

Judicial Reform in Asia

Case Study of ADB's Experience: 1990-2007

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The central question to be addressed in this article is: *what does this empirical evidence tell us about the nature and effectiveness of judicial reform in Asia?*

This case study of the judicial reform program of the Asian Development Bank (ADB) experience 1990-2007 is framed within the global context of substantial growth, underwhelming results, and continuing evolution of approach in an ongoing search for success.

The case study marshals and evaluates a substantial body of new evidence from Asia which has been remarkably under-studied in the academic discourse. This body of experience contributes timely evidence of practice which is significant in supporting a number of key propositions. First, it reveals the still evolving nature of the judicial reform enterprise. Second, it demonstrates that ADB has created some 'results'. Third, it remains difficult to find any evidence of 'success' owing to the continuing conceptual fuzziness in the purpose and goals of endeavor, and the continuing lack of systematic monitoring and evaluation. Fourth, there are some tentative indications of an emerging capacity to demonstrate developmental effectiveness. While this evidence generally conforms to the global literature, the recency of endeavor in this region reveals a dynamic process of evolution, and highlights the incubation of a potentially paradigmatic shift in reform approach.

INTRODUCTION

This case study assesses the experience of the Asian Development Bank in undertaking judicial reform as part of its law and policy reform program across Asia since 1990.

During this period, ADB conducted some four hundred technical assistance projects, valued at approximately USD 420 million, many of which involved aspects of judicial and legal reform, in addition to numerous program loans.¹ These

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¹This estimate excludes law and justice reform loans, and other financing facilities. Owing to mainstreaming, it is difficult to estimate the value of ADB's entire law and justice-related portfolio,

activities have delivered some significant outcomes across the region, visible in terms of improvements to court performance, training and related benefits, though these outcomes are not yet demonstrable in terms of ADB’s end-goal of poverty reduction or its intermediate goal of improved governance.

The case study showcases the journey which ADB, the major multilateral donor in Asia, has taken over the past decade and a half in its endeavours to promote judicial reform across the region. It adopts a documents-based, inductive, qualitative methodology to gather findings from the available evidence of reform endeavours relying on data from a selection of ADB’s documentation all of which is publicly available, though remarkably understudied, from its website: www.adb.org.²

It provides empirical evidence for the overarching proposition that developing a judicial reform approach has been an uncharted endeavour which continues to grapple with three interrelated challenges.

First, ADB has exhibited an institutional ambivalence to judicial reform which is apparent in the ambiguities in its policy approach. As a consequence, articulation of the justification or rationale for judicial reform has morphed from economic growth and market enablement, through neo-liberal institutionalism, to poverty reduction, then good governance, access to justice and pro-poor empowerment, and most recently securitisation. This impressive elasticity in the conceptualisation of the purpose of judicial reform has profoundly hampered the rationalisation of any coherent logic for its intended approach and ultimately frustrated efforts to demonstrate success. While the importance of judicial reform is recognised, this inability to demonstrate success has then rendered this endeavour non-competitive in the quest for funding.

Second, this case study reveals a conflicted picture of ADB’s overall orientation to development effectiveness. On the one hand, there is some proclivity for an empirically-grounded knowledge-based approach to judicial reform. On the other, there is evidence that ‘moving the money’ trumps issues of development effectiveness, with a preoccupation for monitoring the efficient delivery of outputs rather than any overarching focus on evaluating impact and results.

but this may reasonably be estimated to exceed USD 1 billion. For example, Pakistan’s *Access to Justice* Loan was valued at USD 350 million. ADB 2001, *Report and Recommendation of the President to the Board of Directors on a Proposed Loan to the Islamic Republic of Pakistan for the Access to Justice Program*, ADB Manila (Program loans 1897/98-PAK for USD 330 million, and TA Loan 1899-PAK for USD 20 million).

²A note on methodology: the author has served as an independent consultant to the ADB in various settings over the past decade. On occasion, reference is made to interviews with serving and former officers of the Office of General Counsel for the purpose of clarifying the documentary evidence.

Third, the development of judicial reform approach has at its essence been intuitive, a priori conviction-based and hence ideological, rather than empirical and integrated within an organisational process of knowledge-management.

For a combination of these reasons, it has been impossible for ADB to demonstrate improvements to the quality of justice across the region positivistically, even after an extended period of practice. Consequently activities have in practice been justified constructivistically, though this has never been formally acknowledged.³

GLOBAL CONTEXT

Justice reform is a distinct endeavour to assist the judicial arm of government – the courts, judges and related personnel – to adjudicate the law and administer justice. Judicial reform is associated, sometimes inseparably, with the more generic endeavour of ‘legal reform’, sometimes described as ‘law and development’, or ‘the rule of law’. While these terms are to some extent imprecise, this article focuses on those endeavours which primarily involve the courts and the administration of justice.

GROWTH

Judicial reform has grown rapidly and substantially over the past fifty years – some hundred-fold in aggregate. Some indications are illuminating. Hammergren, for example, notes that court assistance started in Latin America in the 1960s valued in hundreds of thousands of dollars, typically climbing to around USD 5 million by the mid-1990s.⁴ By 2001, Biebesheimer reports that the Inter-American Devel-

³This central debate over evaluative modelling has been described by some commentators as being a ‘paradigm war’. This debate pits those who may be called *positivists* against *constructivists*. At its essence, it is concerned with the issues of how evaluation finds truth and contributes to knowledge. On the one hand, positivists advocate a highly formalised scientific approach, often used in econometrics. They are primarily concerned with establishing the validity and reliability of data, adopt experimental methods and counterfactual measurements, and are preoccupied with the overarching need for methodological rigour. On the other hand, constructivists are primarily concerned to hear the voice of stakeholders, notably the alienated poor. They use participatory methods, case-studies and observations and refute the scientific approach as being costly, impractical and irrelevant. This debate is described by Cracknell as a contest between the scientific, objectives-based project management model and the empowerment and ‘pro-poor’ stakeholder participatory model. B. Cracknell, *Evaluating Development Aid: Issues, Problems and Solutions* 2000, p. 161.

⁴L. Hammergren, ‘Latin American Experience with Rule of Law Reforms and Its Applicability to Nation Building Efforts’, in: 38 *Case Western Reserve Journal of International Law* (2006), p. 63. See also World Bank, *Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency* 2002, pp. 34 and 55; R. Messick, ‘Judicial Reform: The Why, the What and the

opment Bank had conducted some 80 projects in 21 Latin American countries, valued at about USD 461 million. During the 1990s, it is estimated that almost USD 1 billion was spent in Latin America by the World Bank, the Inter-American Development Bank (IDB) and the United Nations Development Program (UNDP).⁵ In 2001-2002, this author implemented a single justice program loan from the Asian Development Bank for Pakistan which was valued at USD 350 million.⁶ By 2006, the global lending of the World Bank, alone, for law and justice and public administration was reported to be valued at USD 5.9 billion.⁷

EVOLUTION

Judicial reform has evolved during this period. Trubek and Santos describe it as comprising three iterations or moments. The *first* moment emerged in the 1950-1960s when development policy focused on strengthening the role of the state in managing the economy, and law was seen as an instrument for effective state intervention in the economy. In the *second* moment in the 1980s, law moved to the centre of development policy, influenced by neo-liberal ideas which stressed the primary role of markets in economic growth, and in limiting the power of the state. They then discern a *third* moment which is still in a formative phase, and contains a mix of policy ideas, e.g., that markets can fail, and require compensatory intervention by the state, and that development means more than just economic growth and must be redefined to include human freedom. The role of judicial and legal reform shifted profoundly during this period within the changing political and economic context of development and an evolving vision of the role of the

How', (2002), Paper delivered at the Conference on Strategies for Modernizing the Judicial Sector in the Arab World, 15-17 March 2006, Marrakech, Morocco.

⁵P. de Shazo and J. Vargas, 'Judicial Reform in Latin America: An Assessment', 2006, Policy Papers on the Americas, Volume XVII, Study 2, Center for Strategic and International Studies, Washington, DC, p. 1. Also: C. Biebesheimer and M. Payne, *Inter-American Development Bank Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation* 2001, p. 3; L. Bhansali and C. Biebesheimer, 'Measuring the Impact of Criminal Justice Reform in Latin America', in T. Carothers (ed.), *Promoting the Rule of Law Abroad: in Search of Knowledge* 2006, p. 301 at p. 303.

⁶L. Armytage, 'Pakistan's Law & Justice Sector Reform Experience – Some Lessons', in: 2 *Law, Social Justice and Global Development Journal* (2003), p. 1.

⁷World Bank, 'Annual Report 2006', 2006, cited in V. Harris, 'Consolidating Ideology in Law? Legal and Judicial Reform Programmes at the World Bank', *Bretton Woods Project*, [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=i-126-31a143203d1a6653198c8a82eb7469ee](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=i-126-31a143203d1a6653198c8a82eb7469ee), 26 November 2009.

state in supporting the market.⁸ This evolution has of course been described by other voices in the literature.⁹

EARLY DAYS: USAID'S LAW AND DEVELOPMENT

The current history of judicial reform commenced with American assistance to Latin American reform in the 'Law and Development' movement of the 1960s.¹⁰ The guiding assumption of the law and development movement was that law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers.¹¹ The primary goal of 'Law and Development' was, according to Trubek and Galanter, to transform legal culture through legal education and the transplantation of select 'modern' laws and institutions, with an emphasis on economic or commercial law and the training of pragmatic business lawyers. They saw the movement as having rested on four pillars, all of which subsequently crumbled. These pillars were a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spillovers from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. This potent critique of USAID's hegemonic approach was influential in causing the movement to wane for some years.¹²

⁸D. Trubek and A. Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* 2006, p. 1 at p. 7.

⁹See, for example: J. Faundez, 'The Rule of Law Enterprise – Towards a Dialogue between Practitioners and Academics', CSGR working paper no. 164/05, University of Warwick, 2005; R. Peerenboom, 'The Future of Rule of Law: Challenges and Prospects for the Field', in: 1 *Hague Journal on the Rule of Law* (2009), p. 5; T. McInerney, *Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries* 2006, at p. 12; E. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in E. Jensen and T. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* 2005, p. 336 at p. 345.

¹⁰H. Blair and G. Hansen, 'Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs; USAID Program and Operations Assessment Report No. 7, USAID, Washington, DC, 1994; D. Trubek and M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', in: 4 *Wisconsin Law Review* (1974), p. 1062.

¹¹R. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues', in: 14(1) *The World Bank Research Observer* (1999), p. 117 at p. 125.

