Evolution in the Concept of Development: How Has The World Bank's Legal Assistance Extended its Reach?

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Evolution in the Concept of Development: How Has The World Bank's Legal Assistance Extended its Reach?

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Abstract

The World Bank's legal and judicial reforms programs have expanded considerably since it began to address the issue of governance in the early 1990s. Initially the Bank focused on legal reforms for inducing private investment. Currently, its legal assistance extends to include the criminal justice sector. Such activities cannot be directly construed from its Articles of Agreement. This paper will discuss how the Bank interpreted its Articles in order to ligitimize its expanding activities. The Bank has manoeuvred itself into the criminal justice sector by skillfully changing its concept of development without deviating from its mandate. The change can be described as an 'evolution' which has allowed the Bank to identify any area as target for its development assistance.

Keywords: The World Bank, legal assistance, development assistance, legitimacy

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EVOLUTION IN THE CONCEPT OF DEVELOPMENT: HOW HAS THE WORLD BANK'S LEGAL ASSISTANCE EXTENDED ITS REACH?

1. Introduction

The World Bank's legal and judicial reforms programs have expanded considerably since it began to address the issue of governance in the early 1990s. Initially the Bank focused primarily on legal reforms for inducing private investment. Currently, however, the Bank's specialized legal assistance extends to include the criminal justice sector such as anti-money laundering. In 2005 the United Nations Office on Drugs and Crime (UNODC) and the World Bank undertook joint funding to set up a regional advisor to assist Cambodia, the Lao People's Democratic Republic and Viet Nam in implementing their respective anti-money laundering (AML) programs and frameworks for countering the financing of terrorism (CFT). It is noteworthy that the World Bank has entered into a partnership with the UNODC, a UN office which provides assistance to police and prosecutor offices in member countries in order to fight against illicit drug dealing, international organized crime and terrorism. According to a UNODC document, the regional advisor provides advice, training and technical

assistance to national authorities to support their efforts in establishing, developing and strengthening AML/CFT regulatory and enforcement capacities in the respective countries. The agencies targeted for assistance and training include financial intelligence units, police forces, customs offices, prosecutors and the judiciary, and key policy agencies. "The UNODC/World Bank partnership aims to assist agencies in practical and meaningful ways to equip them to deal with a range of money laundering and terrorist financing issues, from effective regulation of the financial sector to detection of suspected illegal activities and investigation and prosecution of criminal acts, where appropriate."[1] Such activities by the World Bank cannot be construed directly from its Articles of Agreement which set down the Bank's purposes, the main one being to help finance specific projects for productive purposes. Thus the question is how the Bank, under its Articles of Agreement, can justify the extension of its legal assistance to the criminal justice sector in a recipient country?

In this paper I will discuss how the World Bank has interpreted its Articles of Agreement in order to legitimize its expanding activities through an examination of documents issued by the Bank and its General Counsel. I will first explain the mandate of the Bank as set forth in its Articles and relevant provisions thereto. Secondly, I will describe how the Bank formulated its concept of governance which has regularly been used as the basis for legitimizing the Bank's expansion into new fields. Thirdly, I will discuss how the criminal justice sector has come to be included in the Bank's activities in light of the Bank's mandate under its Articles. The Bank has manoeuvred itself into the criminal justice sector by skillfully changing its concept of development without deviating from its mandate. The change can be described as an 'evolution' which has allowed the Bank to identify any area as a target for its development assistance.

2. The World Bank Expands Its Targets

2.1 Articles of Agreement

The World Bank's Articles of Agreement do not provide a definition of 'development'. In Article I, the Bank's first purpose is stated as follows: (i) to assist in the reconstruction and development of territories of member countries by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources

[1] UNODC, "UNODC and World Bank Combat Money Laundering and Terrorist Financing" (2005) 20 *Eastern Horizons*, Regional Centre for East Asia and the Pacific, pp.20-21.

in less developed countries. Further purposes are: (ii) to promote private foreign investment by guarantees and loans, (iii) to promote the long-range balanced growth of international trade, (iv) to arrange loans and guarantees, and (v) to conduct its operations with due regard to the effect of international investment on business conditions in the territories of member countries. Article I ends with the following provision: “The Bank shall be guided in all its decisions by the purposes set forth above.”

