



## A Tangled Web?

# Asking the Gender Question in the Multilateral Development Banks' Law and Justice Policies in India

By/Par **Ahalini Iyengar**

National Law School of India University, Bangalore

### ABSTRACT

Over the course of the last two decades, IFIs (most prominently the World Bank) have begun acknowledging the centrality of human development as an essential element of the economic development process if the growth aimed at is to be holistic and sustainable. Strikingly, there is no agreement on the manner in which this approach is to be achieved, especially in the field of gender and development. This paper focuses on the issue of whether the Multilateral Development Banks' policies have truly attempted at implementing their stated model of gender mainstreaming through their programmes and projects in India, with a specific focus on the legal sector, since that sector has both instrumental and intrinsic value for gender rights advocates. This article will aim at reviewing their approach towards rule of law projects and the manner in which gender equality norms have or have not been addressed within that framework; it will end with recommendations as to the necessary issues which gender programmes must address within the rule of law framework in order to achieve the Millennium Development Goal of gender equity.

**Keywords:** gender, Millennium Development Goals, law

### RÉSUMÉ

Au cours des deux dernières décennies, les institutions financières internationales (notamment la Banque mondiale) ont commencé à reconnaître le caractère central du développement humain comme un élément essentiel du processus de développement économique. Étonnamment, il n'y a pas d'accord sur la manière dont ce processus doit être atteint, en particulier dans le domaine du genre et du développement. Cet article se concentre sur la question de savoir si les politiques des Banques multilatérales de développement ont vraiment tenté de mettre en œuvre un modèle correspondant d'intégration du genre dans leurs programmes et projets en Inde, avec un accent particulier sur le secteur juridique, puisque ce

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secteur possède à la fois une valeur instrumentale et intrinsèque pour les défenseurs des droits des femmes. Cet article a pour but d'analyser leur approche des projets de loi et la manière dont les normes en matière d'égalité entre les sexes ont ou n'ont pas été abordées dans ce cadre. Il se termine par des recommandations sur les questions nécessaires auxquelles les programmes concernant le genre doivent faire face dans le cadre de la loi en vue d'atteindre l'Objectif du Millénaire pour le développement de l'égalité des sexes.

**Mots clés** : Genre, Objectifs du millénaire, loi

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## **INTRODUCTION**

*Development is a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views on development, such as identifying development with the growth of the gross national product.*<sup>1</sup>

One of the important developmental milestones that the international community has achieved over the course of the past decade is the adoption of the so-called “second-generation” approach towards development or the post-Washington consensus that an acknowledgment of the “social” aspect is a necessary addition to the developmental action plan for the Multilateral Development Banks (MDBs).<sup>2</sup>

MDBs occupy a curiously *sui generis* position in international law. For better or worse they have wielded considerable influence in spreading their doctrine of economic liberalization via sanctioned models of development and have considered it almost a truism that globalization brings progress in its wake. However, in spite of their touting the social benefits of the development structures they espouse, it is equally undeniable that none of these organizations made the achievement of social justice and equity their concern or claimed it as their provenance.<sup>3</sup> Rather, the claim for the better part of their existence has been to suggest that economic development along the model they propose is likely to bring about positive changes on the social front as well. The experience of countries (especially those which are the most poverty stricken, conflict ridden and vulnerable) has tended to be quite different, since the impact of globalization on their economies has very often served to

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<sup>1</sup> Amartya Sen. DEVELOPMENT AS FREEDOM (1999) 3

<sup>2</sup> Kerry Rittich, ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social,’ 26 *Michigan Journal of International Law* (Fall, 2004) 199, 200.

<sup>3</sup> Antony Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions, and the Third World,’ 32 *New York University Journal of International Law and Politics*, (2000), 243, 247.

benefit only a rarefied few and leave the rest of the country worse off than before.<sup>4</sup> The interface between the globalization mandate of the MDBs and the human rights paradigm is clearly conflicted – a tension reflected in the ambivalence with which many human rights and gender rights advocates approach the process of globalization.<sup>5</sup> The common consensus is that it can both serve the purpose of, and undermine the cause of gender and human rights.<sup>6</sup>

With the rise in global consciousness about the focal role that human rights can play and the necessity in ensuring that they are not left to an uncaring state's discretion, as well as the realization that strong human rights institutions can often prove fundamental to a robust and sustainable development, MDBs such as the World Bank have begun acknowledging the centrality of human development as an essential element of the economic development process if the growth aimed at is to be holistic and sustainable. However, this acknowledgment is accompanied by a caveat – the process of liberalization is still prioritized. While the MDBs' recommendations on gender and development have spanned the whole gamut of models suggested in developmental practices (including the Women in Development Model, Women and Development Model, Gender and Development model, Women, Environment and Development model and finally the model of Gender Mainstreaming), they have all been framed within the overarching structural adjustment, globalization and liberalization model.

This article will focus on the specific area of gender equity and whether the MDBs' policies have given this issue due regard in the planning and implementation processes in their attempts to put in place such projects in India. Furthermore, I will be examining any efforts at implementing gender policies within the rule of law sector. As a threshold enabler for both "social justice and democratic participation," the legal field remains an important arena for study in the realization of developmental and gender rights goals.<sup>7</sup> Through the sphere of the second generation reforms, law itself is viewed in new ways – it is seen as having both an *instrumental* value and a *substantive* value in achieving the ends of gender justice, rule of law and good governance.<sup>8</sup>

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<sup>4</sup> See Generally, Nancy Birdsall, 'Life is Unfair: Inequality in the World,' 111 *Foreign Policy* (Summer, 1998) 76.

