



Work in progress: Not for Quotation

Title: **Special Evaluation Study on ADB Support to Law and Justice Reform**
Author **Peter M. Robertson, Evaluation Specialist, OED1**
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A. Background

1. In late 2006 the Office of the Counsel General (OGC), in response to a request to the operational side of the Asian Development Bank (ADB) by the Operations Evaluation Department (OED) to identify topics for evaluation, proposed that a special evaluation study (SES) be conducted on ADB's support to law and policy reform. Within this broad reform area, there are over 400 technical assistance (TA) and loans supporting on legal framework and policy reforms.¹ In response, OED included in its 2007 workplan a SES with a narrower focus on ADB's support to law and justice reform (LJR).² LJR has an institutional focus with two aspects, the legal frameworks (legislation, administration of law, and adjudicative functions of the executive and judiciary), and the performance of related institutions primarily through incentives, sanctions and capacity development. LJR affects the balance of power among the executive, legislative, and judicial branches of government, and among diverse social, economic and political groups in society. On the 'supply' side it involves executive and judicial institutions (e.g., formulation of law, the courts, prosecution, police and prison system, and ombudsman), and on the 'demand' side, legal empowerment (e.g., the use of law to increase poor citizens control over their rights and entitlements) and social accountability, (e.g., the legal profession, alternative dispute mechanisms, legal aid).

2. The evolution of development approaches from market/economy to poverty reduction has been reflected in LJR moving from legalistic rule of law to empowerment/rights approaches, respectively. In ADB this shift is evident in the refinements made progressively since the mid-1990s, as a result of policies on governance (1995), poverty reduction (1999), and statements on law and policy reform.³ The ADB's General Counsel 1995 opinion that "in dealing with governance and the promotion of the fundamental elements of accountability, participation, predictability, and transparency, the Bank needs to stay close to its mandate for accelerating the process of economic development in developing member countries,"⁴ confirmed ADB's

¹ Although program loans were introduced in 1978, it was not until after reviews in 1983 and 1987 that a more explicit focus on addressing sector specific policy, legal framework and institutional constraints was introduced.

² Law and judiciary is a subsector of the law, economic management and public policy sector in ADB's project data base. This SES will not address the considerable support provided to policy development across many sectors. It will however refer to the legal framework aspects of sector reform.

³ ADB. 2005. *Law and Policy Reform in Asia and the Pacific: Ensuring Voice, Opportunity, and Justice*. Manila. p. 5. Available: <http://www.adb.org/Documents/Brochures/Voice-Opportunity/voice-opportunity.pdf>. This publication summarizes the refinements to the scope, purpose and instruments of ADB's support to LJR outlined in a number of ADB LJR publications since 2000.

⁴ ADB, 1995, *Governance: Sound Development Management*. Manila. p. 21. Available:

mandate to address LJR, linking its scope closely to market related reforms. ADB's governance strategy recognized strengthening the quality of institutions is a necessary condition to promoting and sustaining pro-poor economic growth, socially inclusive development, and good governance. The poverty reduction strategy reinforced the empowerment/rights approach by stating "*in ADB's view, poverty is 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*" [emphasis in original].⁵

3. ADB's definition of legal systems and access to justice were revised from being seen through a narrow legalistic rule of law prism, to a more inclusive rights prism. Drawing on Lawrence Friedman's work in the late 1960s a legal system was defined as encompassing "the rights and obligations of any individual or private or public institution that is supported by formal or informal enforcement mechanisms" (footnote 3). In preparing the Access to Justice Program in Pakistan, access to justice was redefined as "a function of the relationship between institutions responsible for delivering entitlements (public goods and services) predictably, affordably, and accountably, and the ability of the poor to secure and sustain their access to key sets of assets."⁶ In summary, LJR is concerned with the legal framework and performance of justice institutions in relation to economic growth and poverty reduction.

