Empirical Findings Re: Legal Research on Compounding, Bail, Plea bargaining/Guilty Plea and Cope for Sentencing

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BACKGROUND

The Constitution of Bangladesh provides for equality before law and equal protection of law for all its citizens (Art. 27). It also guarantees protection of the law, and to be treated in accordance with law, and only in accordance with law, as the inalienable right of every citizen of Bangladesh (Art.31). Article 32 further provides that no person shall be deprived of life or personal liberty save in accordance with law. The right to speedy and public trial by an independent and impartial court or tribunal to every person accused of a criminal offence is laid down under Art. 35(3).

Despite these enabling Constitutional provisions and guarantees, all prisons in Bangladesh are severely overcrowded. It is claimed that prisons are often 2-3 times overcrowded than their capacity. Two-thirds of the prison population comprises under-trial suspects waiting hearing of their cases. Their pre-trial imprisonment is often longer than any sentence they might receive if convicted. While many under-trial prisoners are unable to afford legal services to defend their cases, state infrastructures seem to be inadequate and falling short to handle the relentless inflow of criminal cases. As a result, both the backlog of cases and prisoners are increasing every day.

Against this backdrop, GIZ undertook a program **'Prison and Justice Reform for Promoting Human Rights and Preventing Corruption'** with a view to assisting the Government in reducing prison population**.** The program aims to accelerate the release of prisoners whose imprisonment was excessive or unlawful, particularly in the case of women and children. The scheme is predicated on a public-private partnership between the Prison Directorate (and other state intuitions) on the one hand, and legal aid based NGOs on the other. At the heart of this project is a team of paralegals who have been trained to work as a bridge between prisoners and courts, prisons, police, and the legal profession.

One of the areas the program will focus on is reduction of the inflow into prison and the speeding up of the outflow by the use of Restorative Justice.[1] To Peachey[2] Restorative Justice is concerned with righting wrongs- restoring a situation or relationship as best one can to repair the damage, injury, or other wrongdoing. As opposed to Distributive Justice, which is directed at preventing injury or injustice, "Restorative Justice comes in to play after a transgression has been committed." Peachey[3] observes that there are different processes of Restorative Justice i.e. (1) Retribution (2) Restitution (3) Compensation, and (4) Forgiveness. However, they are not mutually exclusive e.g. someone injured in a car accident may desire restitution of lost wages as well as

[1] According to Braithwaite (2004), restorative justice is "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process."

[2] Dean E. Peachy (Kenneth Kressel, Dean G Pruit and Associates, 1989)

[3] ibid

retribution sanction in the hope that it would deter the offender from future drinking and driving.[4]

Restorative Justice is now also being defined as "...a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights."[5]

The GIZ initiative to support the Government in reducing prison population comes from a pressing human rights concern and efforts to ensure access to justice for the women, poor, and socially disadvantaged people.

Earlier, GIZ commissioned a short field study for interviewing its key partners to explore the challenges in the current criminal justice system and identifying opportunities for introducing the concept of restorative justice through program interventions in new areas.[6] The study, among others, recommended conducting legal research around the system of compounding of cases, as provided under Section 345 of the Code of Criminal Procedure. In a related vein, it proposed that the research should enable identifying the parameters that would allow a Judge or a magistrate to design a sentence that assists the restorative and rehabilitative process. The study also recommended carrying out a legal research on a national level to ascertain the percentage of guilty plea at courts.

In response to the recommendations which emanated from this study, GIZ sensed the need for commissioning an empirical legal research to analyse the current practices within the criminal justice system by focusing on bail, compounding, plea bargaining/guilty pleas and scope for sentencing guidelines. The central focus of this research is to identify the building blocks for advocacy and suggest recommendations that would lead to reform in the justice system and targeted intervention within the criminal justice system that will facilitate access to justice for all.

SCOPE OF WORK

The major scope of work of the research as provided in the Terms of Reference is stated as under:

Compounding

- Which cases are being compounded and how?
- Nature offences being compounded
- Why compounding of cases are less common even though there are legal provisions for that

[4] ibid
[5] Suffolk University, College of Arts & Sciences, Center for Restorative Justice, "What is Restorative Justice?" quoted in http://en.wikipedia.org/wiki/Restorative_justice#cite_note-7
[6] James Anderson, Feasibility Study IRSOP-Phase 2

Bail

- How the courts are granting bail
    - In cases of bailable offences
    - In cases of non-bailable offences
    - Under special laws
- Bail by police officers
    - How common
    - If not common, why?

Plea bargaining/guilty plea

- How common and in what cases
- At what stage of the case
- Consequences of guilty plea
- Scope in the legal system

Scope for sentencing guidelines

- For courts/judges/magistrates

Making recommendations based on research findings

METHODOLOGY

Field visits accompanied by the National Project Coordinator, GIZ were undertaken in Madaripur - one of the key pilot sites for IRSOP project intervention and Netrakona- a non-intervention area which owing to the existing linkages between SUS (Sabalamby Unnayan Samity) and the different actors in the criminal justice system provides a window of opportunity for scaling up the restorative justice component of the prison reform project under its second phase.

KII (Key Informant Interviews) were conducted with the following stakeholders:

- Police officers
- Paralegals
- Judges – District and Sessions Judges, Additional Sessions Judge, CJM
- Public Prosecutors

- Jailors
- NGOs

A literature review was also undertaken of the existing laws, decisions of the higher courts, various reports provided by the Senior Program Advisor, GIZ (Prison and Justice Reform for Promoting Human Rights) and collected from website, libraries, peers etc.

MAJOR FINDINGS OF THE RESEARCH

The major findings of the empirical research are discussed below:

Lawyers take advantage of clients' emotion and ignorance. Encourage them to file multiple cases for the same cause of action.

COMPOUNDING

1. On the issue of compounding, an Additional Sessions Judge observed that S345 of the Code of Criminal Procedure provides a comprehensive list of offences that may be compounded with the consent of the aggrieved person or with the permission of the Court before which any prosecution for such offence is pending. He further went on to explain that according to S345 (6) of the Code, the composition of an offence under S345 shall have the effect of an acquittal of the accused with whom the offence has been compounded. Although these enabling provisions exist in theory, they are seldom practiced and this contributes to the huge backlog of criminal cases, he stated. He attributed this to the negative attitude of the lawyers in particular who tend to take advantage of the emotions and ignorance of their clients and encourage them to file multiple cases for the same cause of action for the purpose of making a lot of money.

Not easy to hold lawyers accountable

2. He iterated that it is a huge challenge to hold lawyers accountable for their role in misguiding their clients and adding to the arrears of criminal cases as well as for prolonging commencement of trials by seeking frequent adjournments.