¹²Trubek and Galanter, 'Scholars in Self-Estrangement'; D. Trubek, 'Law and Development: Then and Now', 90 *American Society of International Law Proceedings* (1996), p. 223; D. Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future', in A. Santos and

'RULE OF LAW' REVIVAL AND DEMOCRACY

After some years, in 1981, the United States resumed engagement in judicial and legal reform in El Salvador to help the democratic government prosecute human rights abuses. This political economy context explains why USAID assistance sought to advance democratic development by exposing human rights violations, increasing access to justice, strengthening justice sector institutions and decreasing impunity. According to Hammergren, this was due both to the political, social and economic conditions of the region, and to the chronically debilitated state of judiciaries across the region, being the 'Cinderella' institutions of government.¹³ Biebersheimer describes this second wave of justice reform spreading 'like wild fire' across Latin America, usually centring on criminal justice reform linked to democratic institutions as much as to economic enhancement programs in the region.¹⁴

By the 1990s, USAID expanded its support for judicial and legal reform into the post-Soviet transitional economies of Europe, in what Carothers has termed the 'rule of law revival'.¹⁵ He sees this phase resting on the orthodoxy of twin axioms: that the 'rule of law' is necessary for both economic development and democracy.¹⁶ The promise of reform to remove the chief obstacles on the path to democracy and market economics during an era marked by massive transitions in the global political economy explains why Western policy-makers have seized on the 'rule of law' as an 'elixir' for countries in transition.¹⁷

This conception of judicial reform – embedded as it was in USAID promoting the political economy notions of the free market, democracy, good governance and the 'rule of law' – is to be compared with that of the World Bank.

D.M. Trubek (eds.), *The New Law and Development* 2006, p. 74; J. Merryman, 'Comparative Law and Social Change, 25 *American Journal of Comparative Law* (1977), p. 457.

¹³L. Hammergren, 'International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers', in E. Jensen and T. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* 2003, p. 290.

¹⁴Bhansali and Biebesheimer, 'Measuring the Impact of Criminal Justice Reform in Latin America', p. 306. See also S. Hendrix, 'USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean', 49 *Southwestern Journal of Law and Trade in the Americas* (2002-2003), p. 277.

¹⁵T. Carothers, 'The Rule of Law Revival', in: T. Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge* 2006, p. 3 at p. 7.

¹⁶T. Carothers, 'The Problem of Knowledge', in T. Carothers (ed.), *Promoting the Rule of Law Abroad* 2006, p. 15.

¹⁷Ibid.

JUDICIAL REFORM AT THE WORLD BANK – SHIHATA'S LONG SHADOW

The World Bank started its support judicial reform later than USAID in Latin America in the 1980s. Its approach was initially framed narrowly to conform to its mandate as a state-centric mechanism for enabling economic development. In due course, this approach became more comprehensive, embodying related notions of governance, institutions, safety, security, equity and empowerment.

As chief counsel, Shihata was influential in conceptualising the initial approach to reform. He framed judicial reform within the 'rule of law', which he treated as a precursor to economic stability, and as the means of protecting property rights and honouring contractual obligations. He saw law supporting the broader economic policy framework that guaranteed free competition.¹⁸ The Bank adopted this economic approach because of the reading then possible of its charter. Owing to formal constraints which he stressed prohibited engaging in 'political' activities, he directed the Bank narrowly to take 'only economic considerations' into account.¹⁹ Consequently, the Bank's reform strategy developed from a base focusing tightly on promoting the 'rule of law' in an instrumentalist, 'thin' procedural manner. This concept of the 'rule of law' built on three pillars of rules, processes and well-functioning institutions. It comprised a well-functioning legal and judicial system which allows the state to regulate the economy and empowers private individuals to contribute to economic development by confidently engaging in business.²⁰

The Bank's judicial reform strategy promoted three goals: first, to establish an independent, efficient and effective judicial system; second, to support the processes by which laws and regulations are made and implemented; and third, to improve access to justice by expanding the use of existing services and providing alternative dispute resolution mechanisms.²¹ This vision positioned judges centrally as the key to an effective and efficient legal system.

¹⁸I. Shihata, 'World Bank and Legal Technical Assistance: Initial Lessons', policy research paper 1414, World Bank, Legal Department, Washington, DC, 1995; I. Shihata, *Judicial Reform in Developing Countries and the Role of the World Bank* 1995, p. 219; in M. Rowat et al., 'Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference', World Bank; I. Shihata, 'The Role of Law in Business Development', in: 20 *Fordham International Law Journal* (1997), p. 1577.

¹⁹I. Shihata, 'Human Rights, Development and International Financial Institutions', in: 8(35) *American University Journal of International Law and Policy* (1992), p. 27 at p. 37.

²⁰World Bank 2003, *Legal and Judicial Reform: Strategic Directions*, World Bank, Legal Vice Presidency, Washington, DC, pp. 2 and pp. 16-18.

²¹Idem, pp. 6, 19.

STRUCTURAL ADJUSTMENT, THE ‘WASHINGTON CONSENSUS’ AND POVERTY REDUCTION

In the ever-shifting political economy of the Latin American debt crisis, judicial reform was repackaged in the 1980s as a part of larger programs of legal reforms, usually as a component of what became termed ‘structural adjustment’. This described the fiscal and monetary policy changes which were implemented by the International Monetary Fund (IMF) and the World Bank to provide assistance to developing countries and promote state disengagement from the economy. These policy changes were conditions for financial assistance to ensure that the money would be spent in designated ways. In general, these loans promoted ‘free market’ programs aimed at reducing poverty by promoting economic growth, generating income, and paying off debt.

As the years passed, disillusionment mounted at the lack of visible success of ‘structural adjustment’. By the early 1990s, this impelled a reframing of development approach into what has become known as the ‘Washington Consensus’. This connotes a trifecta of neo-liberal ‘free market’ policies of privatisation, fiscal rectitude and deregulation being promoted by the IMF, World Bank and US Treasury at that time.²² The language of ‘structural adjustment’ evolved further into the new discourse of poverty reduction which increasingly became the ‘raison d’être’ of development, notably after the ‘Asian Financial Crisis’ of 1997/1998.²³

GOVERNANCE AND INSTITUTIONALISM: FROM ENABLING TO CAPABLE STATE

Judicial reform was itself positioned centrally in the Bank’s emerging conceptualisation of good governance. This larger governance dimension of development usually has hinged on notions of transparency and accountability. This approach to governance is grounded in the vision of the capable and enabling state, articulated in the Bank’s World Development Report of 2002 which highlighted the role of institutions in reform endeavours. It articulated a convergence of governance and institutionalism; more particularly, the governance rationale of institutional-

²² J. Williamson, ‘What Washington Means by Policy Reform’, in J. Williamson, *Latin American Adjustment: How Much Has Happened* 1990, p. 5. http://74.125.155.132/scholar?q=cache:-A33j4nxgEwJ:scholar.google.com/+williamson+J+1990+washington+consensus&hl=en&as_sdt=2000.

²³ D. Narayan, *Voices of the Poor: Can Anyone Hear Us? Voices From 47 Countries* 1999. See also: World Bank, *World Development Report 2000: Voices of the Poor*, Washington, DC. World Bank, 1978-2010, *World Development Reports*, World Bank, Washington, DC <http://go.worldbank.org/L8RGH3WLI0>.

ism.²⁴ Of most significance, this conceptualised the institutional role of judiciaries in development:

‘The judicial system plays an important role in the development of market economies ... by resolving disputes between private parties, by resolving disputes between private and public parties, by providing a backdrop for the way that individuals and organizations behave outside the formal system, and by affecting the evolution of society and its norms while being affected by them.’²⁵

MORE COMPREHENSIVE APPROACH: EMBRACING SOCIAL AND HUMAN DIMENSIONS

By 1999, the Bank elevated legal and judicial reform to one of the main pillars of its new Comprehensive Development Framework. This framework was introduced by President Wolfensohn as a reformulation of the Bank’s strategy to poverty reduction. It emphasised the interdependence of all elements of development – the social and human among the structural, governance, environmental, economic, and financial.²⁶

TOWARDS EQUITY?

This policy approach was further refined in the *World Development Report: Equity and Development* in 2006 which re-focused on the issue of inequality of opportunity as a new or more important dimension of poverty reduction. This built on the World Development Report of 2000 on poverty, and in particular on the work of Sen.²⁷ It addressed chronic ‘inequality traps’ by ensuring more equitable access to public goods, including improved access to justice systems and secure land rights among other initiatives. This report is significant in introducing the constitutive element of equity in poverty. Most importantly, it introduced the notion of redistribution to the current discourse:

²⁴ See, in particular: D. North, *Institutions, Institutional Change, and Economic Performance* 1990.

²⁵ World Bank, 2002, *World Development Report 2002*, World Bank, Washington, DC, pp. 131-132.

²⁶ J. Wolfensohn, Proposal for a Comprehensive Development Framework (Discussion Draft), January 21, 1999, at p. 7; <http://web.worldbank.org/WBSITE/DELETEDSITESBACKUP/0,,pagePK:60447-theSitePK:140576,00.html> (archived), at 26 November 2009.

²⁷ World Bank, *World Development Report 2000: Voices of the Poor*, Washington, DC. World Bank, 1978-2010, *World Development Reports*, World Bank, Washington, DC http://go.worldbank.org/L8RGH3WLI0_at 23 December 2010. A. Sen, *Development as Freedom* 1999.

'Given that markets are not perfect, scope arises for efficient redistribution schemes. ... Equity and fairness matter not only because they are complementary to long-term prosperity. It is evident that many people – if not most – care about equity for its own sake.'²⁸

This new focus on equity is consolidated by Sage and Woolcock who argue that a rules system that sustains an 'inequality trap' is a constituent element of such traps, and perpetuates inequities. They acknowledge a near universal consensus that most previous approaches to judicial reform in developing countries had not yielded hoped-for results, and that it is now time to reconsider the relationship between law and society.²⁹ This emerging recognition of the equitable dimension of poverty augurs what may become a profound turning point in the formative journey of the judicial reform enterprise.³⁰

FRAGILITY, SAFETY AND SECURITY

Finally, notions of safety and security provide the latest rendition of the rationale for judicial reform. While criminal justice has been a part of the 'standard package' of reforms since its inception in the law and development movement, concerns over state fragility, failing states, terrorism and the breakdown of the states' capacity to control crime have grown steadily over recent years.³¹ Most recently, the events of 11 September 2001 galvanised the attention of governments and donors to the relationship between security and conflict and the development of political, economic and social goals. This has led to reform efforts which consolidate the internal (criminal) and external (terrorist) capacity of the state to provide security. This rendition is illustrated in the *Guidelines on Terrorism Prevention* (2003) and the *Guidelines on Security System Reform and Governance* (2004) issued by the Organisation of Economic Cooperation and Development (OECD). These guidelines are directed at overcoming state fragility and conflict by reducing armed

²⁸ World Bank 2005, *World Development Report 2006: Equity and Development*, World Bank, Washington, DC, pp. 74-75, <http://go.worldbank.org/2A5GCSRQH0>, at 26 November 2009.

²⁹ C. Sage and M. Woolcock, *World Bank Legal Review: Law, Equity and Development*, Vol. 2, 2004.

³⁰ Most recently C. Sage et al., *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development*, Justice & Development working Paper Series 51845, World Bank, Washington, DC, 2009.

