

Entering the Forbidden Zone The World Bank, Criminal Justice Reform and the Political Prohibition Clause

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Entering the Forbidden Zone

The World Bank, Criminal Justice Reform and the Political Prohibition Clause

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Abstract

Over the past 7 years or so, the World Bank has expanded its rule of law agenda by moving into the area of criminal justice reform. This turn to criminal justice reform, however obvious it may be from a development perspective, was — and still is — a controversial step. This is because the World Bank, like most other multilateral development banks, is prohibited by its basic legal document, the Articles of Agreement, from interfering in the political affairs of its members. It must make its decisions on the basis of economic considerations only. Following the 2011 World Development Report, which made the case for World Bank involvement in criminal justice, in early 2012 the Bank's legal vice presidency released the Legal Note on Bank Involvement in the Criminal Justice Sector and a Staff Guidance Note: World Bank Support for Criminal Justice Activities. This paper shows how the Legal Note and the Guidance Note, by offering new interpretations of the World Bank's mandate and of the criminal justice sector, seek to incorporate criminal justice reform within the World Bank's governance agenda. It argues that the interpretation offered by these documents is unconvincing in addressing the two components of the political prohibition clause, being the injunction to decide on the basis of economic considerations only and the prohibition on political interference. As a result, the Legal Note does not entirely succeed in its mission to provide '...a general legal framework for determining which interventions by the Bank in this sector would fall within the World Bank's mandate under its Articles of Agreement'. This paper concludes by suggesting that some of the loose ends in the

* The author would like to thank two anonymous reviewers for constructive feedback. The usual disclaimer applies.

Legal Note and the Guidance Note can be explained by the purpose of this new legal interpretation of the mandate, which is not so much to provide a consistent legal argument, but rather — and above all — to play [to] constituencies with different interests and maintain the myth of a common understanding of the World Bank's mandate and mission.

Keywords

World Bank – criminal justice reform – rule of law promotion – legal reform – mandate – political prohibition clause – comprehensive development framework – interpretation in international law – IFIs – organizational myth

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The rule of law is a principle of fundamental importance to the World Bank. It lies as the heart of what the Bank is, what it does, and what it aspires to accomplish.¹

ANNE-MARIE LEROY, Senior Vice President and World Bank Group General Counsel

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1 The New Direction of the World Bank's Rule of Law Agenda

For more than two decades,² international organizations, states and NGOs have spent considerable energy and resources on strengthening legal systems

¹ From 'The World Bank and the Rule of Law', in *Legal Vice Presidency Annual Report FY 2011*, (World Bank, Washington, DC, 2011) ('Legal Vice Presidency Annual Report FY 2011') p. vi, available at: <<http://documents.worldbank.org/curated/en/2011/01/15488410/legal-vice-presidency-annual-report-fy-2011-world-bank-rule-law>>.

² Rule of law promotion, of course, has a much longer history, albeit under different names, with the 1960s law and development movement and assistance with constitution-drafting in the wake of decolonization as important post-war episodes, and colonialism before that: see W. Twining, *General Jurisprudence; Understanding Law from a Global Perspective* (Cambridge University Press, Cambridge, 2009) pp. 326–329; E. M. Burg, 'Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'', (1977) 25 *American Journal of Comparative Law* pp. 492–530; J. Gardner, *Legal Imperialism*:

across the globe.³ The World Bank (or 'Bank') is a major player in this field of rule of law promotion. It has developed a sizable portfolio of justice sector projects,⁴ the costs of which averaged USD 335 million annually from 2005 to 2010. To this can be added a number of grants that support rule of law initiatives. World Bank spending is thus a sizable chunk of the USD 2.6 billion which is spent annually on rule of law promotion globally, according to a recent report by the International Development Law Organization ('IDLO').⁵ Unsurprisingly, the Bank is watched closely by practitioners as well as academics, and its justice portfolio has long been the object of fierce and well-deserved criticism and debate.⁶ The Bank has also been praised. It is often invited to provide advice and assistance in court reform, even by countries that are not eligible for Bank loans. It is respected for its innovative work in the

American Lawyers and Foreign Aid in Latin America (University of Wisconsin Press, Madison, WI., 1980); B. Z. Tamanaha, 'The Lessons of Law-and-Development Studies' (1985) 89 *American Journal of International Law* pp. 470–486; D. M. Trubek & M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development' [1974] *Wisconsin Law Review* pp. 1062–1101; S. Humphreys, 'Laboratories of Statehood: Legal Intervention in Colonial Africa and Today' (2012) 75(4) *Modern Law Review* pp. 475–510.

- 3 T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, Washington, D.C., 2006); A. Santos & D. M. Trubek (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, New York, 2006); M. Zürn, A. Nollkaemper and R. Peerenboom (eds.), *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge University Press, New York, 2012); S. Humphreys, *Theatre of the Rule of Law; Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, New York, 2010).
- 4 Since 1990, more than 500 World Bank projects have dedicated between 10–15 per cent of their funding to justice reform. In addition, the Bank has financed 36 stand-alone projects, so-called because they have justice reform as their primary focus.
- 5 International Development Law Organization, *Legal and Judicial Development Assistance Report 2010* (International Development Law Organization, Rome, 2010) p. 4, and pp. 10–14. A copy of the report is available at: <www.idlo.int/DOCNews/LJ%20Annual%20report%20with%20Annexes.pdf>.
- 6 For an overview of critical approaches, see H. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', in H. Cissé, D. Bradlow and B. Kingsbury (eds.), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (World Bank, Washington, D.C., 2011) pp. 59–94. See also J. Faundez, 'Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform', in A. Perry-Kessaris, *Law in the Pursuit of Development: Principles into Practice?* (Routledge, Oxford, 2010) pp. 180–201; and A. Perry-Kessaris, 'Enriching the World Bank's Vision of National Legal Systems and Foreign Direct Investment', in P. Bergling, J. Ederlof & V. Taylor (eds.), *Rule of Law Promotion: Global Perspectives, Local Applications* (Iustus Forlag, Uppsala, 2010) pp. 287–316.

Justice for the Poor ('J4P') program,⁷ which is part of a broader strand in rule of law promotion that is also referred to as the 'legal empowerment of the poor'.⁸ The Bank has produced a considerable number of analytical papers on justice reform, which not only describe and evaluate the Bank's activities in the area of justice reform, but also provide a critical analysis of its conceptual underpinnings, thereby reinforcing the Bank's status as an institution which is serious about the intellectual justification of its work.

Inside the World Bank, the perception of the significance of the justice portfolio has always been different. The Justice Practice Reform Group, the unit within the Legal Vice-Presidency that is responsible for designing and implementing projects as well as gathering and publishing information about legal reform projects, consists of around 20 staff in headquarters and another 60 or so experts in the field.⁹ While it is true that experts working (partly) on justice issues can be found on many floors in the Bank's headquarters in Washington, D.C., as well as in the field,¹⁰ it is clear that their total number is only a fraction of the approximately 10,000 people who work for the Bank in Washington, D.C. or elsewhere. Economists, not lawyers and justice specialists, have always dominated the Bank. Moreover, a portfolio of USD 335 million may be impressive in the field of rule of law promotion, but it is insignificant in the context of an organization that spent almost USD 47 billion last fiscal year on projects. The Bank's activities in justice reform have rarely figured prominently in the Bank's major publications, especially its flagship annual World Development Report.

7 For more information, see the World Bank webpage entitled "Justice for the Poor (J4P)", available at: <<http://go.worldbank.org/SMIKY7M6Oo>>.

8 See generally B. van Rooij, 'Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation' (2012)(2) 4 *Hague Journal on the Rule of Law* pp. 286–318; United Nations Development Program (Commission on Legal Empowerment of the Poor), *Making the Law Work for Everyone (Vols. I and II)* (UNDP, New York, 2008), available at: <www.undp.org/content/undp/en/home/librarypage/democratic-governance/Lep/making-the-law-work-for-everyone---vol-i---english.html>; S. Golub (ed.), *Legal Empowerment: Practitioners' Perspectives* (International Development Law Organization, Rome, 2010).

9 Legal Vice Presidency Annual Report FY 2011, *supra* note 1, pp. 68–9.

10 Other units involved in legal reform are the Public Sector Unit of the Poverty Reduction and Economic Management sector ('PREM'), which from the start in the early 1990s has been responsible for a substantial part of the Bank's judicial reform projects; the Private Sector Development Group, within which the Rapid Response Unit can be found which is responsible for the Doing Business reports; and the World Bank Institute, the major research center of the Bank: A. Santos, 'The World Bank's Uses of the Rule of Law Promise' in Santos & Trubek (eds.) (2006), *supra* note 3, pp. 253–300, at pp. 278–290.

Recently, however, the Bank has discovered the importance of justice reform for its core mission; which, as the homepage of its website reminds us, is achieving a world free of poverty.¹¹ In 2008, Robert Zoellick, the Bank's former president, delivered a major policy speech at the Institute for Strategic Studies in London, in which he argued that "the most important fundamental prerequisite for sustainable development is an effective rule of law".¹² The 2011 World Development Report argues that justice is one of the key requirements for development in fragile and conflict-affected states.¹³ This high-profile support appears to have emboldened the legal vice-presidency. It recently published a new strategy, an annual report and the third and fourth volumes of the *World Bank Legal Review*.¹⁴ It organized its second — and this year its third — Law, Justice and Development Week, which brings together Bank staff as well as a wide variety of external participants to explore how legal innovation contributes to development. It launched a *Global Forum on Law, Justice and Development*, which aims to be a central and innovative platform for knowledge exchange and dissemination and connects various World Bank groups and networks as well as an extensive collection of think tanks, foundations, universities, regional and international organizations, IFIs and central banks, and civil society organizations.¹⁵ The Justice Practice Reform group has expanded its staff.¹⁶

The Bank's recent discovery of the importance of justice reform, however, is not simply a belated acknowledgment of more than two decades of work. It also announces and signals a shift in the direction of the Bank's justice activities. Until six to eight years ago, the Bank steered clear from engaging in criminal justice issues: that is, in the institutions, processes and services responsible for the prevention, investigation, adjudication and treatment of, and responses to, illegal behaviour, which include the police, prosecutorial officers, public defenders, courts and corrections functions as well as a wide range of related institutions, such as private police, victim services, private lawyers, human

11 See <www.worldbank.org>.

12 R. B. Zoellick, 'Fragile States: Securing Development', Speech delivered at the International Institute for Strategic Studies, 12 September 2008, available at: <<http://go.worldbank.org/EE1KBSJV6o>>.

