Joint Assessment of Prospects for Harmonisation within the Justice Sector in Bangladesh

30 June 2007

The study was commissioned by the Justice and Human Rights Working Group of the Local Consultative Group of the Development Partners in Bangladesh. It was funded by the CIDA, DFID-WB Trust Fund, DANIDA and the GTZ.

The group expresses its acknowledgement to the consultants of the study Adam Stapleton, Greg Moran and Sara Hossain.

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Acronyms

AC	Arbitration Council
ACC	Anti-Corruption Commission
AD	Appellate Division (of the Supreme Court)
ADR	Alternative Dispute Resolution
AG	Attorney-General
CBO	Community Based Organisation
CHT	Chittagong Hill Tracts
CLS	Community Legal Services
CTG	Caretaker Government
CrPC	Criminal Procedure Code
DC	District Commissioner
DP	Development Partner
DLAC	District Legal Aid Committee
GoB	Government of Bangladesh
HC	High Court
IP	Indigenous Peoples
IT	Intermediate Technology
JSC	Judicial Services Commission
MC	Magistrate's Court
MoLJPA	Ministry of Law, Justice and Parliamentary Affairs
MoWCA	Ministry of Women and Children's Affairs
NGO	Non-governmental organization
NLAO	National Legal Aid Office
ODA	Overseas Development Assistance
PRSP	Poverty Reduction Strategy Paper
SC	Supreme Court
TDR	Traditional Dispute Resolution
VAW	Violence against Women
VC	Village Court

Joint Assessment of Prospects for Harmonisation within the Justice Sector in Bangladesh

I. Executive Summary

1. Between 21 May-12 June 2007, the development partners (DPs) jointly agreed to field a team[1] to conduct an assessment of prospects for harmonization among DPs within the justice sector.

2. The full ToRs are annexed at **1**. Specifically, the team were required to provide:

   - an analysis of existing strategies and interventions of the DPs working in, or planning to work in, the sector;
   - an analysis of the DPs' comparative advantage and how to achieve complementary action in justice sector interventions;
   - a consolidated and mutually agreed action plan for the DPs with specific recommendations on how to ensure better coordination and harmonisation among the DPs, thus encouraging joint efforts and eliminating duplicating efforts for similar types of interventions; and
   - a structure of common arrangement for the DPs to enable planning, funding, disbursements, monitoring, evaluating and reporting on interventions in justice sector and aid flows

   in order to achieve:

   - a recommended programme which identifies areas where more effective use of donor funds could be made to achieve improvements in human security, access to justice, and better functioning institutions.

3. Following a review of the available documentation containing the reports of development partners as well as recent publications and key background documents (annexed at **2**), the team met with a range of actors in Dhaka (schedule of meetings at **3**), Gazipur and Madaripur.

Political context

4. The situation in Bangladesh today is highly complex and fast moving. The country is governed by a Caretaker Government (CTG) closely supported by the military. A state of emergency is in operation under which certain fundamental rights have been suspended, as has the right to enforce fundamental rights through constitutional petitions before the High Court.[2]

[1] Sara Hossain, Shahdeen Malik, Greg Moran and Adam Stapleton

[2] The rights suspended under Art. 141C include the rights to freedom of association, assembly, movement, expression, profession and occupation, o property, and protection of home and correspondence. The right to move the courts for enforcement of any rights is also suspended, ostensibly with respect to all rights in Chapter III (Fundamental Rights) of the Constitution. However, it should be recalled that certain rights are non-derogable – ie the state cannot resile from its international obligation to secure these rights within the terms in which they are guaranteed by international law. (Even though the state may not be able to derogate from such rights, the rights

Although 'indoor politics', trade union activity and the right to freedom of association and expression are suspended, many politicians remain vocal and visible in the media, which is itself – though subject to considerable self-censorship – continuing to provide a space for public debate. Arrests of political figures at all levels – particularly of the two major political parties – and also of some senior bureaucrats who had hitherto been considered 'untouchables' by law enforcement agencies in connection with corruption cases are a common occurrence.

5. The current anti-corruption drive, and the related arrests and detentions, illustrate the crisis in the judiciary and law enforcement agencies. Executive controls over both, and increasingly partisan appointments have resulted in regular abuse of process, and virtual impunity for those responsible for perpetrating human rights abuses. Over one and half decades, further erosions have taken place in investigation, prosecution, and existing oversight and accountability processes and mechanisms. Independent civil society scrutiny has also been reduced and become less effective as increasingly partisan approaches have developed even within some NGOs.

6. While efforts to introduce new oversight mechanisms were proposed, the pace of change has been glacial. The National Human Rights Commission Bill, for example, has seen ten years of drafting (1997 to 2006) with repeated amendments, submitted to the Cabinet under two administrations and still not enacted). The legislative framework on separation of the judiciary from the executive (similarly 'in process' over the period of two administrations) is only now in place in 2007.

7. The country is relatively calm and tensions appear low. The law and order situation for most ordinary citizens is reported to have improved, with the police and lower judiciary, now ostensibly freed of partisan political controls, being able to respond more to ordinary crimes. There is also a discernible reduction in violence resulting from political conflict – as well as reportedly reduced attacks on journalists and human rights defenders. The Inspector-General of Police has made an announcement inviting complaints as appropriate against the police regarding corruption or misuse of power and has already taken action in a number of cases where such reports have been made.

8. However, as noted above, human rights abuses, particularly issues of arbitrary detention, torture and fair trial, which have been continuing concerns, have been further highlighted under the emergency laws, with access to judicial remedies from the superior courts being severely restricted. The actions of the CTG appear to enjoy broad-based support across the country although perceptions are beginning to change due to the increased cost of living.