The Article’s wording has not been changed since the World Bank’s inception in 1944. In practice, however, the Bank’s activities, though aimed at assisting in the development of member countries by providing capital for productive purposes, have changed dramatically since the collapse of the Soviet Union in the early 1990s as the targets of its activities have greatly expanded. Since no definition is assigned to ‘development’ in its Articles, the Bank has been able to transform its activities flexibly to attain ‘development.’ There is a constraint on it expansion, however, which is set forth in Section 10 of Article IV and reads as follows: “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.” This provision prohibits the Bank from interfering in the political affairs of recipient countries and limits the Bank to considering only economic factors in its decisions to provide loans. As the Bank’s concept of development has evolved, enabling it to expand the range of its activities, this evolution has always been accompanied by the question how the provision prohibiting political activity should be interpreted in practice. In other words, it has now become a constant effort on the part of the Bank to explain ‘development’ devoid of its political aspects when in reality the latter cannot be excluded from the former.

2.2 The Start of the ‘Governance Doctrine’

During the 1980s in its Structural Adjustment Policy, the Bank insisted that economic structural reform was essential for promoting the mid- and long-term economic growth of recipient countries. The market economy, privatization and external liberalization became the foundation of its Structural Adjustment Policy upon which the Bank promoted stabilization of the macro economy, reduction of the public sector and deregulation. However, these reforms did not necessarily bring success, or worse still, they brought social problems such as a serious disparity in receiving health care and education in several African countries. This invited a great deal of criticism against the

Bank's Structural Adjustment Loan Program. Instead of examining its own failure, however, the Bank argued that the capacity of the government in the recipient country was the important factor in the Structural Adjustment Loan Program, and it attributed the failure of the program to the lack of such capacity of government on the recipient side. This was the beginning of the World Bank's 'governance doctrine.' In one of its documents the World Bank states: "In the late 1980s Africa Region [Group] was the first operational unit in the Bank to identify governance issues as necessary for the success of its development agenda. AFR[2] recognized that 'underlying the litany of Africa's development problem is a crisis of governance'. … Public sector management and civil service reforms were given greater emphasis. … The AFR lead was followed by the Latin America and Caribbean [Groups], which supported civil service and judicial reform and provide assistance for decentralization. Since then, all regions [regional groups] have been addressing governance issues."[3] By bringing up the governance doctrine, the Bank stressed that there was no mistake in its prescription such as reduction of financial deficits and trade liberalization, and attributed the failure of its Structural Adjustment Loan Program to the lack of institutional capacity in the recipient country. Prohibited from interfering in the political affairs of a recipient country by its own Articles, how could the Bank claim a right to comment on a recipient country's capacity of government, which is the embodiment of a country's politics?[4] Ibrahim F. I. Shihata, then the Bank's General Counsel, argued that 'governance' has two distinct sets of aspects: (a) those which are related to the Bank's purposes as stated in its Articles and (b) such other sets which represent prohibited political considerations.[5] According to Shihata, 'governance' becomes an issue of concern to the Bank only in its strict sense of the good order required for a positive investment climate and for the efficient use of resources.[6] He argued as follows:

Activities such as civil service reform and legal reform have been found to be relevant to the maintenance of "good order" in the management of a country's resources through the introduction and implementation of appropriate rules and

[2] AFR is an acronym for 'Africa Regional Group', a section in the World Bank which is in charge of lending to countries in the African region.

[3] World Bank, (2004) "*Mainstreaming Anti-Corruption Activities in World Bank Assistance: A Review of Progress Since 1997*", Washington DC: The World Bank, p. 6.

[4] Shihata cited the definition of "governance" as follows: in its full sense, "governance" covers the manner in which a community is managed and directed, including the making and administration of policy in matters of political control as well as in such economic issues as may be relevant to the management of the community's resources. Ibrahim F.I. Shihata, (1991) "*The World Bank in a Changing World*", Vol. 1, Dordrecht; Boston: M. Nijhoff Publishers, p. 79.

[5] *ibid.* p. 80.

[6] *ibid.* p. 93.

institutions, and were therefore distinguished from the typical exercise of political power to manage the country's affairs which generally falls beyond the Bank's mandate. As General Counsel to the Bank, I had no difficulty in reaching the conclusion that the Bank may favorably respond to a country's request for assistance in the field of legal reform, including judicial reform, if it finds it relevant to the country's economic development and to the success of the Bank's lending strategy for the country.[7]

Under this rubric of 'governance', which distinguishes one that is relevant to the Bank's work from one that is the exercise of political power, any kind of institution or organization related to state management if found relevant to economic development, can become a target for Bank assistance. Initially put forward as the reason for the failure of its Structural Adjustment Loan Program to African countries, the concept of 'governance' has now come to be used regularly, and seemingly at the World Bank's convenience, to explain the expansion of the Bank's activities.