13 World Bank, *2011 World Development Report: Conflict, Security and Development* (World Bank, Washington, D.C., 2011) ('2011 World Development Report'), a copy of which is available at: <<http://go.worldbank.org/1BOIJMD8Ho>>.

14 See *supra* notes 1 and 6 and the works referred to therein.

15 For more information, see the website of the Global Forum for Law, Justice and Development, which is available at: <www.globalforumljd.org>.

16 Legal Vice Presidency Annual Report FY 2011, *supra* note 1, p. 26.

rights and ombudsman's offices, community programs and treatment programs. The Bank focussed on legal and judicial reform in areas including contracts, property and bankruptcy. The World Development Report 2011, and the Bank's growing emphasis on post-conflict and fragile states, clearly require the Bank to surrender this historical reluctance, since organized violence has emerged as the most important development challenge that need to be addressed in such states: as the World Development Report 2011 states, "the elements most critical to preventing or transitioning out of violence [are] core criminal justice functions — the ability of the police, courts, and penal system to fairly investigate, prosecute and punish acts linked to organized violence".¹⁷ This reflects the experience of the legal vice-presidency, which in its 2010 Strategy mentions that "[f]ragile states often ask the Bank to work with criminal justice institutions, including financing for police, prosecutors and prisons."¹⁸ Against this background, it is no surprise that the Bank, in a memorandum published shortly after the release of the 2011 World Development Report, announced the forthcoming publication of a legal note on the parameters of Bank involvement in the criminal justice sector, as well as a staff guidance note on how Bank involvement can be operationalized.¹⁹ Both of these documents — the *Legal Note on Bank Involvement in the Criminal Justice Sector* ('Legal Note'), and the *Staff Guidance Note: World Bank Support for Criminal Justice Activities* ('Guidance Note')²⁰ — were published by the Legal Vice-Presidency in early 2012. In addition, the Bank has established a Criminal

17 World Bank, *World Development Report 2011* (World Bank, Washington, D.C., 2011), p. xvi, which is available at: <<http://go.worldbank.org/1BOIJMD8Ho>>.

18 Legal Vice Presidency of the World Bank, *Strengthening the Role of Law to Respond to the Needs and Challenges of the Bank in a Changing World: The Road Ahead for the Legal Vice Presidency* (World Bank, Washington, D.C., 2010) p. 11, which is available from the World Bank webpage entitled "Law, Justice and Development" at: <<http://go.worldbank.org/YAUOR8VO20>>.

19 World Bank, *Operationalizing the 2011 World Development Report: Conflict, Security and Development* (World Bank, Washington, D.C., 2012), which was published on 4 April 2011, and which is available at: <[http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22884392/DC2011-0003\(E\)WDR2011.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22884392/DC2011-0003(E)WDR2011.pdf)>.

20 A. Leroy (Senior Vice President and Group General Counsel), *Legal Note on Bank Involvement in the Criminal Justice Sector* (9 February 2012), available at: <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/CriminalJusticeLegalNote.pdf>>; and Justice Reform Unit Legal Vice Presidency, *Staff Guidance Note: World Bank Support for Criminal Justice Activities* (February 2012), available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/CriminalJusticeGuidanceNote_Feb2012.pdf>.

Justice Resource Group, comprised of experts drawn from across the Bank in relation to areas such as justice reform, crime and violence prevention, youth development, stolen asset recovery, anti-money laundering, environmental crimes and fragile and conflict-affected states.

The entry of the Bank into the area of criminal justice reform is remarkable. This is not so much because it is an expansion of the Bank's activities: the Bank is famous — if not notorious — for its ever-expanding development agenda, which has, over the years, come to include infrastructure, health care, nutrition, environmental protection, education, anti-corruption, legal reform, and much else. As long as a decade ago, Jessica Einhorn, a former Bank managing director, had wondered whether the Bank could credibly claim to be a manageable organization.²¹ However, what is striking about this new direction in justice reform is that it is an expansion into an area which was — until recently — generally regarded as being off-limits for the Bank, given the constraints imposed on its activities by the so-called political prohibition clause in its Articles of Agreement: that is, the prohibition against interfering in the political affairs of member states. After all, the criminal justice system is essentially an exercise of sovereign power, and it is often misused for political ends by targeting political opponents and marginalised groups as objects of investigation, prosecution and punishment.

This paper shows how the Bank, through a new interpretation of its mandate and of the criminal justice sector, has sought to incorporate criminal justice reform in its governance agenda. It argues that this interpretation is unconvincing in addressing the two components of the political prohibition clause, being the injunction to make decisions solely on the basis of economic considerations, and the prohibition against political interference. As a result, the *Legal Note* does not entirely succeed in its mission to provide “a general legal framework for determining which interventions by the Bank in this sector would fall within the Bank's mandate under its Articles of Agreement”.²² This paper concludes by suggesting that some of these issues can be explained by the purpose of the new legal interpretation of the mandate contained in the *Legal Note*, which is not so much to provide a consistent legal argument, but rather — and above all — to play [to] constituencies with different interests and maintain the myth of a common understanding of the World Bank's mandate and mission.

21 J. Einhorn, 'The World Bank's Mission Creep' (2001) (September/October) *Foreign Affairs* pp. 22–35.

22 *Legal Note*, pp. 1–2.

2 Interpreting the Bank's Mandate

The World Bank Group is an international financial institution that provides low-interest loans, interest-free credits, and grants to developing countries for a wide range of purposes that include investments in infrastructure, public administration, health, education and agriculture. It consists of three principal institutions: the International Bank for Reconstruction and Development ('IBRD'), the International Development Association ('IDA') and the International Finance Corporation ('IFC'). The Bank's principal governing documents are the Articles of Agreement of the IBRD and the IDA.²³ These basic constitutional documents define the nature, scope and limitations of the Bank's mandate. In addition, the Bank has various layers of elaborate rules and regulations.²⁴ These rules and regulations, however, must be consistent with and are subordinate to the Articles, which are thus central to understanding the nature and scope of the Bank's mandate.

The Articles require that all Bank decisions and activities must be made in accordance with the Bank's purposes.²⁵ The most fundamental of these purposes, enumerated in Article I in the Articles of the IBRD, is "to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes".²⁶ However, the Bank's pursuit

23 The *Articles of Agreement of the International Bank for Reconstruction and Development*, which entered into force on 27 December 1945 ('IBRD Articles of Agreement') are available from the World Bank's web site at: <<http://go.worldbank.org/oFICOZQLQo>>. The *Articles of Agreement of the International Development Association*, which entered into force on 24 September 1960 ('IDA Articles of Agreement'), are also available from the World Bank's web site at <www.worldbank.org/ida/articles-agreement/IDA-articles-of-agreement.pdf>.

24 These include Operational Policies ('OPs'), which contain essential policy and decision-making rules on various issues, and where appropriate legal principles and other binding requirements. OPs are derived from the Articles of Agreement or incorporate policy positions by the Board of Governors or the Bank's accumulated experience: see Legal Vice Presidency Annual Report FY 2011, *supra* note 1, pp. 53–58.

25 See Article 1 of the IBRD Articles of Agreement and Article 1 of the IDA Articles of Agreement.

26 Although the purpose of reconstruction was largely forgotten once Europe had recovered after the Second World War, the IBRD Articles of Agreement are from 1944, it has recently been reinvented by the Bank to justify activities related to peace-building, security, relief and emergencies. The Foreword to the 2011 World Development Report, for example, begins by recalling the Bretton Woods Agreement and then states that the 'R' is again a central focus of the Bank's activities: 2011 World Development Report, *supra* note 13. See also Senior Vice President and Group General Counsel, 'Legal Opinion on Peace-Building,

of development and reconstruction is subject to certain limitations, which are found in some of the other provisions in the Articles of Agreement. The most important of these is known as the political prohibition clause, which consists of two elements.²⁷ First, the Bank is prohibited from interfering in the political affairs of any member and from making decisions based on the political character of the member concerned. Secondly, Bank decisions must be based on economic considerations only, and these must be weighed impartially in order to achieve the Bank's purposes. As is well-known, all multilateral development banks operate under similar political prohibition provisions, except the European Bank for Reconstruction and Development ('EBRD'), which according to the Agreement Establishing the EBRD was created "to further the practical implementation of multiparty democracy, strengthening democratic institutions, the rule of law and respect for human rights and ... to implement reforms in order to evolve towards market-oriented economies".²⁸

Security, and Relief Issues under the Bank's Policy Framework for Rapid Response to Crises and Emergencies' (22 March 2007) ('Legal Opinion on Peace-Building, Security, and Relief Issues'), annexed to the World Bank publication *Toward A New Framework for Rapid Bank Response to Crises and Emergencies* (World Bank, Washington, D.C., 2007), which is available at: <<http://siteresources.worldbank.org/PROJECTS/Resources/40940-1205169918173/Rapidresponseboardpaper.pdf>>.

27 The relevant provisions are Article IV, Section 10 and Article III, section 5 (b) of the IBDR Articles of Agreement:

"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. The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations."

28 Interestingly, the legal department of the EBDR faced tremendous opposition when it wanted to establish its so-called 'Legal Transition Programme', because it was considered to be too intrusive by the member states: see J. L. Taylor, 'Legal Challenges at the Start of a New International Financial Institution', (2007–8) 17 *Kansas Journal of Law and Public Policy* p. 349, pp. 349–361. For information on the EBRD's Legal Transition Programme, see the EBRD webpage entitled "Legal Reform", which is available at: <www.ebrd.com/pages/sector/legal.shtml>. Ironically and surprisingly, while the mandate of the EBDR is exceptionally broad, the focus of its legal assistance is extremely narrow and deals exclusively with such areas as financial law, insolvency and securities markets, which is the type of legal reform that characterized the World Bank and IMF during the Washington Consensus and for which these IFIs have been fiercely criticized. Clearly, a broad legal mandate may result in narrowly conceptualized legal reform, and vice versa.

