# THE WORLD BANK, ASIAN DEVELOPMENT BANK, AND JUDICIAL REFORM IN INDIA

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Introduction:

The World Bank's initiatives in the area of judicial reforms is linked to its 'discovery' of Rule of Law Reforms in the early 1990s which is related to a variety of factors including the fall of Communist regimes in the erstwhile Soviet Union and Eastern Europe. In keeping with the body of theory called New Institutional Economics (NIE) that underpins to a large extent the Bank's work in 'good governance', the Bank sought to translate the Rule of Law from a philosophical idea into tangible institutions that could be reformed. NIE explicitly identifies Rule of Law as a factor contributing to economic growth and stresses the importance of positive law and legal institutions for protecting property rights and enforcing contracts, two important constituents of the Bank's understanding of the Rule of Law. Motivated by this, multilateral institutions have invested tremendous amounts of resources in efforts to reform legal institutions in developing countries. Over the past few years the World Bank and Asian Development Bank (ADB) have made significant investments in funding these types of reforms.

The World Bank's internal think-tank enumerates what it thinks are reforms needed for actuating the Rule of Law[2]. These are 'reforming laws' (i.e. drafting substantive laws, often categorized into five main headings- property, contract, company, bankruptcy and competition) and 'reforming institutions' (including courts, legislative bodies, property registries, ombudsmen, law schools, judicial training centres, bar associations and enforcement agencies). For the bank, 'legal and judicial reform' was a means to promote the Rule of Law. According to DM Trubek, between 1990 and 2003, the Bank has spent $2.9 billion dollars on around 330 projects in its pursuit of Rule of Law. [3]

Ibrahim Shihata, the World Bank's counsel from 1983 to 1998 defined the Rule of Law as requiring the following criteria:

1. A set of rules that is known in advance
2. Such rules actually being in force
3. Existing mechanisms to ensure the proper application if rules, and a provision to allow for the departure from these rules
4. Resolving conflicts in the application of the rules through binding decisions of an independent judicial or arbitral body.

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[2] See http://www1.worldbank.org/publicsector/legal/building.htm

[3] Brown, G., "The World Bank and Rule of Law Reforms", No. 05-70, Working Paper Series, Development Studies Institute, London School of Economics, 2005 (available at www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf)

5. The existence of known procedures for amending rules when they no longer serve a purpose.

The Rule of Law was defined as a system based on abstract rules, which are actually applied, and on functioning institutions that ensure the appropriate application of such rules.[4]

This definition changed with Shihata's successor General Ko-Yung Tung who said that the Rule of Law would prevail when

1. The government itself is bound by the law
2. Every person in society is treated equally under the law
3. The human dignity of each individual is recognized and protected by law
4. Justice is acceptable to all

According to Tung, the Rule of Law requires transparent legislation, fair labour laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty and have legitimacy. Tung's definition differs from Shihata's in that it moves beyond the guarantee of certain negative freedoms into the realm of promoting positive rights. It also specifically links Rule of Law to the goal of private sector growth and poverty reduction. [5]

Initially the Bank focused primarily on assisting countries through law reform, helping them develop legal environments that encouraged local and foreign private investment, including stable and predictable systems to honour and protect property and contractual rights. Since then, the Bank has begun focusing on judicial reforms as it began to realise that enacting legislation alone could not yield desired reforms without adequate infrastructure to implement, enforce or modify the law. Subsequently, the focus became building and reforming institutions needed for dispute settlement.

As of 2004, there were approximately 600 World Bank financed projects related to legal and judicial reform. In 1992, the Bank approved its first freestanding judicial reforms project – the Venezuela Judicial Infrastructure Project which concentrated on infrastructure and technology. During the project implementation, the project was substantially revised to include support for the Judicial Council, judicial training, and workshops that promoted judges involvement in the reform process.[6]

The most common method used by the World Bank to introduce judicial and legal reforms was to induce changes in legislation and reforms in the administration of justice of borrowing countries. Here the loan would support the Balance of Payments, and not in any way the legal work required. Other methods include investment operations for institution building and technical assistance, learning and innovation loans for small time sensitive programs to build capacity, pilot promising development initiatives, or

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[4] *Supra* note 3 at p13
[5] *Id* at p14
[6] *Id* at p30

experiment to develop locally based models prior to large scale interventions, Adaptable Programs Lending Loan (phased, yet sustained support to long- term development programs that reflect economic priorities and contribute to poverty reduction) and Grants from IDF (Institutional Development Fund)[7]

The ADB's rationale for Judicial Reform is not very different from the World Bank's. On October 20, 2006, The Deputy General Counsel of the ADB Eviline Fischer, in a speech titled, "Lessons Learned from Judicial Reform: The ADB Experience" touched upon some of these reasons.