2.3. Anti-Corruption for Good Governance

Given the fact that corruption in government, that is, abuse of public power, is related to political aspects of the country, the World Bank's commitment to deal with such an issue would seem to go against its Articles of Agreement, which prohibit the Bank's interference in the political affairs of recipient countries. To avoid such interference, the Bank began using the rationale that eradicating corruption was an essential component of 'good governance.' Such reasoning allowed the Bank to target corruption and make anti-corruption another of its activities. This section will examine the World Bank's explanation which it has used to make anti-corruption relevant to its mandate.

The World Bank staff and management had long been aware of the importance of fighting corruption but felt unsure about how to deal with this problem within the Bank's mandate.[8] Shihata described the start of the Bank's anti-corruption activity in the early 1990s:

"*The Articles of Agreement do not specifically include curbing corruption among the Bank's purposes or functions. They generally prohibit the Bank from taking non-economic considerations into account in its decisions and from interfering in the political affairs of its members. For this reason, … [the Bank] has avoided, until*

[7] Ibrahim F.I. Shihata, (1995) "Judicial Reform in Developing Countries and the Role of the World Bank," in Malcom Rowat, et al., eds., *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference*, World Bank Technical Paper No. 280, Washington DC: The World Bank.

[8] World Bank, (2004), p1.

recently, any full-fledged attempt to adopt an anti-corruption strategy. Since the early 1990s, the Bank has, however, identified corruption as an issue to be taken into account in its work on governance and, in a few cases, begun to raise it in the country dialogue. It has also sought to assist its borrowing countries in introducing economic, administrative, legal and judicial reforms through a series of structural and sectoral adjustment loans, technical assistance loans and grants and sectoral investment loans. While the bank was not in this way directly involved in fighting corruption, it was aware that these reforms have a direct positive effect not only on the growth prospects of the borrowing countries but also on the level of corruption."[9]

Though he admitted that the Bank's commitment to anti-corruption was not explicitly included in the governance issue which the Bank began to deal with in the early 1990s, Shihata stated that it was already recognized that institutional reform for good governance had a positive impact on eradicating corruption. It can be seen that he explained the Bank's involvement in anti-corruption by the same logic as he had used to legitimize its involvement in governance in recipient countries.

In 1995 James Wolfensohn became the first president of the World Bank, to express the Bank's concern over corruption as a general development issue. He highlighted the corruption issue in his first speech before the annual meeting of the Board of Governors. He then asked Shihata, the Bank's General Counsel, to consider how the Bank would be able to initiate action against corruption in accordance with its mandate. Shihata found the legal base for the Bank's commitment to anti-corruption in recipient countries within his own argument about governance. He answered:

"*As a practical matter, the World Bank can hardly insulate itself from major issues of international development policy. Corruption has become such an issue. Its prevalence in a given country increasingly influences the flow of public and private funds for investment in that country. The Bank's lending programs and in particular its adjustment lending take into factors which determine the size and pace of such flows. From a legal viewpoint, what matters is that the Bank's involvement must always be consistent with its Articles of Agreement. The Bank can in my view take many actions to help the fight against corruption. … The only legal barrier in this respect is that in doing so the Bank and its staff must be concerned only with the economic causes and effects and should refrain from intervening in the country's political affairs. While the task may be difficult in borderline cases, its limits have been prescribed in detail in legal opinions issued by this author and endorsed by the Bank's Board.*"[10]

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[9] Ibrahim F.I. Shihata, (1997) "Corruption – A General Review with an Emphasis on the Role of the World Bank", 15 (3) *Dickinson Journal of International Law*, pp 451-485.

[10] *ibid*. p. 476.

Citing his own legal opinion on governance issued in 1990,[11] he stressed the relevance of the concept of governance in the recipient country to the Bank's activity of providing assistance for economic reforms in that country. And he argued again that the concern of governance was not with the exercise of state power in the broad sense but specifically with the appropriate management of the public sector and the creation of an enabling environment for the private sector.[12] It can be seen that the Bank's direct involvement in the anti-corruption issue was justified by the General Counsel's legal opinion which had once justified the Bank's commitment to the recipient country's governance in light of the Bank's Articles of Agreement. Regarded as an essential factor of good governance, anti-corruption became a target for the Bank's assistance. According to Shihata, the logic of governance applies to anti-corruption *mutatis mutandis*.