Although the broad contours of the nature, scope and limitations of the Bank's mandate have just appeared on the horizon, it is clear that the provisions in the Articles do not by themselves provide answers to questions such as whether, for example, criminal justice reform falls within the mandate of the Bank, and if so; in what form and shape such reform should take place. In order to decide whether the Bank can engage in criminal justice reform, therefore, it is necessary to determine whether such reform is a means to achieve the purpose of 'development' or 'reconstruction' by facilitating financing investment for 'productive purposes'; whether 'economic considerations' require engagement in this area; and whether the reasons for engagement, or from refraining to engage, are based on the 'political character' of the member country, or whether such engagement constitutes 'interference' in its 'political affairs'. Interestingly, none of these key terms is defined in the Articles of Agreement itself. Their meaning can only be determined through interpretation.²⁹

No body external to the Bank has the authority to decide on the interpretation of the IBDR Articles of Agreement: like other international organizations, the Bank has, in the first place at least, exclusive authority to interpret its own mandate.³⁰ Formally, this authority rests initially in the hands of the Executive Directors, and in the last resort the Board of Governors.³¹ In practice, the Bank

29 This paper does not seek to provide a comprehensive overview of the interpretation of the Bank's mandate, but concentrates on the elements most relevant to criminal justice reform. In particular, it leaves out discussion on the relation between the Articles and various fields of international law, in particular human rights law. For classic papers on this issue, see D. Bradlow, 'The World Bank, the IMF and Human Rights' (1996) 6 *Transnational Law and Contemporary Problems* p. 47; J. Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBDR and IDA Articles of Agreement' (2000) 33 *Cornell International Law Journal* p. 331; V. Marmorstein, 'World Bank Power to Consider Human Rights Factors in Loan Decisions' (1978) 13 *Journal of International Law and Economics* p. 113; and K. Horta, 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 *Harvard Human Rights Journal* p. 227.

30 For the Bank and the IMF, the only exception to the exclusive authority to decide on interpretative matters is when a dispute of interpretation arises between the Bank and former members or between the organization during its liquidation or permanent suspension. On the question of the authority to interpret constitutional documents in international organizations and relevant exceptions, see C. Amerasinghe, *Principles of the International Law of International Organizations* (Cambridge University Press, New York, 2005) pp. 25–33.

31 Article IX provides:

“(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision....”

either relies on formal Board decisions on interpretative issues or defers to legal opinions of its General Counsel, who advises the Executive Directors and the Board of Directors. Obviously, the General Counsel's interpretation of the Articles of Agreement must be guided by the well-known methodology for treaty-interpretation in international law to be acceptable both inside and outside the Bank. As Ibrahim F. Shihata, Bank General Counsel from 1983 until 1998, noted:

[T]he legal interpretation of treaty provisions such as the Bank's Articles is subject to general rules of international law developed through centuries of state practice, judicial precedents and scholarly works. Such customary rules have been codified in two articles of the 1969 Vienna Convention on the Law of Treaties.³²

Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties³³ ('VCLT') identify various broadly-formulated methods for assigning meaning to texts and other statements: literal interpretation, systematic or contextual interpretation, teleological or purposive interpretation and historic interpretation as well as a variety of means which are relevant for establishing the context, such as the subsequent practice of the parties or the rules of international law. This methodological framework cannot be used without making judgments. This is so for at least three reasons. While Article 31 uses the mandatory language that a treaty "shall be interpreted" in accordance with the ordinary meaning of terms in their context and in the light of their object and purpose, Article 32 uses the optional formulation that "recourse may be had to supplementary means of interpretation". The interpreter has to decide whether or not to use these supplementary means. Moreover, the use of each method of interpretation will often, if not inevitably, yield different results; and the interpreter needs to make a choice about which result seems most appropriate. Finally, the use of different methods may yield different and (partly) contradictory results. The VCLT does not suggest a hierarchical ordering in the methodological framework, nor does it provide rules on how to balance various methods: rules

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- (b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

32 I. Shihata, 'Issues of 'Governance' in Borrowing Members: The Extent of their Relevance under the Bank's Articles Of Agreement', in I. Shihata, *The World Bank Legal Papers* (Martinus Nijhoff, The Hague, 2000) pp. 245–282, p. 259.

33 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

which, of course, would themselves pose interpretative challenges. In short, interpretation is an art rather than a science.³⁴ Choice is inevitable. Whether such choices must be regarded as exercises of pure discretion or as being reflective of the right answer — or as something in between the two — is a complex matter which can be left aside here.³⁵

Shihata has stated repeatedly that the legal department of the Bank accords great and overriding significance to the teleological method of interpretation.³⁶ His successors have taken the same position.³⁷ Most recently, for example, Anne-Marie Leroy has noted that

the interpretation of these purposes [in the Articles of Agreement] has evolved to meet the needs of a broader concept of development and the changing demands of the Bank's members. Interpretation has been purposive, guided by a broad view of the objectives under the Articles and examined against the evolving understanding of development.³⁸

34 Amerasinghe (2005), *supra* note 30, p. 33.

35 Some recent publications include U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, Dordrecht, 2007); A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, Oxford, 2008); R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2010); M. Fitzmaurice, O. Elias & P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, The Hague, 2010).

36 I. Shihata, 'Techniques to Avoid Proliferation of International Organizations: The Experience of the World Bank', in N. M. Blokker & H. G. Schermers, *Proliferation of International Organizations: Legal Issues* (Kluwer Law International, Alphen aan den Rijn, 2000) pp. 111–134, p. 133; I. Shihata, 'Interpretation as Practiced by at the World Bank', in Shihata (2000), *World Bank Legal Papers*, *supra* note 32, pp. xliii–lx, at lviii.

37 Ana Palacio, the previous General Counsel, explained:
 “The Bank's Articles, including its purposes, must be interpreted in a dynamic, reasonable, and responsible way that takes into account the changing nature of development and the interests of the Bank's membership. This interpretative approach has been consistently applied over the years to enable the Bank to respond to a variety of new demands for international development assistance and expertise. It has also allowed the Bank to make new interventions through policy changes in response to the evolving needs of its member countries and the broader development agenda, while acting within its mandate as defined by the purposes in the Articles.”

See the Legal Opinion on Peace-Building, Security, and Relief Issues, *supra* note 26, p. 38; see also A. Leroy, 'Strengthening the Bank's Internal Rule of Law' in the *Legal Vice Presidency Annual Report FY 2011*, *supra* note 1, pp. 52–66, at p. 55.

38 *Legal Note*, *supra* note 20, p. 3.

From a legal point of view, it is hard to challenge this position. After all, the Bank has exclusive authority to interpret its own mandate; and this, no doubt, entails the authority to decide on the method of interpretation.³⁹ There are also compelling reasons for preferring the teleological method over other methods of interpretation. First, the formulation of key terms in the Articles of Agreement is broad ('development', 'economic', 'political'), and other methods of interpretation are ill-suited to providing much guidance in clarifying their meaning. Secondly, membership of the Bank has vastly expanded since 1944, and it is hard to see how literal interpretation or systematic approaches, let alone historical interpretations,⁴⁰ can result in a reading of the Articles which takes into account the views and interests of those that are currently members of the Bank. Thirdly, and perhaps most importantly, theories on what 'development' and 'reconstruction' mean, and on what issues constitute challenges for development and reconstruction, have evolved dramatically in the post-war era,⁴¹ as have theories on the role of multilateral development banks and other development agencies.⁴² If the Bank had not interpreted its Articles in a teleological manner, it is hard to see how it could have stayed relevant as a development and reconstruction agency.

39 The nearly irrebuttable presumption in favor of formal legality of the Bank's interpretation of its mandate has been stressed in J. W. Head, 'For Richer or for Poorer: Assessing the Criticisms directed at the Multilateral Development Banks' (2004) 52 *The University of Kansas Law Review* p. 241, at pp. 264–267, 269–282; see also R. C. Hockett, 'From Macro to Micro to 'Mission-Creep': Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability' (2002) 41 *Columbia Journal of Transnational Law* p. 153, at pp. 177–193.

40 Vast changes in membership are of course the reason why the historical intent of the contracting parties is rarely used as an interpretative approach. Besides, establishing the original intent of the parties usually multiplies the interpretative challenges, since their words, too, can be interpreted differently, not to mention the fact that different parties may have had different intentions.

41 Among many other publications, see G. Rist, *The History of Development: From Western Origins to Global Faith* (3rd ed.) (Zed Books, London, 2009); W. Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Oxford University Press, Oxford, 2007).

42 Among other publications on the World Bank and other multilateral development banks, see K. Marshall, *The World Bank: From Reconstruction to Development to Equity* (Routledge, Abingdon, 2008); J. R. Strand, *The Regional Development Banks: Lending with a Regional Flavor* (Routledge, Abingdon, 2013); D. Kapur, J. P. Lewis & R. Webb, *The World Bank: Its First Half-Century, Vols 1: History & 2: Perspectives* (The Brookings Institution, Washington, D.C., 1997).

