codes: O15, O20

Many human rights advocates believe that development agencies should evaluate their projects from the standpoint of human rights law. The most recent flare-up occurred in connection with the World Bank’s draft Environment and Social Framework (2014). The purpose of this document is to ensure that development projects do not cause excessive harm to people or the environment. A project to build a road, for example, may displace people who live in its path and cause harm to the surrounding environment. The document encourages the bank and borrowers to ensure that the affected people are compensated and consulted; and that harm to the environment is mitigated or repaired.

Human rights advocates complain that the Framework does not recognize human rights law as a binding constraint on development projects. In a letter to the World Bank (Alston et al. 2014), a number of UN officials argue that the Bank should do more for human rights.

As the Bank seeks to revise and adapt its Safeguards approach [in its draft Environmental and Social Framework] to the challenges of the twenty-first century, we believe that it is imperative that the standards should be premised on a recognition of the central importance of respecting and promoting human rights. But there is no such provision in the current draft.

Human Rights Watch (2015a) expresses a similar view:

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Human Rights Watch is disappointed that the primary reference to human rights in the draft framework is in the non-binding vision statement and urges you to remedy this. To suggest that human rights are merely visionary suggests that the World Bank views human rights as non-binding, undermines the international human rights framework, and does not remedy the long-standing problem that the bank does not analyze and address potential adverse human rights impacts of its activities.

The critics argue both that the Bank is legally obligated to incorporate human rights law into the Framework and that, by failing to do so, the Bank has missed an opportunity to help advance the cause of human rights.1

The debate raises a broader issue of whether development agencies—including government agencies, international organizations, and NGOs—should promote human rights law in the course of financing development projects. There are actually two intertwined issues. The first is whether development agencies are legally obligated to respect or promote human rights law. The second is whether it is good policy for them to do so.

I argue that while development agencies should consider the impact of their projects on the well-being of the people affected by them, human rights law offers an unhelpful basis for evaluating projects. The problem with human rights law is that it is too ambiguous, contested, and politically charged to provide useful guidance. It is easy to anticipate that a commitment to human rights law will result in the erection of large bureaucratic hurdles that will interfere with development rather than promote it. The evidence suggests that economic growth is the most reliable means for advancing human rights, while there is little evidence that efforts to promote human rights directly by NGOs, governments, and others, actually succeed.

At the outset, I want to make a distinction between what I will call “maximal” and “minimal” human-rights promotion. When critics argue that development agencies should respect human rights they are rarely clear about what they mean. The maximal interpretation is that agencies should take it as part of their mission that of promoting human rights—improving governments’ compliance with human rights. The minimal interpretation is that agencies should avoid violating human rights directly or being complicit in the violation of human rights by governments and other entities that they cooperate with. In practice, these distinctions are hard to make, but they are important to keep in mind.

I. **Legal Issues**

Most states have ratified a number of human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW), the

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1. For an extensive discussion of efforts to persuade the World Bank to incorporate human rights into its mission, see Sarfaty (2012).

Convention on the Elimination of all Forms of Racial Discrimination (CERD),
the Convention Against Torture (CAT), and the Convention on the Rights of
Persons with Disabilities (CRPRD). The treaties declare that certain conditions
and activities are protected as rights from government interference. For example,
the ICCPR recognizes rights to freedom of expression and religious toleration,
and rights not to be subject to arbitrary police actions, imprisonment without
trial, and so on. The ICESCR guarantees rights to work, health care, pensions,
and fair pay. CEDAW bans discrimination against women, while CERD bans
discrimination against racial and ethnic minorities. CAT bans torture. CRPRD
recognizes a range of rights and accommodations for people with disabilities.
Table 1 lists the major treaties.