9. It remains to be seen whether the 'reform process' currently being advocated in relation to political parties, and to election-related activities, will be adopted

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themselves may not be absolute in their terms, and thus even without derogation, the state may have some leeway to restrict their enjoyment). The ICCPR – to which Bangladesh is party – includes within the list of non-derogable rights the rights to life, freedom from arbitrary detention and freedom from torture, as well as to recognition of a person, and not to be imprisoned for a civil liability.

more widely by civil society – including the creation and maintenance of non-partisan initiatives and fora for addressing issues of access to justice.

Development context

10. The concerted efforts of the CTG to tackle corruption in general and in high places in particular, are supported by the donor missions. There is a clear appreciation by those on the ground that for the next elections to be 'free and fair', a level playing field needs to be created. This requires not only the recovery of key institutions from their 'capture' by partisan political interests, but also their reform.

11. In addition, concomitant measures are needed which will make it difficult - if not impossible - for individuals to influence the process and outcomes of elections through illegally acquired wealth and abuse of power. The necessary institutional reform has already started with critical appointments of persons of integrity to institutions such as the Anti-Corruption Commission (ACC), the Election Commission and the Public Service Commission. But follow-through on tackling 'big-league' corruption will take more time. This view is not always shared by the capitals however who are, to varying degrees, pushing for early elections. The message needs to be clarified.

12. The CTG period is viewed by all we spoke to, amongst DPs, GoB and among CSOs, as offering a 'window of opportunity'. Elections are due to be held by the end of 2008, so there is roughly an 18 month period which remains. This study comes at a timely moment therefore and we have concentrated on this period by putting forward a joint portfolio of interventions that are aligned to the PRSP and are 'tangible' in benefit.

13. We take on board that the CTG may not offer clear leadership in this sector as it may have more urgent priorities (such as preparing for the elections and in that connection tackling corruption), so we propose that the DPs lead by example and, by harmonising their efforts, reduce pressure on the government and justice actors and so demonstrate their partnership.

Justice sector

14. Earlier reports[3] describe a formal justice system that is under great pressure and an informal system that is inadequate for the needs of the majority of people who live in rural areas.

15. The formal system has also been corrupted and politicized to an extraordinary degree, especially at the lower end. This has led to a crisis of confidence in the justice process by ordinary citizens. Despite these tensions, there remains a degree of confidence in the Supreme Court and its capacity to act as a bulwark

[3] See in particular: Human Security in Bangladesh: In Search of Justice and Dignity. UNDP. Sept 2002; Country Governance Assessment Bangladesh. ADB. May 2004; 'Activating the Justice System in Bangladesh'. EC. November 2005; Promoting Improved Access to Justice: Community Legal Service Delivery in Bangladesh. The Asia Foundation. March 2007

in defence of basic rights, although this confidence was shaken during the events of late 2006.

16. Key to the restoration of national integrity is the separation of the judiciary from the executive, in accordance with the Supreme Court judgment in *Masdar Hossain* in 1999. We understand the CTG is committed to bringing this about, and has already demonstrated this by putting in place the legal framework for separation (which had not been finalised under the two previous governments, over the seven years that has passed since judgment was delivered).

17. The point has been made before[4] that the current system of justice is inadequate for the needs of contemporary Bangladesh. Experience in the justice sector suggests that 'the window of small solutions'[5] is preferable to 'the language of big solutions'.[6] Reform of the justice system will be a process which takes many years.

Policy

18. The government's national poverty reduction strategy (PRS)[7] has been extended under the CTG for a further 12months.[8] The document (PRSP) is explicit in taking a 'pro-poor' approach when it comes to justice: 'judicial reform is a worthwhile goal in its own right but viewed through the poverty lens, this goal is better prioritized as on ensuring cheap and accessible justice.'[9]

19. The PRSP makes constant reference to the 'how' rather than 'what' by emphasizing the importance of 'producing tangible benefits in the short term' as a first step to 'opening up larger reform agendas.'[10]

20. The PRSP goes on to talk of 'high visibility changes that build citizen trust in the possibility of reform.'[11] It remarks that '[t]he challenge really is not on the length of the reform agenda but rather how reforms are introduced and sustained in the real world.'[12] And it notes how it is 'important to build on the many good practices and islands of excellence which have sprouted despite generally poor governance environments.'[13]

21. We have noted the striking achievements of civil society groups in this regard (both NGOs and CBOs) who have succeeded through the support of the DPs to make justice accessible to ordinary people and to women in particular. This has been done not only through engagement with the informal system of

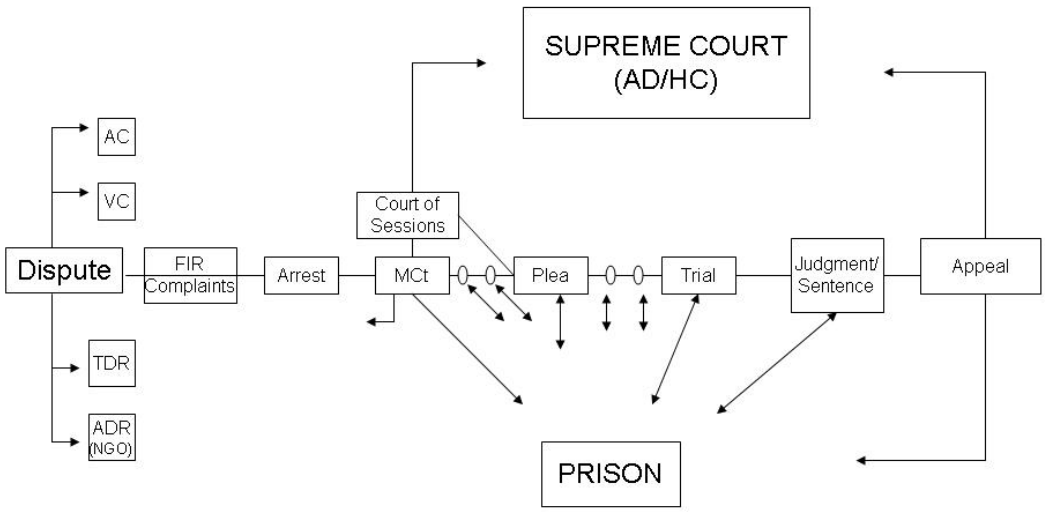
[4] EC 2005
[5] PRSP at para 4.31 p52
[6] id
[7] 'Unlocking the Potential: National Strategy for Accelerated Poverty Reduction' 2004-2007
[8] to June 2008 (source: budget speech of the finance adviser reported in the Daily Star, 8 June 2007)
[9] PRSP para 5.427 at p161
[10] id at para 5.429 at p162
[11] id para 5.429 at p162
[12] id
[13] id at para 5.430, p162

justice (ADR related initiatives), but also the formal system ('low end' initiatives such as community policing and legal aid as well as more 'high end' interventions such as public interest litigation and policy advocacy).