In his speech Fischer said, "Since 1995, international donors have invested more than US$1.0 billion in legal and judicial reform work—for good reason. Strong rules-based institutions promote economic growth. A fair, independent and efficient judiciary supports equitable development. It also improves predictability in the market, and can increase the per capita income growth rate of a country by 1.9 percentage points. On the other hand, a weak judiciary leads to lower per capita income; higher poverty rates; lower private economic activity; poorer public infrastructure; higher crime rates; and more industrial riots."

Fischer goes on to say," Investing in judicial reform is not quite the same as investing in infrastructure. Justice sector investments do not earn revenue or add immediate value in the way that the construction of a road can generate user fees and increase the price of real property. At best, fees collected directly by the judiciary will support its budget requirements…The value created by judicial reform becomes apparent only in the long run. Among its many benefits are *increased investor confidence in the market* (emphasis added), and greater protection of basic rights and liberties…"

The ADB's Administration of Justice Project in India

Though laws in various sectors have undergone changes because of conditionalities from loans from the ADB, World Bank and other such agencies, the first project that explicitly deals with judicial administrative reforms is a recent ADB project that has gone through the preparatory stages but has not been implemented.[8]

The Government of India requested the ADB to provide Technical Assistance (TA) in 2003 for a sector and diagnostic study on administration of justice. A Technical Assistance project on administration of justice was included in the ADB's 2003 Country Strategy and Program for India. An ADB fact-finding mission visited New Delhi in April and May 2003. The TA was approved by the ADB President Haruhiko Kuroda, on 25 July 2003.

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[7] http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120732~menuPK:268725~pagePK:41367~piPK:51533~theSitePK:40941,00.html

[8] The material in this section is taken from the ADB's *Final Report of the India Administration of Justice Technical Assistance Project* TA No. 4153-IND.

A TA contract was subsequently entered into between the ADB and the Association of Universities and Colleges of Canada, an organization that represents Canadian public and private not for profit universities and university degree colleges in association with Justice Development International Ltd (JDI), for the provision of the TA services.

The Government of India requested the ADB to undertake a three-phase process focused on implementation of justice reforms in the Delhi subordinate courts that would entail:

1. An Advisory Technical Assistance (ADTA) on Administration of Justice that focused on the Delhi High Court. The ADTA was completed under TA-4153-IND with a Final Report of May 2004 supplemented by a Facilitation Group Report NOV 2004. A Steering Committee chaired by Justice R.C. Lahoti including members of the Delhi High Court, Department of Justice and other stakeholders endorsed the final report under this TA.

2. A Project Preparatory Technical Assistance (PPTA) on Preparing an Administration of Justice Project which commenced in Jan 2005 and focused on the District courts in Delhi

3. An Administration of Justice Project

4. A Project Monitoring Committee headed by Delhi High Court Justice M.K. Sharma which also had on it Justice Madan Lokur, retired judges L. Prasad and G.B. Bharuka, Devdad Chhotray, Additional Secretary, Department of Justice, and Upamanyu Hazarika, advocate, monitored the project on regular basis.

At its first meeting on Jan 9, 2004, the Project Steering Committee considered a mission *Aide Memoire* prepared by Arjun Goswami, the ADB Project Task Manager, which indicated that the purpose of undertaking the sector diagnostic study was "to set a baseline of recommendations for subsequent pilot testing in 2004 supported by a further TA and commencement of implementation as a full project in 2005 supported by a TA loan."

According to the *Aide Memoire* the ADB's Country Strategy and Program (CSP) for India agreed with the government of India to program a US$750,000 TA grant from the DFID Trust Fund for a Project Preparatory Technical Assistance PPTA/Pilot Study for Administration of Justice in 2004, and a TA loan set at $10,000,000 for a full administration of justice project in 2005. The 10 million figure was scaled down form an initial 30 million that was proposed.

The Pilot Court Program (as detailed in the Pilot Court Survey Report) was inaugurated by the Delhi High Court in August 2004, and supported by the India Administration of Justice Project Preparatory Technical Assistance (PPTA) starting Jan 2005 through August 2005.