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<tr>
<th>Treaty</th>
<th>Entry into force</th>
<th>Ratifying states as of Jan. 2013</th>
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<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial</td>
<td>1969</td>
<td>176</td>
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<tr>
<td>Discrimination (CERD)</td>
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<tr>
<td>International Covenant on Civil and Political Rights (ICCPR)</td>
<td>1976</td>
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<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>(ICESCR)</td>
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<tr>
<td>Convention on the Elimination of All Forms of Discrimination against</td>
<td>1981</td>
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<td>Women (CEDAW)</td>
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<tr>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading</td>
<td>1987</td>
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<tr>
<td>Treatment or Punishment (CAT)</td>
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<tr>
<td>Convention on the Rights of the Child (CRC)</td>
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<td>193</td>
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<td>International Convention on the Protection of the Rights of All</td>
<td>2003</td>
<td>46</td>
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<td>Migrant Workers and Members of Their Families (CRMW)</td>
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<tr>
<td>Convention on the Rights of Persons with Disabilities (CRPD)</td>
<td>2008</td>
<td>132</td>
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<tr>
<td>International Convention for the Protection of All Persons from</td>
<td>2010</td>
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<tr>
<td>Enforced Disappearance (CPPED)</td>
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The treaties are, by their terms, binding on states, not on private individuals
or corporations and other institutions. States offer various guarantees that they
will respect and advance the rights. States comply with the treaties by passing
laws that protect the rights of their citizens and other people on their territory, or
providing administrative guidance to executive agencies. If a private individual
murders someone else, the human rights treaties are not implicated. The murderer
has violated domestic law only. By contrast, political assassinations undertak-
en by the state could be human rights violations. And if the government failed to
prosecute murders, that too could be a human rights violation. Thus, there is
nothing in the treaties that indicate that an NGO is directly bound by them.

The UN letter argues that because the Bank is an international organization
with what lawyers call “international legal personality,” it is bound by “general
rules of international law.” Moreover, the states that borrow from the Bank are

bound by human rights law, and the Bank has an obligation to avoid complicity in their human rights violations. But while there is a consensus that nongovernmental international organizations can undertake legal obligations by entering into treaties and agreements with states and are subject to certain customary norms of international law, there is no consensus that the general rules of international law include human rights obligations. Because most states have not ratified one or more human rights treaties, it is clear that “human rights law” as such is not a source of the “general rules of international law.” International law is based on the consent of states, and until states provide by treaty that NGOs are subject to human rights law, or certain parts of human rights law, NGOs must look to relevant domestic law for the source of their human rights-related obligations.

One reason for concern here—and I will return to this issue in part III—is that the treaties are obviously not written with NGOs in mind. All of the treaties contemplate a state that either abuses citizens (torturing or detaining them) or neglects them (fails to provide health care or schooling). NGOs do not try to exercise force over people, and we do not think that a group of people who start an NGO for a specific purpose—advancing religious ideals, providing malaria nets, documenting climate change, whatever—must also provide health care and schooling to people. If NGOs as a class are to be subject to international legal obligations, these must be worked out through negotiation among the affected parties. They cannot be inferred from the obligations that the treaties impose on states.

The UN letter is on stronger ground when it worries about complicity of NGOs in human rights violations by states. An NGO is morally complicit in human rights violations if it provides advice and resources to a government so that the government can harass a minority group. But beyond obvious cases like this one, complicity is an extremely delicate and difficult area of the law. Consider that governments in most (possibly all) poor countries commit human rights violations. An NGO that lends money to governments so that they can build infrastructure will almost certainly facilitate those violations by helping the government retain popularity or freeing up money for detentions and torture. Indeed, almost all development aid—including lending and cash aid by rich countries—would implicate those countries in human rights violations, because almost all poor countries engage in human rights violations. Governments that took seriously the complicity argument would be required to cut off aid to the countries that most need it.

Thus, a law against complicity, if broad enough, could block virtually all development projects. In domestic law, the rules of complicity are defined in a narrow fashion in order to avoid holding everyone liable for the legal violations of everyone else. Exactly how and whether complicity rules might be developed for NGOs is an important question, but one that needs to be answered—and implemented into law—before NGOs should be held to international human rights law.