At the same time, the Bank's involvement in addressing corruption issues beyond the projects it financed had not been free from controversy. There was an argument that the Bank should only be concerned with functions explicitly stipulated in its Articles of Agreement, the main one being to help finance specific projects for productive purposes. Against this Shihata argued that the Bank had already been able to deal with a large number of governance and institutional issues which were directly relevant to its *development mandate*, without becoming entangled in partisan domestic politics (author's emphasis).[13] Shihata regarded corruption as an economically negative factor which adversely affected the flow of capital. Thus, involvement in anti-corruption was not interference in domestic politics, but an essential factor for economic development in the recipient country. In 1996 the Bank began treating corruption issues as within its mandate, regarding the General Counsel's legal opinion on governance issued in 1990 as having paved the way. In 1997 the World Bank executive board approved the Bank's anti-corruption strategy thereby formally recognized corruption as a major development issue. Thereafter the Bank began to implement the strategy by providing vigorous support for anti-corruption efforts in numerous recipient countries. The World Bank emphasized strongly that its involvement in anti-corruption was not something new that began in 1997; rather it pointed to its long involvement by saying that:

"*… [The] Bank tried to attack corruption through its longstanding support to governance reform. Also, the reforms that the bank supported in the 1980s and 1990, including trade and financial liberalization, fiscal and regulatory reforms, and*

[11] Issues of "Governance" in Borrowing Members – The Extent of Their Relevance Under the Bank's Articles of Agreement, Legal Memorandum of the General Counsel, dated December 21, 1990, also published as Chapter Two in Shihata, (1991).
[12] Shihata, (1997), p. 477.
[13] *ibid*. p. 476.

institutional strengthening were partly aimed at reducing the incentives for corruption."[14]

It further stated that the launching of the 1997 strategy marked an important change putting the anti-corruption issue at the forefront of the Bank's development agenda.[15]

2.4. Anti-Money Laundering

The connection of governance with anti-corruption found a further natural link with anti-money laundering (AML). Once anti-corruption came to be seen as within the Bank's mandate because it was essential to good governance, AML likewise began to be included in the mandate because it was regarded as a part of anti-corruption. The Bank's commitment to AML started at the beginning of this century.

Regarding AML as an aspect of anti-corruption, the World Bank explained that its commitment to AML started in April 2001 when the executive directors of the IMF and the World Bank endorsed the view that money laundering was a matter of global concern.[16] The directors noted that dealing with money laundering would require a cooperative approach involving many different institutions encompassing financial sector supervision and regulation, good governance, judicial and legal reform, and effective law enforcement.[17] At the same time, the executive board of the World Bank noted that although the Bank could support efforts against money laundering, it had to remain within its mandate and thus avoid connection with law enforcement activities.[18] This latter point is noteworthy as it shows again that the World Bank was very much concerned about keeping itself within its mandate and was unsure about the relationship of AML to its mandate. This suggests that a commitment to AML might include activity which goes beyond the Bank's mandate. The executive board instructed the Bank's staff to work out methods for assessing the implementation of anti-money laundering requirements for banks, insurance companies and other capital markets. This agenda was expanded to include technical assistance related to anti-terrorism financing,[19] clearly showing that since September 11, 2001, the Bank has expanded its activities under the name of anti-money laundering to cover anti-terrorism measures. The dramatic increase in the number of such programs is evident from the rapid increase in

[14] Word Bank, (2004), p. 5.
[15] *ibid*.
[16] World Bank, (2004), p 25.
[17] *ibid*.
[18] *ibid.*
[19] World Bank, (2004), p. 26.

the number of documents related thereto. Anti-Money Laundering and Combating the Financing of Terrorism have come to be treated as twins and are now abbreviated as AML/CFT.

2.5. Significance of the "Governance Doctrine"

It is unclear whether such an expansion of Shihata's "governance doctrine" was intended at the time of its pronouncement in early 1990; however, his legal opinion on governance has been cited as the logical and legal basis enabling the Bank to expand its range of targets. By distinguishing it from the typical exercise of political power, the promotion of good governance has become a convenient way to justify the Bank's commitment to new fields. The Bank clearly states that the rationale behind its involvement in corruption is the General Counsel's legal opinion on governance issued in 1990.[20] Coupled with CFT, AML is regarded as an aspect of anti-corruption, which constitutes a part of the governance issue. The legitimacy of the Bank's commitment to AML and anti-corruption can be deduced from the governance doctrine. And *vice versa*, it can be postulated that inferring from the governance theory, the Bank can interpret any issue as a target for its activities.