Serious offences are sometimes compromised!

3. One ADM observed that some cases filed under the Acid Control Act are also being compounded outside the courts given a large number of cases are fabricated.

4. He noted that there is merit in scrutinizing case studies and statistics of the number of petty disputes which are being settled through the Village Courts as there are instances of some of these disputes seeing their way through the Magistrate courts and adding to the huge backlog of cases under the formal justice system.

5. According to him, people are arrested and produced before the magistrate on the grounds of breach of trust, suspicion, public safety and security. Police are vested with unbridled powers to this end, he said.

Lawyers are not interested to compromise!

6. There is also very limited application of Section 345 of the Code of Criminal Procedure given people are largely unaware of the compoundable provisions and how they could potentially benefit from exploring them and the lawyers are absolutely disinclined to encourage their clients to compromise.

7. According to an Additional Public Prosecutor, approximately 1500 cases are pending before the Nari Shishu Court in Netrakona which are contributing to the huge arrear of criminal cases to be heard by the Sessions Judge in the absence of a separate tribunal.

Most of the cases filed under WCRPA are false and fabricated and 50% of them are compromised.

8. She indicated that most of the cases filed under Sections 7[7], 10[8] and 11[9] of the Women and Children Repression Prevention Act are false and fabricated which mask other family and inter personal disputes and as such 50% of such cases are compromised at different stages: at the stage when warrant is issued or at the stage of deposing evidence during trial.

9. One Superintendent of Police observed that few people are aware of the existence of compoundable provisions under S345 of the Code of Criminal Procedure and how they could benefit from exploring the same. Given that lawyers would seldom encourage their clients to settle, he stated that the law should have vested the police with certain powers so that they could play a role in encouraging disputants to enter a compromise by invoking S345 which in turn would have precluded many cases from being filed in the criminal courts.

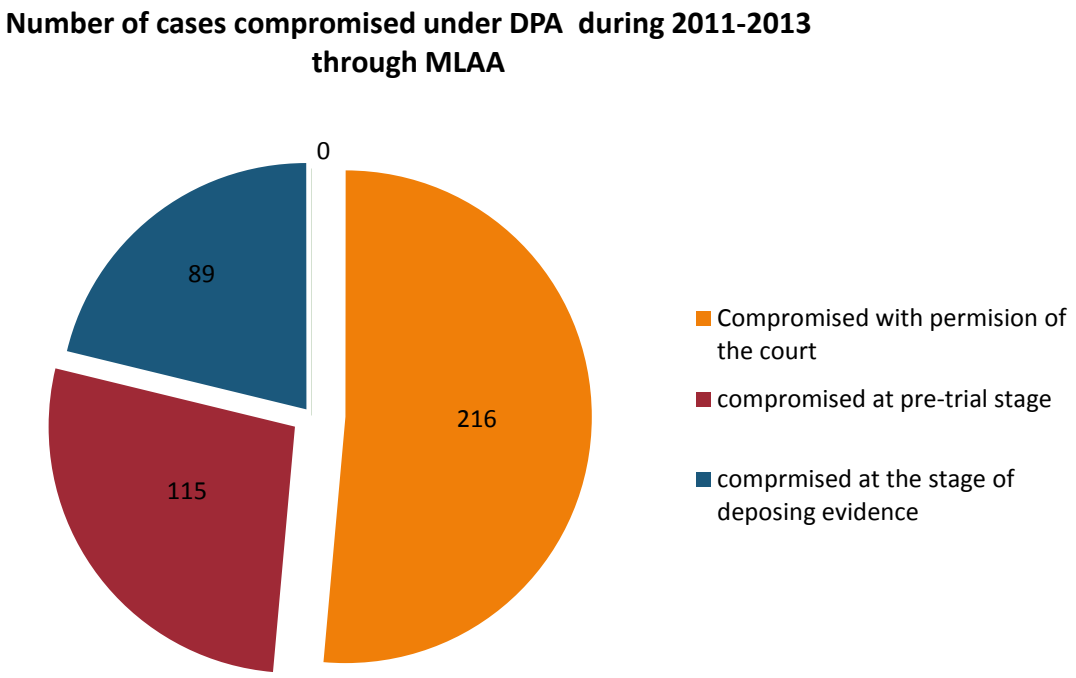
People are not aware of compounding of cases.

10. He informed that many cases are eventually settled outside the courts at a later stage of the trial when significant time and resources have already been wasted but no satisfactory solution has been met by both parties.

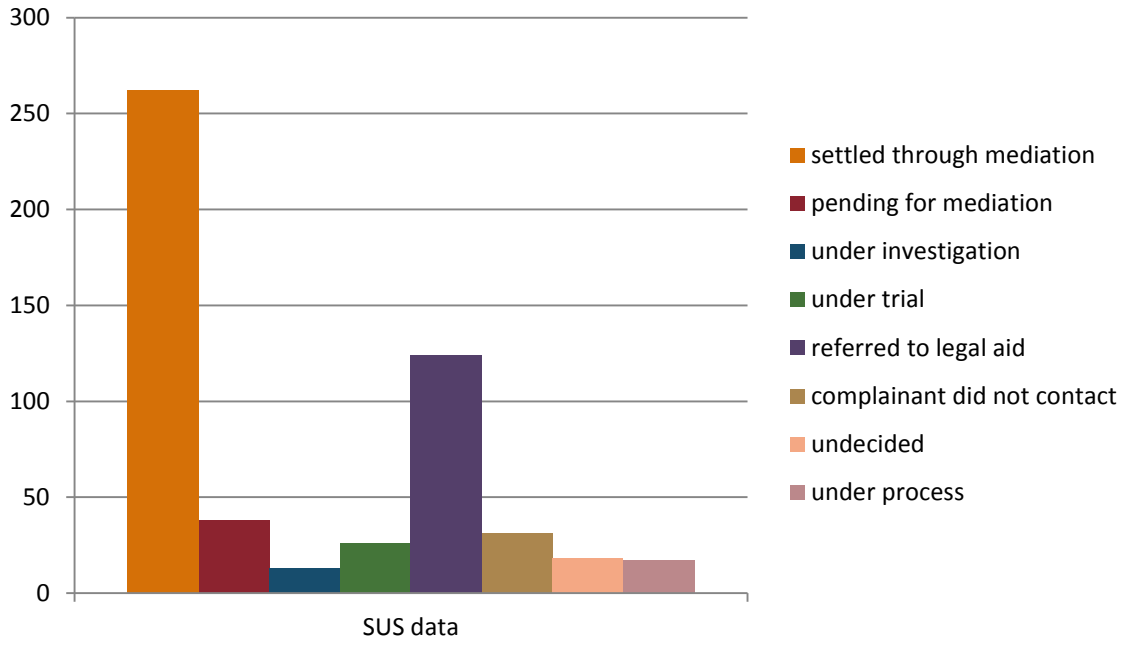
11. According to NGO staff, given that a large number of women shalishkars under different donor supported programs have already been trained and accepted in communities, it would be very useful to engage them in mitigation of petty disputes at the local level. In a similar vein, they also stressed for raising the awareness and capacity building of female local government representatives as well as the members of the WID (Women in Development) committees at the district level.