The difficulties can be seen in the elaborate rules governing complicity under domestic law, where similar questions arise. If a bank lends money to a criminal
syndicate in order to finance extortion and prostitution, the bank or its employees will be held criminally liable. But if a bank lends money to a reputable corporation, and that money is then used for criminal purposes without the bank’s knowledge, it will not be held criminally liable. There are many intermediary cases—suppose the bank lends money to another bank with knowledge that the government suspects that some of the employees of the other bank engage in illegal underwriting practices. Numerous laws and judicial decisions have determined the scope of liability for lenders, usually requiring that the lender have some degree of knowledge or reason to know of the criminal activity and that the loans and the criminal activity be causally connected. It’s far from clear that these laws can be imported into the human rights context. A bank that lends to, say, Russia, China, Venezuela, or even the United States will typically know that government officials violate human rights, and since money is fungible, the loan might contribute to those violations in some way. Do countries violate human rights law by failing to provide medical care to poor people? Arguably yes, but if we made development agencies liable for these violations, then there will be less lending to poor countries rather than fewer human rights violations.

The heart of the UN letter, however, is not a legal argument but a policy argument. The letter argues that the World Bank should recognize itself as bound by human rights law because that is the right thing to do. It would improve development outcomes and promote respect for human rights law among states. The letter seems to make both the minimalist and maximalist arguments, perhaps in the alternative—the World Bank should itself not violate human rights, and it should promote respect for human rights as well. To that argument, I now turn.

II. Development as Freedom

The major intellectual source for the argument that development agencies should advance human rights law is Amartya Sen’s (1999) book, Development as Freedom. Sen’s book is remembered for his argument that development policy should advance “freedom,” which he defined in terms of the flourishing of human capabilities and “functionings.” Sen argues that freedom is a good in itself, by contrast to wealth, which is a means to further ends. For that reason, development policy should advance freedom rather than (or rather than merely) economic growth. He also argues that development agencies should advance freedom because freedom itself advances economic growth. So even if development agencies should consider their mission limited to that of advancing economic growth, they should promote freedom as an instrumental or intermediate good that contributes to wealth.

Sen’s capabilities approach is a version of what philosophers call “objective-list welfarism.” Development as Freedom, along with earlier work

3. For a discussion of the various philosophical approaches to understanding well-being, see Adler and Posner (2006).
by Sen, plays an important role in the intellectual history of welfare economics. Before the 1970s—in the period when development policy was initially debated and formulated—economists who believed that their discipline should be used to guide public policy tended to have a philosophically crude notion of the public good. As a descriptive science, economics takes people’s “preferences” as given, where preferences are just a description of how they rank states of the world that affect them. These preferences can frequently be derived simply by observing people’s behavior. When giving advice to policy makers, economists would retain this assumption. Implicit in their advice, then, was the assumption that the goal of governments is to maximize aggregate welfare as measured by people’s actual preferences. This, in turn, led to the view that governments should maximize economic growth, typically measured by GDP. Development policy focused on infrastructure. Countries need roads, bridges, power plants, and dams. The assumption was that if they were not building these things, it must be because they did not have access to capital markets. Development agencies could help countries by lending against the revenues generated by these projects, or by providing other types of subsidies. Investment in infrastructure should promote economic growth.

Philosophers had long argued that the “preference-based welfarism,” as I will call it, is not an attractive normative goal. Sen joined in this critique. Welfarism, as philosophers use this term, is the view that the public good is advanced when a population’s well-being is maximized. But what is well-being? Jeremy Bentham was a welfarist but of a particular kind. He believed that well-being referred to a positive mental state. Most modern philosophers reject Bentham because Bentham’s view implies that there are no higher or lower pleasures—that people who are coerced into taking happy pills are as well-off as people who derive happiness from family, work, and public commitment. A similar complaint has been leveled at preference-based welfarism. People’s preferences can be poorly informed, or distorted by circumstances; if so, satisfying those preferences will not necessarily make them better off. Sen argued, for example, that people who are accustomed to poverty may come to believe that poverty is good for them, or that women brought up in a sexist society might come to endorse their subordinate positions. Sen insisted that those people are not actually made better off when those preferences are satisfied.

Sen’s objective-list welfarism holds that certain goods are universal. People are made better off if they are educated, fed, given medical care, allowed to participate in politics, and so on—regardless of whether they think they are made better off by these things. When Sen uses the term “freedom,” he often seems to be defining it broadly to encompass all of these goods, so advancing people’s freedom means advancing their well-being. The idea is that a person cannot really be free unless he is adequately fed and clothed, has work, and so on; freedom is not just a matter of having choices.