³¹ In describing judicial and legal reforms, Jensen refers to a 'standard package' of three elements: changing substantive laws; focusing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence. E.G. Jensen and T.C. Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, p. 349.

violence and crime thereby creating a secure environment conducive to other political, economic and social developments.³²

This survey highlights the rapid growth and formative nature of judicial reform over the past twenty years, in particular. This reform has been variously justified on the basis of economic, political, social and human rationales. To date, this ongoing evolution has been impelled by underwhelming results increasingly documented in the literature.³³ This context frames the timeliness of assessing ADB's reform experience in Asia as part of an ongoing search for success in judicial reform.³⁴

ASIAN DEVELOPMENT BANK APPROACH

Within this global context, the Asian Development Bank's judicial reform experience is prescribed by its charter which is to promote economic growth, cooperation and development in the region. This charter requires ADB to 'foster economic growth and cooperation in the region and to contribute to the acceleration of the process of economic development of the developing member countries collectively and individually.'³⁵

ADB has a membership of 67 countries of which 48 are within the Asia and Pacific region and 19 are outside.³⁶ The *Agreement Establishing the Asian Develop-*

³² OECD 2003, *A Development Co-operation Lens on Terrorism Prevention*, OECD, Development Assistance Committee, Paris, <http://www.oecd.org/dataoecd/17/4/16085708.pdf>, at 26 November 2009; OECD, *Handbook on Security System Reform (SSR): Supporting Security and Justice*, 2007, p. 21.

³³ This dual critique of disappointing performance and weak evaluation is longstanding. See Trubek and Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', Merryman, 'Comparative Law and Social Change'; Blair and Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*; Messick, 'Judicial Reform and Economic Development: A Survey of the Issues'; Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge*; L. Hammergren, 'Assessments, Monitoring, Evaluation, and Research: Improving the Knowledge Base for Judicial Reform Programs': <http://www.pogar.org/publications/judiciary/linn1/knowledge.pdf>, at 17 December 2009. L. Hammergren (2002) 'Performance Indicators for Judicial Reform Projects', <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Hammergrenperformance.pdf>, at 9 December 2009. L. Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* 2007.

³⁴ See, for example L. Armytage and L. Metzner (eds.), *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience* 2009.

³⁵ Agreement Establishing the Asian Development Bank, opened for signature 4 December 1965, 571 UNTS 123, Art. 1 (entered into force 22 August 1966). <http://www.adb.org/Documents/Reports/Charter/charter.pdf>, at 23 November 2009.

³⁶ Developing member countries are: Afghanistan, Armenia, Azerbaijan, Bangladesh, Bhutan, Cambodia, Cook Islands, Fiji Islands, Georgia, Hong Kong, India, Indonesia, Kazakhstan, Kiribati, Kyrgyz Republic, People's Democratic Republic of Lao, Malaysia, Maldives, Republic of the

ment Bank (charter) came into force on 22 August 1996. This charter specifies that the primary functions of ADB are to promote investment in the region for development purposes, utilise resources to finance development of developing member countries (DMCs) which will contribute most effectively to harmonious economic growth, assist in the coordination of development policies, cooperate with other international and regional development bodies such as the UN and World Bank, and to: ‘provide technical assistance for the preparation, financing and execution of development projects and programs, including the formulation of specific project proposals.’³⁷

The Charter requires that the resources of ADB must be used exclusively to implement the purpose and functions outlined above, and prohibits interference in the political affairs of any member. It stipulates that only economic considerations will be relevant for Bank decisions.³⁸

The development role of ADB has evolved and been refined over the period under study. In the 1980s, it was conceptualised as primarily promoting economic growth with social equity, with a particular concern for employment creation and poverty reduction.³⁹ In the 1990s, the overriding objective was refined to promote development through the alleviation of poverty through a steady improvement in living standards achieved through increases in income, improvement in social conditions, and protection of the natural environment.⁴⁰

ADB has financed a range of judicial and legal reform activities in numerous countries across the region.

Marshall Islands, Federated States of Micronesia, Mongolia, Myanmar, Nauru, Nepal, Pakistan, Republic of Palau, Republic of Korea, Papua New Guinea, People’s Republic of China, Philippines, Samoa, Singapore, Solomon Islands, Sri Lanka, Taipei, Tajikistan, Thailand, Timor-Leste, Tonga, Turkmenistan, Tuvalu, Uzbekistan, Vanuatu, Viet Nam. <http://www.adb.org/Countries> and <http://www.adb.org/About/membership.asp>.

³⁷ Charter, opened for signature 4 December 1965, 571 UNTS 123, Art. 2(iv) (entered into force 22 August 1966).

³⁸ *Ibid.*, Arts. 8 and 36(2).

³⁹ ADB, ‘Study on the Operational Priorities and Plans of the Asian Development Bank for the 1980s’, Manila, 1983, cited in ADB, *Review of Lending Foreign Exchange for Local Currency Expenditures on Projects*, http://www.adb.org/documents/policies/lending_forex/forex200.asp, at 23 November 2009.

⁴⁰ ADB, ‘The Asian Development Bank in the 1990s’, Panel Report, ADB, Manila, 1989. Cited in: ADB 2001, *Moving the Poverty Reduction Agenda Forward in Asia and the Pacific: The Longterm Strategic Framework of the ADB (2001-2015)*, p. vi, <http://www.adb.org/documents/Policies/LTSF/default.asp>, at 23 November 2009.

FINDINGS AND ANALYSIS

This section is organised institutionally, thematically and chronologically to outline the evolution of the policy framework within which judicial reform was positioned. This will show that judicial reform at ADB was initially relatively ad hoc, framed in response to requests for assistance from developing member countries. Over time, this response became increasingly articulated in terms of the Bank's strategy, notably formulation of governance policy and poverty strategy. Within this context, ADB's Office of General Counsel instituted an increasingly coherent 'law and policy reform' program in which judicial reform became a significant and clearly defined operational niche, which I will examine below.

POLICY FRAMEWORK

While ADB has undertaken various judicial reform activities from its inception in 1966, the Bank was conceived during the post-war period of rehabilitation and reconstruction, and focused on undertaking major infrastructure projects in its early years.⁴¹ Over the past decade, in particular, ADB formulated a number of organisational policies that have been directly influential in establishing its development approach to judicial reform. Of most relevance are ADB's governance policy of 1995, and its poverty reduction strategy of 1999.

GOVERNANCE POLICY

ADB's governance policy, *Sound Development Management*, provided the organisational rationale for judicial reform by pronouncing that a legal environment conducive to development is essential for all developing member countries. For the first time, this policy positioned the notion of governance at the core of ADB's mandate. Noting the Bank's prohibition against political activity, the policy defined governance in economic terms, as being the institutional environment in which citizens interact with themselves and the government, and focused on the ingredients for effective economic management reflecting what is described as 'a growing consensus' that markets generally allocate resources more efficiently.⁴²

This policy nominated the functions of governments as maintaining macroeconomic stability, developing infrastructure, providing public goods, preventing

⁴¹ ADB, *About Asian Development Bank*, <http://www.adb.org/about/serving-asia.asp>, at 23 November 2009.

⁴² ADB, *Governance: Sound Development Management* 1999, p. viii (dated: August 1995; published 1999) <http://www.adb.org/Documents/Policies/Governance/govpolicy.pdf>, 23 November 2009.

market failure and promoting equity.⁴³ The policy postulated the relationship between law and development as follows:

‘A legal environment conducive to development is essential for all developing member countries. It would cover the traditional concept of the rule of law, the existence of a stable and predictable legal system, as well as law reform for economic development ...’⁴⁴

It also emphasised strengthening legal frameworks for private sector development:

‘Promoting development of the private sector in general and that of the financial sector and securities markets in particular, requires an especially strong legal underpinning. This is needed because the system must protect private property, regulate transfers, and register titles, so that property can be used as collateral, thus enhancing credit and liquidity ... the enforceability of contracts and agreements is vital for the promotion of investment and trade.’⁴⁵

ADB then adopted an anti-corruption policy in 1998, building on the earlier policy of the World Bank, to address three objectives: to promote competitive markets, support anticorruption initiatives, and ensure the highest ethic standards.⁴⁶ The policy called for strengthening institutions that would advance transparency and accountability in developing member countries such as the courts.⁴⁷

ADB’s approach to governance has come to provide a significant and arguably the most consistent rationale for undertaking judicial reform. The Bank has increasingly conceptualised and justified its approach to judicial reform by reference to the foundation of its governance policy, which has its origins in the thinking of Max Weber, Douglass North and others of the school of new institutional eco-

⁴³The policy defines public goods as being those ‘that are jointly demanded and whose consumption by one individual does not diminish their availability to others. Education and health care are common examples of public goods.’ *Ibid.*, p. 5.

⁴⁴*Ibid.*, p. 38. The policy specifies that improvements in sector policy frameworks, legal training and ADR; transition to market-orientated systems, and land tenure in Pacific DMCs; systems to protect private property, regulate transfers, register titles, enforcing contracts are nominated as being vital for the promotion of trade and investment, pp. 39-40.

⁴⁵*Ibid.*, p. 40.

⁴⁶World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* 1997, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/coridx.htm>, at 23 November 2009.

⁴⁷ADB, *Anti-Corruption*, 1998, Manila, <http://www.adb.org/Documents/Policies/Anticorruption/anticorruption.pdf>, at 23 November 2009. See also: ABD, *Second Governance and Anticorruption Action Plan (GACAP II)* 2006, Manila, 8; ADB, *Promoting Good Governance: ADB’s Medium Term Action Plan* 2000, Manila.

nomics.⁴⁸ This conceptualisation created a significant policy-based alignment with the approach of the World Bank, which together with its tendency to rely on the World Bank for empirical research, is one of a number of key features of its approach.⁴⁹ There are some divergences in approach however, notably in access to justice and empowerment, reflecting the influence of Amartya Sen's thinking in particular.⁵⁰

POVERTY STRATEGY

In 1999, ADB adopted *Poverty Reduction Strategy: Fighting Poverty in Asia and the Pacific*, making poverty reduction the Bank's overarching goal and principal 'raison d'être'. The strategy defined poverty broadly as:

'[A] deprivation of essential assets and opportunities to which every human is entitled. ... Beyond income and basic services, individuals and societies are also poor – and tend to remain so – if they are not empowered to participate in making the decisions that shape their lives ...'.⁵¹

This strategy stated that poverty reduction and inequality eradication were a humanitarian priority.⁵² It promoted economic growth on the rationale that developing human and social capital increases political stability, raises productivity and enhances international competitiveness, leading to faster growth.⁵³ It then linked governance to poverty reduction through pro-poor policies and macroeconomic management, on the rationale that '(w)eak governance hurts (the poor) disproportionately.'⁵⁴ While judicial reform was not identified in this strategy, it was imported through governance which aimed to promote the rule of law in

⁴⁸ M. Weber, *Law in Economy and Society*, in M. Rheinstein (ed.) and E. Shils (transl.) 1954; M. Weber, 'Politics as a Vocation', in H. Gerth and C. Mills Wright (eds.), *From Max Weber: Essays in Sociology* 1954; North, *Institutions, Institutional Change, and Economic Performance*.

⁴⁹ While ADB formalised its governance policy prior to the World Bank, the intellectual leadership for many other policy-based initiatives, for example, anti-corruption can be traced to that source.

⁵⁰ Sen, *Development as Freedom*.

⁵¹ ADB, *Poverty Reduction Strategy: Fighting Poverty in Asia and the Pacific*, 1999, Manila, p. 5, http://www.adb.org/documents/Policies/Poverty_Reduction/Poverty_Policy.pdf, at 24 November 2009. The strategy notes that the World Bank's the 'dollar-a-day' poverty line and the UN's Human Development Index and Human Poverty Index continue to be used.

⁵² *Ibid.*, p. 6.

⁵³ *Ibid.*, p. 8.