<sup>5</sup> Anne Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights,' 8 *Transnational Law and Contemporary Problems* (1998) 171.

<sup>6</sup> For example, Article 14 of the Copenhagen Declaration on Social Development attempts to create a framework with a strong endorsement for the globalization model and an attempt to achieve social development within that structure, while the MDBs have been relatively sanguine in relegating social equity issues to the backburner. The difficulty in accepting this approach is that the terms of reference are still defined by the MDBs and their approved developmental models with human rights advocates attempting an *ex post facto* approach towards achieving developmental goals rather than them adopting an *a priori* approach and attempting a redesigning of the paradigm itself. <http://www.un.org/esa/socdev/wssdco-2.htm>.

<sup>7</sup> Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social,' 26 *Michigan Journal of International Law* (Fall, 2004) 199, 205.

<sup>8</sup> Ibrahim F.I. Shihata, *COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK* (1997).

## ACHIEVING THE RULE OF LAW

*The world now accepts that sustainable development is impossible without human rights. What has been missing is the recognition that the advancement of an interconnected set of human rights is impossible without development.*<sup>9</sup>

Attempts to evolve a comprehensive definition of what the rule of law entails have frequently suffered from linguistic and conceptual constraints, given the breadth of the idea. The rule of law is both an aspiration and an end; it encompasses myriad facets of the image of a truly progressive and developed society. Broadly speaking, however, the rule of law is perhaps best understood as an amalgamation of five discrete social goods: a government bound by law, equality before the law, law and order, predictable and efficient rulings, and human rights.<sup>10</sup>

The need for a targeted law oriented development programme<sup>11</sup> has several rationales put forward in its favour, which include the democratic rationale,<sup>12</sup> the economic rationale,<sup>13</sup> the poverty alleviation rationale<sup>14</sup> and the peace-building rationale.<sup>15</sup> The evolution of this

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<sup>9</sup> International Bank for Reconstruction and Development, *DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK* (1998) 2

<sup>10</sup> Rachel Kleinfeld Belton, 'Competing Definitions of the Rule of Law: Implications for Practitioners,' *Democracy and Rule of Law Project*, Carnegie Papers, Rule of Law Series (2005) 27

<sup>11</sup> Early rule of law projects in post-conflict aimed at "human rights monitoring, judicial training, legislative reform and physical infrastructure projects" initiatives [Celestine Nyamu-Musembi, 'For or Against Gender Equity?,' Occasional Paper 7, United Nations Research Institute for Social Development (August, 2005). [www.unrisd.org/publications/opgp7](http://www.unrisd.org/publications/opgp7)], which then expanded to include economic aspects such as redrafting commercial legislation and restructuring the banking and the regulatory systems in countries such as Yugoslavia, Croatia and Bosnia-Herzegovina, among others.

<sup>12</sup> The *democratic* rationale: the overarching understanding of the rule of law has been that it gives rise to a system of governance where there is *accountability* for actions which cuts across all echelons of governance. Clearly, human rights protections are *res integra* in such a regime. UK Department for International Development, 2000 White Paper. Available at [www.dfid.gov.uk/pubs/files/whitepaper2000.pdf](http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf)

<sup>13</sup> The *economic* rationale: This argument is predicated on the belief that rule of law is a *sine qua non* for economic growth since predictability and enforceability of commercial law regimes is essential for the sustainable growth in a country. Rule of law regimes benefit commerce and industry, especially in the sectors of contract law and the law pertaining to foreign investments. Moreover, there is an increasing shift to accepting that a society which is not required to grant fundamental rights such as gender equity will suffer from shaky economic foundations and will not be able to sustain its growth in the long term – this view of *economic* development hews to a Sen-like understanding which views development through a more holistic lens. [UK Department for International Development, 2000 White Paper. Available at [www.dfid.gov.uk/pubs/files/whitepaper2000.pdf](http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf)]

<sup>14</sup> The *poverty reduction* rationale: It has frequently been postulated that rule of law oriented reform can play a crucial role in reducing poverty since crime and corruption have a disparate impact on lower income groups in a society, in large part due to a skewed access to justice delivery mechanisms UK Department for International Development, 2000 White Paper. Available at [www.dfid.gov.uk/pubs/files/whitepaper2000.pdf](http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf)/ Furthermore, poverty is certainly a gender issue

reform project has spanned the better part of the last twenty years and has continually evolved.

Early rule of law projects aimed at “human rights monitoring, judicial training, legislative reform and physical infrastructure projects” in post-conflict countries, initiatives which then expanded to economic aspects such as redrafting commercial legislation and restructuring the banking and the regulatory systems in countries such as Yugoslavia, Croatia and Bosnia-Herzegovina, among others. In 1993, the General Assembly first recognized that “the rule of law is an essential factor in the protection of human rights” and, concomitant with such pronouncements at the United Nations level, the World Bank increasingly came to espouse a belief in the congruence of transparent and effective legal and judicial mechanisms to achieve socio-economic development.<sup>16</sup>

From its early beginnings as an attempt to reform the legal and judicial structures in developing countries in order to boost their economic development (a belief which was founded on the belief that institutional changes would drive social change), the project has undergone significant refinement and alteration, not the least of which was the change from believing that any single model of development could adapt itself to the dramatically different circumstances in individual countries. Furthermore, critiques of the rule of law reform project expressly noted that the projects had not adopted an interdisciplinary approach, which would have entailed a close observance of the means and methods by which law intersects with aspects such as development, and that it had not placed an emphasis on local *ownership* of the changes (which would have had an impact in making the changes sustainable). Undeniably, however, there has been increasing agreement that top-down methods scarcely work – among other things, successful programmes are as much about implementation as they are about policy, and a participatory and consultative process can effect significant changes to both. However, such an understanding has not always translated into tangible changes, and it remains an open question about the extent of the chasm between declaring gender as a priority and actually mainstreaming it into projects.