Nonetheless, the Bank still needs to show that its activities fall within its mandate. By deliberately deploying the concept of governance, it has been able to expand the targets of its activities, but it is still required to explain that this expansion does not conflict with its Articles. In the next section, I will discuss how the Bank has explained its involvement in the criminal justice sector in light of its Articles of Agreement.

3. World Bank Creeps into the Criminal Justice Sector

Based on its "governance doctrine", the World Bank has expanded the target of its activities to anti-corruption and to AML. As mentioned above, the World Bank became involved in the criminal justice sector through its AML/CFT project set up jointly with the UNODC in 2005. A typical example of the Bank's AML project is providing technical assistance to the central bank or financial authority of the recipient country in order to build an information management system regarding customers and money flows. However, as part of its partnership with the UNODC, the Bank funded a project that included technical assistance for criminal prosecution. Such funding might be the kind that the Bank's executive board cautioned against providing.[21] The Bank had written up no legal opinion on the criminal justice sector prior to this project. Using legal documents of the World Bank, the next sub-sections will examine the development

[20] World Bank, (2004), p 2.
[21] World Bank, (2004), p.25.

of the Bank's commitment to the criminal justice sector

3.1. Manifestations of the World Bank's Expansion into the Criminal Justice Sector

The first manifestation of the World Bank's desire to launch its involvement in the criminal justice sector can be found in a booklet issued in 2003 by the Bank's Legal Vice Presidency. In order to provide a premise of for advancing into this sector, the booklet states:

"*… [L]egal and judicial reform activities are of a highly sensitive nature which presents challenges. Making sure that these activities stay within the mandate of the institution and within authorization of the Board is essential, while at the same time, permitting the Law and Justice Group to pilot new areas under the supervision of the General Counsel. First, although the Bank's mandate directs it to take only economic considerations into account, and while the Bank does not involve itself into the politics of any member country, it must often be cognizant of the political situation in its client countries. The structural/institutional character of law reform, and the significant impact of reform on entrenched political and social interests in society, mean that political considerations are often an important part of law reform efforts, and those involved in Bank projects must take account of these factors while concurrently remaining faithful to the strictures of the Bank Charter [Articles of Agreement].*" [22]

This comment shows that in its assistance for legal and judicial reforms, the Bank is very much concerned about maintaining its justification and explaining its non-deviation from its mandate as defined in its Articles. The comment also suggests the sensitivity of legal and judicial reforms which have political and social impacts on the society; and as economic consideration is not enough, political consideration is inevitably required for successful legal reforms.

The comment then took up the criminal justice sector as a field which the Bank should branch out into in the near future.

"*Another area that poses challenges is the field of criminal law. In fighting corruption, both the opportunities and incentives for corrupt activities must be considered. Focusing on preventive measures in isolation, without assisting a country's efforts to criminalize corruption and step up capacity in criminal law enforcement, has left a gap in the Bank's anticorruption assistance strategy and potentially undermines the effectiveness of the Bank's activities in this area. … The Law and Justice Group has had very limited involvement in the area of criminal justice, leaving this area to other*

[22] World Bank, (2003) "*Legal and Judicial Reform: Strategic Directions*", Legal Vice Presidency, Washington DC: The World Bank, p. 70.

donors. This reluctance is rooted in the concern that criminal justice may fall outside the scope of the Bank's mandate. Issues related to governance, legal and judicial reform, and corruption were at one time thought to be outside the Bank's mandate, but are now accepted to be within it. An effective and accountable criminal justice system is also a requisite for promoting good governance, a necessary component of legal and judicial systems, and essential for any strategy to curb corruption. The Bank's policy on criminal justice will be developed in the near future. Of course, there are limits on where the Bank should be involved. The Bank's Articles of Agreement prohibit it from interfering in the political affairs of its member states. Its comparative advantage may assist in defining this limitation; …" [23]

