

Chapter 1

Law and Policy Reform: An Overview

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An Introduction to ADB's Law and Policy Reform Program

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The Asian Development Bank's (ADB) focus on law and policy reform raises some interesting questions. Why, as an international financial institution, charged by its Charter to be singularly devoted to economic development, do we at ADB care about justice? What price does injustice inflict on the body of an economy, even if we were blinded to the costs inflicted on its soul? How does poverty reduction, the overarching goal of this institution, fare in the face of shifting levels of justice? Where, when, and how does the seemingly intangible notion of justice become a tangible and an empowering force in the fight against poverty?

Law and Economic Progress

The nexus between law and economic progress is best established in the literature of new institutional economics, which calls

for government regulation and planning of the economy, and for analyzing actual economic conditions rather than applying abstract laws and principles. It empirically demonstrates that the predictability of outcomes and the efficiency in the administration of justice have a veritable impact in attracting investment and fueling economic growth as well as in improving the general management of an economy. In other words, the establishment of the rule of law, at least for resolving disputes relating to contractual or property rights, helps foster growth.

Even the indefatigable dean of free enterprise, the Nobel Laureate Milton Friedman, gave precedence to law over free enterprise. In his preface to the *Economic Freedom of the World: 2002 Annual Report*, Friedman remarked in the context of transition countries that he was actually wrong in insisting on the mantra "privatize, privatize, privatize," when in fact "the rule of law (was) probably more basic than privatization."¹

Much of the recent work on legal and judicial reform has been driven by the desire to create an enabling legal environment for market economies. It is therefore not surprising that many of these projects focus on reform of commercial and business laws or systems of dispute resolution.

¹ Milton Friedman, *Economic Freedom Behind the Scenes: Preface to James Gwartney et al., Economic Freedom of the World: 2002 Annual Report*, at xvii, xvii (2002).

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As Assistant General Counsel, Mr. Hamid L. Sharif heads the Office of the General Counsel's (OGC) South Asia practice group, as well as OGC's special practice group on Law and Policy Reform, which has processed, among others, a loan package of \$350 million dollars for the Access to Justice Program in Pakistan—the largest and the most comprehensive type of program in the area of judicial reform. Mr. Sharif has an LL.M. from Cambridge University and is a UK-qualified barrister.

Role of Criminal Justice Reforms

Paradoxically, what seems to have been less appreciated—or at least less formally acknowledged—is the link between the criminal justice system and economic development. If you accept that human lives are both the end and the means of economic development, securing citizens and their assets in their daily environment would seem critical for any measure of economic development.

Today, ADB is one of the few international financial institutions directly involved in supporting reforms in the criminal justice system and law enforcement organizations. Our experience so far emphatically reinforces the proposition that reform of the criminal justice system is fundamental to economic development.

Consider this fact: the police forces of many of ADB's developing member countries (DMCs) had inherited a system of financing from the colonial era where minimal budgets were allocated for operating police stations. For an average police station in many settings, the annual allocation for non-salary expenditures would not be much above the equivalent of \$100, while a single investigation of a major case could easily cost many times the annual budget allocation for a whole police station. In such a context, how do investigations get financed? What are the odds here that poor people can protect their entitlements and interests?

It is now widely acknowledged that unfettered discretion in the hands of public

officials fosters corrupt practices. Yet, how does one limit the scope of discretion? In Bangladesh as in Pakistan, and in many other DMCs, the only forensic capacity an average police station will have is limited to the ability to distinguish between human and animal blood—the rest belongs to the domain of judgment or what we might call discretion.

The phenomenal rise in private security forces across the region, guarding the lives and assets claimed by those who employ them, may boost the gross national product (GNP) figures but it also hints at a disturbing trend toward the conversion of public safety—an essential public good—into a private commodity. The economic costs are most severe in such circumstances among the small traders who peddle their goods on sidewalks and shops, the truck operator who must ride through the night to make his delivery, and others like them, for they meet their private toll collectors along the way and the tolls must be paid. And the cost is passed on to citizens.