## **MDBS, GENDER AND LAW**

The term “MDB” broadly refers to the six main actors in the world of international financing institutions – the World Bank (which subsumes the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)), the IMF,

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with over seventy percent of those suffering absolute poverty being women. [World Revolution, State of the World: Brief Introduction to Global Issues, [www.worldrevolution.org/projects/globalissuesoverview/overview2/BriefOverview.htm](http://www.worldrevolution.org/projects/globalissuesoverview/overview2/BriefOverview.htm)]

<sup>15</sup> The *peace-building* rationale: Measures aimed at shoring up access to justice and putting in place independent and efficient justice redressal systems play an important role of long term peace-building in countries. Setting up courts, training judicial officers, drafting fair and equitable laws and a Constitution can play an enormous role in bringing stability and development to a country. Unsurprisingly, development and justice are closely intertwined. UK Department for International Development, 2000 White Paper. Available at [www.dfid.gov.uk/pubs/files/whitepaper2000.pdf](http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf)

<sup>16</sup> Address by James D. Wolfensohn, President of the World Bank Group, to the Board of Governors of the World Bank Group (1999).

and the regional multilateral development Banks – the Inter-American Development Bank (IADB), the African Development Bank (AfDB), the Asian Development Bank (ADB), and the European Bank for Reconstruction and Development (EBRD). It has been argued that these institutions represent the “three generations” of MDBs: the first generation refers to the IBRD, which was created for the reconstruction of post-War Europe, the second generation was more attuned to the needs of the Least Developed Countries, and the final generation is best represented by the EBRD, an organization which makes no bones about its political mandate and emphasizes the need to encourage “the principles of multiparty democracy [and] pluralism” in its Charter.<sup>17</sup>

Over the span of their existence, MDBs have considerably expanded beyond the scope of their initial mandate, a phenomenon referred to as “mission creep.”<sup>18</sup> There are two elements to the mission creep critique – the first along the lines of saying that *this* “mission creep” should not be present and the second stemming from criticisms against *any* “mission creep.”<sup>19</sup> Critiques of the MDBs’ expansion of their mandate argue that attempts at involvement in rule of law reform, micro-credit, gender rights, etc., are beyond the scope of the MDBs’ mandates and charters, a critique which is largely unfounded.<sup>20</sup> What is undeniably true, however, is that by the close of the last millennium, the MDBs came to unabashedly wield the tool of “global policy regulation,”<sup>21</sup> whereby the MDBs have placed additional conditions such as acceptance and adherence to the MDBs’ policies in areas such as “*environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction.*”<sup>22</sup>

The issue of *conditionality* has proved to be one of the most controversial of the intersections between human rights and MDB interventions – simply put, conditionality may be defined as a “*portmanteau word that encompasses all the policies that [an MDB] wishes a member to follow so that it can resolve its problem consistently with the Articles.*”<sup>23</sup> Usually, conditionality requires that a member state satisfies the expected “performance criteria” and satisfy the mandated preconditions (from a technical point of view) as well as the requisite

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<sup>17</sup> John W. Head, ‘The Future of the Global Economic Organizations: An Evaluation of Criticisms levelled at the IMF, the Multilateral Development Banks, and the WTO,’ 52 *Kansas Law Review* (2005) 241, 260.

<sup>18</sup> John W. Head, ‘Law and Policy In International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks,’ 17 *Kansas Journal of Law and Public Policy* (2008) 194, 204.

<sup>19</sup> Daniel D. Bradlow, ‘Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?,’ 50 *University of Kansas Law Review* (2002) 695, 709.

<sup>20</sup> Jessica Einhorn, ‘The World Bank’s Mission Creep,’ 80 *Foreign Affairs* (Jan.-Feb. 2001) 22, 22.

<sup>21</sup> John W. Head, ‘The Future of the Global Economic Organizations: An Evaluation of Criticisms levelled at the IMF, the Multilateral Development Banks, and the WTO,’ 52 *Kansas Law Review* (2005) 241, 252.