4. Although ADB has been supporting legal framework reform through policy based program loans and complimentary TA across a number of sectors since the mid-1980s, ADB's support to LJR began in 1991 with the approval of a regional TA (RETA) legal training project.⁷ The first advisory TA (ADTA) to explicitly focus on legal frameworks was attached to a program loan in Mongolia in 1993.⁸ Since then, ADB has approved 111 regional, advisory, and small-scale TA totaling \$68.3 million. ADB's most significant investment in LJR has been the \$350 million access to justice loan in Pakistan approved in 2001 (footnote 6). ADB is currently negotiating a \$30 million administration of justice loan to India, and is preparing loans to support LJR in Bangladesh and the Philippines. In addition as part of the emergency assistance project in response to the earthquake in Pakistan in 2005, a \$2.5 million grant targeted legal assistance, governance and institution building.⁹ Although the majority of the LJR projects selected for this SES have been administered by OGC, regional departments and resident missions are also involved.¹⁰ (Appendix 1 includes a list of projects and an analysis of financial data.)

B. Considerations

5. In an environment of limited resources, there is an imperative to be selective, identifying ADB's comparative advantage, and the most effective LJR strategy, interventions, and

<http://www.adb.org/Documents/Policies/Governance/govpolicy.pdf>.

⁵ ADB, 1999, *Fighting Poverty in Asia and the Pacific: The Poverty Reduction Strategy of the Asian Development Bank*. Manila. p. 3, para. 12. Available:

http://www.adb.org/Documents/Policies/Poverty_Reduction/Poverty_Policy.pdf

⁶ 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*. Manila. (Program loans 1897/98-PAK for \$330 million, and TA Loan 1899-PAK for \$20 million.) p.15. para. 63.

⁷ ADB. 1991. *Technical Assistance for Interim Mekong Committee for Legal Training*. Manila. (RETA 5456, for \$295,000, approved on 19 April).

⁸ ADB. 1993. *Technical Assistance to the Government of Mongolia for Developing Mongolia's Legal Framework*, (TA 1930, for \$500,000, approved on 17 August) was attached to the ADB. 1993. *Report and Recommendation of the President for the Mongolia Industrial Sector Program Loan*. Manila. (Loan 1244-MON, for \$30 million, 17 August).

⁹ In response to the earthquake and tsunami in Indonesia grant funds were approved to support specific anticorruption interventions (\$450,000).

¹⁰ OGC administer 53% of selected TA, and 71% of selected RETA. The Access to Justice Program is administered by the Pakistan resident mission.

implementation arrangements within a longer term institutional context. ADB's current Medium Term Strategy II concludes in 2008, and recommendations to refine ADB's long term strategy to 2020 from an Eminent Persons Group report were recently published.¹¹ This raises issues associated with ADB's LJR strategic framework and the degree to which a framework should be made more explicit. In addressing selectivity, ADB's comparative advantage in supporting developing member country's to address LJR needs to be determined. Lessons identified in this SES from LJR experiences over the last 2 decades provide an opportunity to inform ADB's future LJR strategy and implementation decisions.

6. The focus on the role of law in development increased in the 1960s, through the work of academics, researchers, and legal professionals, as former colonies gained independence.¹² The legal tradition of colonial powers shaped the law, and with post independence political economy changes, there was a need to develop legal frameworks, and train legal professionals, judicial officers, and civil servants to implement them. Although this period has been criticized, particularly as a result of poorly designed and under resourced projects in Latin America and the flawed strategy of transplanting US legal liberalism to countries governed by authoritarian regimes, it did produce an understanding of what are known today as governance issues.

[Law and Development] researchers will be concerned with understanding the actual structure of decision-making in a society and in evaluating the impact of this structure on developmental goals and processes. [They] will want to know who has access to legal processes and how decisions are actually made ... to look beyond the formal rules of the legal procedure and formal doctrinal argument to identify any systemic structural features of legal process which may affect a citizen's access to courts and administrative agencies and influence the decisions reached by those bodies ... to identify law and legal process as one of the obstacles to the achievement of development goals as it will show law's positive potential in the development effort.¹³

7. Although bilateral agencies such as the United States Agency for International Development and the United Kingdom Department for International Development were providing assistance since the 1960s, it was not until the early 1990s¹⁴ that multilateral agencies including the World Bank, Inter-American Development Bank, ADB, and the United Nations Development Programme established LJR programs. The fall of the Berlin Wall in 1989 created opportunities to support LJR in newly independent states and transition economies, including those in Asia such as the People's Republic of China (PRC), Mongolia, and Vietnam. Support for LJR has been the most extensive in Latin American countries, producing more research and evaluation experience than from European, African or Asian reform experience.¹⁵ Appendix 2 provides a brief overview of selected agency's LJR programs.