Tackling the Whole System

We in the development community often talk about entry points and emphasize the importance of the right entry point to make a difference. The choice of the entry point may vary from one context to another. But so far, ADB's experience in pursuit of judicial and legal reforms makes one thing very clear: irrespective of the particular entry point, one must tackle the whole system.

One can begin reform work with the police or the prosecution or the judiciary but, ultimately, each element of the system must mesh to make it all work. There has to be consistency in approach, purpose, and means across the system. The judiciary cannot function effectively if the state structure does not grant its independence. But an independent judiciary without commensurate accountability runs the risk of becoming irresponsible and of creating its own tyranny. Similarly, a vigorous public prosecution is less meaningful if the criminal investigation process is tainted.

ADB's Access to Justice Program in Pakistan

ADB's flagship program in judicial reform is its continuing support to the Government of Pakistan under the Access to Justice Program (AJP). Over \$350 million has been com-

mitted for a program that, in its initial phase, addresses the needs of the whole system. It is perhaps too early to draw final conclusions but there are already some remarkable results and lessons learned.

A particularly dramatic development has been the success of delay reduction strategies introduced in pilot courts in Pakistan. While the problem of delay is still very serious, a number of courts have demonstrated that the problem can be solved. After these strategies were introduced, the number of pending criminal cases in Balochistan decreased from 5,691 in 2002 to 3,523 in 2004. In the city of Quetta, the number of pending criminal cases decreased from 3,332 in 2002 to 2,001 in 2004. In Sibi, pending criminal cases decreased from 614 in 2002 to zero in 2004.

More remarkably, the enabling environment for justice has been strengthened through:

- greater allocations of budget for the judiciary and the police;
- enhancing freedom of expression through revision of oppressive content of court laws;
- strengthening the rights of citizens through a new freedom of information law; and
- increased transparency regarding the judiciary through publication of annual reports.

The Government of Pakistan has also taken the bold step of dedicating \$25 mil-

lion for an access to justice development fund that is finally getting off the ground. The annual income of this fund will be available to subordinate courts for improving service delivery to citizens, and to support subfunds for legal empowerment and improving legal education.