Trained women mediators may be engaged for resolution of petty disputes. Female LGR may be trained

[7] Punishment for the offence of abduction of women and children
[8] Punishment for sexual oppression
[9] Punishment for causing simple or grievous hurt and attempt to murder for dowry



Statistics from MLAA: According to the statistics provided by MLAA, 420 cases have been compromised under the Dowry Prohibition Act between January 2011 and March 2013. Out of these, 89 cases were compromised at the stage of deposing evidence during trial, 115 cases were compromised at the pre-trial stage (once the warrant was issued and the accused was arrested) and 216 cases were compromised through shalish or compounded with the leave of the court. The conditions for compromise include restitution of conjugal rights between the husband and wife in 246 cases and mutual divorce agreed upon payment of dower money and maintenance in 174 cases.



Statistics from SUS: According to the statistics provided by SUS, 529 cases were received between January 2010 and June 2012. Out of them, 262 cases were settled through compromise or salish, 38 cases are pending for mediation, 13 cases are pending for investigation, 26 on trial in the courts, 124 cases were referred to DLAC for assistance, in 31 cases the complainants did not maintain any contact, 18 cases remained unresolved and 17 were under process. A vast majority of these cases are relating to torture for dowry. Other issues relating to VAW in Netrakona include causing simple and grievous hurt, rape, abduction, sexual harassment, forcing to commit suicide and acid violence.

BAIL

Pressure to arrest for intimidation and harassment

1. According to a police officer, arrests under S54[10] and S55[11] of the Cr. PC are very common especially on the grounds of suspicion. There is significant pressure from locally influential people on the police to exercise their discretionary powers around arrests for the purpose of intimidating and harassing their rivals.

2. Arrests under S325[12] and S326[13] of the Penal Code are endemic in Madaripur. There is considerable pressure from the community to arrest and detain a person for committing an alleged offence under S325 of the Penal Code even though it is compoundable. The respondent cited the example of a dispute over the felling of a

[10] Arrest without warrant
[11] Arrest of vagabonds and habitual robbers etc.
[12] Punishment for voluntarily causing grievous hurt
[13] Voluntarily causing grievous hurt by dangerous weapons or means

tree between two brothers and how one of them was grievously hurt by a stone thrown at him by his brother's wife in a fit of anger. In this case, the neighbors who were not fully informed of the incident but had witnessed the blood stains and the head injury of the man who was hurt were empathizing with him. They demanded that the person responsible for causing the injury should be immediately arrested and sent to jail. Accordingly, an FIR was lodged and a case was filed under S326 of the Penal Code whereby the brother (in lieu of his wife) had to be arrested. There is a rigid mindset to refuse bail in the first instance for the commission of an alleged offence under this section of the Penal Code.

Rigid mindset to refuse bail in first instance

3. Political bias and negative outlook of the local representatives are some of the key causes behind lodging of false complaints with the police. There are many petty disputes which could be settled at the local level provided there is a commitment on the part of the local elites and elected representatives to facilitate problem-solving between the victim and the accused through the local justice system. This is particularly true in case of minor and first offences committed against an individual whereby the offender could compensate the victim in some form.

Political bias behind false complaints!

4. One ADM also noted with concern that S54 and S151 of the Code of Criminal Procedure are some of the widely abused legal provisions and are applied by law enforcement agencies for political purposes as well as for harassing and implicating innocent and economically vulnerable people.

S 54 and S 151 are widely abused by police for political purposes as well as for harassment of innocent and poor people.

Linkage between police and major stakeholders are important to build

5. With a view to restoring peace and harmony in society and for the purpose of building trust between the police and the people at large, the respondent (a police officer) stressed for maintaining regular communications with the upazila chairmen, local salishkars, NGOs and other local elites and other local government representatives so that they be encouraged to engage in problem solving of petty disputes within the community. Likewise, he suggested that it would be very useful to forge linkage between the community policing forums and those engaging in ADR. This, in turn, would reduce the workload of police officers in arresting people on trivial grounds. Instead, they could concentrate in tackling serious crimes.

6. For the purpose of reducing the practice of lodging false complaints, a police officer opined that he has taken initiative by providing instructions to local police stations in his jurisdiction to clarify with the complainant whether s/he has explored ADR before lodging an FIR if the offence is petty in nature. He suggested that it would be good to encourage a police officer to require the complainant to cite the reasons for failure to settle the dispute and record it while registering an FIR.

Police officer may be encouraged to ask if ADR was explored before lodging FIR

7. Many petty disputes could be mitigated on the basis of procuring the victim's statement and meeting his/her expectations through facilitated problem solving between the offender and the victim.

8. He noted with concern that investigations revealed 90% cases filed under the Women and Children Repression Prevention Act are false and fabricated and often mask

90% false cases!!

property and other family disputes among relatives. Sometimes medical certificate is also falsely procured.

Educate IOs on the evidence of alibi.

9. He viewed that there is merit in educating the investigating officers around exploring the evidence of alibi at an early stage for the purpose of preventing an innocent person from being implicated in a false case. He suggested that the use of advanced technology including CDR (call data records) to track mobile calls could assist in this regard.

IO shall swear before submitting IR!

10. With a view to mitigating the challenges in relation to submission of biased investigation reports and holding the investigating officers accountable, he iterated that it would be good to require them to swear an affidavit during producing a final report or charge sheet.

Police do not exercise their discretion. Try to shift the responsibility to the courts.

11. On the issue of enlarging an accused person on bail in police stations for allegedly committing a minor offence, he stated that police officers do not exercise their discretion. They are more inclined to shift the responsibility to the courts since they face several challenges which include political pressure, coercion or threat from vested quarters, undue influence and inducement from the complainant, he mentioned.

Granting bail may be included as PI in police

12. He made a very good point regarding setting up one PI (performance indicator) around granting of bail in the ACR (Annual Confidential Report) of police officers which could be one of the deciding factors in their promotion. This could include the number of instances in which they have proactively discharged a first or a petty offender in the police station itself after s/he has been arrested for a minor offence on admonition and upon requiring him/her to furnish a bond for committing no further offence failing which s/he would be liable to be dealt with in a more stringent manner for the commission of a similar offence in future.