"*Where shall I begin, please your Majesty? he asked*
'Begin at the beginning' the King said gravely, 'and go on till you come to the end: then stop' [14]

22. We have adopted a 'justice process' approach to the study that, we contend, offers a perspective to 'Access to Justice' different to the conventional approaches: institutional, sector-wide (with its inherent difficulty of identifying and agreeing entry points) or formal versus informal.

The Criminal Justice System



23. We start at the point of dispute, in the community. We consider the available options within the community (Village Court - which while not an existing option at present will become so with the support of the EC/UNDP – and Arbitration Council on the one hand); and traditional dispute resolution (shalish) and NGO-mediation (ADR) on the other) and where they are not permissible/available, move on to consider the formal justice system.

24. We focus on the criminal justice system in line with the PRSP's injunction. We do not ignore thereby the importance of the civil justice system. We agree with the focus of some of the DPs on enabling the Village Courts and Arbitration Councils to function and in scaling up NGO-mediated settlements through ADR since it is through these fora that most people

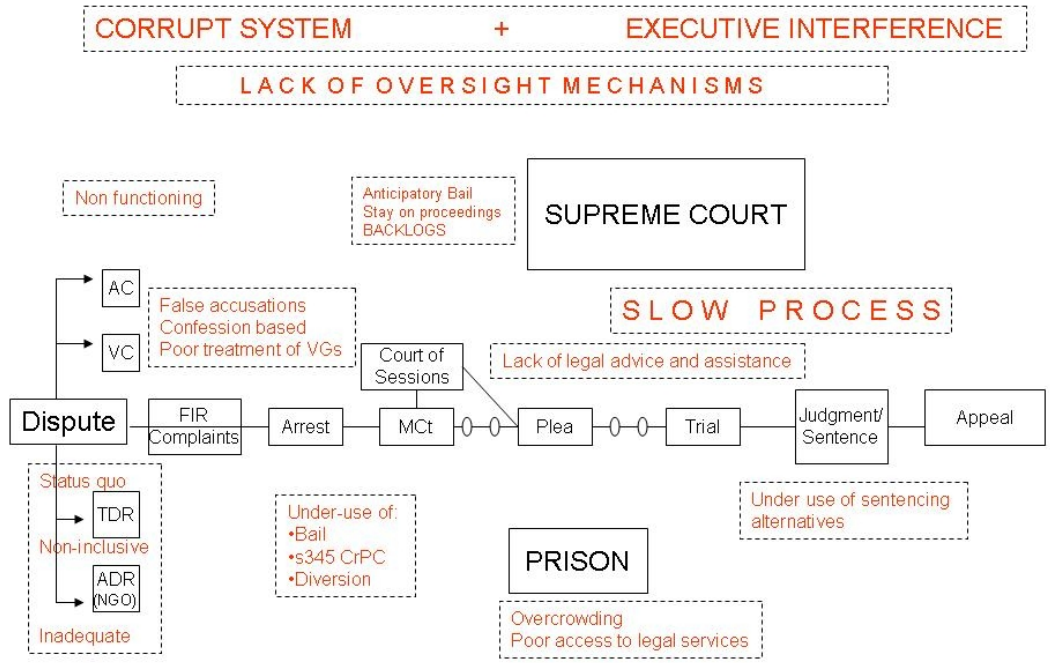
[14] Alice's Adventures in Wonderland

(especially women) will seek a remedy in relation to civil disputes.[15] We also suggest the need for further and deeper engagement with civil justice related activities, particularly in relation to issues of livelihood – around land and labour related disputes.

25. The 'justice process' approach shows how if a dispute fails or cannot be dealt with locally, it then starts its passage through the police and into the court system with numerous adjournments before it is finally disposed of.

26. We then examine the major challenges and obstacles the users and used of the criminal justice system have to negotiate to obtain justice in their case. We find a system that is quite choked.

Major Challenges and Obstacles limiting Access to Justice for the Poor



27. After a close reading of the available literature, some interviews with practitioners, observations on the ground[16] and informed by the team's comparative experience, we concluded that the first priority was relieve some of the pressure on the formal system.