Despite the emphasis on teleological interpretation, however, the legal department has always stressed that it does not feel free to interpret the Articles in a manner which runs counter to the letter of its provisions. As Hassane Cissé, the Bank's current deputy general counsel, recently wrote:

[A]ny decision under a provision of the IBDR articles dealing with interpretation that would lead to a change in the ordinary meaning of the articles would constitute an abuse of power of interpretation and should be made subject to the formal amendment procedure.⁴³

It is doubtful whether this position, in general, is tenable, since most problems of interpretation arise precisely because the meaning of a text is unclear or ambiguous to start with. Perhaps the statement refers to interpretative issues that arise when the meaning of the words in a text are clear and uncontroversial, but are at odds with what is arguably, on teleological grounds the purpose or spirit of the text. In other words, the statement may intend to convey that a literal interpretation trumps a teleological interpretation in cases in which the literal meaning is clear and where the application of literal and evolutive methods of interpretation would lead to different results. More specifically, the Bank's Articles of Agreement cannot be interpreted so as to disregard the injunctions to make decisions solely on the basis of economic considerations, or to avoid political interference. But while it is true that the Bank has always remained faithful to these injunctions, it has not been able to permit the practice of literal interpretation to completely trump a more teleological understanding of its Articles. Rather, it has allowed competing and incompatible interpretations of the Articles to stand side by side, as will be discussed in Part V below.

3 The Political Prohibition Clause: From Shihata to Leroy

If the World Bank is to engage with the criminal justice sector, it must show that such engagement not only serves the overall purpose of development or reconstruction, but also that it does not violate the prohibition against interfering in the political affairs of its members or being influenced by the political character of the members. Moreover, such engagement must be in line with the injunction that only economic considerations are to be taken into account in making Bank decisions. It is clear that these provisions in the Articles of

43 Cissé (2011), *supra* note 6, at p. 84.

Agreement are far from self-explanatory, and can only guide decisions when their meaning has been elucidated through interpretation. However, the interpretation of the political prohibition clause has evolved over the past two decades, and this evolution partly explains why criminal justice reform is no longer considered off-limits for the Bank.

The seminal interpretation of the political prohibition clause is in the so-called '1990 Governance Opinion' by Shihata.⁴⁴ In this opinion, Shihata justified the entry by the Bank into the area of governance reform, which soon also came to include legal reform.⁴⁵ Shihata essentially argued that the Bank could move into this area if it met both a negative and a positive requirement. The negative requirement is that the Bank must refrain from interfering in the political affairs of its members and that its decisions should not be influenced by the political character of the members. Shihata visibly struggled with the question of how he could develop a notion of governance reform that was immune from the effect of the prohibition on political interference or influencing. The result was not a clear conceptual distinction, but a rather casuistic, non-exhaustive list of types of interventions — scattered around in various opinions and papers — which the Bank could not support. In essence, Shihata argued that the Bank must refrain from taking sides with respect to who exercises political power in a country and the form of government in a country; moreover, the Bank must be neutral with respect to the political convictions, opinions and principles of the ruling elite or the opposition.⁴⁶

44 Reprinted with an introduction in Shihata (2000), *supra* note 32.

45 For the background of Shihata's opinion and the development of the Bank's work on legal reform, see Faundez (2010), *supra* note 6. On the legal nature of Shihata's conception of 'governance', see F. von Benda-Beckmann, 'Good Governance, Law and Social Reality: Problematic Relationships' (1994) *Knowledge and Policy: The International Journal of Knowledge Transfer and Utilization* p. 55, especially pp. 56–59; R. C. Effros, 'The World Bank in a Changing World' (2001) 35(4) *International Lawyer* p. 1341, especially pp. 1343–1347; J. K. M. Ohnesorge, 'On the Rule of Law Rhetoric, Economic Development, and Northeast Asia' (2007–8) 25 *Wisconsin International Law Journal* p. 301; G. Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development' (1998) 92(4) *American Journal of International Law* p. 642.

46 This means that the Bank cannot be influenced by, or attempt to change, the fact that the member is member of a particular political bloc, professes a particular political ideology, has this or that form of government, chooses a particular public policy, or makes political choices with respect to the allocation of resources. Moreover, the Bank cannot favour one political party over another, or one competing political candidate in national or provincial elections, but must deal with the government in charge and act impartially with regard to different political factions in the country. Nor can the Bank act on behalf of donor countries in influencing the political orientation or behaviour of client countries.

The positive requirement is that the Bank can only engage on the basis of economic considerations. Shihata developed a strict test to determine whether this requirement has been satisfied. The Bank must show that a proposed program or decision has “direct and obvious economic effects”. Moreover, the case for such effects must be established by Bank staff on the basis of an “objective analysis” and “in a clear and unequivocal manner”, which means, among other things, that they cannot rely on “unestablished” development doctrines or theories. For an effect to be taken into account, it must be “preponderant”, not “minor”: that is, a political matter cannot be turned into an economic issue if the economic effects are marginal.⁴⁷

Confident that it could separate economic from political dimensions of governance and address governance issues without going beyond its mandate, the Bank rapidly developed its governance agenda, which came to also include legal reform. In the late 1980s, the Bank’s agenda was shaped by the ‘Washington Consensus’ that state-centered economies needed to be transformed into market economies.⁴⁸ Strategies were developed to encourage local private investment and attract foreign private investment; and key to this — at least, so it was assumed — is a legal system which protects private property rights, ensures that contractual obligations are honoured, and guarantees that disputes are resolved by an independent judiciary on the basis of general rules.⁴⁹ The legal reform agenda was thus exclusively focused on private law and judicial reform, and aimed at economic growth only. It steered clear from legal reform in areas of criminal justice, civil and political human rights, and democratic governance. With this narrow conception of legal reform and rule of law, the Bank felt it could satisfy the prohibition against involvement in political affairs of members as well as the positive requirement to make decisions solely on the basis of economic considerations.

Shihata’s 1990 Governance Opinion on the nature and limits of the Bank’s mandate in the area of governance was not explicitly contested by subsequent general counsels until it was moderately revised by Leroy in her recent Legal

47 Shihata (2000), *supra* note 32, pp. 271–2.

48 Discussed in more detail in Part V below.

49 I. Shihata, ‘Legal Framework for Development: Role of the World Bank in Legal Technical Assistance’ (1995) 23 *International Business Lawyer* p. 360. For an excellent overview of reasons why, according to the Bank, legal reform is necessary for economic development and for an informative overview of projects which are based on these ideas and assumptions, see R. Laver, ‘The World Bank and Judicial Reform: Overcoming ‘Blind Spots’ in the Approach to Judicial Independence’ (2012) 22 *Duke Journal of Comparative and International Law* p. 183. For critical academic analysis of these Bank assumptions, see Bradlow (1996), *supra* note 29, pp. 60–62.

Opinion. That does not mean that it was uncontroversial: it drew criticism from both outside and inside the Bank. One of these criticisms (another will be discussed in Part V below) was aimed at Shihata's test to determine whether there is an economic argument for Bank involvement. The complaint was that the Bank's use of the test was unpredictable and arbitrary:⁵⁰ for one thing, the test is vague on crucial matters such as the length of the period within which the direct effects of an intervention in the economy must manifest themselves. Moreover, the test appeared to set the bar impossibly high. It is usually impossible to establish causality with objective certainty in any development project, even in classical development projects like building roads or dams; so it is unrealistic to expect such certainty in the less tangible area of governance reform, in particular judicial and legal reform. Indeed, whereas many hypotheses on the impact of the legal system on economic growth are plausible at first sight, research has shown that many of them are only partly true at best. For instance, foreign investors are usually not deeply concerned with the effectiveness of the judiciary and the state of contract law in the countries in which they invest.⁵¹ More generally, causality in the relationship between law and economic development works both ways: legal development contributes to economic growth as much as the reverse situation.⁵²

The criticism that Shihata's test is unworkable was not only voiced by outside critics, but also by Bank staff.⁵³ The Legal Vice Presidency experienced

⁵⁰ Bradlow (1996), *supra* note 29, pp. 60–62.

⁵¹ See A. Perry-Kessaris, 'An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality' (2000) 15(6) *American University International Law Review* p. 1627; J. Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for International Peace, Washington, D.C., 2002).

⁵² See F. Upham, *Mythmaking in the Rule of Law Orthodoxy*, in Carothers (ed) (2006), *supra* note 3, pp. 75–104; K. Dam, *The Law-Growth Nexus, the Rule of Law and Economic Development* (The Brookings Institution, Washington, D.C., 2006); K. E. Davis & M. J. Trebilcock, 'The Relationship Between Law and Development: Optimists versus Skeptics' (2008) 56(4) *American Journal of Comparative Law* p. 895; S. Haggard, A. MacIntyre & L. Tiede, 'The Rule of Law and Economic Development' (2008) 11 *Annual Review of Political Science* p. 205.

⁵³ Indeed, it is hard to avoid the impression that Shihata himself had difficulties applying the test. In one of the papers wherein he made the case for Bank involvement in legal reform, he argued that well-functioning administrative and judicial institutions are "a matter closely associated with, if not a prerequisite for, economic development" according to "development experience over a longer period of time"; that "recent literature on economic development has placed greater emphasis on 'institutional economics', notably on preserving the quality of institutions through the establishment and maintenance of an appropriate and workable legal framework"; that "it is now commonly recognized that

great difficulty in seeking to follow the test, and soon gave up on it. In practice, it started to use a looser test, as the recent *Legal Note* acknowledges diplomatically but clearly: “In practice, the analysis required to show direct economic effect has been carried out in an operationally useful way”.⁵⁴

The *Legal Note* therefore mildly revises Shihata’s test, as follows:⁵⁵

The Bank should be satisfied that interventions in the sector, falling within the development purposes of the Bank, are grounded in an appropriate and objective economic rationale; and Bank interventions should not involve the Bank in the political affairs of member countries.

Clearly, the requirement of an appropriate and objective economic rationale is less demanding and more workable than Shihata’s ‘direct and obvious’ test. Moreover, it appears that the legal department allows a relatively low threshold for satisfying the requirement of an appropriate and objective economic rationale. The *Legal Note* does not require conclusive empirical proof for claims of an objective economic rationale, but it is prepared to endorse action on the basis of a mixture of empirical evidence and plausible but unproven hypotheses. As the *Legal Note* explains, “the Bank has often relied on an amalgam of expert objective analysis of the empirical evidence and logical application of theory, to show economic development benefits of its interventions”.⁵⁶ Indeed, it seems as if the Bank is willing, at least for the time being, to endorse action primarily on the basis of untested hypotheses.⁵⁷ This new, lenient test is

rapid growth requires a number of conditions to be met that are not necessarily of a strict economic or financial character”; and that the “Bank’s experience has confirmed that successful implementation of fundamental policy changes in the business environment and in the financial sector would normally require fundamental changes in the overall legal institutional framework”: see Shihata (1995), *supra* note 49, pp. 360, 361 and 362 respectively. While all of this goes some way in justifying the Bank’s engagement in legal reform for economic reasons, it does not exactly amount to a demonstration of “direct and obvious” economic effects based on “objective analysis” and “in a clear and unequivocal manner”.