<sup>22</sup> See Generally The World Bank, The World Bank Annual Report 2002, available at <http://www.worldbank.org/annualreport/2002/PrintVersion.htm> 67-69; Operations Manual on the AsDB website, at <http://www.adb.org/Documents/Manuals/Operations>

<sup>23</sup> M. Guitian, “Fund Conditionality: Evolution of Principles and Practices,” *IMF Pamphlet Series*, No. 38 (1981).

benchmarks and “conditions for completing a review”<sup>24</sup> with its legal basis stemming from the founding Charters of the Fund and the Bank.<sup>25</sup>

A helpful model to aid in the understanding of the human rights intersections with MDB activity and conditionality would be to adopt the modified “concentric circles” model put forward by de Vylder<sup>26</sup> and adapted by Mac Darrow.<sup>27</sup> This understanding draws three concentric circles and classifies MDB activity in the human rights (and more specifically the gender justice sector) within it in the following manner:

- i. “*Direct or focused*” or “inner circle” actions, policies and projects are defined as being those which “aim directly and predominantly to focus on the rights, interests and needs”<sup>28</sup> of those persons who find themselves disadvantaged by their gender. These policies are aimed at having a direct and explicit linkage with the needs of gender justice. The World Bank and the regional development banks have shown a greater willingness to engage in such explicit gender oriented policies, at least on an ostensible level in contradistinction to the IMF, which has by and large postulated that benefits to women are a natural corollary to market stability, growth and good governance.<sup>29</sup> Activities in this sector within the legal field could include pushing for gender based legal literacy programmes, family planning programmes and gender sensitive legal drafting and education in the same. As the latter part of the paper argues, however, gender has not received sectoral allocation in terms of project funding which is a step backwards from a commitment of focusing attention on the same.
- ii. “*Indirect or inclusive*” or “middle circle” actions may be defined as “actions which aim to benefit broad population groups including poor people,” and also address issues of mitigating barriers which inhibit greater civil society participation, as well as issues of horizontal and vertical distributional equity.<sup>30</sup> Such a policy may have an equally strong impact but is couched in more general and broad based terms and may have a broad brush with respect to its scope and efforts. For example, in the gender rights context, such policies may include tax and public expenditure policies, social security measures, welfare activities

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<sup>24</sup> IMF, ‘Conditionality in Fund Supported Programmes- Overview’ <http://imf.org>

<sup>25</sup> IMF, ‘Financial Organisations and Operations of the IMF,’ *IMF Pamphlet Series* No. 45 (1998).

<sup>26</sup> S de Vylder, *Development Strategies, Macro-economic Policies and the Rights of the Child*, Discussion Paper for Radda Barnen (1996) 9.

<sup>27</sup> Mac Darrow, BETWEEN LIGHT AND SHADOW: THE WB, THE IMF AND IHRL, (2003) 62.

<sup>28</sup> OECD/DAC Poverty Study (1993) at 3.

<sup>29</sup> IMF, ‘Women 2000: IMF support aims to enhance participation by women in social and economic development,’ 29(12) *IMF Survey* (2000) 202. This policy has, however, known a few departures such as the case of an ESAF loan to Senegal in 1998 which expressly included elements drawn from the African Action plan for the Beijing World Conference and required that the Senegalese government expressly focus on women’s health, literacy, public participation and entrepreneurship and that it should put in place monitoring mechanisms for studying how these policies actually impacted the women of the country. IMF, ‘Senegal: ESAF Policy Framework Paper, 1998-2000,’ 27 February 1998 at 20.

<sup>30</sup> OECD/DAC Poverty Study (1993) at 3.

pursued by the State as well as activities which seek to address family welfare, as a whole.<sup>31</sup> This sphere is the one which sees the most pan-MDB intervention, given that health and education sector reforms are almost always expressly included in plans for structural reforms.<sup>32</sup> In this regard, the World Bank's Operation Policy 4.20 which deals with the *Gender Dimensions of Development* contains important safeguards, in spite of not being couched in human rights language.<sup>33</sup>

- iii. The outermost circle or the zone of “enabling actions” is a sphere whose impact may be as strong as the above two circles, but where the actions undertaken are even more tangential to the issue of gender rights. Such actions may be referred to as “structural measures aimed at underpinning growth and other policies aimed at social, environmental and economic benefits”.<sup>34</sup> Factors such as WTO rules, multilateral trade and environmental treaties, exchange rate policies would all feature within this sphere. As women have been described as the “shock-absorbers” of economic adjustment,<sup>35</sup> interventions in this area have important implication for gender rights.

The current trend in rule of law programmes is split along three broad lines – the first in the area of constitutional reform and drafting,<sup>36</sup> the second in the area of judicial administration<sup>37</sup>

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<sup>31</sup> S de Vylder, *Development Strategies, Macro-economic Policies and the Rights of the Child*, Discussion Paper for Radda Barnen (1996) 9

<sup>32</sup> Mac Darrow, BETWEEN LIGHT AND SHADOW: THE WB, THE IMF AND IHRL, (2003) 64.

<sup>33</sup> However, there has been little effort to adopt an understanding which looks at the gender aspect in *all* bank activities- especially in non-traditional areas such as energy and mining, transportation, finance, information and communication, *inter alia*.

<sup>34</sup> OECD/DAC Poverty Study (1993) at 3

<sup>35</sup> This means that women are usually the ones worst affected when the state privatizes the health or the education sectors since the caretaking burden normally falls disproportionately on them and privatizations tends to have a disproportionate impact on the employment levels of women. Anne Orford, ‘Globalization and the Right to Development,’ in P. Alston (ed.), *People's Rights* (Oxford University Press, 2001) 155

<sup>36</sup> On the issue of progressive constitutional reform – as has been the recently MDB supported case in Eritrea, Ghana, Malawi, South Africa and Uganda – MDBs can help in preventing situations like Kenya where extremely gender discriminatory personal laws were kept outside the purview of Constitutional guarantees of equality.