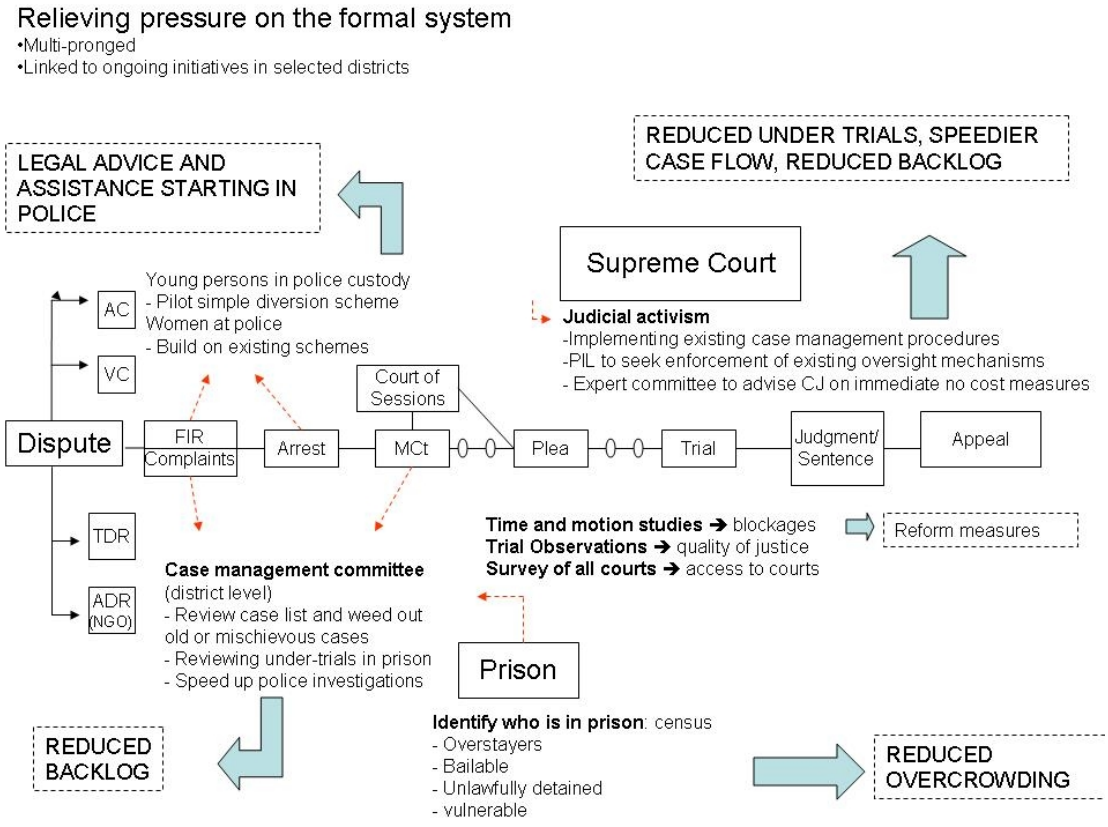
28. In so doing, we deliberately restricted ourselves to 'a real-life demonstration of what is do-able'. Experience over the years supports gradual and

[15] 'a large number of mediation settlements and cases (over 70% of the total for some organizations) involve money – including dowry, dower, maintenance or other family-related disputes with monetary implications, financial disputes with non-family members, or land disputes.' 'Promoting Improved Access to Justice, Community Legal Service Delivery in Bangladesh', The Asia Foundation, March 2007 at p15.

[16] The team visited Madaripur between 31 May-2 June 2007 and observed NGO-mediation, Village Court and Community Police Forum and the case management project in Gazipur.

incremental 'system-building' and 'systemic improvements' over big picture solutions.

29. Our focus therefore is on measures that promote closer communication, co-ordination and collaboration among all justice actors and partnership with civil society (NGOs, CBOs and lawyers). These measures also produce an immediate outcome or lay the ground for more far-reaching reforms later on.



30. We seek to illustrate above that relatively simple and prompt actions can be taken immediately to reduce prison overcrowding and case backlog.[17] We propose further 'door-opening' measures at police stations to *start* the process of trust and confidence building that will permit CLS to operate inside the police stations.

31. We test the leadership in the Supreme Court and suggest establishing a committee to implement immediate 'no cost' measures and guide DP support. We also analyse what is happening in the courts: why the process is delayed, what is the quality of justice delivered and how people navigate their way around the system.

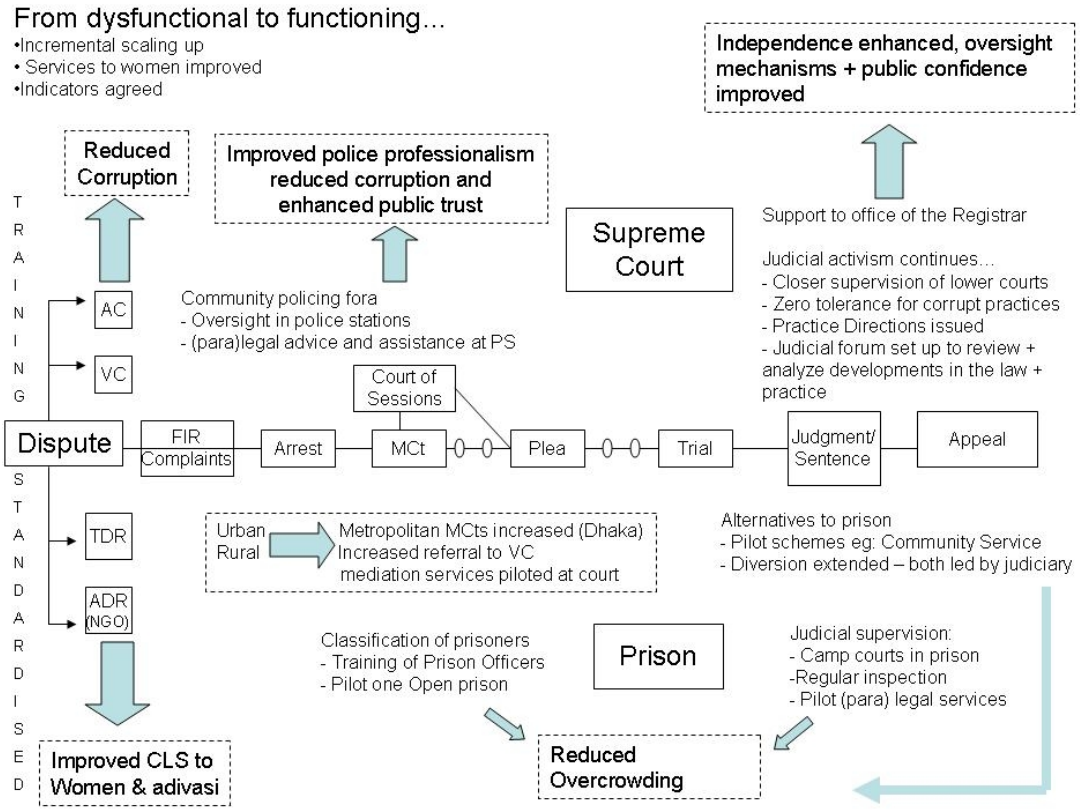
32. At the same time as we reduce the pressure on the system, we seek to address the causes of dysfunction. The support of the DPs to scale up the