13. Once this performance indicator is in place and becomes one of the deciding factors in promotion of police officers, it could be replicated by many others which in turn would have a profound impact on reducing the number of criminal cases that would otherwise see their way to the courts, he noted.

14. Paralegals deployed under the IRSOP project of GIZ in Madaripur informed that currently they are a team of five including four male and one female who are assigned to work inside the prisons. They regularly visit prisons to check the prison register, interview prisoners and take prompt action for providing them with legal redress. They have been accepted within the prison system. Their caseload include obtaining legal assistance for prisoners for commission of alleged offences around theft, drug peddling while a majority of them are under the Women and Children Repression Prevention Act, 2003.

15. They noted that in 90% cases, their first point of communication with the alleged offender is inside the prisons. However, in rare instances, they do come in contact with the accused either in court custody or in police stations. They recalled an excellent example of some kids ranging between the age of seven and eleven who were arrested under Section 54 for petty theft (stealing some soft drinks from a shop).These paralegals were notified at the time of arrests and they promptly intervened by communicating with their parents and guardians. As a result of their proactive intervention, these kids were released from the police station and handed over to their parents.

16. Likewise, they shared another interesting case in which they came in contact with a woman who was arrested on the charges of trafficking under the Women and Children Repression Prevention Act. She was picked up from a brothel and legal support was provided to her by MLAA. She incarcerated for a month till the time her medical report was made available to the court which confirmed that she was below eighteen years of age after which she was granted bail. Notably, in this case the paralegals remained in constant touch with her from the time of her arrest and being produced in court till she was subsequently enlarged on bail and escorted to board a bus to return her home in Boalmari. Although she was charged with an offence which is non-bailable, the learned judge exercised his discretionary powers to release her by granting bail under S497[14] of the Code of Criminal Procedure.

17. On the issue of granting of bail by the courts, the paralegals noted that there is a tendency to grant bail to the accused during the 3rd or 4th appearance in court for an alleged offence under S380[15] of the Penal Code. They further observed that majority of these offenders comprise of day laborers, rickshaw pullers, hawkers and van drivers belonging to the economically vulnerable groups.

Bail is granted at 3rd-4th appearance for theft in dwelling houses

18. Given that investigations reveal an overwhelming number of cases filed under the Women and Children Repression Prevention Act are false and vexatious, the paralegals observed that there is a growing trend among the judges to exert pressure on the parties to effect a settlement or compromise between the victim and the accused. They iterated that more and more judges attach a lot of weight to the statement of the victim. This is particularly true in case of disputes between the husband and wife and where a case has been filed under S11[16] of the said Act or under S4[17] of the Dowry Prohibition Act. They noted that the statement of the victim is indeed one of the deciding factors in granting bail. Accordingly, judges often resort to scare tactics by reminding the accused of the consequences of failure to reach a compromise during trial with a view to effecting a settlement between the victim (wife) and the offender (husband) along the lines of her expectation. The end result is

Judges exert pressure and resort to scare tactics

[14] When bail may be taken in case of non-bailable offence
[15] Theft in dwelling house
[16] Punishment for acts of violence committed within the family such as causing simple or grievous hurt or attempt to murder for dowry
[17] Penalty for demanding dowry

either restitution of conjugal rights or divorce between the couple upon fulfillment of the conditions of payment of dower and maintenance.

19. The paralegals also opined that on account of increased collaboration between the actors in the criminal justice system in Madaripur, there have been instances where the courts have assigned MLAA staff designated at the thana level to conduct fact-finding of cases under the Women and Children Repression Prevention Act so that they could report back to courts on the findings within a stipulated timeframe with a view to expediting hearings.

20. A District and Sessions Judge noted with concern that there are not enough courts to deal with the arrear of criminal cases. According to him, the judge is constrained to apply his judicial mind since he is overburdened. Sometimes, in the absence of a separate Nari Shishu tribunal, the Sessions judge has to hear 150-200 criminal cases in a day.

Courts are overburdened. A judge hears 150-200 cases a day - fails to apply judicial mind.

Long delay for trial is a good ground for bail.

21. He noted that bail is granted when there is long delay in holding trial by applying S339C[18] of the Code of Criminal Procedure. There is also an apex court judgment which states that long delay in holding trial is a good ground for bail, he said. He cited the example of a GIZ assisted case in which bail was granted after twenty months.

22. On the issue of a huge number of cases resulting in acquittals under the Women and Children Repression Prevention Act, he noted that on an average, 15-20 cases end in acquittals on a monthly basis in one district alone.

23. On the issue of challenges in processing bail as has been noticed in the case of an arrestee under S109[19] of the Code of Criminal Procedure, a Special Public Prosecutor maintained that the court could proactively release the arrestee on his/her own bond upon fulfillment of a condition in writing that s/he would refrain from committing any further offence and maintain good behavior. He affirmed that there is no provision under S109 which allows detention of a person in jail pending proceeding under the same. Similar conditions could be applied in the case of a person arrested under S151[20] of the Code of Criminal Procedure, he said.

Courts can proactively release an accused under s.109 instead of allowing detention.

24. He stated that in 90% cases, drug-dependents tend to re-offend and hence they should not be allowed to languish inside the prisons. Instead, they should be diverted out of the criminal justice system and provided with psycho-social counseling support and treatment with a view to enabling them to come out of their addiction and integrate within the society. In a related vein, he suggested that in narcotic cases filed by the parents of the accused where it is difficult to find a guarantor, the accused person could be discharged on his/her own bond upon fulfillment of a condition in writing

90% drug-dependents re-offend. They need counseling and rehabilitation.

[18] Time for disposal of cases
[19] Security for good behavior from vagrants and suspected persons
[20] Arrest to prevent cognizable offence

that s/he would refrain from taking drugs and attend a drug rehabilitation center for counseling and treatment.

25. He also shared that sometimes the accused persons continue to languish in prisons on account of long delay in submission of reports by the investigating officers. However, there are rare instances in which the charge sheet or the final report has been submitted in a period of fifteen days. The investigating officers should be provided adequate training and support for submitting their reports expeditiously, he maintained.

IR is hardly submitted within 15 days.

26. According to the Public Prosecutor, bail is a right of the accused as is laid down under S496[21] of the Code of Criminal Procedure. As such, directives should be imposed upon the police to release the arrestee upon furnishing a bond when s/he is arrested under Sections 323[22], 324[23], 325 and 420[24] of the Penal Code, he said.

Police should be directed to release some arrestees after furnishing bond.