The Administration of Justice Project, which is the main component, was not implemented. The reasons for this are discusses later in this paper. Though the cost of the project has been revised many times the total proposed estimate was around $30 million

initially which was revised during the period of the pilot project to $10 million. Both the ADTA and the PPTA reports on the face of it deal with issues that have been debated extensively over the years – court delay reduction mechanisms, targeting backlogged cases, administrative strength, caseflow management, judicial training, court budget systems, infrastructure and statistical management systems and the functioning of the state legal aid sector. However, a closer look at their recommendations in the Aide Memoire, show that there are a number of contentious issues, a few of which I will touch upon in this article.

I Lok Adalats:

The *Aide Memoire* to the ADTR suggests the design and introduction of a system for either discretionary or routine diversion of cases from court lists to approved mediation, arbitration, early neutral evaluation or ADR processes. One such process that is listed are Lok Adalats.

Galanter and Krishnan[9] have argued that state instituted Lok Adalats derived their ideological appeal from the idea that such courts were closer to indigenous modes of dispute resolution by simplifying formal procedure, doing away with lawyers, and emphasizing compromise and conciliation.

Through statistics, they show that the rate of settlement of Lok Adalat cases has fallen between 1999 and 2001. However this could be due to a number of reasons including an increase in the number of Lok Adalats, fewer resolutions that result in cases being settled, reduction in the number of cases, a shortage of mediators, or the routing of more complex cases to such fora. Lok Adalats mainly dealt with cases related to auto accidents, family matters, Ordinance violations, and minor criminal matters.

Critiquing the procedures followed in Lok Adalats, Galanter and Krishnan argue that the assumption that Lok Adalats necessarily supplement access to justice is not empirically accurate in all cases since overall the Lok Adalat docket is made up of cases that have already been brought to another forum. They state "Lok Adalats do not provide new facilities for the vast portion of potential claims that are discouraged by court fees, the cost of lawyers, the prospects of delay, and paltry recoveries'. They cite a study by Robert Moog[10] linking pressures put on court officials to reduce court arrears and the nature of cases that are routed through to the Lok Adalats in Uttar Pradesh by observing that even those cases settled in courts were routed again to Lok Adalats so that the number of cases that find settlement through Lok Adalats goes up.

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[9] Galanter, M and Krishnan, J, "Bread for the Poor, Access to Justice and the Rights of the Needy in India, March 2004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682324

[10] Moog, R.S., "Conflict and Compromise: The Politics of Lok Adalats in Varanasi District" 25 LAW & SOC'Y REV 545 in Galanter, M and Krishnan, J, "Bread for the Poor, Access to Justice and the Rights of the Needy in India, March 2004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682324

Galanter and Krishnan characterize Lok Adalats as illustrating 'debased informalism' since they are recommended "not by the virtue of an alternate process, but by avoidance of the tenements of the formal institutional process".

Their argument is succinctly put in the following extract from their paper

"*The Lok Adalat's achievement then, is to provide an official process for claimants to secure a portion of their entitlements without the aggravation, extortionate expense, inordinate delay and tormenting uncertainty of the court process. To secure this, they yield up discounts. Assume, for example, a motor vehicles claimant who would secure Rs 50,000 compensation after an expensive 10-year struggle in courts. Imagine that this same claimant might be able to get half that amount at a Lok Adalat in just a few months. This is clearly a preferable outcome for the claimant, given the legal costs avoided and given the appropriate discount for the futurity and uncertainty of the court recovery.*

*But this claimant is entitled not to the discounted future value of his claim, but to the full present value. What makes the delivery of the discounted value a 'benefit' is simply that the full entitlement can be vindicated only by recourse to a disastrously flawed judicial system that at best can deliver it in ten years. Thus, the benefit conferred by the availability of the Lok Adalat is a benefit only by virtue of the enormous transaction costs imposed by the judicial system.*

*The establishment of Lok Adalats represents the use of scarce reform energies to create alternatives that are 'better' than the courts, but it is not necessary to be better than the ordinary judicial system. The flaws of the system serve not as a stimulus to reform it, but for setting up institutions that bypass it*" [11]

II Frivolous/Vexatious Justice

A major focus of the ADB Report is on reducing the cost and delays in litigation, while at the same time making the judicial process more efficient and competent. This can be seen both in the ADB Report and in Hazra and Debroy's proposition that high rates of pending cases should be regulated, especially vexatious and frivolous litigation. They rely on the Report of the 1986 Justice Satish Chandra Committee and the 2003 Malimath Committee Report to argue for ways to look at " methods to curtail frivolous litigation". [12]