54 *Legal Note*, *supra* note 20, para. 21.

55 *Ibid.*, para. 17.

56 *Ibid.*, para. 21.

57 The *Legal Note* states, at para. 23:

“[T]he Bank’s assessment of the economic rationale for criminal justice interventions will no doubt further evolve in tandem with the evolution of our understanding of the linkages between economic development and crime and violence on the one hand, and of the linkages between particular kinds of interventions and crime and violence on the other hand.”

an important step towards justifying the turn to criminal justice reform: as we shall see in Part V below, there are many plausible hypotheses on how crime and violence impede economic growth, but very little empirical research which confirms or disproves these hypotheses. Moreover, little is known about which policy measures and instruments are effective in curbing crime and violence.⁵⁸ Other than that, however, the test set out in the 1990 Governance Opinion remains unchanged: the *Legal Note* does not weaken the Bank's commitment to avoid interference in political matters, or change the interpretation of what that means.⁵⁹

4 The Legality of Criminal Justice Reform

While the *Legal Note* is the first justification of the Bank's involvement in criminal justice reform, it does not mark the beginning of the Bank's engagement with this sector. Below the legal radar, the Bank has been active in criminal justice for seven years or so. Law, as usual, is following, not leading; though it should be noted that the first attempt to adopt a Legal Note on Criminal Justice dates back to the last year of Roberto Dañino's tenure as General Legal Counsel.⁶⁰ The precise number of Bank activities in the area of criminal justice reform and the sums of money involved are difficult to quantify, since many such activities are components of larger projects and are not specifically designated as justice reform activities. However, it is clear that the Bank has supported a variety of interventions, including health programs in prisons, violence prevention and crime reduction programs, anticorruption measures involving national criminal justice institutions in the context of the G-20 Anti-Corruption Action Plan and the Stolen Asset Recovery Initiative (StAR) with the UNODC, and the Institutional Integrity Vice-Presidency's work with criminal justice institutions as part of its investigative and preventive work.⁶¹ Moreover, many different divisions within the Bank have been engaged with

58 *Ibid.*

59 *Ibid.*, para. 25:

“[T]he Bank is prohibited from involving itself in the partisan politics or ideological disputes that affect its member countries (Thus, for example, the Bank distances itself from favouring political factions, parties or candidates in elections). Bank decisions cannot be influenced by the political character of the member country. This prescribed neutrality with respect to political character keeps the Bank from endorsing or mandating a particular form of government, political bloc or political ideology.”

60 *Ibid.*, para. 4.

61 *Guidance Note*, *supra* note 20, paras. 12–16.

the criminal justice sector: the Justice Reform Practice Group; the Poverty Reduction and Economic Management Network, including the Public Sector Group; the Sustainable Development Network; the Institutional Integrity Vice Presidency; the Private Sector Development group; and the Human Development Department.⁶² The *Legal Note* and *Guidance Note* are meant to justify this past engagement, as well as a stepping-up of Bank involvement in the sector in accordance with the 2011 World Development Report. What is the reasoning behind this?

4.1 *An Economic Rationale for Engagement with Criminal Justice Reform?*

First, the Bank argues that there is an appropriate and objective economic rationale for engagement with criminal justice reform. This case for engagement is a negative one: research shows that criminal violence undermines economic growth and development. This claim is uncontroversial. What is debated, and what is largely unclear, is *how* crime constrains economic growth.

In the *Legal Note* and the *Guidance Note*, the Bank offers various hypotheses of causal pathways by which crime constrains growth, without discussing the available evidence.⁶³ Some of these hypotheses concern the impact of perceptions of crime on development, others the impact of actual types and levels of crime: crime and violence scare away foreign investors; crime and violence lower investment; crime and violence undermine strategies to increase levels of social and human capital, by causing social mistrust, a lack of societal unity, generalized fear and the erosion of social institutions; crime and violence have direct and indirect costs that divert funds from productive activities to such expenditures as preventive measures, health care, prisons and the like; crime restricts movement and thereby the ability to work, and the physical injuries it causes have a similar negative impact on employment; crime hinders access to basic services, in particular health and education; when violence is widespread, donors' organizations cannot implement economic and social development programs. Surveys indicate that, for the poor, crime and violence rank equally in importance to hunger, lack of water, and employment. Corruption covers a range of criminal activities that undermine and derail economic development, and an effective, credible and reliable criminal justice system is indispensable to a country's ability to combat corruption.

Until recently, such arguments could not persuade the Bank to engage with criminal justice reform, despite the fact that the negative impact of crime on economic growth has been debated for decades, including by the Bank itself:

⁶² *Ibid.*

⁶³ *Legal Note, supra* note 20, paras. 11–12.

indeed, Bank studies on the economic effects of crime go back to at least the mid-1990s.⁶⁴ The reason for this lack of enthusiasm for criminal justice reform was that the Bank considered criminal justice as an extension of sovereign power and therefore as outside its mandate, because it would amount to a violation of the prohibition to interfere with political affairs. As the *Legal Note* explains, the “traditional view in the Bank has it that criminal justice is ... essentially an exercise of sovereign power, akin to the military, support for which will inevitably involve the Bank in making political judgments and therefore not a proper subject for Bank intervention”.⁶⁵ This political prohibition has lost none of its force, nor has its interpretation changed: so why is it that the Bank now feels compelled to enter the area of criminal justice reform?

The answer is that the Bank has changed its view of the criminal justice sector. It no longer considers the criminal justice sector as essentially an exercise of sovereign power, but rather as a provider of services, like the health care, education or energy sectors. As the *Legal Note* explains, the new paradigm of the criminal justice sector is as a service provider.⁶⁶

Scholars and practitioners today generally accept that the criminal justice sector as a whole is expected to deliver both safety and justice for all members of society in the form of enforcement as well as prevention, while producing a legally appropriate resolution of each case brought to the formal or informal system. 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, conflict resolution as well as individual and community development, and as a central part of the everyday meaning of the rule of law and good governance. This service orientation has changed priorities within the sector: raising the priority of tasks that contribute to these goals, while reducing the resources devoted to individual cases unlikely to contribute to either safety or justice. It also has increased attention to sector-wide coherence, early intervention, governance and accountability.⁶⁷

64 See e.g., World Bank, *Jamaica — Violence and Urban Poverty in Jamaica: Breaking the Cycle*, Report 15895-JM, (World Bank, Washington, D.C., 1997), available from: <<http://documents.worldbank.org/curated/en/1997/01/695003/jamaica-violence-urban-poverty-jamaica-breaking-cycle>>; see also R.L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean* (World Bank, Washington, D.C., 1997) (as part of the *World Bank Latin American and Caribbean Studies Viewpoints Series*).

65 *Legal Note*, *supra* note 20, para. 22.

66 *Ibid.*, para. 6.

67 This is also clear from the risk-management approach of the Bank. To determine whether interventions in criminal justice pose a risk for the Bank, the *Guidance Note* lists such

By arguing that crime has an important impact on economic development, and by depoliticizing the criminal justice sector the *Legal Note* opens up a vast new area for Bank involvement.

However, the *Legal Note* immediately puts a lid on any potential new Pandora's box of criminal justice reform. First, it observes that the criminal justice system is not only a service-delivery mechanism, but is also capable of being abused for partisan political ends. Hence, engagement with the criminal justice sector poses the risk that the Bank becomes an instrument of partisan politics. The *Legal Note* broadly distinguishes three levels of risk: high, low and a 'grey area'.⁶⁸ 'High risks' include activities such as support for acquiring lethal equipment, specialized police training (crowd control, police SWAT-team development, weapons training, undercover surveillance, criminal intelligence), some anti-narcotics campaigns, investigating and prosecuting specific criminal cases, crimes against the state, terrorism cases, support in countries where human rights violations have reached pervasive proportions, and support for paramilitary police or the military, or services and institutions that do not conform to international due process standards. These high-risk activities are off-limits for the Bank. 'Low-risks' include activities such as research on crime and criminal justice, public health programs that target the general population and may include such participants in the criminal justice chain as prisoners, victim support and counselling, rehabilitation of offenders, juvenile justice programs, training and technical assistance for public offenders, crime prevention other than policing, construction of court buildings, and activities that are logical extensions of civil justice activities, such as case management. There is no legal obstacle to Bank engagement with these activities. The 'grey area' consists of activities involving the provision of assistance to the police, prosecutors' offices and prisons which 'have a good economic rationale but pose some risks of political interference and other implementation and reputational risks specific to criminal justice work'.⁶⁹ Here, in particular, the Bank

questions as: whether the country is one in which the criminal justice system generally is or has been misused for partisan political ends and whether this is likely to change during the course of the intervention; whether the proposed project participant (if a state actor) has a history of past or present misuse of the agency and/or its staff for partisan political ends; whether the project participant (if a non-state actor) has had past or present involvement in partisan politics; and whether civilian oversight and/or other accountability mechanisms exist for the police and other criminal justice institutions involved in the requested activity, and whether these are effective: see *Guidance Note*, *supra* note 20, para. 22.

68 *Legal Note*, *supra* note 20, para. 34.