[17] Paralegals in Kenya reduced the under-trial population in one women's prison from 80% to 20% in a six week period working with the prison authorities, prosecution and magistrate. The impact of Uganda's 'chain linked' project is set out in Annex 5.

ongoing work at the informal level will assist in this regard as it will reduce the number of cases going through to the courts; and enable the formal system to refer more cases back to the community (ie to the Village Court).

33. We build on what is happening here and now and draw on good practices developed in the region and elsewhere to inform their development. The problems in Bangladesh are far from unique and are to be found in varying degrees all over the world, therefore we place great importance on learning from lessons elsewhere.

34. Many of the measures we propose are low cost, some are highly visible and all aim to maximize the participation of criminal justice actors and community legal service providers and build up partnerships between them.



35. As activities in the community are rolled out across the country, we urge DPs to consider standardizing the training so that quality standards can be set and monitoring mechanisms established. We push the door more open in the police stations, suggest closer oversight over the courts and we propose a number of low cost penal reform measures.

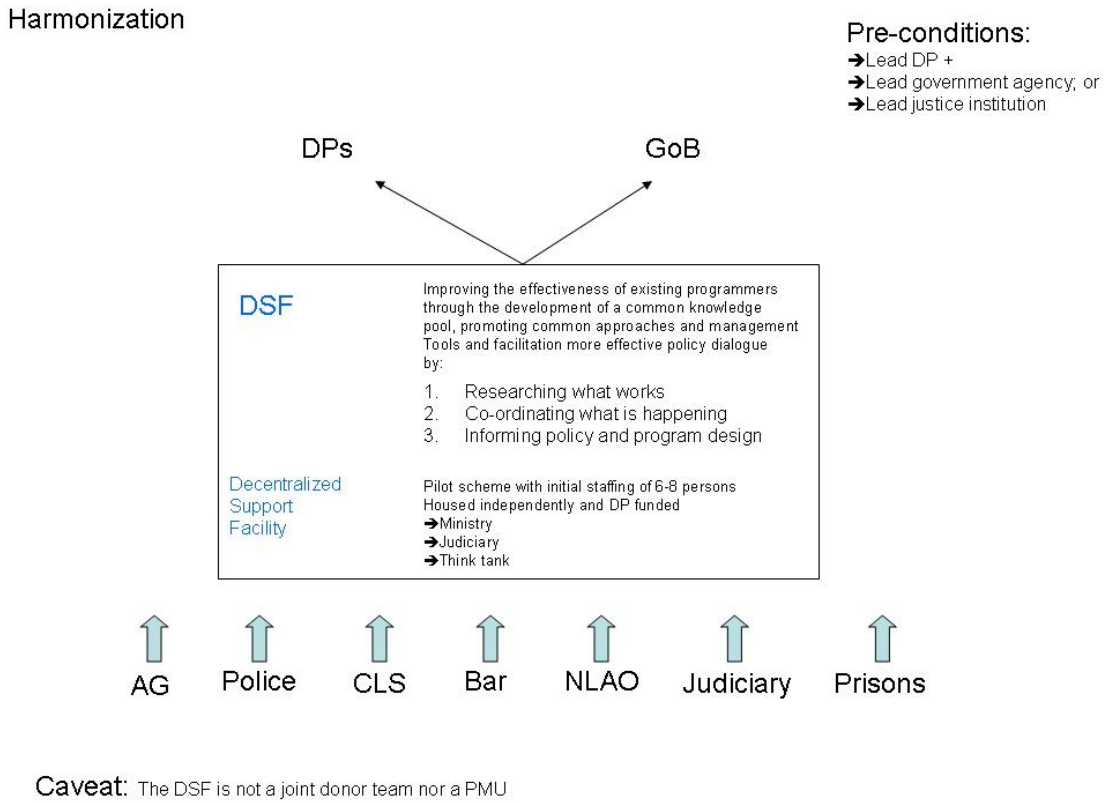
36. We insert – exceptionally – two institution building 'projects' by way of support to the office of the Registrar (as a final stage in institutionalizing judicial separation) and support to the Metropolitan Magistrates' Courts in Dhaka (because of the stark situation that currently exists with 21 magistrates to service 10 million people in one site).

37. We submit this approach has two principal advantages: the release of pressure and removal of blockages will enable the system to work with improved efficiency (in the districts where these measures operate); more importantly, we suggest, is that it shows what local initiatives can achieve (almost immediately) and how private/public partnerships can and do develop 'almost by osmosis'.[18]

38. As to the medium to long term, we have noted the fate of the 15 year government 'Strategy for Legal and Judicial Reforms' launched in 2000. Our view is that in the current political period, the articulation of such a strategy, however sensible, is not a practical suggestion and would not gain the space it would need for consultation and deliberation.

39. Finally, we are required to suggest how the development partners can better harmonise their assistance. We have noted the pressure on all parties (the 250 delegations government receives each year, the time-bound reporting requirements on CLS providers, the paucity of empirical data, the pressure on DPs themselves to 'do more with less') and seen how like-minded DPs combine around an issue or activity already.

40. We see a need for an independent unit or facility to assist all those engaged with implementation on the ground by taking over some of their burdens, eg in procurement and research. We have borrowed from an initiative developed in Indonesia (known as the Decentralised Support Facility) by all the DPs present in Bangladesh which appears to us to be suitable for adaptation to the justice sector here.