The rationale supporting the Bank's involvement in the criminal justice sector again lies in Shihata's "governance doctrine." The Bank recognizes that there are inherently political aspects in legal and judicial reforms. Thus, in order to assist legal and judicial reforms in a recipient country, Shihata was careful to define 'governance' as different from the typical exercise of political power in the management of a country's affairs which generally fell beyond the Bank's mandate. The reasoning justifying the commitment to the criminal justice sector runs as follows: 1) it is already accepted that issues related to governance, legal and judicial reforms and corruption lie within the Bank's mandate; 2) an effective and accountable criminal justice sector is necessary for good governance, legal and judicial reforms and anti-corruption; therefore, 3) the criminal justice sector is within the Bank's mandate. In effect, this reasoning indicates that any field, if it is regarded as essential for good governance, can become a target of the Bank's activity. In 2003 the Bank's new challenge to the criminal justice sector was manifested, although the General Counsel's legal opinion on the issue had not yet been written.

3.2. Human Security

The advent of the concept of "Human Security" is another factor supporting the World Bank's involvement in the criminal justice sector. The Report of the Commission on Human Security, issued in May 2003, emphasizes the importance of advancing the security of people in the various stages of their lives. In Chapter 4 of the report, public safety, humanitarian relief, rehabilitation and reconstruction, reconciliation and coexistence, and governance and empowerment, are listed as key human security clusters following violent conflict. In order to attain, *inter alia,* public safety, the report

[23] World Bank, (2003), p71.

points out the need for the reform or creation of the state security sector. It states that along with reforming the army, police and intelligence services, reforming the security sector also requires changing the legal system, building an independent judiciary and providing services to manage prisons. The report further implies that there is a need to get the income and expenditures of the military, police and other security institutions under control. It goes on to say that:

"*Effective state security institutions upholding the rule of law and human rights are an essential component for achieving human security, development and governance. They are keys to rebuilding trust and confidence in institutions and creating a climate for reducing poverty and attracting investments.*" [24]

Further on is the following noteworthy statement:

"*Despite the growing attention to the reform of the state security sector, multilateral actors, such as the World Bank, have been reluctant to engage. They see such efforts as interfering in the internal and political affairs of a country. Far from it, however; reform of the security sector should be seen as an integral part of any strategy to strengthen governance and development.*"[25]

Thus the report argues that an area the World Bank has avoided in light of its Articles of Agreement is actually one essential to development and requiring the Bank's active involvement. This argument suggests that, by categorizing crime prevention and public safety as infrastructure for development, the comprehensive idea of Human Security has encouraged the World Bank to deliberately expand its concept of development.

3.3. General Counsel's Legal Opinion on the Criminal Justice Sector

It was not till January 2006 that the General Counsel of the World Bank issued a legal opinion on the Bank's involvement in the criminal justice sector of recipient countries.[26] In his Legal Opinion, the General Counsel said that although the Bank had recently become more involved in the criminal justice sector, there had not yet been a corresponding evolution in the Bank's legal views on the link between criminal justice and the Bank's work within the context of the Bank's Articles of Agreement. He

[24] Commission on Human Security, (2003), *Human Security Now*, New York: UN Publications, p. 63.

[25] *ibid.*

[26] Legal Opinion on Bank Activities in the Criminal Justice Sector, Senior Vice President and General Counsel, dated January 31, 2006.

admitted that the Word Bank's involvement in the criminal justice sector had preceded the issuance of a legal opinion thereon.

The aim of the Legal Opinion is, of course, to provide justification for the Bank's involvement in the criminal justice sector of a recipient country. The reasoning is the same as that already used. First, the Legal Opinion defines the concept of development comprehensively enough to include the criminal justice sector. Then, the Opinion states that there exists an economic rationale for the Bank's involvement in the sector. Thus, the Opinion concludes that this involvement in the sector is for economic development purposes and is not interference in the political affairs of the recipient country; therefore, the Bank's involvement in the sector is within its mandate. This is expatiated as follows.

The Legal Opinion begins by stating that the interpretation of the purposes enumerated in the Articles of Agreement has evolved to meet the needs of a broader concept of development and that the concept of development itself has evolved substantially over the past years along with the Bank's mission. Development is no longer confined to economic development as narrowly defined, but encompasses broad areas of human development, social development, governance and institutions. The Legal Opinion states that contemporary practitioners and others in the development community treat the criminal justice sector as a means for the delivery of services to the public in the areas of safety, and as a central part of the everyday meaning of the rule of law, human rights and good governance. The Legal Opinion defines the criminal justice sector not only as the traditional institutions such as the police, prosecutor, public defenders, courts and prisons, but also as a wide range of other institutions such as private police forces, victim services, private lawyers and bar associations, human rights and ombudsman's offices, addiction treatment programs and community service programs.