4. See also Nussbaum (2011).
We can round out the discussion by mentioning that some philosophers disagree with Sen that welfare can be separated from preferences but disagree with economists that preferences necessarily reflect people’s well-being. On their view, satisfaction of preferences advances a person’s welfare only when those preferences are informed and undistorted. Thus, we can distinguish four views of welfare: objective; mental-state; preference-based; and “undistorted” preference-based. Most philosophers reject the preference-based approach of the economists, but debate about the other three continues.

Sen’s book was a watershed because it suggested that development policy should not necessarily be focused on maximizing GDP. Maybe infrastructure projects are not the best use of development money; or maybe, if they are, they should be used to advance people’s well-being in a philosophically proper sense. But what Sen’s view meant for development policy was actually quite obscure. What does it mean for development policy to advance “freedom” or “human capabilities” or objective well-being?

The major approach of his followers has been to try to use a metric that encompasses Sen’s list of objective goods. This metric would be superior to GDP because GDP reflects preference-based welfarism—just the total amount of money that people pay for goods and services, whether their preferences are good ones or not. The most famous such metric is the United Nation’s human development index (HDI). The HDI gives countries a score based on an algorithm that takes into account GDP per capita, literacy, and life expectancy.

Why do these three factors go into the HDI? The immediate problem faced with an objective-list approach is that of arbitrariness. If the good is not derived from people’s preferences, then what is it derived from? Why not use environmental quality, unemployment rate, and availability of contraception? Philosophers have proposed numerous approaches for answering these questions, but they cannot agree among themselves, and there is no obvious way to answer these questions.

But these controversies may not matter much. The reason is that people tend to have either all the objective goods or none of them. Wealthier people are more educated and healthier, and have more access to contraception, and are more likely to live in unpolluted localities, than poorer people are. One way to understand this phenomenon is that when philosophers argue about the list of objective goods, they look around at what people seem to enjoy, and what people seem to enjoy are the goods that they voluntarily buy or obtain through the political process or through migration. Another way is to recognize that if some goods really are objective, then people will buy them unless they are incredibly deluded.

The upshot is that it makes little difference if one uses HDI or GDP per capita as one’s metric for measuring the well-being of populations. They are highly correlated, in part because GDP per capita is an input in HDI, and partly because wealthier countries tend to have healthier and more educated populations.

Figures 1 and 2 illustrate this point. Figure 1 shows the relationship between GDP per capita (logged) and expected years of schooling, one of the inputs in HDI. Figure 2 shows the relationship between logged GDP per capita and
another such input—life expectancy. The figures show a very strong correlation in both cases.

So Sen’s philosophical point, while important, was of little practical consequence. Whether development agencies try to help countries improve their HDI
or their GDP per capita, they will probably do the same thing. They will fund infrastructure projects—because infrastructure projects, when successful, enrich a population and thus enable it to spend more money on health and education. And development agencies will fund health and education—because healthier and more educated populations make more money.

Still, the significance of the HDI for present purposes is that it shows that if one agrees with Sen, one might endorse a metric that approximates the objective goods that Sen endorses without having to rely on human rights or human rights law. The metric could be the HDI, or another metric that accounts for objective goods—or it could be GDP per capita, as I have argued. These metrics could support traditional development policy or minor variations on it. One could imagine, for example, a development policy that emphasizes support for schools and medical clinics rather than transportation infrastructure. Or the funneling of development resources to countries that score badly on health and education even though they are wealthier than countries that score well on these variables. These approaches may well be justified, but they do not entail a commitment to human rights as it has been embodied in international human rights law.

Sen does not argue that development agencies should advance human rights law or should otherwise be subject to or constrained by human rights law, though he does not rule out this view, either. He does not address it. In a chapter on human rights law, Sen argues that many non-Western cultures recognize the values that he sees as the source of human rights law—and therefore, that human rights law is not a foreign imposition on these non-Western cultures. The argument was a response to the so-called Asian-values position that people in Asian countries care about order and harmony rather than individualistic values. Be that as it may, Sen does not take a position on whether human rights law embodies his capabilities approach.

The UN letter and the HRW document, in contrast, argue that development policy should respect and promote human rights law. What that might mean is the subject of the next part.