[18] Dr. Debopriyo Bhattacharya, interview 300507

II. Overview of the Justice Process in Bangladesh

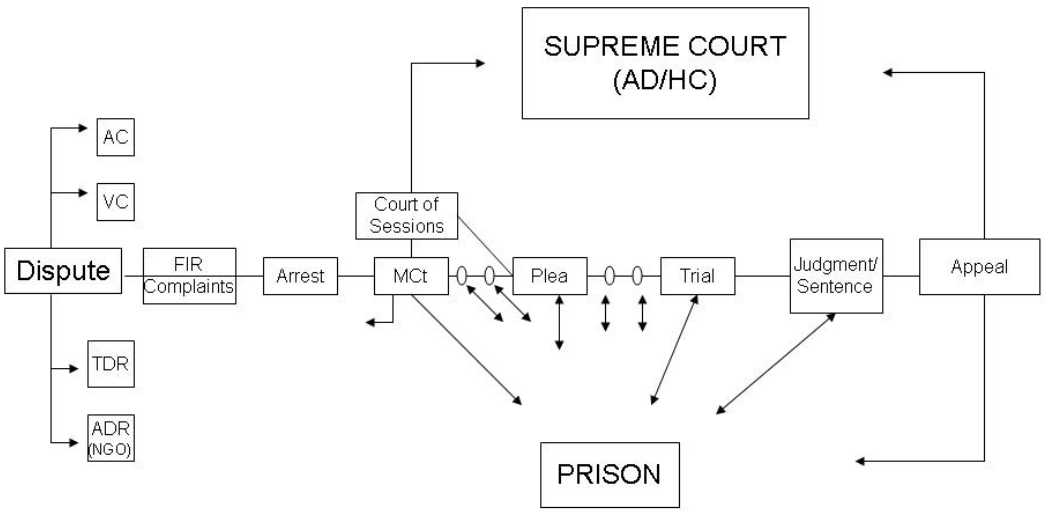
The Criminal Justice System

41. In view of the 'ground realities'[19] of Bangladesh and eight point strategic agenda of the PRSP, the focus of this report is on the criminal justice system.[20]

42. This is not to deny but rather to acknowledge the significant interventions already being made in the arena of civil justice, and in particular to women and the ultrapoor, which require further support and coherence. The bulk of CLS activities currently focus on financial claims by women (a highly vulnerable group) in the area of post divorce/separation (for dower, maintenance, and less commonly, custody of children). These activities could be strengthened and deepened (and extended to groups who are subject to intersecting discriminations, for example Adivasis, or persons with disabilities). They could also be accompanied by a new approach focusing on livelihoods which would address civil claims arising in relation to land and labour disputes respectively.

43. The approach adopted has been to view the criminal justice process as a series of events from the point of dispute to final appeal as per the first graphic below:

The Criminal Justice System



[19] PRSP at pxx
[20] *Criminal Justice* is one of the eight points of its medium term strategic agenda (PRSP at xx)

44. The PRSP views the goal of 'judicial reform' through a 'poverty lens' and concludes that its operationalisation is 'better prioritized as one ensuring cheap and accessible justice'.[21]

45. In the informal system, the parties can seek a remedy through an arbitrated Shalish process or NGO mediated solutions. Alternatively, they could seek a remedy in private family matters through the Arbitration Council (housed inside local government institutions, eg in the Union Parishad if in a rural area, or a Paurashava, or in a City Corporation in urban areas) or in minor criminal and civil matters through the Village Court (although as noted above these last are not yet functioning). These failing, or in more serious cases, the matter goes to the police and so through the formal justice system.

46. The FIR is recorded by the police, or complaint is made before a Magistrate, a case is filed and, almost invariably, a summons or arrest warrant issued. In many cases, despite there being a genuine complaint, the police may refuse to record the FIR, or more rarely the Magistrate may refuse to take cognizance of it. Alternatively, the police may receive the information and act on it even where it is patently false. It is understood that this may be due to being influenced by monetary considerations or by powerful quarters. Following investigation, the police will submit a report, either a 'final report' indicating that there is no case made out, or a 'chargesheet' based upon which the magistrate/concerned Court then takes cognizance of the case.

47. The case is then set down for a plea (charge-framing) and, assuming a not guilty plea is entered, is listed for trial. At the close of the trial, the accused is either acquitted or convicted when s/he is sentenced. There is then the possibility of an appeal to the Sessions Court /High Court, and then ultimately to the Appellate Division (either by right, eg in cases involving death sentences or if an important point of law is involved, or where leave is granted by the AD for this purpose).

48. The system is in place. However it is dysfunctional.

Identifying obstacles to accessing justice and causes of dysfunction

49. The police and lower courts are widely perceived to be corrupt and there is executive interference at all levels. There are no independent inspection mechanisms to visit police cells or prisons. Lawyers are not present during police interviews.

50. It is widely perceived that the police entertain false accusations without making adequate investigations and rely on confession-based evidence rather than visiting scenes of crime and/or seeking corroborating evidence in support. They also refuse to accept complaints where, in their view, the issue concerned does not constitute a crime, most notoriously in cases of domestic violence, or in cases of violence against certain minorities, or in other cases