¹¹ ADB. 2007. *Toward a New Asian Development Bank in a New Asia: Report of the Eminent Persons Group to The President of the Asian Development Bank*. Manila. Available: <http://www.adb.org/Documents/Reports/EPG-report.pdf>.

¹² Jensen, E. and T. Heller. 2002. *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. Stanford University Press. Stanford, identify five "waves" in the law and development movement of rule of law reform since World War II. See also Ahmad, R, and D. Porter. 2006. Justice Sector Reforms and Policy Conditionality: Symbiosis or Mutual Denial? In *Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries*. International Development Law Organisation. Rome. pp. 57–78.

¹³ Quoted in McAuslan, P. Law, governance and the development of the market: practical problems and possible solutions, In Julio Faundez. (ed.) 1997. *Good Government and Law: Legal and Institutional Reform in Developing Countries*. Macmillan Press. London. p. 26.

¹⁴ During the fourth wave when "the rule of law became the big tent for social, economic, and political change generally..." (footnote 10, p. 347.)

¹⁵ ADB has led research and studies on LJR in the Asia and Pacific region (Appendix 3).

8. Drawing primarily from Latin American LJR experience, a number of issues have been identified as contributing to the slow pace of LJR in improving the quality of law and justice systems. At a political economy level, the variety of institutions, complex normative framework, and the fact that justice systems are integral part of the political system are identified. For example, the Pakistan country assistance performance evaluation (CAPE)¹⁶ notes that the access to justice program was designed in exceptional circumstances, where political, executive, institutional, and civil society forces on one hand, and ADB staff resources on the other, were aligned to support reform. What are the strategic lessons for ADB in such 'exceptional' circumstances, particularly where executive short cut approach is adopted to push through reform?¹⁷ At the program level, inadequate diagnostic tools, overly ambitious design, and ineffective monitoring and evaluation indicators are identified in the LJR literature. A number of studies refer to the difficulty in defining appropriate indicators at the diagnostic, monitoring, and evaluation stages.¹⁸ The SES will review how international political economy and program design lessons are consistent with ADB experience, have influenced the design of ADB projects, and have implications for the ADB's future LJR strategy.

9. ADB's governance policy (footnote 4) identifies four interdependent elements of good governance—accountability, participation, predictability and transparency. The policy recognizes that a legal framework encompassing the rule of law, stable and predictable legal system, and law reform for economic development, impacts on the entire process of development. The policy also recognizes the implications of legal pluralism¹⁹ referring to the "special cultural circumstances of Pacific DMCs ... [where] the coexistence of Western political, legal, and administrative systems, on one hand, and communal property rights and traditional forms of conflict resolution, on the other, and their interface present considerable challenges to the governments concerned, necessitating careful and sympathetic adjustments" (footnote 5, p. 40). Until recently LJR has been addressed through a conventional 'systems' approach, where, drawing on international best practice, market and social legislation (and regulations) have been revised, and the capacity of institutions (organizations and individuals) to provide services and generate demand has been addressed.²⁰ This approach assumes that law functions in a manner similar to the Western tradition, where the law is the singular normative order. However, in Asia and the Pacific legal pluralism presents a challenge for the conventional approach. The SES will explore how ADB's support for LJR addresses complex inter-linkages between the four governance elements in pluralist settings.

¹⁶ ADB. 2007. *Pakistan: Country Assistance Performance Assessment, Draft*. Manila. p. 29. paras. 90–91.

¹⁷ For example this could be relevant for the design of LJR programs in Bangladesh under the current political dispensation.