27. Referring to S497 of the Code of Criminal Procedure, he iterated that the law clearly provides for granting of bail under special considerations and grounds in case of non-bailable offences. However, these provisions are directory and not mandatory. As such, this depends on the prudence and orientation of the judge and his/her willingness to exercise discretion and judicial mind in granting bail to the accused person for commission of a non-bailable offence. However, there are only a few instances of granting bail under S497 especially in the case where the alleged offender is not an adult, a woman, an aged person or is sick or infirm. In the wake of an alarming rise in the number of false cases under the Women and Children Repression Prevention Act, there is a growing trend among judges to grant bail during deposition of evidence at the stage of trial for alleged offences under this special law.

Granting bail under special considerations in case of non-bailable offence is directory, not mandatory. It depends on the prudence of the Judge.

28. On the issue of bailing with certain conditions, he noted that this is not widely practiced. However, the criminal justice system could benefit from exploring these options, he observed. Conditions could include imposing certain restrictions relating to the movement of the accused, releasing him/her on probation, requiring him/her to stay away from the victims, witnesses and other co-accused, abstaining from the use of intoxicants, drugs and alcohol, attending a counseling and rehabilitation program, and requiring him/her to surrender important documents including passport, national ID, business license etc, he said.

29. He lamented that barring a few exceptions; there is hardly any good practice of applying the judicial mind by magistrates and judges while exploring their discretion around bail. The age and mental state of the offender, the FIR and the consequences of imprisonment for the accused is seldom considered before trial commences. As a result, significant amount of time is wasted by refusing bail during the first and fourth

Applying judicial mind is exception rather than the rule in case of bail!

[21] In what cases bail to be taken
[22] Punishment for voluntarily causing hurt
[23] Voluntarily causing hurt by dangerous weapons or means
[24] Cheating and dishonestly inducing delivery of property

appearances and in the process of waiting for the submission of investigation and medical reports.

30. On the issue of granting bail and proactively applying enabling legal provisions within the Code of Criminal Procedure, one Sessions Judge noted that it depends on the mindset and orientation of the judge. Reflecting on his own experience in exercising judicial mind while granting bail, he suggested that there is a growing trend among judges to apply this in the case of a dispute between the husband and the wife against the grim reality that in most cases, the fallback position of women is vulnerable for they lack livelihood skills and receive little or no support from their close relatives in the wake of marital disputes. As such, they are inclined to go back to their husbands even if they are occasionally abused or rebuked by the same. Taking these circumstances into consideration, courts do encourage the husband and wife to enter into a negotiated compromise.

In case of family disputes, Judges often encourage the couple to compromise even though the wife is occasionally abused or rebuked by the husbands.

Courts often ask NGOs to conduct fact finding and report back.

31. Reverting to the biases and delays in submission of investigation reports, he observed that courts occasionally ask NGOs to conduct fact finding and report back on the findings. This is a useful exercise in unraveling the real facts, he viewed. Given the proximity of the NGOs to the people and their expertise in engaging in problem solving, he noted that their involvement assist in expediting investigations and bringing pertinent facts and information to the notice of the courts.

32. One jailor noted that there is tendency to grant bail to the unconvicted prisoners before certain festivals including Eid and Victory Day.

33. She further mentioned that that drug dependents should not incarcerate inside the prisons but should be provided with psycho-social counseling and treatment.

34. An Additional Public Prosecutor observed that the victim's statement is the primary consideration for the judge in exercising his/her discretion around granting bail. For example, in the case of a dispute between the husband and wife in particular, courts tend to encourage the parties to enter into a compromise given the objective of the wife is to go back to her husband as has been observed in most cases, she said.

Victim's statement is the primary consideration for granting bail to the accused.

35. She further iterated that bail is also granted to the co-accused once the final report is submitted to the court. However, there have been instances when the courts have also taken suo motu cognizance of an offence even after the submission of FRT in the wake of allegations that the investigation reports are biased.

36. On the issue of exercising his discretionary powers and application of judicial mind in relation to granting bail for non-bailable offences, one Chief Judicial Magistrate noted that the courts are severely constrained owing to political pressure and the hostile attitude of the bar. However, he stated that bail is generally granted to an accused who has been charged with an offence under S326 of the Penal code after a period of one month. The grounds on which bail is granted include among others socio-

Socio-economic reasons, poverty, impact of imprisonment on the family, age, physical and mental condition of the accused are grounds for bail.

economic reasons, abject poverty and impact of imprisonment on the family of a single breadwinner or earning member besides taking into consideration the age, physical and mental condition of the accused.

37. He went on opining that there is no practice of "on-call" prisoners in Netrakona and attributed this to the proactive jail visits made by the District Judge, Superintendent of Police, Chief Judicial Magistrate and the Deputy Commissioner in the respective district. He also informed that it is the duty of the GRO and jailor to ensure the next date for producing the under-trial prisoner in court for hearing in the event if there is a postponement or adjournment of the proceeding.

38. One Superintendent of Police observed that there is hardly any practice of granting bail in police stations given the prevailing socio-political circumstances are not favorable and the police are more inclined to shift the responsibility to the courts in this regard. It is up to the courts to exercise their judicial discretion in granting bail to the accused for non-bailable offences on grounds stated under S497 of the Code of Criminal Procedure which include the age, sex, physical and mental state of the offender, he said.

Granting bail from police station is rare.

39. He was also very critical about the role of lawyers in relation to furnishing bail bonds as required under the Code of Criminal Procedure. Police verification also reveals that the address of the offender is in most cases incorrect, he stated.

40. The NGO staff was extremely critical of the negative role of police officers as to how they exercise their arbitrary powers of arrest without warrant. Given that there is a stipulated target that has to be met by them in terms of the number of people shown arrested, they tend to apprehend innocent and poor people and then implicate them for commission of offences in relation to other cases for which investigation is pending before the police officer.

41. They noted that many under-aged girls are rescued and temporarily kept in the shelter home of SUS. They were of the view that first offenders and women in particular should not be allowed to incarcerate in prisons and safe custody where they come into contact with hardened criminals and habitual offenders.

First offenders and women in particular should not be sent to jail where they come into contact with hardened criminals

PLEA BARGAINING/PLEADING GUILTY

1. Reflecting on their local experience, the paralegals noted that there is a tendency among the accused to plead guilty for offences punishable with imprisonment or a

Tendency to plead guilty in petty cases

nominal amount of fine as under S34[25] of the Police Act of 1861 and S501[26] and 290[27] of the Penal Code and for certain offences committed under the Bengal Gambling Act of 1867.

In murder or dacoity cases, pleading guilty is rare because the accused is often acquitted due to short of witnesses

2. Reflecting on his experience on instances of guilty plea while he was posted in Dhaka, an Additional Session Judge observed that sometimes there were instances of the accused persons pleading guilty in narcotic cases under the Narcotics Control Act. According to him, most murder cases result in acquittals given witnesses do not turn up after a certain point of time. Therefore, it is very unlikely for the accused to plead guilty in such cases. He shared that he has noticed similar trends in armed robbery cases as well. Again, lawyers do not encourage the accused to plead guilty except in cases where the maximum term of sentence has already been served out.