III. HUMAN RIGHTS LAW

What would it mean for development policy to comply with human rights law? Human Rights Watch and the UN experts do not make clear their thinking on this issue. One possible argument is what I have called the “minimal” approach—that a development project must comply with human rights law; another possibility is the maximal approach—that a development project must promote human rights law. In the first case, a proposed project might be screened by human rights lawyers and blocked if they believe that it would cause a violation of human rights law. In the second case, development experts might look for projects that advance the values underlying human rights. To get a sense what either approach would entail, one must know something about human rights law.
A. What Is International Human Rights Law?

The treaties described above lay out hundreds of different rights or interests that states are required to protect. A partial list includes rights associated with criminal procedure (to a lawyer, not to be detained without charges, to a trial, to appeal, not to be tortured); with political and civil freedom (to speech, to association, to travel, to privacy in communications); with employment and other economic activity (to fair wages, to a job, to unionize, to own property); with family life (to marry whoever one wants, to bequeath property, to establish a family, for children to live with their parents); and with social insurance (to welfare, to health care, to education, to food). There are also rights to cultural freedom, to self-determination, to religious freedom, and to scientific progress. Numerous rights protect children, women, ethnic and racial minorities, and disabled people from discrimination, and offer various types of accommodations. There are other rights that are not found in the treaties but have been asserted by numerous states, and are sometimes thought to be part of the law. These include a right to security (protection from crime), the right to development (the right of poor countries to economic growth), and, most controversially, the right to be protected from defamation of religion, which has been asserted mainly by Islamic countries.

The rights are thus extraordinarily numerous, covering nearly all aspects of human life, and effectively requiring governments to advance all human interests of any importance. The rights are thus not only numerous but very generous. However, the rights are also often ambiguous. The right to freedom of expression, for example, contains exceptions for expression that disrupts public order or violates public morality. The treaties do not explain how the value of expression should be weighed against the values of order and morality; nor do they describe the relative weights of different rights when they conflict. For example, certain types of expression may violate religious sensibilities; the idea of defamation of religion reflects the view of many states that the religious sensibilities should take priority. The treaties also provide no indication how a government should devote resources to enhancing health, education, and welfare; how much money should be devoted to training police so they do not violate people’s rights; and so on.

Countries have created numerous international institutions that are given varying levels of authority for interpreting treaties, setting priorities, and monitoring compliance. These institutions include the Human Rights Council, the UN Office of the High Commissioner on Human Rights, nine treaty committees that are connected to the nine core treaties, and various regional courts, like the European Court of Human Rights. But none of these institutions possess the authority to issue final interpretations of the international treaties, and hence to resolve conflicts among states, which frequently interpret the rights in different ways. The international institutions also are given meager resources to enforce their views.

Probably for these reasons, states’ ratifications of human rights treaties seem to have had little impact on their behavior. The picture is complicated. A few studies have found that respect for human rights increases in some countries after
they ratify treaties, but the magnitudes are small, and the results hold for only some countries and only for some of the rights. The usual bugaboos of regression analysis—omitted variables, reverse causation problems, and noisy data—also require one to suspend judgment. For example, the evidence suggests that the amount of torture in the world—a human rights violation of exceptional importance—has not declined since the human rights treaties were negotiated. Figure 3 shows some additional evidence. If countries took ratification of the ICCPR seriously, then one would have expected extrajudicial killings to decline after they ratified it, and that freedom of speech, freedom of religion, and independence of the judiciary to increase. Yet there is no evidence of such effects. While some progress occurred in the 1990s—probably because of the collapse of communism, not the rise of human rights law—over the last fifteen years progress in human rights has ground to a halt.

One of the reasons that human rights has not advanced is that countries have not created strong enforcement mechanisms. The councils, offices, commissions, and courts that I mentioned above have few formal powers to compel states to comply with human rights, and are starved of funds and staff. Countries are simply unwilling to delegate to independent institutions the power to compel them to act against their will.