69 *Ibid.*

can only provide support after undertaking careful risk analysis, which essentially examines whether the proposed activities are likely to be abused for partisan political ends.⁷⁰

4.2 *Comparative Advantage with Other Multilateral and Bilateral Donors*

As a second limitation — although this is unrelated to the political prohibition clause — the Legal Note and the Guidance Note argue that the Bank often lacks comparative advantage in core areas of criminal justice reform vis-à-vis other multilateral and bilateral donors. This comparative-advantage argument may, in part, be a reflection of the original vision of the founding members that the World Bank, like the IMF and the World Health Organization and unlike the United Nations, should address a specific and defined set of problems.⁷¹ It may also serve to show that the Bank, which has often been accused of hubris,⁷² is aware of its own limits. Moreover, the argument reflects the spirit of the Paris Declaration on Aid Effectiveness,⁷³ the Accra Agenda for Action⁷⁴ and Busan Partnership on aid effectiveness and donor coordination.⁷⁵ In any event, the comparative advantage argument is used by the Bank as an additional argument to justify its non-engagement with what it considers to be high-risk criminal justice reform activities, as Bank experience and in-house capacity is relatively modest, and the field is crowded.⁷⁶

⁷⁰ *Ibid.*, para. 31.

⁷¹ On the original ideas of the functioning of the Bank, see D. Bradlow & C. Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF' (1995) 17(3) *Human Rights Quarterly* p. 411.

⁷² See e.g., C. Caulfield, *Masters of Illusion: The World Bank and the Poverty of Nations* (Henry Holt & Co, New York, 1996); and S. George & F. Sabeli, *Faith and Credit: The World Bank's Secular Empire* (Westview Press, Boulder, CO, 1994).

⁷³ Adopted 2 March 2005. A copy is available via the OECD web site at: <www.oecd.org/dac/effectiveness/4391948.pdf>.

⁷⁴ Adopted 4 September 2008. A copy is available via the OECD web site, at: <www.oecd.org/dac/effectiveness/4391948.pdf>.

⁷⁵ Adopted on 1 December 2011. A copy is available via the OECD web site, at: <www.oecd.org/dac/effectiveness/busanpartnership.htm>.

⁷⁶ *Guidance Note*, *supra* note 20, para. 32:

"[T]he experience and leadership of some ... agencies in the higher-risk areas of specialized police training (e.g. crowd control, police SWAT-team development, weapons training, undercover surveillance, criminal intelligence) reduces the need for Bank support for programs in these areas, where the Bank in any case currently lacks a comparative advantage or institutional mandate to support such involvement."

In short, the *Legal Note* and *Guidance Note* advocate and seek to justify a cautious approach to criminal justice reform. This raises questions about whether the Bank can make an effective and legitimate contribution to addressing the problem of insecurity in developing countries. But that is another discussion. The question that is relevant for the purposes of this paper is whether the Bank's legal justification for engagement in the area of criminal justice reform is convincing. In the author's view, it is not, in two respects: these will be discussed in the following sections of this paper.

4.3 *For Economic Reasons Only?*

The *Legal Note* states that the Bank can only engage with criminal justice reform if there is an objective economic rationale. This interpretation of the Bank's mandate clearly respects the letter of the Articles of Agreement, which as noted above stipulate that "only economic reasons shall be relevant" to the decisions of the Bank and its officers. But it also reinvents a contradiction in the Bank's mandate which has slowly emerged since the late 1990s, and which has been lingering implicitly in the Bank's legal documents ever since. This contradiction will inevitably resurface in the next few years, as the Bank decides on whether or not to initiate or support projects in the area of criminal justice reform.

The source of this contradiction is the so-called Comprehensive Development Framework ('CDF').⁷⁷ In the 1980s and 1990s, the Bank had become the object of widespread and fierce criticism. Its focus on macroeconomic structural adjustment, deregulation and privatisation — the so-called 'Washington Consensus' — had not only largely failed, but had also had adverse effects on the poor in many developing countries. In the late 1990s, the Bank responded by refocusing its efforts on the human side of development and the poorest of the poor. The result was the CDF, adopted in 1999 under the leadership of President Wolfenson. According to this framework, it is inadequate to conceptualise development purely in terms of economic growth: development is a holistic process with many other components, such as education, gender equality, cultural preservation, governance and health. Although law was not

77 For information in relation to the CDF, see the World Bank webpage entitled "Comprehensive Development Framework", available at: <<http://go.worldbank.org/N2NDBE5QL0>>. See also R. C. Blake, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development' (2000) 3 *Yale Human Rights and Development Law Journal* p. 159; and J. Pender, 'From 'Structural Adjustment' to 'Comprehensive Development Framework': Conditionality transformed?' (2001) 22(3) *Third World Quarterly* p. 397.

explicitly identified as a component of development in the framework, it was clear that law importantly contributes to development, broadly conceived, irrespective of its impact on economic growth.⁷⁸ When the legal vice-presidency organized a major conference in 2001 to explore the role of legal and judicial reform in the development process, Amartya Sen, in his key note address, famously said that “even if legal development were not to contribute one iota to economic development ... legal and judicial reform would be a critical part of the development process.”⁷⁹

Obviously, this approach to legal reform is at odds with the letter of the Articles of Agreement, which requires decisions to be made on the basis of economic considerations only. But it would be a mistake to dismiss a broad approach to legal reform as simply inconsistent with the political prohibition clause and therefore outside the Bank’s mandate. After all, one of the two overall purposes of the Bank’s work, according to the same Articles, is development. And since 1999, the Bank has embraced a comprehensive understanding of development and continues to present this understanding as the basis of its work to this day. As the *Legal Note* states:

The concept of development itself has evolved substantially over the past 60 years and along with it the Bank’s mission. As currently defined, the Bank’s mission consists of the alleviation of poverty through economic growth and equity within a society. This approach to the alleviation of poverty understands poverty as multidimensional. Development is no longer confined to economic development narrowly defined, but encompasses broad areas of human development, social development, education, protection of global public goods, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity.⁸⁰

With the adoption of the CDF and the expansion of the Bank’s understanding of development, the Bank has thus made its own Articles contradictory: while the purpose of development requires the Bank to be guided in its decisions

78 Faundez (2010), *supra* note 6, pp. 180–201; von Benda-Beckmann (1994), *supra* note 45, pp. 55–67.

79 A. Sen, ‘The Role of Legal and Judicial Reform in Development’, World Bank Legal Conference held in Washington, D.C. on 5 June 2001, p. 10, a copy of which is available via the World Bank’s web site at: <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>>.

80 *Legal Note*, *supra* note 20, para.10. Interestingly, the *Legal Note* refers to Sen’s analysis as well as the CDF as the main sources for this conception of development.

and programs by more than just the enhancement of economic development, the political prohibition clause requires the Bank to make its decisions solely on the basis of economic considerations. The Bank has never publicly acknowledged this contradiction, let alone resolved it.⁸¹ Indeed, the *Legal Note*, after celebrating, with the lines just quoted, the comprehensive notion of development in its opening section on the Bank's mandate, goes on in the next section to state that the "Bank must be satisfied that interventions ... are grounded in an appropriate and objective economic rationale".⁸² Moreover, when it discusses the impact of crime on development, the *Legal Note* only refers to effects on business competitiveness, investment, employment, economic growth, and productive activities.⁸³

This contradiction is not just a theoretical matter: it affects decision-making by the Bank, including with respect to criminal justice reform. After all, hypotheses on the economic impact of crime will sometimes turn out to be less plausible than they appeared at first sight. For example, it is a plausible idea that a high level of crime in a neighbourhood deters poor people from seeking employment which requires them to go to or return from work late at night. But what if the poor from this neighbourhood are eager to take highly dangerous jobs in mining and private security? Equally, it is a plausible assumption that domestic violence has negative effects on employment of poor women because they will show up late at work or miss work. But what if domestic violence does not have a special effect on employment, and other poor women

81 There is one peculiar passage in the *Guidance Note* which suggests that the difference between an economic rationale and development is resolved by either interpreting development narrowly as economic development or by interpreting an economic rationale broadly as encompassing non-economic goals. In a textbox at para. 5, entitled "What does the Legal Note Say? Conditions for Bank support for Criminal Justice Work", it states:

"[T]he first condition [i.e. that the Bank should be satisfied that interventions in the sector are grounded in an appropriate and objective economic rationale] means that the case needs to be made for each proposed country strategy and individual intervention, both in terms of the significance of crime and violence as a development issue in the recipient country *and in terms of the effectiveness of the proposed activities in reducing crime and violence.*" (Emphasis added.)

However, this is probably just an insufficiently guarded turn of phrase: it is clear from both the *Legal Note* and the *Guidance Note* that engagement with the criminal justice sector is consistently justified in terms of economic development, not in terms of comprehensive development.

82 *Legal Note supra* note 20, para. 23.

83 *Ibid.*, para. 11.

have the same problems with maintaining their jobs?⁸⁴ What is the Bank supposed to do in such cases? Should it stay out of criminal justice reform programs aimed at improving the security of people because the economic rationale is weak or absent? Or should it seek to improve security, regardless of the economic impact, because it is important in its own right, as the 2011 World Development Report, the Voice of the Poor volumes and other Bank publications argue and show?

Neither the *Legal Note* nor the *Guidance Note* explain what the Bank must decide in such cases: or, to be more precise, any decision can be supported on the basis of different parts of these documents as well as other Bank documents. While this flexibility may be applauded as giving Bank staff justification for working on programs that benefit the poor despite their economic rationale being weak or non-existent, it is also a matter of concern. For one thing, it is likely to provide new fuel for the old accusation that the Bank's choices are often unpredictable and arbitrary.⁸⁵ Moreover, it can easily exacerbate the practice of goal-post-shifting in the Bank's rule of law work. The presence of multiple justifications for rule of law activities has enabled policymakers to change the original justification of projects when their outcome appears to be suboptimal or worse, and to thereby avoid rigorous assessments of the design and execution of projects as well as learning to improve from well-deserved criticism; and Alvaro Santos has uncovered that goal-post-shifting has led to a lack of transparency, waste of resources, and opportunistic behaviour.⁸⁶ Of course, none of this is the inevitable result of a flexible mandate. However, given the history of the Bank's involvement in legal reform, it is also far from self-evident that these traps will be avoided in the future.

