

At issue: Consolidating ideology in law?

Legal and judicial reform programmes at the World Bank

The World Bank has vastly increased the resources it commits to good governance, with a large portion of that going to a complex and under-researched area: legal and judicial reform. Researcher Victoria Harris explores the how the Bank uses such reforms to cement in place its preferred market-based development paradigm.

The necessity of legal and judicial reform to facilitate market-led development has been widely promoted by the World Bank since the early 1990s. Despite its articles of agreement prohibiting it from becoming involved in the political affairs of states, the Bank's foray into governance reforms - to which legal and judicial reforms have been central - tells a different story. Generally citizens are protected from the potential excesses of the state and market by the judiciary so an independent judiciary is therefore a cornerstone for the protection of civil and political rights. In contrast, Bank-led reforms are market-focused, including training for lawyers and judges and the formulation of contract and property rights laws. Legal reforms have been executed by circumventing democratic processes undermining accountability, setting a worrying precedent.

Legal and judicial reforms are one of six main themes of the World Bank's governance work, the other five being: anti-corruption, civil service reform, decentralisation, public financial management and tax administration. These are key ingredients of the new institutional economics paradigm of the post-Washington consensus, which sees economic development as dependent on stable and predictable market-transactions. Good governance reforms have developed rhetorically, as an anti-corruption strategy and in response to the failure of infrastructure projects and structural adjustment programmes to fulfil sustainable development objectives.

The Bank has defined adherence to the rule of law as an integral part of economic and social development and promotes legal and judicial reform as a means to "promote the rule of law". In 2005 the Bank's former legal counsel, Robert Dañino stated that Bank support for rule of law and justice sector reform "has made major contributions to the substantive furtherance of a broad array of human rights in a range of fields". Independent judiciaries and functioning court systems are clearly important tools for human rights protection. However, the Bank's legal reform focus is on the ability of legal systems to facilitate market transactions by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order.

Civil society has cautioned that the Bank may use the rhetoric of human rights to legitimise its legal and judicial reform programmes that are executed to facilitate markets, rather than to uphold rights. Gordon Barron of the London School of Economics notes that criticisms of the Bank's legal and judicial reform programmes have rested on the "absence of a guiding theory" of law and development and an opportunistic application of rule of law reform.

Richard Messick writing for the Bank's *Research Observer* cites analogies between the Bank's reform programme and the so-called 'law and development movement' in the 1960s. That programme, led by USAID and the Ford Foundation, sought to use law as a tool for development and social change mainly in Latin America but academics criticised it for its lack of coherence. Practitioners had no way to prioritise, predict or measure the effect of reforms, which were created and implemented without public participation. Foreign legal consultants dictated the content and pace of reform which focused exclusively on formal legal systems.

In response the Bank claims that the 'law and development movement' was state-centred and that within its own market-based model, "the state

is no longer the protagonist of social change". However as Barron has pointed out this leads to a worrying notion of a "faith in spillovers", that market led reforms will naturally engender human rights and democracy, although there is little empirical evidence to suggest this.

Codifying corporate rights

Legal reform or the passing of new laws to implement Bank projects affects all major sectors that the Bank is involved in. Independent judiciaries are necessary to uphold and implement laws. Judicial reform is political as judicial mandates are generally written in constitutions, but due to the political nature of these reforms the Bank has stated that it "does not directly finance the legal work required". However, informal conditions are prevalent in the guise of investment climate and governance indices and monitoring systems. The World Bank's Country Policy and Institutional Assessment (CPIA) and *Doing Business* indicators as well as the Business Environment and Enterprise Performance Survey (BEEPS) jointly prepared by the Bank and European Bank for Reconstruction and Development, suggest that for countries to become attractive to foreign direct investment and gain funding from the Bank, certain market-oriented legal and judicial reforms are necessary.

The CPIA, the Bank's policy scorecard, rates all countries annually and has 16 indicators grouped under four headings: Economic management, structural policies, social inclusion and public sector management and institutions. The BEEPS index allows companies to rate the business environment in 22 transitional countries in Central and Eastern Europe, Central Asia and Turkey. The dataset examines the "wide range of interactions between firms and the state" including the quality of the business environment, the legal and judicial climate, financial development and regulation. Both surveys rate the ability of member states to uphold property rights.

Graham Harrison of the University of Sheffield notes that the Bank will: "stop all lending to any member state that violates the property rights of a transnational corporation". Scorecards and monitoring surveys act as a policing strategy, to protect the interests of foreign direct investment and direct the nature of state reforms.

Embedding reforms

The Bank has become increasingly involved in legal and judicial reform since 1991. Lending for this area is executed via the Bank's legal general counsel, which has financed more than 1,300 projects. Reforms are "multidisciplinary", focusing on both institutions and legal frameworks for specific Bank-funded projects across all major sectors including: health, education, finance, energy, agriculture and public administration.

Worldwide there are 23 freestanding active and upcoming projects for the reform of a state's legal system. From 2001 to 2006 worldwide lending for law & justice and public administration, the Bank's classification for this work, increased from \$3.9 billion to \$5.9 billion, dwarfing lending in all other sectors and accounting for nearly one quarter of total sector lending. Law & justice and public administration is the top sector for both IBRD and IDA lending. Worldwide thematic lending for "rule of

law” also rose, from \$410 million to \$757 million, in the same period.