⁵⁴ *Ibid.*, pp. 12-13.

contributing to poverty reduction.⁵⁵ Establishing this relationship beyond its endorsement in rhetoric has however presented the Bank with an imposing challenge as will be seen in this case study.⁵⁶

LONG-TERM STRATEGIES

ADB enshrined governance into its *Long-Term Strategic Framework: 2001-2015*, with sustainable economic growth and inclusive social development, as its three core strategies.⁵⁷ This strategy was reviewed at its mid-term in 2007 by a specially formed Eminent Persons Group (EPG). Their assessment, *Towards a New ABD in a New Asia*, found that tackling issues of economic success was the new challenge for the region, requiring a fundamental change in direction.⁵⁸

Perhaps unsurprisingly, not everyone shared this euphoric view of poverty reduction. Despite Asia’s ‘stellar’ growth in gross domestic product, there was a mounting concern that this was masking rapidly rising relative and absolute inequalities.⁵⁹

ADB recently approved its new *Long-Term Strategic Framework 2008-2020* (Strategy 2020). This strategy identifies governance and capacity development as one of five drivers of change, and provides a strategic framework for mainstreaming legal and judicial reform in the Bank’s operations. Specifically, support for

⁵⁵The strategy does discuss building social capital, and a more inclusive society, through antidiscrimination legislation, land reform, security of property and tenure rights, legal recognition of user groups, and accessible justice systems. *Ibid.*, p. 11.

⁵⁶A. Asra et al., ‘Poverty and Foreign Aid: Evidence from Recent Cross-Country Data’, working paper no. 65, ADB, Manila, 2005, at p. 19. See also: K. Pistor and P. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* 1998; C. Burnside and D. Dollar, ‘Aid, Policies, and Growth’, 90(4) *The American Economic Review* (2000), p. 847 at p. 864. The discourse over the existence and sufficiency of empirical evidence to justify reform approach is however much contested. Chemin, for further example, argues that ADB’s *Access to Justice* loan which focused on judicial reform among other elements, valued at USD 350 million or 0.1 percent of Pakistan’s 2002 GDP may have contributed an estimated increase to Pakistan’s GDP by 0.5 percent through improved judicial efficiency. M. Chemin, ‘The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan’s ‘Access to Justice Programme’, 93 *Journal of Public Economics* (2009), p. 114.

⁵⁷ADB, *The Asian Development Bank in the 1990s*, at pp. 14, 20. It postulated that ‘inaccessible, unpredictable, and inefficient legal systems that lack transparency also discriminate disproportionately against the poor. Similarly, corruption (a clear symptom of bad governance) often affects the weakest groups in society the most.’

⁵⁸ADB, *Toward a New Asian Development Bank in a New Asia*; Report of the Eminent Persons Group to The President of the Asian Development Bank, ADB, Manila, 2007, at p. 10, <http://www.adb.org/Documents/Reports/EPG-Report.pdf>, at 24 November 2009.

⁵⁹I. Ali and J. Zhuang, ‘Inclusive Growth toward a Prosperous Asia: Policy Implications’, working paper no. 97, ADB, 2007, at p. 4.

policy, legal and regulatory reform and institutional capacity are now identified as necessary conditions for ADB to be effective in its core operational areas. Mainstreaming governance, including legal and judicial reform, within this increasingly labyrinthine framework has potentially significant strategic implications though these may not yet be fully apparent, though it is noteworthy to observe that the significance of governance has been downgraded in ADB's latest strategic hierarchy.⁶⁰

On any reckoning, ADB's development policy approach has continued to evolve at an organisational level. This approach may be described as dynamic – if not volatile – traversing economic enablement, poverty reduction, governance and institutional integrity as justifications. This is indicative of tectonic tensions within the Bank's hierarchy of organisational priorities. For those charged with operational implementation, these policy shifts have required judicial reform to be justified first in economic terms, then institutionalist and good governance, and most recently empowerment.

As we shall see, this has required impressive intellectual elasticity and caused no end of 'retro-fitting' of policy justification. This is evident in ADB's Office of General Counsel, which designed and implemented judicial reform projects from conviction in their a priori importance, constantly rearticulating their justification to fit these ever-shifting formal policies.

IMPLEMENTATION

The Office of General Counsel (OGC) established and administered the Bank's 'law and policy reform' program, which included judicial reform. This program is significant because it provides evidence that in undertaking judicial and related reforms, the OGC acted proactively to both fill ADB's policy gap and provide continuity in institutional leadership. This required the OGC to devise and rearticulate a variety of justifications for this endeavour, which has most consistently been conceptualised as providing a means to implement the Bank's governance policy.

Since its inception in 1966, the OGC has been primarily responsible for providing advice and assistance on legal matters relating to the organisation, administration, finance, policies, and operations of ADB and its various operational departments.⁶¹ The OGC responded from time to time to a range of requests to

⁶⁰ ADB, *Strategy 2020: The Long-term Strategic Framework of the ADB 2008-2020* 2008, p. 10, <http://www.adb.org/Documents/Policies/Strategy2020/default.asp?p=policies>, at 24 November 2009.

⁶¹ ADB, *Office of the General Counsel* <http://www.adb.org/OGC/default.asp?p=aml>, at 24 November 2009.

address the needs of judicial and legal institutions in developing member countries.⁶² Since the mid-1980s, ADB started to support broader reforms which included law reform. Specific support for reforms in the law and justice arena began in 1991, and the first technical assistance advisory project started in 1993.⁶³

From the early 1990s, the OGC developed a vision for law and policy reform which articulated a growing recognition of the potential importance of judicial and legal reform to operationalise institutional aspects of ADB’s new governance policy. By 1995, General Counsel Metzger conceptualised the role of reform in terms reminiscent of Shihata, to set up appropriate legal frameworks in key sectors of developing economies: ‘Among the most significant challenges facing developing member country governments in the region is the development of new regulatory frameworks for economies ...’.⁶⁴

In 1998, the OGC presented an information paper on its vision for a law and development program to the board of ADB. This framed support through governance policy by developing legal frameworks as the means of promoting predictability, transparency, accountability and participation.⁶⁵ The rationale for this program was to:

‘create a policy legal and regulatory environment that is supportive of economic growth and of the socially-orientated objectives of environmental protection and the reduction of poverty ... With the growing realisation that the role of the private sector is indispensable in furthering economic growth, the Bank’s law and development activities have focused on the development of legal and regulatory frameworks that support private sector development.’⁶⁶

⁶² ADB, *Review of Law and Development Activities of the Asian Development Bank* OGC, Manila, 1998, <http://www.adb.org/Documents/Reports/IN42-98.pdf>, at 24 November 2009.

⁶³ ADB, *Technical Assistance for Interim Mekong Committee for Legal Training*, ADB Manila, 1991, <http://www.adb.org/projects/project.asp?id=25022>, at 24 November 2009. Also: ADB, *Technical Assistance to the Government of Mongolia for Developing Mongolia’s Legal Framework*, 1993; attached to and cited in ADB, *Project Performance Audit Report on the Mongolia Industrial Sector Program (Loan 1244-MON) in Mongolia*, ADB, Manila, p. 2, <http://www.adb.org/Documents/PERs/PE563.pdf>, at 24 November 2009.

⁶⁴ B. Metzger, ‘Opening Remarks Seminar on Legal Aspects of Regional Cooperation: Opening Remarks’, Seminar on Law and Development, Auckland, May, <http://www.adb.org/Documents/News/1995/nr1995053.asp>, at 23 November 2009. See also I. Shihata, ‘World Bank and Legal Technical Assistance: Initial Lessons’, policy research paper 1414, World Bank, Legal Department, Washington DC, 1995; I. Shihata, ‘Judicial Reform in Developing Countries and the Role of the World Bank’; Shihata, ‘The Role of Law in Business Development’.

⁶⁵ ADB, *Review of Law and Development Activities of the Asian Development Bank*. See also ADB, *Law and Development Bulletin*, Manila, 2003 http://www.adb.org/Documents/Periodicals/Law_Bulletin/bulletin03.pdf, at 24 November 2009.

⁶⁶ This ‘information paper’ did not embody a formal ADB policy position; OGC, *A Review of the Law and Development Activities of the Asian Development Bank*, 1998, p. ii, <http://www.adb.org/Documents/Reports/IN42-98.pdf>, at 4 December 2009.

This vision called for a more systematic approach to law and development which would prioritise capacity-building and institutional strengthening with an emphasis on continuing education and training, comprehensive judicial reform programs, and support for the institutional framework of the rule of law.⁶⁷ The OGC justified judicial and legal reforms by supporting the Bank's major development objectives of promoting economic growth, reducing poverty, improving the status of women, supporting human development and protecting the environment.⁶⁸ It is however noteworthy that the OGC was already aware of the lack of theoretical justification for ADB's formal assertion of the relationship of law and the economy, acknowledging the dearth of scholarship on the subject: '[T]here is no well developed and generally accepted theoretical model in which to place the Bank's or other agencies' law and development programming.'⁶⁹

As a matter of dialectic, it may be deduced that in the absence of either empirical data or a theoretical model the OGC acted out of conviction in initiating judicial reforms on behalf of ADB.

MITCHELL'S PUZZLE – EVOLVING JUSTIFICATIONS FOR LAW AND POLICY REFORM

Although this information paper was never formally adopted as policy, OGC set about replacing the earlier ad hoc responsive approach by developing its 'law and policy reform' program on a *de facto* basis.

Judicial reform has formed a significant focus in ADB's law and policy reform program.⁷⁰ In 1997, the OGC established a small Law & Policy Reform Unit to manage this program until 2005. During this time, it managed a range of projects, publications and reports.⁷¹

Following the introduction of ADB's poverty strategy in 1999, the justification for judicial reform continued to evolve. It was now reframed within the overarching goal of poverty alleviation to promote pro-poor sustainable economic growth, social development and human capability, and good governance. This was further refined to focus on five priority areas: to strengthen the enabling environment for

⁶⁷ *Ibid.*, in particular paras. 80-82 at pp. 29-31.

⁶⁸ *Ibid.*, p. 5; citing: ADB, *Medium-Term Strategic Framework 1995-8, 2005*, Manila.

⁶⁹ *Ibid.*, p. iii.

⁷⁰ ADB, *Law and Policy Reform: Frequently Asked Questions*, <http://www.adb.org/Law/faqs.asp#q4>, at 24 November 2009.