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5. See Chilton and Posner (2016) for a survey of the literature, which includes Hathaway (2002), Simmons (2009), and Fariss (2014).
This state of affairs can be contrasted with domestic rights enforcement. In advanced democracies, constitutions usually contain a limited number of judicially enforceable rights—for example, rights to fair trials. Courts are powerful and independent and usually enforce the rights by ordering the release of people detained in violation of them, ordering the government to pay money to victims of rights violations, and so on. Even in countries with constitutional rights to work, housing, and the like, courts rarely enforce these rights; instead, they are left to politics. So, as a practical matter, in advanced countries, the courts focus on political and civil rights. Because the courts are respected, and because they hear numerous cases, they are able to resolve conflicts among rights, and provide interpretations so that rights can be applied in specific contexts.

Imagine, then, a bank in an advanced country that seeks to make a loan and does not want to violate the law. The bank’s lawyers can advise it as to what domestic law is, and in this way the bank can easily avoid loans that, for example, are used by criminal organizations. Banks are under no obligation to respect constitutional rights, which are enforced against governments, not private actors.

B. International Human Rights Law and Development Policy

With this picture of international human rights law in mind, let us turn back to development policy. Development agencies face a huge array of choices as to what projects to fund. Old-style development projects include power plants, dams, and canals. Today, many development agencies fund vaccination programs, malaria net distributions, and educational programs. Any of these projects could be good or bad from a human rights standpoint, but as we have seen, it’s hard to know what the human rights standpoint requires.

Consider, for example, a simple project like the construction of a road. A road can enhance economic activity by reducing transportation costs, but it can also harm people. People whose dwellings block the planned route will be displaced, of course, but roads can also have more complicated impacts. A limited-access highway could convert settlements not connected to exits into ghost towns. The government may need to use force to move people, to protect materials from scavengers, and to protect roadbuilders from criminals. The road construction may harm the environment, and interfere with farming by causing diversion of waterways and blockage of paths for farm machinery. Government officials may engage in reprisals against people who criticize the project. And then often there will be corruption, incompetence, and needless violence.

6. In most poorer countries, courts are too weak or corrupt to enforce rights vigorously, though often rights are respected because public opinion approves of them, especially in democracies.

No development agency will deliberately cause harm, but all development agencies must cooperate with governments, including local governments and police. The flipside of the hard-earned lesson that locals must be “stakeholders” in development projects—that a development project will fail unless the agency consults the people affected by it and obtains their approval and cooperation—is that the development agency must also defer as much as possible to their interests and judgments. In developing countries, where corruption and violence is endemic, this means that projects also will be subject to these scourges.

What would it mean to bind the development agency to human rights law for a project like this one? Many of the harms I have described can be easily recast as human rights violations—if people are displaced without compensation or with inadequate compensation, for example, or are forced to pay bribes, or if environmental harms occur. The project might therefore be blocked, despite the good it can bring. Or, alternatively, the development agency might be required to take measures to eliminate the human rights violations.

But it is impossible to eliminate all human rights violations. The best that could be done would be mitigation measures. For example, the development agency could be required to survey affected people periodically and ensure that their rights are respected. But this introduces three costs.

First, the cost of monitoring for human rights violations is not trivial. Staff and other resources must be used to interview people, evaluate their statements, seek official responses, compile data, and write reports. Except when abuses are egregious, it will be often be difficult to evaluate people’s claims. People who oppose projects for reasons having nothing to do with human rights or who seek to pressure the government to increase payouts may exaggerate the damage done by a project.

Second, because violence and corruption are widespread in poor countries—the countries that are more desperately in need of development aid—there will almost always be a plausible argument that a development project causes human rights violations. All development projects require the permission and cooperation of government officials, and all of them can be used by government officials for political ends—to help favored constituents, to harm disfavored groups. Where government officials are corrupt and resort to violence, the agency will find itself implicated in these human rights violations, almost unavoidable. This means that pressure to avoid complicity in human rights violations can push development agencies out of countries that need their help the most.

Third, because of the extraordinary diversity of countries, it will often be difficult to determine whether human rights violations that accompany projects can be controlled or not. In one country, it may be reasonable for a development agency to assume that people who are displaced from housing will eventually obtain redress in courts or through the political process, while in another country such an assumption may not be reasonable. Countries differ greatly with respect to their institutional capacity and cultural tolerance for corruption and violence. Indeed, variation will occur across regions within countries.
Even if these costs can be tolerated, another problem looms above all the rest—the ambiguity of human rights law, which I discussed above. Consider a development project to build a power plant that will reduce the cost of electricity in a poor rural area, but will also cause harm to the environment, interfere with traditional hunting grounds, require displacement of some people, and create opportunities for local corruption. It is easy to say that the power plant will advance some rights and retard others. Some people will be better off, others worse off. How is the development agency to determine whether the project complies with human rights law?