[21] id at para 5.427 at p161

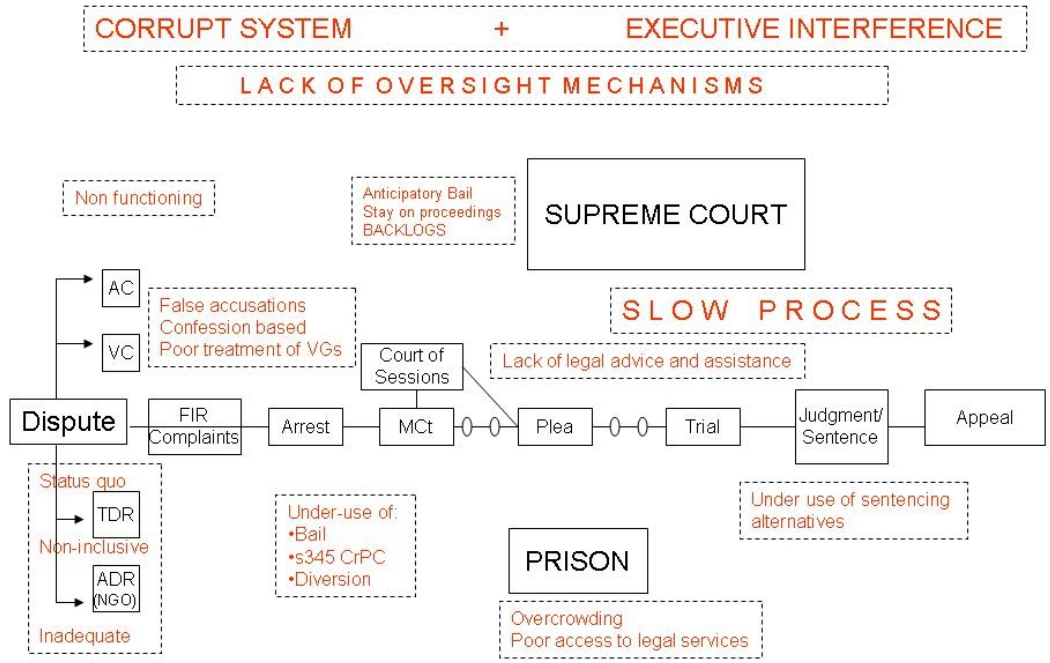
where some powerful quarter has exerted either monetary or political influence over them to refuse to record an FIR. Their treatment of women, young persons and Adivasis – whether as the complainant or the accused – are unprofessional and often insensitive.[22]

51. At both police stations and magistrates courts, there is insufficient use of bail, referral mechanisms such as those for compoundable offences under s345 of the Criminal Procedure Code (CrPC) and even the simplest diversionary mechanism such as a caution or conditional discharge.

52. Prisons are overcrowded and prisoners have little access to legal advice or assistance.

53. In the next graphic, we look at the chain of events an ordinary person will pass along and the principle obstacles s/he will encounter in an attempt to secure justice in his or her case.

Major Challenges and Obstacles limiting Access to Justice for the Poor



Corruption and executive interference

The Criminal Justice System

'As political tensions between the two leading parties usually run high, this sometimes leads to efforts to control and use the magistracy and criminal justice system to harass political opponents and, conversely, to absolve

[22] A recent survey by the DFID/UNDP police reform project disclosed that 99% women will not attend a police station to report a crime for fear of ill-treatment by police officers.

whichever party is in power of wrongdoing. Too often, changes in government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party and the institutionalisation of dozens of criminal and corruption cases against ministers and important bureaucrats from the last government.'[23]

54. Executive control – in terms of appointments postings etc -- over the magistracy, together with the duality of their roles have severely impacted on access to justice, and on governance more generally.[24] Lack of effective separation of the executive and the judiciary, together with pervasive corruption in the lower judiciary, and the lack of any effective oversight, has led to the continuing erosion of confidence in the judiciary and arguably, to the increasing popularity of extra-judicial means of conflict resolution.

55. In practice the Government, of whichever hue, has invariably used the Magistracy as a tool of control over opposition politicians and dissenters, ensuring that arrest warrants are issued, police remand allowed or bail orders denied at their whim. In addition to the state, influential private parties - such as powerful landgrabbers, corrupt business houses or the religious right - have also been able to influence outcomes which result in the harassment of those mobilising to demand citizens rights to land, to exposure of corruption or raising voices critical of orthodoxy. The failure to exercise judicial discretion, combined with the absence of effective oversight mechanisms, has in such instances led to serious abuse of process.

56. Two examples by way of illustration. The first showed the use of the courts by a close associate of the Prime Minister's son to harass a group of citizens that was daring to mobilise people around the issue of clean politics. The second demonstrates the state capture that was evident in late 2006.

57. In 2006, a Magistrate acting on a complaint by a then 'Advisor' to the Government issued arrest warrants against five eminent citizens (including a former Caretaker Cabinet Member, a former Finance Minister, a former President of the Metropolitan Chamber of Commerce, the Head of a leading think-tank) regarding an allegation of criminal defamation, on the basis of a complaint that they had cited materials from a UN document critical of recent GoB financial policy.[25] The warrants had been issued without any preliminary inquiry and without any evidence that the Magistrate had been satisfied on objective materials that their issuance was merited.

[23] Law and Policy Reform, ADB, 2003, at 55.

[24] Magistrates – until the very recent changes in the law – performed both executive and judicial functions. Executive functions would include for example issuance of an arrest warrant, or an order for proscribing public gatherings, judicial powers include for example those to grant bail, or police remand, or to take evidence).

[25] C.R. Case No. 2319 of 2006. It should be noted that laws on criminal defamation – and the almost automatic issuance of warrants of arrest following such complaints being filed, has led to serious harassment of investigative journalists. Reportedly there has been a sharp decline in cases of this nature since 11 January, 2007, with Courts only issuing summons in such cases not warrants – perhaps an indicator of the absence of overt political influence over their functioning.

58. The second concerned the arbitrary acceptance of a complaint. On 30 November 2006, the High Court was about to pass orders in a constitutional challenge to President Iajuddin Ahmed assuming office as the Chief Advisor of the Caretaker Government. Just before it was about to do so, the Attorney General, a political appointee, accompanied by the immediately outgoing Law Minister, personally went to the residence of the Chief Justice and obtained – in total violation of all procedures – a handwritten order endorsed on their application purporting to stay the proceedings.