⁷¹ File notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R Clendon, C. Vandenebee and V. You, among others, in reference to implementation of ADB's program of Law and Policy Reform: OGC, *A Review of the Law and Development Activities of the Asian Development Bank*, 1998. The qualitative dimensions of this history are not accessible solely from documents published on the Bank's website.

economic growth, empower the poor by raising awareness of legal rights, enable the poor to exercise legal entitlements, support equality of access to justice, and contribute to regional cooperation.⁷²

In 2004, the OGC published an illuminating report which reviewed its experience and articulated ADB’s approach to law and policy reform. On the key issue of justification, Chief Counsel Mitchell was candid: ‘*Regardless* of whether one places emphasis on economic growth, social development or governance, it is important to recognise that law helps transform policy into reality on the ground’ [italics added].⁷³

Significantly, this report positioned the role of judicial and legal reform in what Mitchell described as the ‘puzzle’ of poverty alleviation:

‘ADB’s definition of poverty reduction recognises that a developing member country must have both the capacity to generate income through public and private sector endeavours and the policies and laws to ensure that its citizens have equal access to “essential assets and opportunities”. Legal and policy reform represents the building blocks for both pieces of the *puzzle* ... to demonstrate how ADB’s activities work at the nexus of the interactions between citizens, business and state institutions...’. [italics added]⁷⁴

In 2005, ADB’s President Kuroda reformulated these pieces of this ‘puzzle’ to justify judicial reform in terms of good governance and economic development:

‘[O]ne of those keys – perhaps the most important one, because it underlies all the others – is *good governance* (sic). Not just effective or efficient governance, but *good* governance: that system of rules, rule-making, and rule-enforcement that regulates the behavior of people and norms of society, upholds the law, and delivers timely justice to all – equally and fairly... a judiciary that holds the law above everything . . . and everyone . . . is indispensable (sic). Good, consistent jurisprudence based on law, as well as predictable and time-efficient resolution procedures are necessary for that sense of predictability, transparency, and accountability.’⁷⁵

⁷² ADB, *Law and Policy Reform in Asia and the Pacific: Ensuring Voice, Opportunity and Justice*, 2005, Manila, at pp. 4-5. Curiously, this was reduced to four priorities by E. Fischer: strengthening the enabling environment for economic growth, legal empowerment of the poor, access to justice, and regional cooperation. E. Fischer, ‘Law and Policy Reform Initiatives at ADB’, paper presented at the Orientation Seminar for DMCs, Manila, 2005, 14 September, <http://www.adb.org/Documents/Events/2005/DMC-Officials-Orientation-Program/ppt-fischer.pdf>, at 4 December 2009.

⁷³ Some of these 400 projects may have involved relatively small legal and/or judicial reform components. ADB, *Report on the Asian Development Bank’s Law and Policy Reform Activities in Support of Poverty Reduction*, OGC, ADB, 2004, Manila, at p. iii, <http://www.gsdc.org/go/display&type=Document&id=1000>, at 24 November 2009.

⁷⁴ ADB 2004, *ibid.*, p. 3.

⁷⁵ H. Kuroda, ‘Good Governance and the Judiciary’, 2005, speech delivered at the International Conference & Showcase on Judicial Reforms: Strengthening the Judiciaries of the 21st Cen-

JUSTIFICATION – AN EVER INCREASINGLY HEADY MIX

During the same period, Mitchell acknowledged a need to adopt an expanded definition of the legal system to address ADB's broader poverty reduction and development objectives.⁷⁶ He pointed to a need to move away from traditional, limited and formalistic definitions of the legal system which focused on courts.⁷⁷ This approach extended reform to encompass both formal and informal enforcement mechanisms, and recognise legal empowerment as a means of enabling the disadvantaged to access justice and use the law in a move towards a more pro-poor approach.⁷⁸

'Poor people face many barriers to exercising their human rights. ... Recognising these barriers has resulted in programs to improve the poor's access to justice institutions, support equality of access to justice, and reduce or eliminate discrimination in the courts' application and enforcement of laws and policies.'⁷⁹

This hybridising and continual re-branding of the theoretical rationale for judicial reform has continued, and reflects both a lack of any unifying empirically-grounded validation of the determinants of growth and the ever shifting development policy orientations of the Bank. These rationales have traversed a spectrum of conceptions from economic market-strengthening and poverty alleviation, through neo-liberal institutionalism, to political notions of good governance, transparency and accountability, and most recently empowerment.⁸⁰ While invariably framed to conform

ture, Manila, 29 November, <http://www.asianlii.org/asia/other/ADBLPRes/2005/22.html>, at 24 November 2009.

⁷⁶This redefinition was first adopted in 2001 in the Bank's largest law and development activity: ADB, *Report and Recommendation of the President to the Board of Directors on a Proposed Loan to the Islamic Republic of Pakistan for the Access to Justice Program*, 2001, Manila, p. 15, http://www.adb.org/Documents/RRPS/PAK/rrp_32023.pdf, at 24 November 2009; See also: ADB, *Special Evaluation Study on ADB Support to Law and Justice Reform*, 2007, Manila, <http://www.adb.org/Documents/Evaluation/SES/ADB-Law-Justice-Reform/SES-Law-Justice-Reform.pdf>, at 24 November 2009.

⁷⁷ADB, *Report on the Asian Development Bank's Law and Policy Reform Activities in Support of Poverty Reduction*, OGC, 2004, Manila, at p. 17.

⁷⁸ADB, *Law and Policy Reform in Asia and the Pacific: Ensuring Voice, Opportunity and Justice*, 2005, Manila, at p. 5.

⁷⁹A. Mitchell, 'Investing in Justice', 2005, speech delivered at the International Conference & Showcase on Judicial Reforms: Strengthening the Judiciaries of the 21st Century, Manila, 29 November 2005, <http://www.asianlii.org/asia/other/ADBLPRes/2005/23.html>, at 24 November 2009.

⁸⁰These reforms have included supporting the courts, law drafting agencies, prosecution services, police and prisons; with some support to the bar and civil society to promote access to justice through legal aid, legal literacy and promotion of the use of legal rights. Support was usually provided to formal enforcement mechanisms that support and protect rights and obligations, and a

to ADB’s charter, the latest addition to this increasingly heady mix has been the seminal thinking of Sen on human opportunity, then taken up by others such as Anderson and Golub.⁸¹ As we shall shortly see, this continual shift in the stated purpose for judicial reform had significant implications in the Bank’s subsequent ability to define and demonstrate success in this endeavour.

Despite this continual re-dressing of justification, there has been little substantial change in the Bank’s approach to judicial reform or the content of its activities.

REFORM ACTIVITIES

ADB’s engagement in judicial and legal reform grew steadily from the early 1990s and peaked in Pakistan’s *Access to Justice Program* loan, valued at USD 350 million one decade later.

During this period, the OGC managed a portfolio of law and policy projects. These were expanded to include: improving the organisational mechanism of judicial systems; building capacity and institutionalising training in courts and related agencies; drafting laws and reforming legal frameworks; promoting transparency and disseminating legal information; and conducting research and dialogue in strategic areas of law and policy reform.⁸² It designed and implemented a range of technical assistance activities in key law and policy reform areas, with an emphasis on promoting governance and the rule of law. More recently, there has been some inclusion of the informal sector, legal empowerment including that of the bar, alternative dispute mechanisms and legal aid, and social accountability.⁸³

lesser to extent informal mechanisms. File notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R Clendon, C. Vandenabeele and V. You, among others.

⁸¹ Sen, *Development as Freedom*; M.R. Anderson, ‘Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs’, working paper no. 178, Institute of Development Studies, Brighton, 2003; S. Golub, ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’, working paper no. 41, Carnegie Endowment for International Peace, 2003; S. Golub, ‘Legal Empowerment: Impact and Implications for the Development Community and the World Bank’, in C. Sage and M. Woolcock (eds.), *The World Bank Legal Review, Law, Equity, and Development*, Vol. 2, 2006, p. 167.

⁸² ADB, *Law and Policy Reform in Asia and the Pacific: Ensuring Voice, Opportunity and Justice*, p. 6.

⁸³ ADB, *Departments and Offices*, 2009, <http://www.adb.org/Help/index/D.asp>, at 24 November 2009. Also H. Sharif, ‘Law and Policy Reform: an Overview’, in ADB, *Challenges in Implementing Access to Justice*, OGC, ADB, Manila, 2005, p. 9 at p. 10; G. Atay, ‘Legal Aspects of ADB Operations’, paper presented at the Orientation Seminar for DMCs, Manila, 2002, 19 November, http://www.adb.org/Documents/Events/2002/RETA5927/Gulen_Atay.pdf, at 24 November 2009.

The OGC published annual reports of its law and policy reform program between 1999 and 2005. These annual reports span the range of current issues in legal and judicial reform and provide a body of substantive resources of relevance to the Bank, developing member countries and academic institutions throughout the region.⁸⁴ It also published substantive works which cover topics from insolvency to legal empowerment, judicial independence, access to justice, legal identity, criminal justice and competition regulation.⁸⁵ These works are useful in providing insights into specific project activities across the region during the period, and have provided an analysis of those projects in each annual review.⁸⁶

⁸⁴ OGC's annual Law and Policy Reform Reports 1999-2005: *Law and Development in ADB: Insolvency* (1999) http://www.adb.org/Documents/Others/Law_ADB/l&d-1999.pdf; *Law and Development in ADB: Insolvency Law Reform* (2000), http://www.adb.org/Documents/Others/Law_ADB/lpr_2000_2_prelims.pdf; *Law and Development in ADB: Legal Empowerment: Advancing Good Governance and Poverty Reduction* (2001) http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.pdf; *Law and Development in ADB: Guide to Moveable Registries* (2002), http://www.adb.org/documents/reports/movables_registries/registry_guide.pdf; *Law and Policy Reform at the ADB: Judicial Independence* (2003); http://www.adb.org/Documents/Reports/Law_Policy_Pov_Red/law_and_policy.pdf; *Law and Development in ADB: Challenges in Implementing Access to Justice* (2005), <http://www.adb.org/documents/reports/law-policy-reform/legal-reform.pdf>, all at 24 November 2009.

⁸⁵ See, e.g., ADB, *Legal Identity for Inclusive Development*, 2007, <http://www.adb.org/documents/books/legal-identity/legal-identity.pdf>, at 24 November 2009.

⁸⁶ Without attempting an exhaustive survey of the full range of the Bank's law and policy activities, it is possible to cross-reference a range of identified projects in the narrative of OGC's annual reviews, with other project-level documentation available under the Bank's public information policy on its web-site, specifically, *Technical Assistance Reports* (defined as a recommendation to the Board or President to finance a technical assistance project), at: <http://www.adb.org/Projects/reports.asp?key=reps&val=TAR>, at 25 November 2009; and, *Technical Assistance Completion Reports* (which are prepared within 12 months after project completion, in order to improve planning, formulation, and implementation of future projects with the benefit of the project experience) at: <http://www.adb.org/Projects/reports.asp?key=reps&val=TCR>, at 25 November 2009, including: TA2853 VIE, 31105 VIE, TA2823 VIE, TA4060 VIE, TA3613 VAN, TA3613 VAN, 312.01 VAN, TA36427 CAMB, TA3577 CAM, TA3790 BHU, TA2967 MON, TA30539 MON, SSTA2896MALD, TA3389 MALD, 32270 MALD, RETA5640, RETA5731 + 30150, RETA5895, TRA33274, RETA 5658, RETA5987 + OTH 35038, TA3015 PAK, TA3366 VAN, TA3433 PAK, RETA 5967, 32023 PAK, RETA 6188. Reference is also made to file notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R. Clendon, C. Vandenabeele and V. You, among others, in reference to implementation of ADB's program of Law and Policy Reform. See also project documentation for 36 projects represents 51.4 percent of the total of 70 law and policy reform projects identified by the OGC in a draft information paper, 2007: <http://www.adb.org/Documents/Evaluation/SES/ADB-Law-Justice-Reform/SES-Law-Justice-Reform-App1.pdf>, at 24 November 2009.