3. He acknowledged that understanding the mindset of the judge or magistrate is crucial before convincing the accused to plead guilty since it may result in conviction in most cases.

Laws may be amended to include the provisions of plea bargaining in line with Indian laws

4. The judge seemed to be very open to the idea of amending the law in Bangladesh with a view to introducing plea bargaining along the lines of the amendment effected in India in the year 2005 under the Code of Criminal Procedure. He stressed the need for educating the judges, magistrates, lawyers and the accused on the advantages of plea bargaining in case of less serious offences and in case of offences committed against an individual. This could be achieved by facilitating a compromise between the offender and the victim whereby the offender agrees to plead guilty, offer an apology and compensation as well as reimburse costs incurred for litigation in return for a less harsh sentence or conviction.

Ensuring voluntary consent of the accused for plea bargaining is crucial.

5. However, he emphasized that while making an application for plea bargaining, it is imperative to ensure that the accused person voluntarily consents to pleading guilty and that s/he is not coerced or induced in doing so. At the same time, he endorsed the idea that the judgment delivered by the court in the case of plea bargaining shall be final and no appeal shall lie in any court against such judgment as is the position under the Code of Criminal Procedure.

6. Citing the challenges faced by judges in dealing with a huge number of criminal cases, he noted that it would be good to encourage the parties to engage in a mutually satisfactory disposition of the case at any stage of the case (pre-trial, trial, post-trial) before pronouncement of the final verdict. Given that in practice, there is an emerging trend that a large number of cases are being compromised by the parties at the pre-trial, during and after trial, there is merit in introducing plea bargaining, he said.

[25] Punishment for certain offences on roads etc.
[26] Punishment for printing and engraving matter known to be defamatory
[27] Punishment for public nuisance in cases not otherwise provided for

7. On the issue of incentivizing the accused for pleading guilty in return for a reduced sentence or less harsh punishment, he said it would be good to set-off the period of detention undergone by the accused against the sentence of imprisonment as is the position under the Code of Criminal Procedure in India.

8. On the issue of pleading guilty, a Special Public Prosecutor observed that there is no incentive in the offering for the accused who is guided by his/her lawyer to decide on it. There is also no denying that the rigid mindset of the magistrates and judges is also a deterrent in encouraging the accused to plead guilty for less serious offences. S/he is pre-empted by the fear that his/her statement would be used as evidence and would result in a harsher punishment. There is an urgent need to educate the judges, magistrates, lawyers and the accused persons on the advantages of mitigation of petty offences through plea bargaining and how the criminal justice system could incentivize the accused by encouraging him/her to plead guilty in return for lesser punishment and thereby contribute towards reducing the prison population.

No incentive for pleading guilty!

9. He opined that introducing plea bargaining would work well for offences committed against an individual as it would enable the victim and the offender to enter into a mutually satisfactory compromise which could, depending on the circumstances of each case, include payment of compensation and legal costs, tendering an apology, opportunities for restitution of conjugal rights or for agreeing to a mutual divorce upon fulfillment of the conditions of payment of dower money and maintenance.

10. He cited some excellent examples of cases in which the alleged offender could be encouraged to plead guilty in return for being discharged on certain conditions by the courts. The examples include instances whereby a person is arrested with one bottle of alcohol, heroine or phensidyle or with some fake notes and where there is no previous history of conviction and criminal records against the accused person.

11. He further suggested that this would require the police, magistrates and judges to think outside of the box and apply their judicial mind in assessing the accused based on the nature and gravity of the offence and the circumstances in each case.

Police, magistrates, judges need to think outside of the box

12. On a final note, he observed that there are enabling provisions within the Code of Criminal Procedure, the Penal Code and the Women and Children Repression Prevention Act which if effectively invoked would go a long way in reducing the number of false and vexatious cases that are being filed. These provisions include S250[28] 0f the Code of Criminal Procedure, S211[29] and S219[30] of the Penal Code and S17[31] of the Women and Children Repression Prevention Act, among others.

[28] False, frivolous or vexatious accusations in cases tried by Magistrates
[29] False charge of offence made with intent to injure
[30] Public servant in judicial proceeding corruptly making report, etc., contrary to law
[31] Punishment for filing a false case or lodging a false complaint

13. One Superintendent of Police was very open to the idea of introducing plea bargaining in Bangladesh and noted that it should be encouraged for mitigation of petty offences particularly in those cases where there is room to compensate the victim by the offender. However, he iterated that plea bargaining should not be allowed or encouraged in relation to mitigation of serious offences involving heinous crimes against the society and violence against women.

CHALLENGES IN REDUCING CASE BACKLOGS

Lawyers lured by the greed of money entice clients to file multiple cases for the same cause of action

1. The Special Public Prosecutor of one Nari-Shishu Court shared his experience on how different provisions under the law are being abused by filing more than one case for the same cause of action. He said that lawyers are lured by the greed of money which they could cash in by playing with the emotion of their clients through encouraging them to file a number of cases. A very common example is the tendency to file cases under S4 of the Dowry Prohibition Act and S11 of the Women and Children Repression Prevention Act for the purpose of realizing dower money and maintenance by the wife. The victim's underlying expectation is seldom taken into account by the lawyer who instead of encouraging compromise between the parties would rather influence the client to bring charges for causing grievous hurt. Medical certificate is also falsely procured for making a strong case, he said.

Distorting facts by lawyers contributes in increasing number of cases

2. According to available statistics, approximately 300-400 criminal cases are pending for trial before the Sessions Court in Madaripur. The prosecutor opined that the role of the lawyers in distorting facts and presenting them before the court is one of the key factors which contribute to the overwhelming number of false cases that are pending for hearing on a daily basis.

Only 18.3% of the prisoners are convicted, 82% are under-trials

3. As per statistics provided by the Jailor, as of 13-05-2013, there are 424 prisoners that are housed in Madaripur jail of which 78 are convicted and the rest are under-trial prisoners. There are also 13 under-trial women inside this prison who have been charged with offences relating to drug peddling. Many of them are old people (in-laws) who have been remanded for alleged offences under the Women and Children Repression Prevention Act. Some of the remand prisoners do not have any previous track record of criminal activities.

A judge hears 50-60 criminal cases a day!

4. One Sessions Judge observed that he is overburdened and has to hear 50-60 criminal cases on an average on a daily basis that include charge hearings, bail applications, appeals, contests, evidence, issue of prosecution witnesses etc. This precludes him from applying his judicial mind in exercising his options for sentencing, he said.