It seems very likely that the question will be shunted off to lawyers in a bureaucracy somewhere, who will develop rules of thumbs and presumptions based mainly on their intuitions. If the lawyers are ignorant of local conditions, as they are likely to be, and so unable to make the tradeoffs that best advances the public good, they will block some good projects while approving some bad projects. The additional layer of bureaucratic decision making will cause delay and increase cost, with very limited benefits, if any at all.

And this creates a significant problem. The places with the worst human rights violations—and the worst institutions—are the places that need development aid the most. But if agencies face substantial costs and risks because of their exposure to human rights law, then they will most likely respond by abandoning the poorest people for those who are not so poor.

C. Lessons from the World Bank’s Rule of Law Projects

The current push for the World Bank and other development agencies to comply with human rights law echoes an earlier movement from the 1980s and 1990s. At that time, the view arose that development agencies should advance the “rule of law” in developing countries. Rule-of-law projects took many different forms, including: training judges; building courthouses; drafting bankruptcy legislation; introducing title registries; and developing arbitration programs. The theory was that many countries failed to develop, despite receiving a great deal of aid, because they lacked secure property rights, transparent legal procedures, and other features of the rule of law. The absence of these protections deterred foreigners from investing in countries, and allowed many of the benefits of development to be lost to corruption and government inefficiency.

“Human rights” and the “rule of law” are not the same concepts, and indeed it is hard to compare them because they are both so vague, but they clearly overlap. One can think of the rule of law as a particular way of institutionalizing the values underlying human rights. Some human rights—like the right to a fair trial—are inseparable from the rule of law, which emphasizes procedural fairness and the independence of the judiciary. Other human rights—like the right to vote—are vulnerable in countries where the rule of law is absent or weak. Elections can be undermined by corruption, and disputes can explode into violence; a state with strong legal institutions can address both of these problems. At the same time, some human rights go beyond what the rule of law requires. The
right to health care, for example, is not entailed by the rule of law, as it is normally understood. Still, the concepts are close enough that the history of the rule-of-law projects is instructive.

As Carothers (2003) discusses in an influential paper, the rationales for rule-of-law promotion seemed self-evident, but scrutiny revealed some serious ambiguities. One argument for the rule of law is that it is necessary to attract foreign investment. Investors will not put money in a country unless they know that their property interests will be protected by courts from expropriation. However, China stood as an obvious counterexample to this thesis. Recent research explains that foreign and domestic investors often obtain security for their property rights from complicated personal and political relationships—with other businesses, with government officials, with influential members of the public—rather than through the rule of law. An additional point, overlooked by researchers as far as I know, is that foreign investors can benefit if a country violates the rule of law. Most obviously, the host government may expropriate land from farmers and hand it over or sell it to a foreign investor because the host government seeks economic growth. Host governments might also use their security forces to protect foreign-owned pipelines, mines, and factories, and security forces in poor countries frequently violate human rights. And governments may need the option to expropriate in order to appease a public demand for wealth redistribution and in this way forestall revolutionary movements and insurrections that would be more damaging to foreign investors than a limited and orderly round of expropriation by the incumbent government.

Another argument for rule-of-law promotion mentioned by Carothers is that the modern market economy depends on the rule of law. It is a core idea among western thinkers that a market economy depends on the enforcement of property and contract rights by an independent judiciary. Yet this is an altogether too static understanding of markets. In developed countries, this may well be true. But in developing countries, the major problem with development is often the barriers—institutional, customary, traditional, religious, political—that stand in the way of development of a market economy. China again is exemplary. The key point is that while China encouraged some types of economic activity by protecting (often de facto) property rights, it also made way for this economic activity by violating customary property norms—echoing the enclosure movement in Great Britain, and the dispersal of Indians in the United States. All of these activities violated the rule of law; all of them may well have been necessary for development.