Analysis of these project activities provides the basis for the following observations: with the notable exception of Pakistan’s AJP,⁸⁷ the usual size of ADB’s technical assistance in law and policy is relatively small when assessed against the Bank’s overall financial capacity.⁸⁸ In the early 1990s, the stated justification for these projects was predominantly economic and market-strengthening though this later evolved to reflect ADB’s governance focus; the later justification is an invariable – though not necessarily cogent – conflation of both.⁸⁹ The capacity-building approaches of these projects may be classified into five categories: professional, institutional, organisational, policy and knowledge management.⁹⁰ However, the most common points of engagement were institutions dedicated to the training of judges and/or lawyers, or occasionally ministries of justice and/or the courts – in effect, training was a unifying element of engagement strategy across most activities.⁹¹ About half of these activities were framed within some form of sequenced engagement rather than being one-off.⁹² Finally, ADB generally participated as the sole donor in reform programs rather than in a consortium with others.⁹³

⁸⁷ ADB, *Report and Recommendation of the President to the Board of Directors on a Proposed Loan to the Islamic Republic of Pakistan for the Access to Justice Program*, 2001, Manila. (Program loans 1897/98-PAK for USD 330 million, and TA Loan 1899-PAK for USD 20 million); http://www.adb.org/Documents/RRPS/PAK/rrp_32023.pdf, at 24 November 2009.

⁸⁸ The average size of sampled projects varied from USD 113,166 (x 15, or 41.6 percent, small-scale TAs), to USD 674,272 (x 11, or 30.5 percent, of regional TAs), to USD 717,500 (x 10, 27.7 percent, of advisory TAs).

⁸⁹ What is remarkable about this is the omission of any justification by reference to the development of human capital, and the preservation of safety and state security which are becoming increasingly prominent in the post 9/11 global discourse.

⁹⁰ These categories were made up as follows: *Professional* – usually involved intensive foundational short (2-3 weeks) re-training of government lawyers of regional basis; *Institutional* – capacity-building of regional or national training institutions for judges or lawyers involving 6-9 months study-tours and training-of-trainers, research and development of substantial training materials, design of curricula, and limited technical support for delivery of initial ongoing training activities; interestingly, assistance usually focused at the professional rather than academic levels; *Organisational* – usually need assessments for establishing or restructuring state justice institutions; *Policy* – advisory assistance to develop policies, draft new laws, staff training and occasional public education; *Knowledge management* – more recently, involving thematic research, study-tours, conferences, workshops and publications. <http://www.adb.org/Documents/Evaluation/SES/ADB-Law-Justice-Reform/SES-Law-Justice-Reform-App1.pdf>, 5 December 2009.

⁹¹ ABD rarely engaged directly with the bar, civil society entities or the local community in its judicial reform activities, with the notable exception of AJP in Pakistan.

⁹² 19 projects, or 52.7 percent of sample, comprised TAs in support of loans, SSTAs as preparatory TA/RETAs, RETAs generating localized TAs, and on occasion as follow-up to earlier TAs.

⁹³ 3 projects, or 8.3 percent of sample; one other project led to subsequent (unplanned) World Bank engagement.

Most recently, law and policy reform has been increasingly 'mainstreamed' into larger loan programs administered by operational departments, though it remains to be seen what the future holds following ADB's evaluation of this portfolio, as discussed below.⁹⁴

In sum, by 2007, ADB had managed an increasingly substantial law and policy reform program, consisting of more than four hundred regional, advisory, and small-scale technical assistance projects in judicial and legal reform with a total value estimated at USD 420 million. An unquantifiable number of additional law reform and training activities were bundled within other loans.⁹⁵ Directly managed by the OGC, some seventy of these projects focused on legal and judicial policy reform, institutional reform and legal empowerment. As we have seen, these were aimed at addressing a number of priority areas such as strengthening policy, empowering awareness, improving access and contributing to cooperation. An urgent need to bring greater programmatic focus to this work was observed.⁹⁶

REFLECTIONS ON EXPERIENCE

The OGC monitored its experiences from time to time in a number of ways. It reported generally high levels of appreciation expressed by developing member countries.⁹⁷ These were consistent with the OGC's internal self-assessments which usually self-rated performance as 'successful' or 'very successful' in project comple-

⁹⁴ ADB, *Report on the Asian Development Bank's Law and Policy Reform Activities in Support of Poverty Reduction*, OGC, ADB, 2004, Manila, at p. 2, http://www.adb.org/Documents/Reports/Law_Policy_Pov_Red/Law_Policy.pdf, at 5 December 2009.

⁹⁵ While this is described as a 'minimum estimate', it includes all projects which have any judicial or legal reform aspect, and arguably inflates the standing of this endeavour which is dedicated terms is much smaller. ADB's evaluation in 2009 categories only 44 dedicated judicial reform projects. ADB, *ADB Technical Assistance for Justice Reform in Developing Member Countries*, IED, ADB, 2009, Manila, at p. 11, <http://www.adb.org/Documents/SES/REG/SES-REG-2009-06/SES-REG-2009-06.pdf>, at 25 November 2009. Precise quantification is difficult where a component of legal or judicial reform is incidentally included in other reform programs. ADB, *Challenges in Implementing Access to Justice Reforms*, OGC, 2007, Manila, at p. 7, <http://www.adb.org/documents/reports/law-policy-reform/legal-reform.pdf>.

⁹⁶ File notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R. Clendon, C. Vandenaabeele and V. You, among others, in reference to ADB, *A Review of the Law and Development Activities of the Asian Development Bank*, OGC, 1998, Manila; and ADB, *Report on the Asian Development Bank's Law and Policy Reform Activities in Support of Poverty Reduction*, 2004, Manila. <http://www.gsdc.org/go/display&ctype=Document&cid=1000>, at 24 November 2009.

⁹⁷ ADB, *Medium-Term Strategic Framework 1995-8*, 1998.

tion reports.⁹⁸ The OGC also discerned a culture shift on the value of judicial and legal reform in both ADB and developing member countries, which has elevated the standing of governance reform and led to a range of improvements in justice systems.⁹⁹ This is unsurprising and confirms an internal diagnosis of positive bias across all ADB’s projects.¹⁰⁰ This experience has been variously discussed by OGC.¹⁰¹ These discussions have usually not offered any empirical, measurable evidence in terms of impact, though Sharif does endorse Armytage to demonstrate improvements in court disposals, inferential of enhanced access to justice, in Pakistan.¹⁰²

Closer scrutiny of the available project completion reports reveals markedly variable project quality. Significant weaknesses have been identified by the Bank’s own evaluation department in the design and development logic in the projects’ technical assessment frameworks relating to: harmonisation of project objectives with institutional goals; specification of measurable performance targets; and the collection baseline measures and data on results. These weaknesses have impeded any systematic, quantitative evaluations of outcome or results over more than a decade of activity.¹⁰³

⁹⁸ Synthesis of publicly available technical assistance completion reports; ADB, *Technical Assistance Completion Reports*, 2009, <http://www.adb.org/Projects/reports.asp?key=reprs&val=TCR>, at 25 November 2009.

⁹⁹ File notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R. Clendon, C. Vandenebee and V. You, among others, in reference to implementation of ADB’s program of Law and Policy Reform.

¹⁰⁰ ADB, *Performance of Technical Assistance*, OED, 2007, Manila, p. 37, <http://www.adb.org/Documents/SES/REG/sst-reg-2007-02/SST-REG-2007-02.pdf>, at 25 November 2009.

¹⁰¹ See, for example: A. Mitchell, ‘The Role and Rule of Law in Asia’, speech delivered at the Association of Harvard University Alumni Clubs of Asia, Manila, 20 November 2004, <http://www.asianlii.org/asia/other/ADBLPRes/2004/8.html>, at 25 November 2009. Also E. Fischer, ‘Lessons Learned from Judicial Reform: The ADB Experience’, 2006, speech delivered 20 October 2006, <http://www.adb.org/Media/Articles/2006/10829-speech-Eveline-Fischer/>, at 25 November 2009.

¹⁰² H. Sharif, ‘Law and Policy Reform: an Overview’, in ADB, *Challenges in Implementing Access to Justice*, OGC, ADB, Manila, 2005, p. 9 at p.10, <http://www.adb.org/documents/reports/law-policy-reform/legal-reform.pdf>, at 25 November 2009. Also Armytage, ‘Pakistan’s Law & Justice Sector Reform Experience – Some Lessons’.

¹⁰³ ADB, *Special Evaluation Study On Performance of Technical Assistance*, 2007, Manila, p. vi, <http://www.adb.org/Documents/SES/REG/sst-reg-2007-02/SST-REG-2007-02.pdf>, at 25 November 2009. See also ADB, *ADB Technical Assistance for Justice Reform in Developing Member Countries*, IED, 2009, Manila, <http://www.adb.org/Documents/SES/REG/SES-REG-2009-06/SES-REG-2009-06.pdf>, at 25 November 2009.

EVALUATION SYSTEMS

The Independent Evaluation Department (IED) is responsible for administering the paraphernalia of monitoring and evaluation activities for ADB, which has endeavoured to strengthen these functions in recent years.

Traditionally, IED has focused on appraising the efficiency of reform activities. Its mission is to help ADB become a learning organisation that continuously improves its development effectiveness and is accountable to its stakeholders.¹⁰⁴ Its core task is the assessment of policies, strategies, country programs and projects to determine their relevance, effectiveness, efficiency, and sustainability.¹⁰⁵ In recent years, its focus has shifted from assessing whether project implementation had achieved expected benefits, to shaping ongoing decision-making, though it is acknowledged that there is a long feedback loop from approval to the completion of an operation, when development results can be assessed:

‘It takes 7 years or more to implement projects or programs after Board approval and for completion and evaluation reports to be prepared... The completion and evaluation reports for most of the projects and programs approved in the 1990s were prepared between 2000 and 2005.’¹⁰⁶

To illustrate this proposition, the law and development reform program which was formalised in 1995 only underwent evaluation in 2007; and its evaluation report was only released in September 2009 – some fifteen years later.¹⁰⁷ This lead-time has major implications for ADB’s management of knowledge.

ADB has embraced the global trend towards managing-for-development-results which is enshrined in the *Paris Declaration on Aid Effectiveness*.¹⁰⁸ It has also

¹⁰⁴ ADB, *Independent Evaluation Department*, <http://www.adb.org/IED/default.asp>, at 25 November 2009.

¹⁰⁵ ADB, *Independent Evaluation at the Asian Development Bank*, OED, 2007, Manila, p. 1, <http://www.adb.org/evaluation/documents/Independent-Evaluation/Independent-Evaluation-ADB.pdf>, at 25 November 2009. See also: ADB, *Learning Lessons in ADB* OED, 2007, Manila, <http://www.adb.org/Documents/Reports/Learning-Lessons-ADB/Strategic-Framework-2007-2009.pdf>, at 25 November 2009.

¹⁰⁶ ADB, *Independent Evaluation at the Asian Development Bank*, Manila, OED, 2007, Manila, p. 11.

¹⁰⁷ ADB, *ADB Technical Assistance for Justice Reform in Developing Member Countries*, IED, 2009, Manila, p. 11, <http://www.adb.org/Documents/SES/REG/SES-REG-2009-06/SES-REG-2009-06.pdf>, at 25 November 2009; below, n. 124. Other major donors who may have started earlier, notably the World Bank and USAID, are yet to conduct comprehensive thematic evaluations of their judicial and legal reform portfolios.