¹⁸ For example, Popkin, M. 2004. *Access to Justice, Good Governance, and Civil Society*. Available: http://www.iadb.org/sds/doc/SGC-Panel_IV_ENG.pdf. Dakolias, M. 2005. *Methods for Monitoring and Evaluating the Rule of Law*. Paper presented at the Center for International Legal Cooperation's 20th Anniversary Conference Applying the 'Sectoral Approach' to the Legal and Judicial Domain. The Hague. The Netherlands. Available: http://www.cilc.nl/Conference_publication_2005.pdf. Toope, S. J. 2003. *Legal and Judicial Reform through Development Assistance: Some Lessons*. McGill Law Journal 48, 358–417. Hammergren, L. *Assessments, Monitoring, Evaluation, and Research: Improving the Knowledge Base for Judicial Reform Programs*. Paper presented at the Rule of Law Conference on Judicial Administration Modernization in the Arab States. Marrakech, Morocco. 15–17 March. Available: <http://www.pogar.org/publications/judiciary/linn1/knowledge.pdf>. Jensen and Heller (footnote 13) draw on LJR experience from Europe, Asia and Latin America.

¹⁹ Legal pluralism refers to the numerous and often contradictory sets of norms used to regulate social, economic and political relationships within a single geopolitical space. From the perspective of legal pluralism, state law is one source of regulatory norms. While it often represents a particularly powerful and legitimate normative order, it is not one which can be completely separated from other orders such as those deriving from customary, religious, project and/or local law, all of which provide alternative bases for claiming rights.

²⁰ ADB's Access to Justice Program loan to Pakistan is an example of this approach.

10. ADB's program loan modality, complemented by ADTA, was introduced to address policy, including legal framework and institutional constraints to improve the effectiveness of sector investment loans. However, it was not until the late 1980s, through finance sector program loans, that legal framework reforms were introduced.²¹ By the mid-1990s legal and regulatory reforms, as part of a broader policy package, were common in program loans across a number of sectors—energy, finance, public resource management, industry and trade, transport, health and education. The SES will draw on recently completed sector assistance performance evaluation studies in energy and transport to provide an overview of ADB's support to legal frameworks in sectors through the program loan modality.

11. Almost 70% of LJR projects are categorized in ADB's project database in the law, economic management and public policy sector, under the law and judiciary subsector, with the balance in other subsectors, or in the finance sector. Since 1993, 73 ADTA totaling \$51.3 million have been approved across 18 developing member countries, with 16 of these being small-scale TA, totaling \$2.2 million.²² ADB has provided 59% of the funding, with 31% from the Japan Special Fund, and 11% from eight donors or TA funds. The percentage of total funds allocated to each of the three categories defined for the purpose of this SES: (i) economic growth (42.5%), (ii) access to justice (42.5%), and (iii) capacity development (11%). Of the 38 RETA projects totaling \$17.0 million, 13 are small-scale TA totaling \$1.1 million. ADB has provided 45% of the funding, with 35% from the Japan Special Fund, and 19% from four donors or TA funds. RETA support (i) conferences (6%), (ii) studies and research (65%), and (iii) regional training (29%). The outputs of RETA provide a significant contribution to LJR knowledge management products (Appendix 3). The combined allocation is access to justice (47%), economic growth (45%) and training (19%). In assessing ADB performance, the SES will explore the institutional aspects of managing ADB's LJR portfolio, including the role of OGC as a non-operational department administering TA, and providing technical assistance to regional departments administering LJR TA and loans.

C. Approach to the Evaluation

12. The objective of this SES is to assess ADB's performance in LJR and identify lessons from LJR strategies and implementation by ADB and multi- and bilateral agencies to guide future strategic and implementation prioritization. The evaluation will address three areas: (i) strategic framework for LJR interventions, (ii) design, monitoring and evaluation of LJR projects, and (iii) institutional, partnership, and financing modalities. To assess success of LJR strategies and implementation, the evaluation will adopt the CAPE report top-down and bottom-up methodology. From the top, assessing positioning, contribution to results, and ADB performance vis-à-vis the LJR priorities (through case studies on capacity development and access to justice) in selected countries with a sufficient number of interventions (Pakistan and PRC), and from the bottom assessing the relevance, effectiveness, efficiency, and sustainability of selected completed and on-going projects (TA and loan projects in Pakistan, India, Philippines, Mongolia, Vanuatu, Cambodia, and Fiji²³). The study will include (i) discussions with ADB staff, executing agencies and key stakeholders of selected ADB projects, (ii) analysis of ADB and selected multi-lateral agency project design, monitoring and completion documents,

²¹ From 1978 to 1987, 11 of the 15 approved program loans were in the agriculture and natural resources sector, only some of which included policy and associated institutional reform measures.