5 Non-Political Criminal Justice Reform?

The *Legal Note* and *Guidance Note* state that the Bank has overcome its reluctance to engage with the criminal justice sector because it no longer perceives

84 The examples are taken from C. Stone, *Crime, Justice and Growth in South Africa: Towards a Plausible Contribution from Criminal Justice to Economic Growth* (Center for International Development, Harvard University, South Africa Growth Initiative, Working Paper No. 131, 2006), pp. 8–12.

85 See e.g., C. Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton University Press, Princeton, NJ, 2008).

86 Santos (2006), *supra* note 10, pp. 281–290.

the sector as an exercise of sovereign power, but as a provider of services, being the provision of a safe environment and processes for an appropriate and fair resolution of disputes. Criminal justice is a central element of rule of law. The two *Notes* also argue that Bank support for the criminal justice sector does not violate the prohibition on political interference or influence as long as such support steers clear of partisan politics. This means that the Bank cannot favour or endorse political factions, parties, candidates, ideologies, convictions or opinions, but must remain neutral.⁸⁷

The distinction between the exercise of sovereign power and service delivery is somewhat odd. Criminal justice involves (the threat of) punishment; and this function, by any definition of the term, is the infliction of pain and deprivation, against their will, on those who have broken the law.⁸⁸ Moreover, since a characteristic feature of sovereignty consists of the ability to impose rules on citizens and other actors, if necessary by means of the threat and use of sanctions, and against their will, it is impossible to separate the criminal justice system from the exercise of sovereign power. Indeed, it is precisely because it exercises sovereign power in the promulgation and enforcement of criminal law that the state is capable of providing security and justice, as Thomas Hobbes argued long ago.⁸⁹ Thus, the distinction is not between the criminal justice system as a service-delivery mechanism and as an exercise of sovereign power, but rather between criminal justice systems that use sovereign power to deliver security and justice to citizens and those that abuse this power and are a source of insecurity and injustice for particular groups of citizens, or the vast majority of citizens.

Against this background, it is unsatisfactory that the *Legal Note* and *Guidance Note* arrive at a list with so-called 'high-risk activities' that are off-limits for the Bank, which includes support for or financing of weapons and other legal equipment, crowd control, SWAT-team development, weapons training, undercover surveillance, military and paramilitary police, and criminal intelligence.⁹⁰ While it is clear that such support may be unwarranted in particular

87 *Legal Note*, *supra* note 20, para. 25.

88 T. Honderich, *Punishment: The Supposed Justifications Revisited* (Pluto Press, London, 2005) pp. 4–16; R.A. Duff & D. Garland, 'Introduction: Thinking About Punishment', in R. A. Duff and D. Garland (eds.), *A Reader on Punishment* (Oxford University Press, Oxford, 1994) pp. 1–43.

89 T. Hobbes, *Leviathan* (ed. and transl. R. Tuck and M. Silverthorne) (Cambridge University Press, Cambridge, 1991) Chap. 6, p. 78 ('On the Citizen'): "[S]ecurity is to be assured not by agreements but by penalties; and the assurance is adequate only when the penalties for particular wrongs have been set so high that the consequences of not doing them are manifestly worse than of not doing them."

90 *Legal Note*, *supra* note 20, para. 34; *Guidance Note*, *supra* note 20, paras. 20 and 32.

cases — because it does not have a good economic rationale, or because the risk of political interference is high or because other organizations have a comparative advantage — the activities themselves can be as necessary for the delivery of safety and justice as the more sympathetic lower-risk activities of community policing or the provision of health care in prisons. Crowd control, for example, is an essential component of policing anywhere: the police must be able to prevent, control, disperse and arrest large groups of civilians involved in food riots, violent clashes between political factions or supporters of sporting teams, or similar events.⁹¹ More generally, it is hard to see how the World Bank and other donors can deliver on the promise of justice and security in fragile and post-conflict states without assisting with strengthening the strong arm of the state. After all, among the causes of repeated cycles of violence, according to the 2011 World Development Report, are organized transnational crime and ethnic violence, and these issues can obviously not be addressed by low-risk interventions such as treatment and prevention and research programs alone.⁹² It should be added, however, that the *Legal Note* cautiously indicates that the Bank's mandate will 'probably not exclude' support for drug law enforcement;⁹³ and that it lists general policing, prosecution and prisons in the grey zone area in respect of which support is possible after a careful and extensive risk-analysis.⁹⁴ It thus appears that the Bank is prepared to consider support for at least some of the activities on its black list. Still, the automatic blacklisting of activities such as crowd-control seems to reflect an insufficient acknowledgment of what criminal justice reform and the delivery of safety requires.

Another point relates to the prohibition on political interference. The *Legal Note* claims that the Bank acts in accordance with the political prohibition clause when it does not take sides in controversies over who governs, the form of government and ideological disputes. Thus, when the Bank considers supporting criminal justice reform initiatives, it must always ask such questions as these:⁹⁵

Is the country one in which the criminal justice system is or has been abused for partisan political ends? Has the project participant (if a state actor) been so used in the past or is it still being so used currently?

91 C. Stone, 'A New Era for Justice Sector Reform in Haiti' (Harvard Kennedy School of Government Faculty Research Working Paper Series, 2010), pp. 7–10.

92 See 2011 World Development Report, *supra* note 13, especially pp. 51–68.

93 *Legal Note*, *supra* note 20, para. 34 (footnote 48).

94 *Ibid.*, para. 34.

95 *Ibid.*, para. 31.

Do civilian oversight and/or accountability mechanisms exist for the police and other criminal justice institutions? Is the participant (if a non-state actor) involved in partisan politics? Are the proposed project activities ones that entail a high risk of misuse of this kind?

However, the criminal justice system is a sensitive area in every country, if only because part of the criminal law is a reflection of local views on such matters as the position of marginalized groups and women, the extent of freedoms of speech, association and privacy, the meaning of a fair trial, and appropriate forms of punishment. There will always be groups of people in a country who regard Bank support for the criminal justice system as favouring one party or group or ideology over others. In that sense, it is unclear how the Bank can avoid becoming involved in ideological disputes.

More importantly, in using the term ‘non-partisan’ the *Legal Note* suggest that the Bank does not commit itself to any substantive position regarding who governs, the form of government and ideologies. However, the *Legal Note*, and especially the *Guidance Note* — which is intended to operationalize the *Legal Note* and informs what the *Legal Note*, at the end of the day, comes down to — effectively commit the Bank to an extensive body of substantive norms. For example, one element in the risk-management strategy that the *Legal Note* prescribes is that criminal justice reform cannot be supported in countries in which human rights violations have reached pervasive proportions or international due process standards are not respected.⁹⁶ The *Guidance Note* explicitly requires “adherence to international standards and principles ... in the area of criminal justice”, and refers to an annexed attachment “for a more detailed illustrative list of the relevant instruments”.⁹⁷ This turns out to be a “non-exhaustive” (sic) list of almost 80 international human rights treaties, conventions, standards and principles, including dozens of UN human rights treaties, conventions, statements and principles, such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention of the Right of the Child, and the UN General Assembly resolution on Basic Principles on the Independence of the Judiciary; ILO conventions; various regional human rights treaties, such as the African Charter on Human Rights and the American Convention on Human Rights. Clearly, the Bank introduces significant substantive limits on what it is prepared to support via the backdoor of this annexed list in the *Guidance Note*. This is excellent,

96 *Ibid.*, para. 34.

97 *Guidance Note*, *supra* note 20, para. 23 (item 6).

but it is hard to understand how it is in line with the prohibition in the Articles of Agreement that the Bank and its officers should not “be influenced in their decisions by the political character of the member or members concerned”.⁹⁸

The *Legal Note* thus gives the Bank the mandate to make decisions to support interventions in the criminal justice sector partly on political grounds. This is not a new observation.⁹⁹ A decade ago, Heather Marquette had already written that the Bank was suffering from creeping politicization,¹⁰⁰ primarily because prominent Bank officials argued that anti-corruption and democratization are intimately linked.¹⁰¹ Outside the area of corruption, Bank reports and program documents increasingly spoke about aims such as the level of citizen participation in decision-making and protection of individual rights against abuse of power. As a result, Alvaro Santos wrote that “the illusion of maintaining an apolitical stance...has become ever more difficult to sustain”.¹⁰² However, when these critics wrote that the Bank was suffering from creeping politicization, they referred to policy statements and documents. They did not refer to legal opinions, which had always avoided the suggestion that Bank assistance could be conditional upon the beneficiary meeting requirements regarding respect for civil and political rights and democratic governance. It is true that a 2005 note by General Counsel Roberto Dañino argued that “the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank’s

98 *Ibid.*, Annex III, pp. 38–43.

99 See e.g., J. W. Head, *Losing the Global Development War: A Contemporary Critique of the IMF, the World Bank and the WTO* (Brill, Leiden, 2008).

100 H. Marquette, ‘The Creeping Politicisation of the World Bank: The Case of Corruption’ (2004) 52 *Political Studies* p. 413; Santos (2006), *supra* note 10, pp. 275–7.

101 Joseph Stiglitz, the chief economist, wrote in the Introduction in C. Gilbert & D. Vines (eds.), *The World Bank: Structure and Policies* (Cambridge University Press, Cambridge, 2000), at p. 3:

“Earlier, discussions of corruption would have been off limits for the World Bank, which was generally proscribed from engaging in political matters not directly related to development. But the new thinking argues that there is no bright line of demarcation: corruption, though a matter of politics, is at the heart of underdevelopment. But once that line has been broached, the limits of what should be in the Bank’s purview are no longer clear. Openness, transparency, and democratic processes provide an important check on the operation of special interest groups and the extent of corruption.”