5. He expressed concern over the fact that investigation reports are delayed which contribute to the backlog of criminal cases and maintained that investigating officers are also overburdened with multiple tasks. They also lack necessary skills, training, logistics and infrastructure support which also weaken the investigation, he said. He

also raised his concern around the expenses incurred in service of summons and how these issues remain unaddressed under the legislation.

Lawyers are often responsible for backlog of cases!

6. One Chief Judicial Magistrate was very critical about the role of lawyers and the bar in relation to how they contribute to the huge case backlogs in the criminal justice system. He observed that most lawyers do not prepare for the hearings and seek frequent adjournments and thereby delay cases from being dealt with.

Lawyers often fail to bring in enabling legal provisions to the attention of the Magistrate!

7. He seemed totally oblivious of the existence and application of the Probation of Offenders Ordinance 1960 and S4 in particular which provides for conditional discharge for a person (who has had no previous conviction) convicted of an offence punishable with imprisonment for not more than two years. He blamed the lawyers for the lack of awareness of the courts. According to him, most lawyers do not research well to bring the enabling legal provisions and enlightened Supreme Court decisions to the notice of the magistrates and judges which if proactively invoked would significantly contribute towards reducing the prison population.

8. On the issue of an alarming rise in the number of false cases which are filed under the Women and Children Repression Prevention Act, one Superintendent of Police mentioned that police are reticent to register false cases and more and more complaints are being lodged through the courts.

Evidence of alibi is sparingly used.

9. He lamented that significant time is lost in processing a final report (approximately 6 months) and the alleged offender has to incarcerate in the prison until such time after which s/he is discharged. He also informed that the evidence of alibi is also sparingly used by the investigating officers as a result of which innocent people have to incarcerate in jail till the FRT is processed or a medical report is produced in court.

10. The field level staff of SUS involved in providing legal support to socially and economically vulnerable clients in Netrakona observed that it is extremely challenging for a disadvantaged client to lodge a complaint with the police. They feel intimidated and are disinclined to report a crime for they are expected to pay for registering a GD or FIR. The amount ranges between 200-300 taka depending on the financial status of the complainant.

Police takes bribe and implicates innocent instead of offender.

11. On conditions of anonymity, a field staff informed how investigating officers ask for different rates (bribe) from the accused person depending on the charges brought against the same in return for exonerating his/her name from the charge sheet. He further explained how upon receiving bribe, the SI having true knowledge of the real offender would seek to exercise his power in implicating a number of other (poor and disadvantaged) people in the alleged crime and accordingly temper with the police report.

12. Depending on the sensitivity of the case and the socio-economic status of the complainant, the SI would often submit a police report for prosecution or release of the accused person even though s/he has been implicated in the FIR. However, if the accused person is economically solvent or influential, the SI would produce a charge sheet implicating other people in lieu of the accused person upon receiving a hefty amount of bribe in many cases. He also lamented that in certain cases in which the complainant or victim is less resourceful and ignorant, s/he may not even file a naraji petition or fresh complaint which in turn would provide an opportunity for the accused to go unpunished. Even if a fresh complaint is lodged and another SI is entrusted to investigate, h/she would also produce a report which is almost similar in nature to the one submitted by his/her colleague, he said. Most police officers work in close syndication with the criminals as well as locally and politically influential people, he mentioned.

Most police officers work in syndication with criminals and politicians.

13. On the issue of granting of bail by the courts, the field staff iterated that unofficially, rates are negotiated between the defense lawyer and the PP or between the complainant and the PP as a result of which bails are opposed or allowed. Therefore, poor and disadvantaged people who are not in a position to satisfy the PP with a financial inducement are often denied bail and incarcerate for a longer period. It is very unfortunate that most PP and APP are politically appointed and act on *tadbirs* (recommendations/request from a senior colleague, political leader, peer or friend), he said.

Money is the deciding factor for the PP to oppose or allow bail !

14. A Special Public Prosecutor noted that the magistrates and judges have a rigid mindset and cannot think beyond applying easy formula while exercising their sentencing options. Besides, bail prayers are indiscriminately rejected for there is scope of filing miscellaneous case with the Court of Sessions, he noted.

Magistrates and Judges have rigid mindset

15. One District and Sessions Judge opined on the issue of long delay in disposal of criminal cases. He cited reasons which include lack of cooperation of the accused and the fact that witnesses do not show up on the dates fixed for hearing for which the hearing of a case has been adjourned repeatedly. Besides investigation and medical reports are also delayed and biased, he said.

Absence of witness delays disposal of cases

16. An Additional Sessions Judge noted with concern that apart from filing false cases under the Women and Children Repression Prevention Act, there is a tendency to abuse certain provisions under the Dowry Prohibition Act and S385[32] of the Penal Code.

[32] Putting person in fear of injury in order to commit extortion

TYPOLOGY OF CASES

1. One Additional Public Prosecutor noted that other than cases filed under the Women and Children Repression Prevention Act; most of the criminal cases in Netrakona revolve around charges brought under Sections 325, 326 and 307[33] of the Penal code.

2. A Superintendent of Police noted that majority of disputes in Netrakona are related to land and family disputes. He lauded the role of community policing forums in crime prevention and the NGOs like SUS in facilitating settlement of petty disputes. He recommended that efforts should be underway to institutionalize CPF and effective linkages should be forged between the CPF and the CBOs which engage in Salish.

3. He noted that in each police station, there are 4-5 cases (approximately) of arrests made under S54 of the Code of Criminal Procedure in Netrakona. The caseload of the police includes offences like theft and burglary. He further observed that there is a tendency to implicate people under S326 of the Penal Code and medical reports are also fabricated and procured falsely.

4. Regarding the category of cases registered in Madaripur, one police officer noted that 60% of the cases are filed under the Women and Children Repression Prevention Act while the remaining includes cases under the Narcotics Control Act and S326 of the Penal Code.

60% of cases at police station are under WCRP Act!

90% cases are in relation to land and property disputes

5. 95% cases that are filed in Netrakona are in relation to land and property disputes. He noted that civil and criminal cases are filed for the same cause of action. However, 50% of these cases are compromised at the initial stage.

6. As per the statistics available from the Sessions Court, between 2001 and March 2013, 79 cases have been filed under the Acid Control Act in Netrakona. Out of them, final report has been submitted in 43 cases following which the accused have been acquitted and 2 cases have ended in conviction.

7. According to information provided by the District Acid Control Council, Netrakona, out of 66 cases which have been filed, charge sheet has been framed in 34 cases and final report has been submitted in 32 cases. 2 cases have resulted in conviction whereas 10 cases have ended in acquittals while 22 cases are pending before the court of the Additional Sessions Judge. Out of the SUS assisted cases relating to acid violence, 16 cases have been compromised out of court.