²² Technical assistance completion reports have been approved for 22 of the 57 TA, and 8 of the 29 RETA. A completion report is not required for small scale TA.

²³ Pakistan, India and Philippines provide examples of TA leading to a loan; Mongolia, a transition economy where ADB provided first legal framework support followed by training of legal professionals; Vanuatu capacity development of law administration; Cambodia where support to land legislation included innovative information and empowerment activities; and in Fiji a Pacific-wide regional judicial training program jointly funded by DFID, the Australian and New Zealand governments and UNDP was implemented by the University of South Pacific, Suva campus.

(iii) literature review of LJR, (iv) discussions and/or correspondence with staff of selected development agencies and LJR academics, (v) preparation of case studies—access to justice and capacity development; and (vi) an overview of legal framework support to key sectors particularly through the program loan modality. Key questions guiding the evaluation are listed in Appendix 4.

13. The study proposes to use the following sources of information:

- Quantitative analysis of ADB financial databases on trends (evaluation officer).
- Quantitative analysis of LJR projects based on checklist-based review of TA reports, RRP, TA completion reports (TCR), project completion reports, relevant TA performance evaluation reports, sector and CAPE reports, and country partnership strategies (national consultant).
- Validation of selected TCRs, CAPEs to contribute to bottom-up assessment (evaluation specialist, international consultants).
- Selective literature study on projects and evaluations by multi- and bilateral agencies identifying key lessons, and issues relevant to LJR (evaluation specialist, national and international consultants).
- Review of law and justice statistics for Asia in governance databases, including Freedom House and Governance Matters (evaluation officer, national consultant).
- Assessment of ADB knowledge products, including ADB publications (evaluation specialist, national consultant).
- Capacity development case study (legal and judicial training focus), including missions to Mongolia, Vanuatu, Fiji, Philippines, and Pakistan (international consultant 1).
- Access to justice case study including missions to Pakistan, India, Cambodia, and Philippines (international consultant 2 and evaluation specialist for Cambodia mission only).
- Overview of support to sector legal frameworks through program loans focusing on energy, transport, and law and economic management sectors.
- Application of a TA survey (from SES on Performance of TA) to professional staff, executing agencies, and consultants (evaluation specialist, national consultant).
- Presentation of draft findings to relevant ADB staff (evaluation specialist, international consultants).

D. Resources Required and Timeframe

14. It is proposed to carry out the SES from April to November 2007, following the steps outlined in the schedule below. Recent advice that the World Bank Independent Evaluation Group is planning to conduct an evaluation on the same topic this year is being followed up. Initial positive responses suggest that there may be changes to the scope and timing of this SES. Notwithstanding, the study will be headed by an OED evaluation specialist with contributions from two international LJR consultants (2 person months each of a LJR capacity development expert, and an access to justice expert), a domestic LJR consultant (6 person months), and a national evaluation officer (2 person months substantive input). The evaluation specialist leading this SES was involved in the design of ADB's Access to Justice Program monitoring and evaluation framework and system, and later in program implementation, and will only participate in the Cambodia field mission, and will not participate in the bottom-up assessment of LJR activities in Pakistan. An international peer reviewer is proposed. Appendix 5 includes the consultant's terms of reference. The cost estimate for the SES is attached as Appendix 6. The proposed schedule for the SES is:

Mission preparation	May II–IV
Recruitment of consultant	May III–IV
Operations Evaluation Mission	June–August
Storyline consultation with OED and OGC management, peer reviewers and regional departments	June I
OED internal review	Sep III
Interdepartmental circulation	Oct I
Draft to Editor	Nov I
Submission for Approval by Director General OED	Dec I

- attachments: Appendix 1: Law and Justice Reform Project Data
Appendix 2: Summary of Law and Justice Reforms Programs of Selected
Development Agencies
Appendix 3: ADB's Law and Justice Reform Publications
Appendix 4: Evaluation Matrix
Appendix 5: Terms of Reference for Consultants