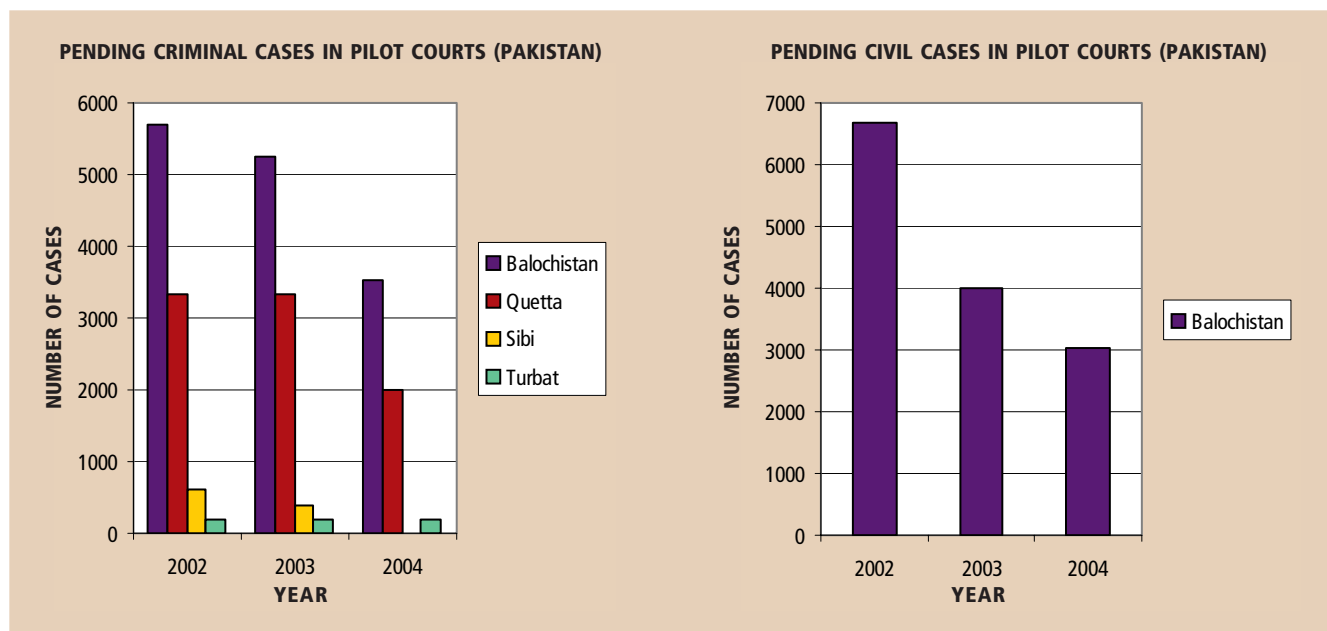
Conclusion

Such success rarely comes easily and without considerable cost. Often, the temptation is to find options that are inexpensive and that affect large numbers of people—the oral rehydration therapy equivalent, if you will, of justice. The growing affection and even romanticism among many quarters for informal systems such as alternative dispute resolution (ADR) springs from such a perception. Yet mounting evidence suggests that it can be a dangerous remedy to a difficult problem.

Informal dispute resolution mechanisms, which are seldom subject to judicial review by the formal system, can no doubt provide speedy resolution of a dispute and at an impressively low cost. Yet ADR often fails in delivering the fundamental objective of justice. To the extent the informal dispute resolution systems are controlled by local elites, they are often inherently gender- and class-biased and sanctions they impose may not withstand the minimum expectations of human decency.

Similarly, there is the growing emphasis on enhancing systems of administrative justice so that most disputes between citi-

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zens and state functionaries can be resolved at the departmental level. This is a welcome development. Yet, just like the systems of informal justice, it can only work in the shadow of a functional and robust judicial system. Delivery of justice as a public good through the formal judicial system is the lynchpin of these alternative systems for delivering justice. Where the formal justice systems fail, there will be failing states and failing economies that leave citizens, particularly the poor, vulnerable to the predatory behavior of state functionaries and powerful private interests. Therefore, in the quest for justice, it is important to stay focused on the ultimate objective of justice and not be blinded by the mirage of rapid solutions at low cost.

Challenges in Law Reform

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The Asian Development Bank's (ADB) symposium on Challenges in Implementing Access to Justice Reforms presents many opportunities to share information and best practices on judicial, criminal law, and policy reforms. To set the stage for discussions, a broad overview of ADB's engagement in this important topic and the challenges that await are discussed below.

Building Legal Infrastructure

One might ask: What does legal reform have to do with ADB? Why should we care? There are several answers.

First, ADB's Poverty Reduction Strategy is underpinned by three pillars: pro-poor sustainable growth, social development, and good governance. Each of these pillars, in turn, is embedded in legal and constitutional concepts. Therefore, legal frameworks have much to do with its effectiveness in carrying out its mandate.

Second, growth will only benefit all

people when everyone, including the poor, is legally empowered. Legal empowerment gives the poor a better ability to play an informed role in decisions that affect their lives. Over the longer term, mobilizing public interest and expectations can, in turn, make public institutions more accountable to the needs and rights of the poor.

Third, there is growing evidence that economic growth needs to be supported by a good legal system. The Peruvian economist Hernando de Soto, who dramatically highlighted the power of property rights in fostering economic development, has suggested that, in the absence of legal reforms, it could take several hundred years for developing countries to catch up with the rest of the world.