<sup>37</sup> Apart from the common problems which are the legacy of a colonial past [language, geographical location, complex procedures, high procedural costs, lack of legal aid and corruption] which in any event have a disproportionate impact on women who are already disadvantaged and disempowered by virtue of their gender, women suffer the deleterious effects from a host of institutional factors inhibiting their access to justice delivery mechanisms. Literacy levels are generally lower among women- this aggravates language and complexity problems; there are inadequate toilet and sanitation facilities in court buildings – which have a disparate effect on women with babies. Family courts are chronically underfunded even as the majority of those who approach it are women pursuing maintenance and custody claims and lack of access to legal aid tends to have a particularly negative impact on women given their low income levels. Finally, the judicial sector sees little participation



and the third in the area of administration and good governance norms. In the Indian context, the first point is largely moot since there is no effort to draft a new Constitution – indeed, the Constitutional guarantees as to gender equity suffer more from problems of implementation rather than issues of enunciation. On the second point, it is a tragedy that persistent underfunding has made accessing the justice mechanisms an onerous burden. Finally, on the third point, endemic corruption and the inability of the state to undertake detailed assessments of the ways and means that gender politics play out have meant that even pro-gender equality policies have not seen the kind of success they should have – often lip service is paid to change and the new forms of administration merely mask the perpetuation of existing hierarchies.

### **INDIA AND MDB INTERVENTIONS: AN ASSESSMENT**

The World Bank website for India does not list gender as a sector towards which money is allocated (in contradistinction to agriculture, transport, health, education, etc.) but considers it as a *theme* or a *goal* which must be worked towards. Arguably, giving gender a sectoral status would help in granting gender a position of equivalence comparable with agriculture, water, etc., and thus help in focusing attention to that area. For example, for the Bank, education is both a sector which garners specific fund allocation and also a goal.

Of the 649 active, proposed and considered projects of the World Bank in India, 41 projects list gender as a theme. Of the 41 projects, 33 involve an allocation of funds to the “public administration, law and justice” sector. Almost all these 33 projects involve investing in central and state administration and none of them mention investing in training judges, setting up courts, legal education programmes, deliberating on legal interventions which could have an impact on gender or even in creating effectively gender sensitized institutions of local justice and self-governance. Furthermore, gender as a theme is never more than 40% (in one project) and otherwise occupies a range between 10% and 33%. It is possible, however, to perceive a positive trend in two regards.

First, when one looks at gender themed interventions by the World Bank in India, the last half a decade or so have not only shown an increased level of activity in gender matters, but, more importantly, the projects are spread more evenly over all sectors now as opposed to their heavy concentration in the education and health sector earlier, which had made the linkages between a gender focus and the different sectors highly uneven. For example, in spite of the Bank focusing a large proportion of its lending on the transportation sector, the sector cropped up in merely two gender themed projects. No information and communication projects listed gender as a theme in spite of their almost intuitive correlation. Finance, although much neglected initially, has come to include gender as a theme in projects over 2007.

Secondly, while the use of the legal sector as an enabling and intrinsic sector has been severely underutilized in gender issues, the fact that public administration is devoted funding

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from women, especially in judicial roles. Celestine Nyamu-Musembi, ‘For or Against Gender Equity?’, Occasional Paper 7, United Nations Research Institute for Social Development (August, 2005). [www.unrisd.org/publications/opgp7](http://www.unrisd.org/publications/opgp7)

in gender projects indicates an important acknowledgement that governance is an important aspect in gender projects due to entrenched mindsets.

It is true that change has been effected – prior to 1990, gender does not really find an approach in the Bank's Indian projects. However, the whole point of gender mainstreaming is to include it in every facet of every activity of the Bank. This would mean asking the gender question and a gender impact assessment in all the Bank's project in acknowledgment of the fact that, directly or indirectly, gender issues arise in almost every type of project and in order to understand their presence or absence, the impact assessment should be a *sine qua non*. This, however, does not seem to be part of the Bank's approach. Even in the projects that explicitly invoke gender as a theme, gender role identification and gender needs assessment seems largely absent. Undoubtedly, again, it is important to emphasize that project structures do show signs of a more bottom up approach – but the earlier projects have almost always proceeded along assumptions instead of a situation specific study.

In the case of the Asian Development Bank, there were no projects which linked a rule of law objective (such as governance) to gender equity goals even though 90 ADB projects dealt with governance. Finally, just five projects actually mentioned gender equity as a theme.

## **THE WAY AHEAD: SUGGESTIONS AND ALTERNATIVES**

*Just as the Berlin Wall came down, the wall between politics [in this case human rights] and economics [in this case development] must come down, with the recognition that... in order to meet the Millennium Development Goals, both politics and economics must work hand in glove.<sup>38</sup>*

As a preliminary point, my findings in this study indicate that to a large degree, claims that gender justice principles have been kept in mind in MDB projects have been composed of more rhetoric than results, a fact which becomes clear on a closer examination of some of the ostensibly “gender” based programmes of the MDBs. The primacy of market-oriented legal reforms has allowed gender rights to be cast as an antagonist to economic development which is, to my mind, a false dichotomy, since economic growth can never be sustainable unless accompanied by corresponding betterment in social indicators.<sup>39</sup> In this context, legal

<sup>38</sup> Ko-Yung Tung, Former Vice-President and General Counsel of the World Bank.