102 Santos (2006), *supra* note 10, p. 277.

mission".¹⁰³ But this opinion reflected 'the personal thoughts of the author' and was never adopted by the Board, so it did not represent official Bank policy.¹⁰⁴ The same is true for a 2006 essay by Ana Palacio, Dañino's successor as General Counsel, who argued for an evolution from the restrictive interpretation of the political prohibition clause regarding civil and political rights to a more permissive reading.¹⁰⁵ The novelty of the *Legal Note* and the *Guidance Note* is that these documents — albeit very briefly in the main text, and only clearly in one of the annexed documents — incorporate concern for civil and political rights. It looks as if the Bank, in its legal pronouncements, is slowly moving away from the position where it could justifiably be criticized as being insensitive to the requirement that there should be respect for civil and political rights.¹⁰⁶

6 Concluding Thoughts — The Point of a Legal Opinion

This paper has shown that the *Legal Note* and *Guidance Note* manage to justify Bank involvement in criminal justice reform by making two changes in the legal interpretation of the Bank's mandate. First, it distances itself from Shihata's strict and unworkable 1990 interpretation of what it means for the Bank to make a decision solely on the basis of economic considerations. From now on, Bank involvement in a program or activities requires no more and no less than an "appropriate and objective economic rationale" for such participation. Moreover, the Bank is willing, at least in the coming years, to assume that this requirement will be met on the basis of plausible hypotheses and little empirical evidence. According to the *Legal Note*, there is indeed an appropriate economic rationale to engage with criminal justice reform, for there are many plausible hypotheses in relation to how crime and violence constrain economic growth, and how criminal justice reform can help to reduce levels of crime and violence. Secondly, the *Legal Note* distances itself from the view that the criminal justice sector is essentially an extension of sovereign power. Instead, the Bank now views the sector as a provider of services: security and justice. According to the *Legal Note*, this view enables the Bank to engage with

103 R. Dañino, 'On the Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts', extracted in A. Palacio, *The World Bank Legal Review: Law, Equity and Development* (Vol. 2) (2006), at pp. 295, at p. 299.

104 Cissé (2011), *supra* note 6, at p. 73.

105 A. Palacio, 'The Way Forward: Human Rights and the World Bank', a copy of which is available via the World Bank's web site at: <<http://go.worldbank.org/RR8FOU4RG0>>.

106 See *supra* note 29.

criminal justice reform without violating the prohibition to interfere in the political affairs of member states.

However, the reinterpretation of the mandate is not altogether convincing. First, it does not acknowledge, let alone resolve, the tension in the Articles of Agreement between the Bank's overall purpose of development on the one hand, and the injunction to make decisions solely on the basis of economic considerations on the other. To be sure, these two components of the Bank's mandate are not always at odds with each other. But they surely can be, because the *Legal Note* endorses a comprehensive understanding of development and this entails that the Bank must sometimes support interventions even though their economic rationale is weak or absent. This is not merely a theoretical issue, but poses choices in criminal justice reform; and the *Legal Note* is unclear on how these should be resolved. Secondly, the reinterpretation of the criminal justice sector as a provider of services rather than as an extension of sovereign power is not altogether convincing. The criminal justice sector is able to deliver security and justice precisely because it is an exercise of sovereign power. Hence, it is unsatisfactory that the Bank *ipso facto* rules out support on the paramilitary side of the criminal justice spectrum, because this is essential to deliver on the promise of the 2011 World Development Report 2011 and related policy documents in relation to addressing the causes of repeated cycles of violence. Moreover, while the *Legal Note* and *Guidance Note* claim to respect the political prohibition clause by remaining neutral with respect to forms of government and ruling elites and ideologies, it is in fact, through the backdoor of its risk-management strategy, incorporating respect for a significant body of international human rights law and standards, including civil and political rights. The *Legal Note* and *Guidance Note*, therefore, appear to be the first official — though somewhat hidden — acknowledgment that Bank support can be conditional upon respect for civil and political rights.

The question is why the *Legal Note* and *Guidance Note* contain such loose ends, and why they can be read as endorsing a narrow as well as an expansive understanding of development and politics. The answer must probably be sought in the nature and purpose of legal interpretation in an institution such as the World Bank. It has been observed that international lawyers, perhaps more so than their colleagues in national legal systems, strongly adhere to the fiction that interpretation is a methodology which aims — and is appropriate — to uncover the inherent meaning of a text.¹⁰⁷ In fact,

107 D. F. Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4 *European Journal of International Law* p. 472; I. Venzke, 'The Role of International Courts as Interpreters and Developers of Law: Working Out the Jurisgenerative Practice of

interpretation can best be viewed as a social practice within which the meaning of texts is established in interaction between relevant constituencies and stakeholders. Obviously, an interpretation aims to be a legally credible reading of a basic legal document. But it also serves other purposes: for instance, as in the case of a complex IFI such as the World Bank, maintaining a myth about the organization behind which stakeholders and constituencies with different interests and views can rally.¹⁰⁸

It is difficult for an outsider to form a complete picture of the many different and competing interests and constituencies which the legal department of the World Bank need to take into account when drafting a legal opinion. However, it is clear that there are various audiences that want to see the Bank as a technocratic financial institution which has its eyes firmly fixed on nothing but the economic growth of developing countries; an organization which aims to get back the money it lends with interest, makes profitable equity investments, underwrites securities that are safe, and extends guarantees for loans made by others because they are financially trustworthy. It is decidedly unhelpful, from this perspective, if the Bank, in its decision-making in relation to lending and investing, is portrayed as being guided by non-economic aims and a desire to interfere with sensitive and controversial political issues of developing countries. One type of audience are the international capital markets, on whose

Interpretation' (2001) 34(1) *Loyola of Los Angeles International and Comparative Law Review* p. 99; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, Oxford, 2012); A. Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning', in P. H. F. Bekker, R. Dolzer & M. Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, Cambridge, 2010) pp. 34–54.

108 John Taylor, former General Counsel of the EBRD, writes the following about the purpose of interpreting the charter of an IFI and the role of the legal department:

"[E]specially in its earliest days, the EBDR had virtually no jurisprudence. Why does this matter? Partly because of the intensity and variety of different interests and constituencies at play in the context of the EBDR, or for that matter any IFI....In my view... any IFI has a strong need to develop the acceptance of a shared understanding, and not just as a former legal matter but in a broader sense as well. I see, and tried to impress on others at the EBDR, a need to develop the acceptance of a shared understanding, particularly among the shareholder countries, as to the meaning of the IFI's nature, powers and mission. Moreover, I regard an IFI's legal department...as the principal actor responsible for nurturing this shared understanding...How can this be accomplished? ...one method [is] the use of charter interpretations'.

See J. L. Taylor, 'Legal Challenges at the Start of a New International Financial Institution' (2007–8) 17 *Kansas Journal of Law and Public Policy* p. 349, at pp. 359–60.

confidence the Bank, which has triple-A status, is dependent for raising financial resources. The World Bank, after all, is a bank; it is not a non-governmental organization or a do-good private foundation. Another type of audience are the member countries of the Bank, as represented in the Board of Governors. Many of the members are deeply divided over many issues relating to human rights, democracy and indeed the rule of law, as is well-known from the fierce battles representatives of these countries wage over these issues in other international organizations, in particular several UN-organs such as the UN Security Council and the UN General Assembly. Yet another audience are the economists working in the Bank, whose clear dominance is based on the assumption that their unique professional expertise and skills are essential for the effective functioning of the organization.

However, there are also powerful reasons to expand the Bank's operations in areas which may or may not have effects on economic growth, and which are essentially political. As Paul Collier has observed, the developing world has been shrinking rapidly over the past decades, but the bottom billion who remain in low income countries face repeated cycles of extreme violence.¹⁰⁹ Development organizations that ignore this problem and refuse to address causes of insecurity run the risk of becoming irrelevant in the eyes of the supposed beneficiaries of aid. Indeed, the 2011 World Development Report 2011 and its *Voices of the Poor* volumes underscore that security should be a top priority for anyone who intends to provide aid and assistance.¹¹⁰ Moreover, the World Bank, like other IFIs and development organizations, has been confronted with competition in aid-delivery from some of the BRIC-countries, in particular China and Brazil, which attach fewer strings to their financial assistance, or in any event different and — for government officials in developing countries — less burdensome strings.¹¹¹ Finally, various groups within the Bank, especially those working on governance-related issues, have become convinced that security and criminal justice reform are an inevitable and

109 P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press, Oxford, 2007) p. 4.

110 D. Nerayan, *Voices of the Poor: Can Anyone Hear Us?* (2000); D. Narayan & P. Petesch, *Voices of the Poor: From Many Lands* (2002); D. Narayan, R. Chambers, M. Kaul Shah & P. Petesch, *Voices of the Poor: Crying Out for Change* (2000), all of which are available from the World Bank's web site at: <<http://go.worldbank.org/3T5PAAJ060>>.

111 N. Mwase & Y. Yang, 'BRICs' Philosophies for Development Financing and Their Implications for LICs', IMF Working Paper 12/74 (2012), available at: <www.imf.org/external/pubs/ft/wp/2012/wp1274.pdf>; P. Kragelund, 'Back to BASICS? The Rejuvenation of Non-traditional Donors' Development Cooperation with Africa' (2001) 42(2) *Development and Change* p. 585.

important part of development-work. This is evident from the input given by various divisions in the Bank for the new guidance note on criminal justice, the number of Bank-divisions that have been involved in criminal justice reform over the past years, as well as the broad composition of the newly established criminal justice resource group. Further, Bank staff working on justice issues have an expansive understanding of development and view human rights issues as an integral component of their work, as is clear from many of their publications.¹¹²

If a legal opinion must develop a consistent interpretation of the Articles of Agreement, then the new *Legal Note*, as elaborated upon by the *Guidance Note*, fails in some important respects. But if the purpose of a legal opinion is to play to different constituencies by giving all of them the sense that the World Bank still is the organization with the mission they think it has, then the *Legal Note* appears to be a clever piece of work.

112 See, for example, T. Chopra & D. Isser, 'Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights' (2012) 4(2) *Hague Journal on the Rule of Law* p. 337; D. Desai, D. Isser & M. Woolcock, 'Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies' (2012) 4(1) *Hague Journal on the Rule of Law* p. 54; B. Z. Tamanaha, C. Sage and M. Woolcock, *Legal Pluralism and Development Scholars and Practitioners in Dialogue* (Cambridge University Press, Cambridge, 2012).