Pratiksha Baxi, in a recent presentation, has argued that the figure of the Indian litigant as vexatious or frivolous if highly problematic. Observing that vexatious litigation is a colonial category used to promote the idea that the British 'gifted' to Indians, she pointed out that the very category of frivolous or vexatious litigation often masks the way state

[11] *Supra* note 10

[12] Hazra, A.K. & Debroy, B., *Judicial Reforms in India: Issues and Aspects,* Academic Foundation, New Delhi, 2007, pp 15-36.

law is used to contest or entrench caste, class, and gendered inequities that structure everyday life. [13]

Baxi says that frivolous litigation is a powerful category precisely because it individualises the manipulating and dishonest litigious citizen. She says that it is significant that the state does not use the term frivolous litigation to describe dishonest litigations that the state brings against the poor routinely, and that the fact that the government uses judicial delay or the police uses forgery to file vexatious cases against the poor never features as an aspect of the impetus to reduce judicial delay.

She says that reform measures like those suggested by the ADB Report do not challenge the enforcement of impoverishment, and instead " use the poor as a resource to legitimise the extraordinary idea that rule-of-[good]-law must be strengthened to actualise the projects of good governance, economic growth and market friendly models of human rights". [14]

II Amendments to the SARFAESI Act

In keeping with the focus on commercial laws, the only substantive legal reform suggested by the ADB Report are amendments to the Securitisation, Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI), Act. The Report recommends the participation of the ADB's Banking Division to provide technical assistance to develop and draft a legislation that addresses gaps in the SARFAESI Act, and bring it at par with the modern law of secured transactions

The Aide Memoire represents a summary of the ADB Mission that visited Delhi on June 21, 2005, mentions the SARFAESI Act, a recommendation that until the ADTA stage was not part of this process at all. " Consistent with international developments on secured transactions law reform, the GOI has been seeking to move creditors away from such recourse to the criminal courts through a new legal regime which it enacted in 2002 known as the Securitisation, Reconstruction of Financial Assets and Enforcement of Security Interests Act (SARFAESI). This Act introduces the concept of empowering banks and financial institutions to take possession of collateral and sell them without recourse to the court. The SARFAESI regime goes beyond self enforcement by creditors by providing the essential pillars of an access to credit legal framework."

The ADTA in its annexure has included a draft SARFAESI Bill. The Objective of this Bill throw some light on the purpose of this legislation: "The SARFAESI Act, 2002 introduced important concepts for the law of secured transactions and the enforcement of security interests. However, the Act does not provide any parallel rules for the creation, use and registration of those security interests, nor does it address matters such as setting priorities among security interests in the same collateral. Through the Secured Transaction Reform Technical Assistance (TA No 3866-IND) the Asian Development

[13] Baxi, P, Comment on the Judicial Reform panel, Indian People's Tribunal on the World Bank, Jawaharlal Nehru University, September 24, 2007.
[14] *Id*

Bank and the Government of India have worked to fill that substantive gap for security interests in movable property. Therefore, the purpose of the accompanying draft Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Bill, 2005, is to improve the use of credit, to enterprises, secured by movable property and to develop institutions creditors use for self-enforcement of security interests pursuant to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002."

The ADB Report links the proposed changes to the SARFAESI Act with reduction of cases of section 138 Negotiable Instruments Act cases (that deal with dishonouring of cheques) filed in the criminal subordinate courts.

IV Reforms of the Criminal Justice System

While the focus of the ADB project is on the civil administration of justice there are references to the administration of the criminal justice system. The ADB Report recommends developing the use of audio and video/audio technology in courtrooms to permit courts to take evidence or submissions from persons outside the courtroom, while acknowledging that its suitability to Indian conditions needs to be tested.

The Report talks of fast-track courts while not addressing the question of what the procedures in these courts will be and whether they will function as merely backlog courts. It recommends establishing a cell within the Department of Justice that is dedicated to ongoing assessment of criminal procedure reform proposals and the preparation of bills to enact those reforms.

Bikram Jeet Batra, in a recent speech[15] has pointed out that while these recommendations appear harmless in themselves, they need to be read along with existing attempts to 'reform' the criminal justice system including the Malimath Committee on Reform of the Criminal Justice System (2003) and the Madhav Menon Committee's recommendations to Draft a National Policy on Criminal Justice (2007), both of which have raised serious concerns from human rights groups in India.