Finally, the rapid economic integration that is being witnessed in the Asia and Pacific region demands that countries cooperate well with each other. The world is becoming more and more globalized, with highly complex international agreements covering critical issues such as trade and the environment. Countries without legal infrastructure will find it very difficult to effectively participate in international arrangements and are likely to be left behind.

Legal and judicial reform is therefore no longer a human rights issue alone. It is also at the heart of catalyzing the full potential of our economies.

Challenges Ahead

Over the last ten years, ADB has been increasingly mainstreaming law and policy reform through about 400 technical assistance and loan projects.

This includes the largest legal and judicial reform program on a global scale—the \$350 million Pakistan Access to Justice Program, which targets a matrix of judicial, police, administrative, and policy reforms.

While some progress on law and policy reform have been seen in many countries, there is still a great deal to be done in terms of initiating reforms and helping member countries enhance their capacity to implement and manage reforms over the long term.

For example, the most basic of human rights is the right to a legal identity. Yet, in South Asia, a shocking 63 percent of births go unregistered each year. In East Asia and the Pacific, the figure is 22 percent. It would

be reasonable to assume that the lack of a legal identity could easily go hand-in-hand with disempowerment and reduced access to resources, services, and opportunities. On the other hand, compulsory registration could open avenues for rent-seeking and misuse of information. ADB has initiated a project to study the implications of legal identity and develop a balanced approach to addressing the problem.

Another challenge is that while many countries have enacted appropriate laws and regulations, these are not necessarily being enforced or efficiently administered. For instance, many jurisdictions extend to all citizens, often through constitutional provisions, the right to legal counsel. Yet, in practice, the poor are seldom aided by legal counsel, often due to lack of information and procedural problems in the system. ADB's flagship program in Pakistan includes the establishment of a \$25 million legal aid fund to address this issue.

There are, of course, many other challenges. Looking ahead, there is much to be learned by sharing information and experiences among countries and regions. After all, the law is knowledge, and the work done to date in this area builds a knowledge base that can and should be shared among countries and institutions.

ADB recognizes that simply replicating policies or institutional arrangements found elsewhere will rarely be successful. Instead, each reform initiative must be anchored in local knowledge of institutional practices. However, the constructive experiences of many countries can inform efforts of others.

To illustrate, the People's Republic of China (PRC) is contemplating a new set of laws and regulations relating to competition. While the change in the domestic economy is driving the impetus for legal change, PRC is carefully examining the experiences from a wide range of jurisdictions to identify the most promising mod-

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Mr. Geert van der Linden assumed the position of Vice President of the Asian Development Bank (ADB) for Knowledge Management and Sustainable Development in September 2003. ADB's Regional and Sustainable Development Department, Economics and Research Department, and the Office of External Relations come under his responsibility. Previously, he was Special Advisor to the President, developing ADB's role in the areas of knowledge management, policy, and strategy. He also headed ADB's response team to the region's Severe Acute Respiratory Syndrome (SARS) outbreak. In 2002, Mr. Van der Linden was Director General of ADB's East and Central Asia Department—operations coordination; infrastructure; agriculture, environment, and natural resources; social sectors; and governance, finance, and trade. He was also responsible for the ADB's resident missions in the People's Republic of China, Kazakhstan, Kyrgyz Republic, Mongolia, and Uzbekistan, as well as liaison offices in Azerbaijan, Tajikistan and Turkmenistan. Mr. van der Linden holds a Masters degree in Economics from Erasmus University in 1972. He participated in the Executive Development Program of the Harvard Business School in 1997.



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els. ADB has been pleased to assist PRC in this process.

Conclusion

The Asia and Pacific region stands on the brink of opportunity. Growth has been strong, poverty has been reduced, and the region is well positioned to lead the global economy in the 21st century.

However, in order to reap the full benefits of sustained economic growth, countries must address long-standing issues of governance and they must strengthen their legal and institutional frameworks. This is a long-term investment and will require vision and firm determination. The long-term nature of the challenge, however, should not deter any country from grasping the reins and driving forward with change.