A third argument is that the rule of law promotes democracy. Again, it is not clear whether this is true. Revolutions that inaugurate democracies often begin with massive rule-of-law violations; rigid insistence on the rule of law can also block the formation of democracy in countries with authoritarian traditions and

8. See also Carothers (2006); Dam (2006).
institutions. But the more important point is that many developing nations repudiate democracy—or, at least, democracy in the full-blown sense. Again, China above all. A cliché of the development literature is that development projects work best when the local government supports them. There must be “buy-in.” A country that sees rule-of-law projects as Trojan Horses from which democracy will spring will do all it can to undermine them.

All of these lessons from the rule-of-law movement have clear application to the goal of promoting human rights in developing countries. The relationship between human rights, development, and democracy is complex. Promoting human rights will not necessarily accelerate development or democratization. Countries that have advanced toward the endpoint envisioned by the human rights regime have done so unevenly. Many countries have gotten rich first and then supplied political rights. Others have respected some political rights (e.g., freedom of expression) but not others (e.g., freedom of religion). Many countries banned discrimination against various minorities only after advancing along other lines. The human rights regime assumes a kind of “recipe” for economic and political development, but no such recipe exists.

But there is an even more serious problem—for both rule-of-law promotion and human rights—and that is the “problem of knowledge,” as Carothers puts it. Rule-of-law projects foundered because of the complexity of the legal systems to which they were applied. To laymen, law is just a set of rules. Lawyers know better. In any society, the rules listed in books of statutes are little more than a starting point for understanding the law. (Indeed, many countries do not have those books, or do not enforce the laws in those books.) In practice, law is a highly complex undertaking involving numerous actors—judges, lawyers, religious figures, traditional mediators, informal go-betweens, trade groups, families—who often themselves have only a vague notion of what the rules are, and discover them only in the context of a specific dispute during which arguments that appeal to precedent and authority are hashed out. A development agency which asks local experts what the “law” is will likely receive many different answers, usually starting with “it depends . . . .” Grafting a well-developed statute from a Western country into the law books of a developing country—say, a bankruptcy code—can have unpredictable results. What matters is not that the law is in the books but how legal actors react to it, and it is often easy for them to ignore it completely.

Moreover, because the law varies tremendously from country to country—and even from place to place within countries—a rule-of-law project that achieves success in one place may founder in another. Law is different from other development projects that rely on universal scientific and engineering principles. Taking into account the differences in the environment, a dam will work as well in Cambodia as in Guyana. A bankruptcy law that works in Cambodia will not necessarily work in Guyana because legal principles and practices are not universal or even very similar across jurisdictions.

Human rights advocates echo rule-of-law promoters in a way that should make them uncomfortable. Human rights, like the rule of law, are taken to be
self-evident goods, hardly in need of any debate. As a result, there is no clear sense of what the rationale of human rights is, just as there was none for the rule of law. In both cases, advocates end up trying to apply a formula or recipe to diverse countries with diverse histories, traditions, and cultural and political values—without understanding that countries’ ability to absorb western institutions and change their way of doing things varies tremendously, and in a way that demands a pragmatic approach that cannot be formulated in treaties or UN documents.

**Conclusion**

Development agencies, like doctors, should do no harm. The dilemma that they face is that if they provide loans or other aid to governments in poor countries, they will almost always be required to cooperate with corrupt and dishonest officials, who may use their money to bad ends. But if they keep their hands clean under all circumstances, it will be impossible to provide aid to the people who need it most. What should they do?

Sen was right to criticize economists who believed that development agencies should focus on economic growth and nothing else. Certainly as a matter of theory, this is wrong. But the implications of Sen’s critique are more complicated than people have realized. It is not at all clear what the goal of development agencies should be if not economic growth; it is most unlikely that alternative measures like HDI are an improvement.

The idea that development agencies should promote human rights is superficially appealing but does not escape the problem. Human rights law is both too vague and too contestable to provide guidance to agencies. So what should agencies do? If they avoid breaking the laws of the country that they work in, and the laws of the western countries from which they obtain donations, and otherwise use common sense, they will probably do 90 percent of what any reasonable human rights approach would ask them to do. They would certainly avoid complicity in any kind of serious violence. Demanding that development agencies also promote human rights, by contrast, would ensnarl them in debates and controversies that have no end.

**References**