<sup>39</sup> The pride of place accorded to market-based legal reform has meant that anything which is viewed as being potentially conflicting is relegated to being ignored “*even if this means that goals such as equality and redistribution must be sidelined in the process*” (Kerry Rittich, “Feminism after the state: The rise of the market and the future of women’s rights” in Isfahan Merali and Valerie Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights* (University of Pennsylvania Press, Philadelphia, 2001, 95). Given the importance of gender in assessing distributional equity issues, a whitewashing of these issues during the process of legal reform sows the seeds for entrenched inequality. It is precisely these set of policies by the MDBs which advocate a prioritization of even the welfare activities of the state which has given ground to worries that state resources are now, even less likely to be channelled towards gender oriented reform which seeks to achieve substantive equality by allowing for regulatory changes which recognize the different gender based duties and obligations and

reform can be a powerful way of achieving gender equality. The Asian Development Bank's initiative at encouraging legal literacy in Bangladesh<sup>40</sup> has had a positive effect in mitigating corruption and enhancing good governance standards, since the average person who completed or participated in the project displayed: i. general knowledge of law; ii. engagement and confidence in citizen advocacy; iii. positive perceptions of gender equity; and iv. the role of women in governance; and confidence in the value of law and good governance.

The World Bank's lending activities have displayed minimal congruence with gender in the law and justice arena, even though there has been prolific research output in the issues of gender and law and how they impact and are impacted by property rights, labour rights, social welfare measures and access to productive capital. In spite of the very real need to harmonise formal and informal dispute resolution mechanisms and the importance of a legal agenda in advancing gender rights issues, this has not percolated into actual funding for such projects through mainstream lending by the Bank, and hardly any Gender and Law programmes have been implemented in the Indian context.

Against this backdrop certain undeniable truths have emerged. One is the fact that national sovereignty is an incredibly touchy area for most nations, and any attempts at inroads into it, no matter how well-intentioned, must be handled with sensitivity and accompanied with every effort to make the people and government of the nation state feel a sense of ownership over such policies. Western or alien models of development imposed on a top-down basis do not aid in the attempt to bring about holistic change. While aspirational ideals, especially in tradition and hidebound areas such as gender rights are important and necessary, there must a focus on institution building and increased participation in decision making processes in order for the ideals of gender justice to be achieved. While the role of the MDBs is important in this context, the *advisory* role they play should be crucially valued. Furthermore, as again discussed above, the MDBs have not shied away from using the mechanism of conditionality in order to grant loans, and as international organizations which occupy a *sui generis* status in the international community and can play a massive role in driving positive change, they should, in my belief, use this tool of conditionality more robustly to push a gender equity agenda. Conditionality does not *ipso facto* mean hectoring a state or pushing it to make decisions it is not ready for; what it does represent, in my opinion, is an opportunity to make sure that both formal and informal institutions in a nation are shored up and that the issue of gender rights is not relegated to playing second fiddle within the rule of law agenda. This is

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seeks to create an *enabling* environment. Hence, the assertion of conflict is perhaps deliberately couched in terms of conflict since taking gender considerations into legal reform can sharply escalate the costs of a project, both conceptually and in terms of actual design and as Rittich noted, “a commitment to gender equity, in particular one that includes economic equality for women, is not easily reconciled with market-centred policies as they now stand” (Kerry Rittich, ‘Distributive justice and the World Bank: The pursuit of gender equity in the context of market reform,’ in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations*, (United Nations University Press, New York, 2001) 42). To my mind, this dichotomy is fundamentally misplaced because the issues of gender rights are matters which are more in the category of ‘*when*’ rather than ‘*if*’ and any country seeking growth will find it incumbent to address the same.

<sup>40</sup> See generally <http://www.asianlii.org/asia/other/ADBLPRes/2001/2.pdf>

especially so because purposive interpretation of their mandate has allowed the MDBs to be creative in their decision making processes and choice of projects.<sup>41</sup>

A general recommendation that can be made in the Indian context is to critique the way that institutional reform in India (setting up courts, training judges, etc.) has focused almost exclusively on the commercial courts and/or commercial arbitration in the sphere of dispute resolution. In order to effectuate the intersections of gender justice and law reform, it is impossible to avoid the conclusion that it is family courts which should ideally receive attention from the MDBs. Family court in India is among the least developed, with poor infrastructure and almost no attempt to understand the needs of the people who most commonly approach its doors. Shoddy infrastructure (lack of proper sanitation being just one example) can represent access barriers, as can the lack of legal aid in such matters. Women are the overwhelming majority at these courts, and a lack of investment in such courts (some states in India do not even have dedicated family courts) can greatly hamper any attempt to eradicate gender inequality. Women constitute fifty percent of a nation's potentially productive capital, but the intertwining of the economic and the social mean that they can never achieve their potential if stymied by institutionally entrenched barriers. Chronic underinvestment in non-commercial judicial reforms only dampens women's participating in public life and deprives the country of robust fundamentals for strong economic growth.