[33] Punishment for attempt to murder

OVERARCHING RECOMMENDATIONS:

Compounding and exploring the use of ADR:

1. Given that lawyers would seldom encourage their clients to settle, the law may vest certain powers with the police so that they could play a role in encouraging disputants to enter a compromise by invoking S345 which in turn would preclude many cases from being filed in the criminal courts.

2. Given that a large number of women shalishkars under different donor supported programs have already been trained and accepted in communities, it would be very useful to engage them in mitigation of petty disputes at the local level.

3. Programs may be undertaken for raising the awareness and capacity building of female local government representatives as well as the members of the WID committees at the district level.

4. Comprehensive awareness campaigns may be undertaken to disseminate the benefits of compounding.

5. It is necessary to engage with the lawyers with a view to changing their mindset so that they would encourage their clients to compound petty disputes.

6. The complainants may be asked to resort to ADR first if the offence is petty in nature.

7. Petty disputes could be resolved through procuring victim's statement and meeting his/her expectations through ADR.

8. It would be good to encourage the parties to engage in a mutually satisfactory disposition of the case at any stage of the case (pre-trial, trial, post-trial) before pronouncement of the final verdict.

Bail:

1. The investigating officers may be educated around exploring the evidence of alibi at an early stage for the purpose of preventing an innocent person from being implicated in a false case. Use of advanced technology including CDR to track mobile call list could assist in this regard.

2. It may be useful to require the IOs to swear an affidavit during producing a final report or charge sheet.

3. Performance indicator may be set for granting of bail in the ACR of police officers which could be one of the deciding factors in their promotion.

4. The courts may proactively release the arrestee on his/her own bond upon fulfillment of a condition in writing that s/he would refrain from committing any offence and maintain good behavior.

5. There is no provision under S109 which allows detention of a person in jail pending proceeding under the same. Similar conditions could be applied in the case of a person arrested under S151 of the Code of Criminal Procedure.

6. In 90% cases, drug-dependents tend to re-offend and hence they should not be allowed to languish inside the prisons. Instead, they should be diverted out of the criminal justice system and provided with psycho-social counseling support and treatment.

7. In narcotic cases filed by the parents of the accused where it is difficult to find a guarantor, the accused person could be discharged on his/her own bond upon fulfillment of a condition in writing that s/he would refrain from taking drugs and attend a drug rehabilitation center for counseling and treatment.

8. The investigating officers should be provided with adequate training and support for submitting their reports expeditiously.

9. The police, magistrates and judges should think outside of the box and apply their judicial mind in assessing the accused based on the nature and gravity of the offence and the circumstances in each case.

10. Lawyers who often act as sureties for serious cases should be held accountable for their failure to shoulder responsibility around bail bonds (failure to pay penalty for bail forfeiture)

11. First offenders, juveniles and women in particular should not be allowed to incarcerate in prisons and safe custody where they come into contact with hardened criminals and habitual offenders.

Plea bargaining:

1. Law in Bangladesh may be amended with a view to introducing plea bargaining along the lines of the amendment effected in India in the year 2005 under the Code of Criminal Procedure.

2. There is a need for educating the judges, magistrates, lawyers and the accused on the advantages of plea bargaining in case of less serious offences and in case of offences committed against an individual.

3. This could be achieved by facilitating a compromise between the offender and the victim whereby the offender agrees to plead guilty, offer an apology and compensation as well as reimburse costs incurred for litigation in return for a less harsh sentence or conviction.

4. It would be advisable to set-off the period of detention undergone by the accused against the sentence of imprisonment as is the position under the Code of Criminal Procedure in India.

5. While making an application for plea bargaining, it is imperative to ensure that the accused person voluntarily consents to pleading guilty and that s/he is not coerced or induced in doing so.

6. Judgment delivered by the court in the case of plea bargaining shall be final and no appeal shall lie in any court against such judgment as is the position under the Code of Criminal Procedure in India.

7. Plea bargaining should be encouraged for mitigation of petty offences particularly in those cases where there is room to compensate the victim by the offender. However, it should not be allowed or encouraged in relation to mitigation of serious offences involving heinous crimes against the society and violence against women.

8. A first offender may be encouraged to plead guilty in return for being discharged on certain conditions by the courts. The examples include instances whereby a person is arrested with one bottle of alcohol, heroine or phensidyle or with some fake notes and where there is no previous history of conviction and criminal records against the accused person.

Steps towards reducing backlog of cases:

1. There are enabling provisions within the Code of Criminal Procedure, the Penal Code and the Women and Children Repression Prevention Act which if effectively invoked would go a long way in reducing the number of false and vexatious cases that are being filed. These provisions include application of S250 0f the Code of Criminal Procedure, S211 and S219 of the Penal Code and S17 of the Women and Children Repression Prevention Act, among others.

2. Drug dependents should not incarcerate inside the prisons but should be provided with psycho-social counseling and treatment so that they do not reoffend.

3. It would be very useful to provide vocational and other skills training to prisoners through linkages with organizations and institutions that could offer necessary training for their reintegration post-jail terms.

4. Efforts should be made to institutionalize CPF and effective linkages should be forged between the CPF and the CBOs which engage in Salish.

Good prison practice:

1. Netrokona Jail may be taken as an example of good prison practice and can easily become a replicable model for other prisons.

2. Comprehensive rehabilitative arrangements for prisoners shall be made available.

3. Prisoners shall be accorded human treatment to live a disciplined life.

4. Prisoners may be encouraged to grow crops, vegetables and fish inside prison area.

5. Prisoners shall be allowed to play musical instruments, perform in theatres and cultural events and attend schools, if applicable.

6. Computer and other vocational training shall be in place and women shall be engaged in handicraft making.

7. Hygiene and cleanliness shall be maintained inside the prisons.

8. Counseling facilities and hospital services shall be in place and contact with family members shall be encouraged.

9. Utilization of government legal aid funds shall be ensured.

10. Coordination among the jail visitors and CSOs shall be encouraged.

Sentencing guidelines:

1. Judges and magistrates shall be encouraged and trained to apply their judicial mind while considering bail petition.

2. Judges and magistrates shall be trained to avoid rigidity and think out of the boxes.

3. Serious crimes such as those under the Acid Control Act shall not be allowed to be compromised.

4. Judges and magistrates shall be trained on compounding of cases.

5. Judges and magistrates shall be trained and encouraged to provide incentives (in the form of lenient sentences) to an accused pleading guilty for less serious offences.

6. Judges and magistrates shall be sensitized on different alternative dispute resolution mechanisms.