The Legal Opinion then explains the economic rationale behind the commitment to the criminal justice sector. The potential development impact of intervention in criminal justice is supported by ongoing research which shows that crime and violence have become serious obstacles to sustainable economic development; they undermine strategies to increase levels of social and human capital, and have direct and indirect costs that divert funds away from development and other productive activities. AML/CFT is referred to as an example of intervention with an economic rationale given the economic damage that results from money laundering and terrorist financing which divert financial and other resources away from pro-development activities.

Referring to the prohibition on political interference,[27] the Legal Opinion states

[27] The Legal Opinion mentions a counter-view that criminal justice is essentially and exercise of sovereign power, akin to the military, support for which will inevitably involve the Bank in

that no Bank intervention, even in such traditional areas as infrastructure, is immune from political implications that may draw the Bank unwittingly into partisan debate. It further states that the risk of political interference should be managed rather than avoided altogether. In the area of criminal justice, study of the political situation of recipient countries will be needed in order to avoid involvement in political affairs. The Legal Opinion divides the criminal justice sector into three areas: white, black and grey. White areas are those where the Bank's activity would likely pose no serious legal issues; black areas are those which, because the economic rationale is weak or the inherent risk of political interference is high, or both, pose serious legal issues; grey areas are those that merit particularly close attention. It is stated that the financing of policing, prosecutors and prisons falls into this third area where the high potential risks need to be managed by well-formulated guidelines and specialized expertise, neither of which, the Legal Opinion admits, the Bank presently possesses.

The Legal Opinion concludes that the Articles of Agreement do not prohibit the Bank from involvement in the criminal justice sector, and that any particular intervention should be grounded in a reasonable economic rationale and should avoid interference or the appearance of interference in the political affairs of recipient countries.

This Legal Opinion gives justification to the Bank's involvement in the criminal justice sector in light of its Articles and clarifies that the conditions for involvement be a rational economic basis and non-interference in political affairs. Under these two conditions, the Bank's activities in a country's criminal justice sector are to be guided by 'white', 'black' and 'grey' areas. This Legal Opinion is the first legal document to address the legitimacy of the World Bank's involvement in the criminal justice sector under its Articles of Agreement. It clearly supports the expansion of the Bank's targets of activity. It also clarifies the areas where the Bank should and should not become involved; and when undertaking any particular activity, it stresses the need to fulfill the two aforesaid conditions. However, this Legal Opinion comes three years after the manifestation of the Bank's involvement in the criminal justice sector; thus it is likely that under careful scrutiny there might be grey areas where the Bank has already become involved.

3.4. Controversy over the Bank's Involvement in the Criminal Justice Sector

The expansion of the Bank's activities is not without controversy.[28] On one side

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making political judgments and therefore not a proper subject for Bank intervention.

[28] See Guy Brucculeri, (2004) "A Need to Refocus the Mandate of the International Monetary Fund and the World Bank," 17 *Winsor Review of Legal and Social Issues*, pp. 53-82; Jessica Einborn, (2001) "The World Bank's Mission Creep," 80 (5) *Foreign Affairs*, pp. 22-35; Jane Rueger, (2003) "From Reluctant Champion to Developing Ringmaster: Managing the

are those who argue that the Bank should concentrate in its original mandate, i.e. assisting in economic activities; on the other side are those who say the Bank should be involved in poverty reduction and active in as many areas as possible for combating terrorism which is regarded to be resulted from poverty.

There is also a concern that enhancing AML regulations might infringe on human rights in developing countries where the laws do not necessarily guarantee the rights of citizens and people held as suspects. Strengthening AML regulations will definitely affect the role and function of the criminal justice sector in the society concerned. Unless the legislation process is open to the public and public comments are invited and taken into consideration, tightened AML regulations may result in biased empowerment of the prosecutor's office. Furthermore, when coupled with CFT, the targets of AML programs tend to expand. It should be scrutinized that the Bank makes legislation and enforcement of such laws a condition for receiving its loans.