A second area of judicial reform is in the area of informal justice institutions, an arena which has proved particularly troubling for India over the past few years. While these institutions have the benefit of being localized, responsive, cost-effective and speedy, they are also imbued with archaic notions of gender rights and female honour. The potential benefits accruing for them must be effectively leveraged since the overburdening of courts and the other institutional barriers to accessing justice through formal institutions makes reform of these informal institutions imperative, especially in rural areas and with respect to family and property matters. It is at these sites where religion, culture and law intersect and where "abstract ideas of rights and justice are given meaning and content and translated into different outcomes for different people."<sup>42</sup>

A final role for the MDB intervention in the legal sector is in the actual passing of legislation itself. This is an especially delicate matter owing to allegations of inroads into national sovereignty, especially in countries like India which would militate against such open influence. Appearances aside, however, MDBs have an important role to play, particularly in the passage of property and commercial legislation – for example in issues such as land tenancy and ownership. MDB focus on making these legislations gender sensitive and equitable and recognizing customary rules and practices which might be more gender equitable while drafting and codifying laws can go a long way towards entrenching gender sensitive norms.<sup>43</sup>

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<sup>41</sup> Herbert V. Morais, 'Testing The Frontiers Of Their Mandates The Experience Of The Multilateral Development Banks,' 98 *American Society of International Law* (2004) 64, 67

<sup>42</sup> Celestine Nyamu-Musembi, 'For or Against Gender Equity?,' Occasional Paper 7, United Nations Research Institute for Social Development (August, 2005). [www.unrisd.org/publications/opgp7](http://www.unrisd.org/publications/opgp7)

<sup>43</sup> In other jurisdictions, gender justice advocates have drawn attention to shortcomings in these reforms, as well as gender bias in the broader socioeconomic context that governs property relations. Failure of state programmes to address landlessness especially of female-headed households, under-representation or complete lack of representation of women in key decision-making institutions on

It would be my recommendation that the MDBs' governing bodies adopt certain crucial changes to their method and style of functioning in order to redress those lacunae which have been validly critiqued. *First*, primacy must be given to human rights and environmental concerns by linking MDB loans to the acceptance and implementation of measures aimed at ensuring basic minimum protections. *Secondly*, the MDBs must allow space for greater democracy in decision making and ensure pre-project stakeholder representation on an institutionalized basis. Not only will this prevent the imposition of a top-down project, it will aid in refining any programmes and ensure that the national governments are not running roughshod over the actual needs of the people. A stakeholder analysis from a gendered point of view could be a valuable tool in exploring the impact that such policies actually have on women's rights and lives.<sup>44</sup>

In essence, thus, space must be created for alternative conceptions of rights and equity. It is little wonder that some of the world's most stable economies and societies are those founded on a strong conception of substantive equality and gender justice, and if that is the model aspired to by developing countries such as India, the *a priori* steps to such growth must be addressed instead of assuming that gender justice will come about *ex post facto* economic growth as a "natural corollary" – *inter alia*, "intersectionality analyses" have been rife with examples proving the divergence between economic growth *simpliciter* and actual social changes.<sup>45</sup>

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land and other key resources are two examples. Uganda and Tanzania have enacted laws requiring a certain level of representation of women in non-formal tribunals established by the state. In Tanzania, village land councils established under the 1999 Village Land Act are made up of seven members, three of whom must be women. Kenya, by contrast, has made no attempt at all to deal with women's exclusion. For instance, although there is nothing in the Land Adjudication Act or the Land Dispute Tribunals Act to make provision for women's inclusion in the process. Also, support for initiatives such as the South African Law Commission. Land titling programmes that have resulted in a transition from family holdings to individually owned land parcels registered in the name of the "male head of household". This has been identified as an almost universal pattern in countries in which formal titling of land has been implemented Lastarria-Cornhiel, Susana. 1997. "Impact of privatization on gender and property rights in Africa." *World Development*, Vol. 25, pp. 1317–1333; Meizen-Dick, Ruth, Lynn Brown, Hilary Sims Feldstein and Agnes Quisumbing. 1997. "Gender and property rights: Overview." *World Development*, Vol. 25, pp. 1299–1302.

<sup>44</sup> Against this backdrop, there is a very pressing need for strong academic and research backed advocacy from gender justice proponents, research that is capable of presenting alternate models of development as opposed to merely a deconstructionist critique. Such an approach would allow for alternate conceptions of rule of law which would focus on local ownership of policies as opposed to a state-centric top-down model of change which primarily aimed at formal institutional change. Furthermore, research and advocacy would allow for a presentation of a critique of market based justifications for reforms which entrench inequity and derogate from the ideal of substantive equality in the sphere of gender justice.

<sup>45</sup> To take but one example, if social and cultural factors inhibit women's participation in the workplace outside their homes, economic self-sufficiency and a harnessing of women's productive capacity would not be achieved by creating jobs in factories near her place of residence. In such a situation, opportunities to stimulate entrepreneurship and employment through home based work should be pursued, even as a multi-pronged strategy led by education is used to challenge entrenched social norms. Similarly, educational and health policies must take into account discrimination that minorities and women face in gaining access to the same.

In addition to an intersectionality analysis, MDBs must be pushed to pursue a stakeholder analysis, institutional analysis, impact analysis, (which assesses the scenario using the social science mechanism of beneficiary and participatory assessments and the economic mechanism of partial and general equilibrium models), social risk analysis, and to pursue rigorous monitoring and evaluation policies.<sup>46</sup> Finally, I would like to propose an incorporation of the *gender budgeting initiative* within the MDBs in a comprehensive manner in order to “facilitate, at appropriate levels, more open and transparent budget processes” and integrate “a gender perspective in budgetary decisions on policies and programs.”<sup>47</sup> Interestingly, gender budgeting is not new to the Indian context and deserves a very careful incorporation into the fiscal regime in the country.<sup>48</sup>