Internal documents of the Bank make it clear that while the Bank, as a genera rule is prohibited from involvement in the criminal justice sector, there is a lot of interest within the World Bank in greater involvement in 'reforming the criminal justice system'.[16]

Conclusion

It is not very clear why the administration of justice project was not implemented. However, a significant obstacle was opposition from the Delhi High Court. While the relationship between High Court and District court is very clear (the district court clearly

[15] Batra, B.J., " Reform of the Criminal Justice System and the ADB" at the Judicial Reform panel, Indian People's Tribunal on the World Bank, Jawaharlal Nehru University, September 24, 2007.

[16] Robert Danino, 'Legal Opinion on Bank Activities in the Criminal Justice Sector', January 31, 2006 and 'Bank Activities in the Criminal Justice Sector: A Discussion Note'.

being subordinate), the relationship between High Court and Supreme Court is not, and there was some friction between the Project Monitoring Committee headed by Delhi High Court judge and the Steering Committee chaired by a Supreme Court judge.
The High Court judges also felt that they did not want foreign consultants, many of whom they perceived as extremely incompetent, coming in and telling them what to do
They also felt that they needed to protect themselves from what they perceived as interference from the Executive (the Central and State government) in what is otherwise their domain.

The Delhi High Court and Steering Committee did not want anything to do with components dealing with 'Out of Court Settlement' (dealing mostly with the implementation of proposals under the SARFAESI Act) and 'Enabling Legal Empowerment and Project Management Unit' (public awareness campaigns, training of public prosecutors, legal aid). So at the end of the first two phases, the Project Monitoring Committee indicated that the project had to go before a Full Court. It is not clear whether the project was blocked at this stage or when it went before the Ministry of Economic Affairs.

While the ADTA and PPTA only give us a glimpse of what the problems with the ADB's suggestions are, a recently published book titled 'Judicial Reforms in India', co-edited by Arnab Kumar Hazra and Bibek Debroy[17] gives us a clearer picture of the links between efforts at judicial reform and economic liberalization by linking the failures at judicial reform are linked to costs such as the inability check government excesses, the lack of enforcement of property rights, the inability to enable exchanges between private parties, and the curtailing of the development of markets, especially in the sector of foreign investments.

The links between the contributors of this book and the ADB project are many. Arnab Kumar Hazra, the co-author of the book is a staff consultant to the ADB for the Administration of Justice Project. A number of contributors in the book have either worked on the project including Robert Hann, 'a Principal' of Justice Development International Ltd, which along with the Association of Universities and Colleges of Canada co-authored the ADTA.

In their introduction to the book, Hazra and Debroy say," Legal reforms are recognized as critical to attaining higher growth rates. The importance of the judicial system lies in checking abuses of government power, enforcing property rights, enabling exchanges between private parties and most importantly, upholding the 'Rule of Law'. A balanced, swift, affordable, accessible and fair justice delivery system besides promoting law and order aids in the development of markets, investments, and economic growth, therefore helping in poverty reduction."

Hazra and Debroy argue that well developed formal mechanisms to enforce contracts help the small and unaffiliated entrepreneurs and firms. They say that inefficiencies in

[17] *Supra* note 12

court procedure ad management often provide opportunities for rent seeking by attorneys, judges, and judicial support personnel. They recommend methods of alternate dispute resolution including Lok Adalats to reduce delay in litigation and the use of specific processes such as video remand instead of transportation to court for hearing bail applications to improve efficiency of the courts.

While a bulk of the recommendations, both in Hazra and Debroy's book and in the ADB Report seem to be based on common sense notions of increasing efficiency and reducing delay, this paper is an attempt to locate these recommendations within the larger framework of the World Bank and the ADB's notions of Rule of Law which are clearly linked to private sector growth and the free market.

Professor Upendra Baxi in a speech at the Indian Law Institute last year[18] talked of how "judicial globalization further occurs in the name of 'good governance' which requires an intense reform of justicing under the auspices of governmental and inter governmental aid and development agencies. He said, "…In principle, un-objectionable, such auspices often take over the agenda of law reform and reform of judicial administration, and shape them in accordance with their economic and strategic needs."

Baxi pointed out how the World Bank and related programs of 'good governance' promote the structural adjustment of judicial activism- these covertly address as well as overall seek to entrench market friendly, trade-related forms of judicial interpretation and governance. Taking a cue from him, it is time we asked how we might prevent the creation of a system that will benefit corporate elites and commercial transactions in the guise of helping the poor through reform of judicial administration.

E.O.M.

[18] Upendra Baxi, "*Access to Justice in a Globalised Economy: Some Reflections*", Indian Law Institute, New Delhi, 2006.