¹⁰⁸ *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability*, 2005, <http://www.oecd.org/dataoecd/11/41/34428351.pdf>, at 5 December 2009.

endorsed the growing international recognition of the need for more and more rigorous impact evaluation. This is particularly apposite in the global arena of judicial reform which has been consistently critiqued since the earliest days of ‘law and development’ as lacking systematic evaluation until the present time.¹⁰⁹ It now aims to conduct one impact evaluation annually, though this remains to be seen in future.¹¹⁰

Hence, it will be many years before ADB will have developed and routinised impact evaluation as a regular feature of its evaluation practice. In the meantime, its evaluation process will continue to rely mainly on process-based assessments of performance outputs, as it now has to this point.

DEVELOPMENTAL CONSIDERATIONS – WHAT ADB SAYS; WHAT IT DOES

While ADB has committed itself to the *Paris Principles* and notably to improving development effectiveness, a review of practice demonstrates that, contrary to rhetoric, development effectiveness is *not* necessarily trumps.

In relation to development effectiveness, there is evidence that highlights an institutional conflict within ADB which arises from its dual identities as a financial institution and a development agency.¹¹¹ In 2003, ADB committed itself to improving the effectiveness of its operations through a program of managing-for-development-results. In 2007, it reviewed its progress in implementing this commitment to find that its organisational culture continued to emphasise achieving loan approvals, disbursements and loan targets as opposed to focusing more actively on development results.¹¹² In effect, lending money continues to trump development effectiveness.¹¹³

¹⁰⁹This critique of evaluation has a lengthy provenance, from Trubek to Hammergren, above, n. 33.

¹¹⁰ADB 2007, *Independent Evaluation at the Asian Development Bank*, OED, ADB, Manila, pp. 25, 27, <http://www.adb.org/evaluation/documents/Independent-Evaluation/Independent-Evaluation-ADB.pdf>, at 4 December 2009.

¹¹¹ADB 2007, *Managing for Development Results in the ADB: a preliminary assessment*, OED, ADB, Manila, p. vi: Staff survey results indicate that there is a common belief among international staff that ADB’s culture emphasizes achieving loan approvals, disbursements, and lending targets as opposed to focusing more actively on development results, <http://www.adb.org/Documents/SES/REG/SST-REG-2007-32/SST-REG-2007-32.pdf#160609>, at 5 December 2009.

¹¹²While ADB’s concern to improve development results preceded the *Paris Declaration on Aid Effectiveness* 2005, this declaration evidently regorganised attention to improving the Bank’s overall results-orientation. ADB 2006, *Managing for Development Results in the ADB: Revised Action Plan* ADB, Manila, p. 1, <http://www.adb.org/Documents/Policies/Revised-Action-Plan/MfDR-Revised-Action-Plan.pdf>, at 25 November 2009.

¹¹³ADB, *Managing for Development Results in the ADB: a preliminary assessment*, OED, 2007, Manila. ADB defines MfDR ‘as a management approach to improve planning, monitoring and

In relation to capacity-development, there is evidence of a dawning institutional recognition of the complexity of the development effectiveness. In 2007, ADB assessed its capacity-building approach which it found to be one of its most intractable challenges, with progress being disappointingly slow.¹¹⁴ It found that there was a heavy emphasis on training which was, in effect, excessively relied on as the primary and often only facilitator of change.¹¹⁵

ADB has acknowledged the need for a political economy approach to development which recognises complex interrelationships between political and economic institutions and processes. There is however a marked lag between this formal endorsement and actual project management practice, where reforms have continued to rely heavily on technical inputs that have relatively limited policy impact.¹¹⁶

Finally, in relation to knowledge, ADB has committed to becoming a learning institution in its *Long-Term Strategic Framework* for 2001–2015.¹¹⁷ There is however another gap between this commitment and what may be described as its more pragmatic approach in practice.¹¹⁸ In a review conducted in 2007, it was found that a fundamental paradigm shift was required to improve the Bank's organisational and learning culture, management systems, information technology solutions, community of practice, and business processes for lesson learning.¹¹⁹

evaluating operations in order to achieve and sustain intended development results. It aims to help managers answer three key questions: are we being effective, how do we know we are, and do we use this information to determine future action?' ADB, *Managing for Development Results in the ADB: Revised Action Plan* ADB, 2006, Manila, p. 1, <http://www.adb.org/Documents/Policies/Revised-Action-Plan/MfDR-Revised-Action-Plan.pdf>, at 25 November 2009; MfDR is a management strategy that focuses on using performance information to improve decision-making, using practical tools for strategic planning, risk management, progress reporting and outcome evaluation. It stresses using intended results rather than inputs (outputs/impacts) as the starting point to managing development, constructing a results-chain to guide measuring, monitoring and reporting activities at the planning, implementation and evaluation stages.

¹¹⁴ ADB, *Integrating Capacity Development in Country Programs and Operations: Medium-Term Framework and Action Plan*, 2007, Manila, p. 1, <http://www.adb.org/documents/policies/integrating-capacity-development/integrating-capacity-development-2007.pdf>, at 25 November 2009.

¹¹⁵ *Ibid.*, p. 12.

¹¹⁶ G. Abonyi, 'Towards a Political Economy Approach to Policy-based Lending', working paper no. 14, ADB, 2002, p. 9; http://www.adb.org/Documents/ERD/Working_Papers/WP014.pdf, at 25 November 2009.

¹¹⁷ ADB, *Long Term Strategic Framework (2001-2015)* 2001, Manila, p. 16.

¹¹⁸ ADB, *Knowledge Management at ADB*, 2004, Manila, p. 13, <http://www.adb.org/Documents/Policies/Knowledge-Management/knowledge-management.pdf>, at 29 November 2009. It defined knowledge as 'understanding the why, what, how, who, when, and where relative to taking some action. Knowledge is the product of organization and reasoning applied to raw data', at p. 4.

¹¹⁹ ADB, *Learning Lessons in ADB*, OED, 2007, Manila, p. vi, <http://www.adb.org/Documents/Reports/Learning-Lessons-ADB/Strategic-Framework-2007-2009.pdf>, at 29 November 2009.

EVALUATION OF TECHNICAL ASSISTANCE

In 2007, ADB reviewed the overall effectiveness of its technical assistance advisory projects – including judicial reform – which mainly involve capacity-building activities focusing on policy reform, agency functioning, skills transfer and/or training.¹²⁰ This review found that almost one-third of technical assistance projects were rated as being not been successful.¹²¹ The review found a litany of deficiencies, concluding that staff were under-exposed to policy reform, capacity-building and change management.¹²²

The following year ADB reviewed its project performance management system to find a range of factors associated with lack of success, including deficient capacity-building, insufficient supervision during implementation, less than rigorous internal review, inadequate technical analysis and inappropriate project design.¹²³

¹²⁰ Activities categorised as being: general reform (95 percent), recommendations for policy reform (88 percent), recommendations for functioning of agency (79 percent), seek to transfer skills (75 percent), training staff (74 percent). ADB, *Country Studies from the 2007 Special Evaluation Study on Performance of Technical Assistance*, OED, 2007, Manila, <http://www.adb.org/Documents/Evaluation/Case-Studies/CS-Country-Studies-Analysis/CS-Country-Study-Analysis.pdf>, at 25 November 2009.

¹²¹ ADB, *SES: On Performance of Technical Assistance*, 2007, Manila, at p. vi, <http://www.adb.org/Documents/SES/REG/sst-reg-2007-02/SST-REG-2007-02.pdf>, at 4 December 2009. See also ADB, *Country Studies from the 2007 Special Evaluation Study on Performance of Technical Assistance*, OED, 2007, Manila, p. 44. See also ADB, *Independent Evaluation at the Asian Development Bank*, OED, 2007, Manila, at p. 24, <http://www.adb.org/evaluation/documents/Independent-Evaluation/Independent-Evaluation-ADB.pdf>; See also ADB, *Learning Curves: Performance of Technical Assistance Manila*, OED, 2007, Manila, <http://www.adb.org/Documents/Evaluation/Learning-Curves/SES/LC-Performance-Technical-Assistance.pdf>, at 25 November 2009.

¹²² These deficiencies included that projects often lacked clarity in strategic direction and were of mixed design quality; their objectives were donor-driven and varied from the attainable to the complex and unrealistic; they were generally not owned or country-led, and often designed incrementally as a one-off rather than as part of a long-term strategic engagement process, with weak follow-up on the implementation of results and recommendations. Additionally, there was an absence of clearly monitorable indicators in many design frameworks, with generally weak management, implementation and performance monitoring, and an over-all weak knowledge management with little evidence of lessons being incorporated in TA designs. ADB 2007, *Country Studies from the 2007 Special Evaluation Study on Performance of Technical Assistance*, OED, ADB, p. 42.

¹²³ ADB, *Project Performance and the Project Cycle*, 2008, Manila, <http://www.adb.org/Documents/SES/REG/SST-REG-2008-38/SST-REG-2008-38.pdf>, at 25 November 2009. See also ABD, *Learning Curves: Project Performance and the Project Cycle* OED, 2008, Manila, <http://www.adb.org/Documents/Evaluation/Learning-Curves/SES/LC-Project-Performance-Project-Cycle.pdf>, at 25 November 2009.

EVALUATION OF JUDICIAL REFORM

In 2009, ADB conducted its first formal evaluation of justice reform projects during the period 1991-2008. This evaluation rated those projects as 'successful' on the basis that they had helped to increase awareness of the need to improve legal empowerment, access to justice and judicial independence, and had undertaken capacity building. It also assessed them as being 'effective' measured in terms of the extent to which they had delivered their envisioned outputs including reports, studies and training.¹²⁴

While affirming the importance of justice reform, the evaluation found that justice reform was ad hoc, strategically peripheral and lacked any clearly planned approach. It found that projects were generally poorly designed, lacked baseline measures, and were particularly weak in defining impacts, outcomes, and indicators, and their causal links. Project objectives were conflated, development logic confused, and monitoring frameworks consistently focused on outputs, with 'negligible evaluative value' beyond monitoring the performance of consultants. It found that justice reform has been given low priority because projects were not designed to demonstrate tangible development impacts which could be evaluated.¹²⁵ Significantly, because projects had difficulty in demonstrating measurable evidence of development impact, they competed poorly for internal funding.¹²⁶

CONCLUSIONS

What can be drawn from this experience for the purpose of building or refining our understanding of the theory, practice and evaluation of judicial reform?

ADB's experience of practice is significant in demonstrating the proposition that developing a judicial reform approach has evidently been an uncharted endeavour, or continuing journey, with numerous challenges. These challenges have existed at the foundational level of conceptualising a consistent, clear and compelling policy approach to articulate what judicial reform is supposed to achieve. This

¹²⁴ ADB, *ADB Technical Assistance for Justice Reform in Developing Member Countries*, IED, 2009, Manila, p. 11, <http://www.adb.org/Documents/SES/REG/SES-REG-2009-06/SES-REG-2009-06.pdf>, at 25 November 2009. This author served as an independent expert on a part of this evaluation. The evaluation sample comprised 22 of the 44 justice reform projects conducted which provided a total approved amount of USD 19 million for advisory assistance to individual DMCs and USD 6.6 million for regional studies, conferences, and training programs. Of these, 11 TAs were small-scale of USD 150,000 or less; 33 TAs provided more than USD 150,000, five of which provided more than USD 1 million. Of the 44 TAs, 33 were processed and administered by OGC and 11 by operational or regional departments.