Using market economics and feminist theories instead of restricting one's approach towards a deconstructive critique has the advantage of being able to present a coherent alternative framework seeking to achieve the goals of gender equity. An adoption of this perspective by the MDBs would allow for an appreciation of the underlying basis for poverty and gender inequity and would be able to tackle the problem through its causes and not through its symptoms and thus act to mitigate problems by acknowledging “multiple marginalities”<sup>49</sup> instead of inadvertently perpetuating vicious cycles of poverty. Given that even the most trenchant critics of the MDBs acknowledge their impact on policy and practice,<sup>50</sup> an adoption of a gendered perspective by them can only prove to be beneficial in holding up these MDBs to greater standards of transparency and accountability. One mode of achieving this could be to remember that the MDBs are, at their heart, merely a conglomerate of states,

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<sup>46</sup> Christina T. Holder, ‘A Feminist Human Rights Law Approach For Engendering The Millennium Development Goals,’ 14 *Cardozo Journal of Law & Gender*, (Fall, 2007) 125, 156.

<sup>47</sup> Fourth World Conference on Women, Sept. 4-15, 1995, Report of the Fourth World Conference on Women, 165(i), U.N. Doc. A/CONF.177/20/Rev.1 (1996). Lisa Philipps, Miranda Stewart, ‘Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budget,’ 34 *Brooklyn Journal of International Law* (2009) 797, 843. Such an approach proceeds from the assumption that fiscal policy is often deceptively gender neutral and has disparate impacts on men and women owing to differences in their economic strength and the socio-economic roles that either is expected to play. Such an analysis could use a multiplicity of available tools including collecting statistical data about the impact of taxes on gender lines, and the manner in which governmental incentives affect behaviour. Increasing space is also given to representation of women in the budget making process as well and it is expected that such a policy would best subserve the needs of transparency. This approach has gained increasing international recognition- for example, the U.N. Financing for Development Conference reiterated the necessity of using a gender based lens for analysing fiscal policies. It is, unfortunate that even in spite of this international consensus about gender budgeting, the standards of transparency, as enunciated by the IMF and OECD, make no mention of assessing gender impact as a relevant factor for governments to report in their project assessments.

<sup>48</sup> U.N. Development Fund for Women, GENDER BUDGET INITIATIVES: STRATEGIES, CONCEPTS AND EXPERIENCE (2001) 113; Vibhuti Patel, Gender Budgeting in India, Paper presented at National Workshop on Gender Budgeting--An Effective Tool for Achieving Women's Empowerment (April 15, 2007), available at <http://www.gender-budgets.org/content/blogcategory/84/156/>

<sup>49</sup> Kimberlé Crenshaw, ‘Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality,’ in WHOSE STORY IS IT ANYWAY?: FEMINIST AND ANTIRACIST APPROPRIATIONS OF ANITA HILL (Toni Morrison ed., 1992) 402.

<sup>50</sup> See *Generally* Ceri Hayes, ‘Out of the Margins: The MDGs Through a CEDAW Lens,’ in GENDER AND THE MILLENNIUM DEVELOPMENT GOALS (Caroline Sweetman ed., 2005) 67.

most of whom are signatories to wide ranging treaties on gender rights and justice, and push for a greater monitoring of their adherence to their treaty obligations even when this is through the prism of their membership in international organizations.

Unregulated, the policies of liberalization and privatization can often entrench extreme poverty, especially among women worldwide – a scenario which is brought into stark relief by policies over the past few decades – while gains in ameliorating the position of women have been meager at best and concentrated in sectors such as education access and political access, with the equally important areas of employment, security and poverty showing little improvement.<sup>51</sup> UNIFEM research has shown that development job generation for women has been largely restricted to the “export-oriented light industry sector” characterized by its low income levels, little opportunity for growth, and volatility.<sup>52</sup> Hence, it becomes important to assess the interactions between the MDBs’ economic development and poverty reduction mandates through a lens which specifically addresses the role of gender in issues of impact, especially since attempts to be “gender-blind” in micro-economic policies have ended up hewing to a skewed form of objectivity when subjectivity should have been the norm. Quite apart from all other considerations, few organizations except the MDBs possess the advisory strength and resources to effectively fund a programme for gender justice. On both a gender basis and on a more general level, it is necessary for the MDBs to adopt and promote the principles of “transparency, participation, legality, competence, and accountability”<sup>53</sup> in their actions.

To conclude, the findings of this research indicate that second generation reforms have served to reiterate the integral importance of law to the development process and have emphasized the need to take legal institutions into consideration while seeking to achieve goals pertaining to gender and social justice – an importance which is underscored by the fact that respect for law and recognition of legal rights are crucial for achieving HRD goals. However, in spite of the acknowledgment of this centrality, it is an equally undeniable truth that this has not appreciably altered the approach taken by the MDBs towards development – neither the foundational institutional framework nor the substantive composition of the legal reform plan has undergone much change.

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<sup>51</sup> Thandika Mkandawire, Social Development Research at UNRISD, 2005-2009, United Nations Research Institute on Social Development, [http:// www.unrisd.org](http://www.unrisd.org)

<sup>52</sup> United Nations Research Institute for Social Development, GENDER EQUALITY: STRIVING FOR JUSTICE IN AN UNEQUAL WORLD (2005) 8-9.

<sup>53</sup> John W. Head, ‘The Future of the Global Economic Organizations: An Evaluation of Criticisms levelled at the IMF, the Multilateral Development Banks, and the WTO,’ 52 *Kansas Law Review* (2005) 241, 306.