By assisting legal and judicial reforms in the recipient country, the donor, consciously or not, reinforces the power of the state. Assistance to the criminal justice sector in particular might adversely affect the human rights situation in the country. The Commission on Human Security stresses the significance of security in a country for the achievement of development, and expects the commitment of the World Bank to the reform of police and prosecutors offices in recipient countries in the name of development. However, external assistance to the reform of legal and judicial systems may lead to the reinforcement of state power, to put it further, the existing undemocratic regime of a recipient country. Under the guise of combating terrorism, transnational organized crime and money laundering, assistance to a country might reinforce an undesirable administration with a poor human rights record. The idea that the rule of law upheld by effective state security institutions is important for development, has to be applied carefully, otherwise it could be misused.[29]

Expanding Mission of the World Bank," 10 (2) *Indiana Journal of Global Studies*, pp. 201-226; Olivera Medenica, (2004) "The World Bank, the IMF and the Global Prevention of Terrorism: A Role for Conditionalities," 29 (2) *Brooklyn Journal of International Law*, pp. 663-707.

[29] Also I would like to point out that the World Bank and other multilateral and bilateral donors promote the 'rule of law' as an essential component of good governance, but they have never thought that their assistance need to be provided under the 'rule of law'. They deliberately employ the concept of the 'rule of law' to be confined to the domestic sphere of the recipient country. It is interesting to note that Japan's Ministry of Justice, in the explanation of its legal technical assistance, states that the legal system of a country is a 'common property' ('*kyotsu zaisan*' in Japanese) with other countries. (*See* Japan's Ministry of Justice's website: *Hoseibishien ni tsuite* (About Legal technical Assistance), http://www.moj.go.jp/.) If so, what are the rights and obligations of the donor to such property, *i.e.*, the legal system of the recipient country? This is a sensitive question of tension between the donor and the recipient country over the concept of

While acknowledging that development in a country is not confined to a particular area but related to the society as a whole, and accepting that the criminal justice sector falls within the parameters of "development", it is still necessary to continue examining whether and how the Bank should be involved in this sector.

In the Legal Opinion discussed above, the financing of policing, prosecutors and prisons is regarded as falling within the "grey area" where the potential risks of interfering in political affairs are high and effectively managing those risks requires well-formulated guidelines and specialized expertise. The General Counsel admitted that the World Bank possesses neither of these at present, and it seems that the Bank entered into its partnership with the UNODC in order to acquire such expertise. This project seems to have involved an implementation process which the Bank's executive board had once cautioned against engaging in.

4. Conclusion

The World Bank has manoeuvered itself into the criminal justice sector by skillfully changing its concept of development. The Bank advocates the need for good governance in order to achieve development and has targeted numerous institutions in recipient countries in order to promote good governance. When becoming involved in a new field, the Bank always justifies its move with an economic, non-political rationale. The Bank justified its involvement in the criminal justice sector by arguing that such involvement was to ensure security and the rule of law in order to promote good governance. The concept of human security became a motivating factor for this involvement. The flexible interpretation of its Articles of Agreement to explain the legitimacy of its expanding activities has enabled the World Bank to become involved in areas and activities which cannot be directly construed from its Articles. Moreover, this process has been pursued actively as the Bank's policy to meet the exigencies of its practices.[30]

'rule of law'.

[30] Shihata states that it is not enough for the General Counsel's advice to be legally correct; it is also expected to enable the executive directors to perform their responsibilities in a manner which best suits the needs of the Bank's business. Shihata also wrote, "Without changing its charter which defines its purposes and sets out explicit limits on its work, the World Bank has greatly broadened the scope of its operations beyond anything envisaged at the time of its establishment. … Expanding dimensions of the concept of development have had their effect on the Bank's functions." Ibrahim I.F. Shihata, (2000) "The Dynamic Evolution of International Organizations: The Case of the World Bank", 2 *Journal of History of International Law*, pp. 217-249.

As the concept of good governance taken hold in the development community, a frame of mind has arisen that equates development with the attainment of good governance. It is pointed out that since the revival of law and development in early 1990, the idea that building 'the rule of law' might itself be a development strategy has encouraged the hope that choosing law can substitute for the perplexing political and economic choices that have been at the centre of development policy-making for half a century.[31] However, development policy is formulated through competing political choices and economic analyses, and the rule of law cannot substitute for these. Therefore, we legal scholars who discuss law and development need to continue asking ourselves what is development, although we are unable to 'evolve' the concept of development as the World Bank does at its need and convenience.

[31] David Kennedy, (2003) "Laws and Developments", in John Hatchard and Amanda Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21st Century: Essays in honour of Peter Slinn*, London: Cavendish Publishing Limited, p. 17.

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