¹²⁵ *Ibid.*, at p. 26.

¹²⁶ *Ibid.*, at p. 24.

has affected not only what reforms were undertaken, but also how success is to be measured, whether in terms of market enablement, good governance, poverty reduction or empowerment. These difficulties have been compounded by an historic and continuing under-investment in systematic, rigorous evaluation which has in turn hindered the ability to measure impact, demonstrate results and inform the ongoing refinement of approach.

SIGNIFICANCE FOR THE PURPOSE OF JUDICIAL REFORM

I now offer three observations on the central issues of development purpose and effectiveness.

First, ADB has exhibited an institutional ambivalence to judicial reform which is apparent in the diverse rationalisations of its policy approach ranging from market enablement, to poverty alleviation, good governance and, most recently, empowerment. This reform has *never* held the status of a formal ADB policy.¹²⁷ At the institutional level, ADB’s most consistent rationale for judicial reform over the years has been the promotion of good governance, variously conceptualised as providing the means to alleviate poverty. The organisational status of governance has however itself evidently been volatile, first elevated in the *Long-Term Strategic Framework* of 2001, and then relegated in the revised *Long-Term Strategy 2020*. Consequently, the status of judicial reform has been – and continues presently to be – organisationally uncertain. It may be argued that ADB’s formal ambivalence to judicial and legal reform may reflect nothing more than its monolithic but unavoidably multifaceted nature. There has, however, also been a disconcerting lacuna of articulated policy in the focal arena of judicial and legal reform, though it should be emphasised that this was not for want of trying on the OGC’s part. What this evidence suggests is the existence of a process of policy boiler-plateing with which projects were – usually retrospectively – institutionally dressed to mask Mitchell’s ‘puzzle’, i.e., the acknowledged lack of any coherent theory or compelling, empirical foundation for this endeavour. While this trend was necessitated by major macro-level reformations of the Bank’s policy position during this period, it does indicate that in practice the various articulations of the rationale for ADB’s law and policy reform program were being re-dressed for what was already being done, rather than steering it.

Second, ADB’s championship of judicial reform has been a priori and conviction-based, rather than being knowledge-based, or informed by empirical evidence

¹²⁷ The OGC paper on law and development activities of 1998 only held the status of a ‘Board information paper’; that is, it did *not* embody a formal ADB policy position. Telephone discussion between author and Hamid Sharif, Assistant General Counsel of ADB at that time, on 25 September 2009.

and the systematic evaluation of experience. This is not to suggest that ADB eschewed empirical research, but rather that its role was limited and non-determinative. Given the existence of concerns over the lack of any coherent theory or empirical validation, *why did ADB still push on with judicial reform?* The answer to this question is that ADB established its law and policy reform program in response to the advocacy of the OGC that it was important: this is clearly attested by Mitchell and subsequently by ADB's own evaluation.¹²⁸ Driven by the OGC's conviction, the reform process may ultimately be empirically validated through the work of Chemin and others, in due course. The hiatus in ADB's policy leadership enabled, or obliged, the OGC to champion its own vision of the importance of judicial reform. This impelled the OGC counsel to establish and manage the 'law and policy reform' program. In effect, the OGC organised and described these activities to conform to rationale of ADB's reform program as formally articulated.

Third, an analysis of the documented evidence presents a strangely mixed, even internally conflicted, picture of ADB's institutional orientation to development effectiveness. On the one hand, there is consistent organisational evidence of ADB's mounting concerns to improve its development effectiveness. Even before the *Paris Declaration* in 2005, these concerns are discernible in a range of operational initiatives to introduce management-for-development-results, improve capacity-building approaches, and integrate monitoring and evaluation in the project performance management system. On the other hand, there has been a surprising lack of internal proficiency in capacity-building which is a core tool of technical assistance. Only recently has this tool been extended beyond training in the development of human capital. Similarly, a more sophisticated political-economy vision of change has superseded the purely technical approach. Historically, there has been surprisingly little empirically-based research to guide reform endeavours, and ADB is only sometimes behaving as a knowledge-based institution.¹²⁹ Moreover, the Bank's commitment to evaluation, while rhetorically long-standing, has been limited to focusing on efficiency rather than impact.

¹²⁸ See ADB, *Report on the Asian Development Bank's Law and Policy Reform Activities in Support of Poverty Reduction*, OGC, 2004, Manila. Also file notes taken by the author at ADB Headquarters in Manila between 20-31 August 2007 of professional discussions with senior existing and former members of OGC including: H. Sharif, E. Fischer, R. Clendon, C. Vandenabeele and V. You, among others on implementation of ADB's law and policy program.

¹²⁹ For example: ADB conducted a number of preparatory studies before launching its Access to Justice Loan in Pakistan. Additionally, it has sponsored some empirical research; see, e.g., K. Pistor and P. Wellons, 'The Role of Law and Legal Institutions in Asian Economic Development 1960-1995 1998, sponsored by ADB, Manila; ADB, *Towards a Political Economy Approach to Policy-based Lending*, working paper series no. 14, 2002, http://www.adb.org/Documents/ERD/Working_Papers/WP014.pdf, at 29 November 2009; and more recently, empirical studies on access to justice, legal empowerment and legal identity, among other issues.

At first blush, these features may seem to be anomalies in development approach. But, perhaps this should not be unsurprising when it is remembered that the charter explicitly prescribes that ADB is first and foremost a financial organisation with a developmental mandate, rather than a development organisation with financial resources.¹³⁰ More significant, what this evidence demonstrates is that, contrary to rhetoric, development effectiveness is *not* necessarily trumps at ADB. The evidence indicates that a range of organisational priorities constantly compete internally. Within the ADB monolith, advocates for development effectiveness, just like the advocates for judicial reform, must stake their cause against competing claims, sometimes making organisational headway and sometimes not. The Bank’s recent evaluation has illuminated a rare public insight of this phenomenon which has rendered judicial reform internally under-competitive for funding.¹³¹

SIGNIFICANCE FOR THE EVALUATION OF JUDICIAL REFORM

Addressing the question of evaluation, clearly the most significant aspect of ADB’s experience is the recent, tentative emergence of evidence of an empirically-validated relationship between judicial reform activity and economic growth. As we have seen in the findings of Chemin, there is some evidence which suggests that improvements in Pakistan’s gross domestic product may be attributed to expediting case disposal in courts resulting from ADB’s *Access to Justice Program*. These findings are very recent, and their significance remains untested. Once fully peer reviewed, they may offer a potentially significant contribution of empirical evidence to address Mitchell’s ‘puzzle’ over the theoretical relationship between judicial reform and economic growth.¹³²

In the meantime, ADB’s recent evaluation of its law and policy reform program provided a potentially valuable but circumscribed opportunity to review this endeavour. This evaluation remains disconcertingly constrained by an insistent focus on efficiency. Historically, the Bank has relied on an elaborate system of procedures for process-based monitoring and evaluation to guide its endeavours.

¹³⁰ This might explain, for example, why this author was evacuated from managing an existing judicial reform project in Pakistan in 2002, under threat of a nuclear stand-off with India, while ‘emergency-only’ missions were despatched from Manila to sustain ongoing negotiations for the Bank’s upcoming USD 350 million access to justice program loan.

¹³¹ Hammergren refers to a similar analysis of an internal contest over competing causes within the World Bank. Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America 2007*, pp. 309, 313-315.

¹³² Chemin, ‘The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan’s ‘Access to Justice Programme’,’ in relation to validating elements of the foundational theories of Max Weber and Douglass North in the schools of new institutional economics and new comparative economics.

This system is used to plan, implement, monitor and evaluate its reforms. It is based largely on the OECD's best practice approach to evaluation using relevance, effectiveness, efficiency, and sustainability as criteria to survey stakeholders and staff perceptions for quantitative assessments.¹³³ This system replicates the logical framework approach which at its essence is an efficiency-based assessment that aligns actual outcomes with proposed targets. While there are clearly numerous layers of monitoring oversight, ADB is yet to invest in undertaking impact evaluation in any systematic manner.

Consequently, ADB remains unable to evaluate the impact of its law and policy endeavour. Its evaluation formally attests to the importance of judicial reform, but it does not offer any evidence of its contribution to its goals of poverty alleviation, good governance or civil empowerment. Project records demonstrate that ADB has delivered some significant development outcomes throughout the region in its law and policy reform program over fifteen years. There is consistent evidence of an array of operational activities and technical outputs in the form of policy development, new laws, empirical research, judicial and legal training, organisational and efficiency improvements in courts notably in delay reduction, technical publications and institutional reorganisation. Many, if not most, of these activities were useful and positively appreciated by key informants in developing member countries.¹³⁴ It is reasonable to surmise that the rates of judicial and legal development across the region would have been measurably impeded without the OGC's support. This, however, does *not* indicate development effectiveness. Disappointingly, these outputs and outcomes do not necessarily translate into measurable results or impacts in terms of contribution to the higher goals of poverty reduction, enhanced governance and improved justice for the people.

Finally, the OGC's conceptualisation of the rationale for judicial reform has had an unintended effect. While it has demonstrated an impressive elasticity in repositioning the law and policy reform program within ADB's ever shifting

¹³³ Development Assistance Committee, Working Party on Aid Evaluation, of the Organisation of Economic Cooperation and Development (OECD-DAC): OECD, *DAC Criteria for Evaluating Development Assistance*, http://www.oecd.org/document/22/0,2340,en_2649_34435_2086550_1_1_1_1,00.html, at 25 November 2009.

¹³⁴ These findings aggregate available technical assistance completion reports, supplemented with file records of discussions of this researcher with key stakeholders in developing member countries in 2007 and senior members of OGC. For the purposes of this review, a sample of Technical Assistance Completion Reports (TACRs) available at <http://www.adb.org/Projects/reports.asp?key=reps&val=TCR>, at 5 December 2009, including: TA2853 VIE, 31105 VIE, TA2823 VIE, TA4060 VIE, TA3613 VAN, TA3613 VAN, 312.01 VAN, TA36427 CAMB, TA3577 CAM, TA3790 BHU, TA2967 MON, TA30539 MON, SSTA2896MALD, TA3389 MALD, 32270 MALD, RETA5640, RETA5731 + 30150, RETA5895, TRA33274, RETA 5658, RETA5987 + OTH 35038, TA3015 PAK, TA3366 VAN, TA3433 PAK, RETA 5967, 32023 PAK, RETA 6188.

policy-frame, this has hampered the articulation of any consistent development approach. The ever-shifting logic in planning and in due course justifying the attainment of development objectives as part of the Bank’s performance management system has inadvertently foiled subsequent evaluative efforts to readily demonstrate success. Despite the intricate arcana of its internal monitoring and evaluation procedures, in the post-*Paris* era of development effectiveness, it is difficult to avoid the conclusion that ADB’s reform management system is now unfit for purpose in relation to the evaluation of judicial reform.

In sum, this case study demonstrates that ADB – like most other donors – has made something of a leap of faith in terms of investing in judicial and related reforms for over fifteen years. It may now be nearing the point where it can demonstrate some impact measured in terms of an empirical relationship between judicial reform and economic growth. Until such a point is reached, however, this endeavour is vulnerable to mounting concerns over the entrenched and widening inequality gap in Asia.