The financing of reform through structural and sector adjustment loans usually carries specific law reform conditions with it. Adjustment lending conditionality for justice administration projects “often includes the preparation and adoption of certain laws and regulations that reflect policies agreed upon with the Bank”. Reform of the judiciary often necessitates a change to a country’s constitution. However, in 2005 a Bank publication on policy-based lending stated that; “Any attempt ... to introduce political transformation through policy-based lending in the form of politically motivated conditionality may contravene the Articles”. It also states that “requiring the passage of a law could cause problems between the executive and legislative branches of a borrower’s government” and should be avoided.

Outsourcing justice

The legal vice-presidency of the Bank has provided law reform technical assistance to governments since 1986. It has advised governments on drafting legislation as it relates to project lending in such sectors as: public health law, environmental law, human rights and transport. Much of this technical assistance has been carried out by foreign consultants.

For example, the US-based management consultancy *Glocoms, Inc* won the largest technical assistance tender in the Romanian judicial reform project, for \$480,000. *Glocoms’* strategy for public sector reform rests on privatisation and restructuring fiscal policy. The group has directed Bank projects in Angola, Armenia, China, the Russian Federation and Malawi. It has just announced the opening of new country offices in: Mongolia, Armenia, Vietnam, DRC, Malawi, Kenya and Georgia, all countries undergoing judicial and institutional reform programmes.

The Bank has recognised that early judicial reform projects in Venezuela and Peru were unsuccessful because they failed to develop a consensus between the Bank and effected parties. However, it is still hard to find evidence of real participation or ownership in the development of projects. Awarding technical assistance contracts for the components of legal and judicial reform programmes to foreign consultants is representative of this trend.

The acknowledgement of past failures has led the Bank to develop a reform rhetoric which is posited as being socially and culturally inclusive. Beyond the rhetoric it is hard to find evidence of a commitment to these ideals. The bias toward market reforms is exemplified by the breakdown of funded projects. Out of a total of 555 Bank-supported rule of law projects, 240 are focused on the development of legal institutions for a market economy. Only 40 projects have ‘access to justice’ components which include goals such as, raising public awareness of legal institutions and laws, educational programmes and institutional transparency.

This is emblematic not only of the Bank’s reform agenda, but also the practical limitations the Bank faces. Inclusive and participatory legal reform depends on the commitment and political will of domestic politicians, which may be lacking. There is evidence that many law reforms have been passed by decree. Meanwhile, because of prohibitions on involvement in a borrowing country’s politics the Bank is often left with little option but to carry out infrastructure projects, such as the building or renovation of courtrooms.

Reform in Central and Eastern Europe

The rapid transition from centralised communist rule towards market-based economies in Central and Eastern Europe since 1991 led to a proliferation of Bank-sponsored legal and judicial reform programmes in the region. The possibility of EU accession clearly spurred reform efforts on. Slovenia, Slovakia and Romania have now all made it into the top twenty reforming countries in the Bank’s *Doing Business Report*

2005 graded on such measures as property security and the length of time it takes to set up a business.

A 2002 evaluation of lending and non-lending projects in Europe and Central Asia by the Bank’s Operations Evaluation Department (OED), now the Independent Evaluation Group, states that “legal reform in *itself* has not been a Bank strategic objective” rather that it has “been a tool to implement policy reforms being sought by the Bank”. The primary focus of reforms was on securing the privatisation of state-owned enterprises and national banking systems and developing legal frameworks in the energy and mining sectors. At the end of the nineties the focus of policy reform in the region moved toward developing legislation for foreign direct investment.

The OED also reported that, far from stemming corruption and increasing accountability and transparency, adjustment lending conditionality in countries with weak governments has tended to “increase governance by ordinance” which can “undermine democracy and distort the roles of various branches of government” leading not only to greater political instability but also to instability within the market.

The development policy of Romania drafted in 2004 after initial diagnostic and sector assessment evaluations by the Bank saw the adoption of “an extensive set of new laws”. Although a referendum was held before the introduction of some new judicial legislation, the government stated that “the volume and speed of adoption of this legislation meant frequent use of emergency decrees and similar instruments and limited parliamentary debate or public consultation”. The use of emergency decrees to pass legislation required by adjustment lending conditionality has been registered in the Russian Federation, Kazakhstan and Ukraine.

Contradictions abound

Legal and judicial reform programmes highlight the Bank’s fraught relationship with its own articles of agreement, the nature of its interference in the political matters of state and its position on human rights. These contradictions are becoming more evident, as increases in spending on rule of law reshape legal systems and institutions throughout the world. There is no empirical evidence that ensuring private investment rights will further the protection and promotion of universal human rights, although the Bank insists these reforms will benefit the poor.

Countries such as Romania are scoring well in terms of their willingness to reform. However, it is unclear whether reforms are being executed or upheld by legal institutions. The Bank’s methodology has focused on training judges and improving the physical and administrative infrastructure of court systems, yet legal and judicial reforms are dependant on the political will to implement them. The Bank claims it is promoting the rule of law through legal and judicial reform yet the implementation of these reforms can undermine democratic processes, questioning the legitimacy of externally-imposed law reform as a development strategy. These reforms also reveal the increasing reach of the Bank into frontiers that have traditionally been the domain of governments and not markets.

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A longer, fully-referenced version of this article is available at:
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