59. The Court rose, and lawyers in the courtroom reportedly responded angrily. The former Law Minister threatened counsel for the political parties before leaving. Gangs of young men then appeared. They set alight several vehicles and caused some damage within the Supreme Court.

60. Two cases followed. One was by the Court Keeper who made a complaint to the local police station accusing lawyers (including the counsel involved) of having led a gang involved in such breakages. This was brought after almost all the SC judges reportedly met in the CJ's house and mandated a prosecution for sedition against lawyers (privately it was reported that many of these judges had close links with the outgoing government). Another was filed by a lawyer closely related to a Minister in the outgoing government, naming the former President of the Bar as having led the procession that was involved in the breakages.

61. On examining this complaint, the CMM ordered that it be treated as an FIR and that an investigation take place as to whether they lawyers concerned had committed sedition. The persons named in the police report included three of the top lawyers in the country, two of them being framers of the Constitution. One of them had been sitting at the time with a Judge of the Appellate Division. Others had been involved in giving a press conference on live television.

62. It was not explained at the time of submitting the police report on what evidence these highly eminent persons were implicated in the offence. To this day, no official inquiry has been held into the incident, the charges have not been withdrawn (though on an application by the 'accused' lawyers, the High Court has questioned the State as to whether there has been an abuse of process, and has stayed the proceedings for one year). No action has been taken against those who initiated such complaints, or repeated false allegations in the media, or who conducted the investigations.

63. These cases demonstrate the nadir of judicial independence – and starkly illustrate the extent to which the criminal justice system and powers of arrest, investigation and prosecution can be tampered with in the interests of denying liberty and security of the person, and the ultimate goal of preventing reform. And it stands as a chilling reminder to the ordinary citizen of the risk of being caught up in the process of 'justice'.

64. Above the Magistracy, at the Sessions Court level, executive controls are manifestly evident, and can be seen in the way in which cases are handled,

including decisions to allow prosecution applications for withdrawal. For example, under the last government, several corruption cases against a former dictator, were rapidly withdrawn at a time of media speculation regarding the formation of a possible political alliance between himself and a leading political party.[26]

Civil Justice System

65. Here too, the combination of corruption and executive influence has operated to block access to justice. The executive have used the carrot of favourable postings and the stick of blocking promotion or favourable postings, to influence the outcome of particular decisions, and in particular over interim orders. Where high ranking persons working within the executive have worked in collusion with powerful financial interests (eg developers, landlords) this has led to a real distortion in judgments and orders, with 'justice being purchased by auction sale'.

66. The continuing deputation of judicial officers to executive posts in different ministries has also been perceived as creating an 'executive' mindset in many judges, as well as possibly facilitating the development of a nexus of corrupt officers within the judiciary and the civil service.

67. The failure to separate the judiciary from the executive has become part of the context and cause of the endemic rise of corruption. The play of these twin factors has resulted in the lower courts increasingly becoming a place where rights to liberty and fair trial are denied, not secured. The erosion of public confidence in the courts may in turn have catalysed resort to self-help as a form of conflict resolution (not to mention the apparent popularity of particularly robust law-enforcement techniques) thus contributing to the increase of violence in society.

68. It has not been possible to ensure effective judicial accountability. The Supreme Court's (SC) powers of discipline and control over the subordinate judiciary have been circumscribed by executive actions. The SC itself is increasingly seen as having shifted from its foundational principles of independence and impartiality, with controversial appointments having been made of persons on partisan lines and in defiance of any reasonable understanding of the qualification criteria.

69. In practice, only the Bar and the media have played a watchdog function to highlight the most egregious abuses and to contribute to building a public demand for reform in this area. Lessons can be learned from these successes and built upon.

[26] Bangladesh: Ruling Coalition Tries to Revive Ershad' South Asia Analysis Group, 14 September 2006. http://www.saag.org/%5Cpapers20%5Cpaper1951.html; 'Ershad gets fourth acquittal in a month' Daily Star Law Week, 3 September 2006.

Lack of oversight mechanisms

70. At present, few oversight mechanisms or structures exist and, where these do, they are not being implemented or have not been tailored to include oversight of criminal justice actors. For example:

    - The powers of the Supreme Judicial Council, inter alia, to investigate allegations against judges and take necessary action, have only rarely been invoked.

    - Although the current High Court rules require regular inspection of the lower courts by High Court Judges, this is not happening systematically or rigorously.

    - Although civil servants are required to submit annual declarations of wealth and assets, no similar requirement exists for judges at any level and nor is any systematic action taken to address discrepancies between known sources of income and assets.

    - The judicial code of conduct for the High Court is not prioritised, is not enforceable, in need of review and requires checks to be created to ensure that that it is implemented.

    - Contempt laws, and their use *suo motu* by the Supreme Court effectively trammels criticism or questioning of judicial action or behavour.

71. Of the national institutions commonly found in many countries, only the Anti-Corruption Commission, Law Commission and Judicial Service Commission have been established. However:

    - The Anti-Corruption Commission was entirely dysfunctional for three years after its establishment, and since it has begun to function, its current focus has been largely on political figures and it has yet to consider corruption amongst judicial officers, prosecutors, police, civil servants, or others involved directly in justice sector related corruption.

    - The Law Commission focuses primarily on conducting research and preparing reports (often with draft legislation attached), but these reports and bills are largely ignored by the Ministry of Law which is the primary implementing body.[27] The Commission does not see itself as having a role to play in generally scoping legislation for compliance with national or international human rights law, or in engendering national dialogue on priority law reform (though it has been consultative in relation to such initiatives on eg corporate or commercial law matters).

[27] At the last session of parliament, government claimed to have passed 172 pieces of legislation. The LC was not consulted on any of them (source: Former CJ, Mustafa Kamal, Chair, Law Commission, interview of 28 May 2007).

- The Judicial Service Commission's role is in appointments of judges to the lower courts only, and there is no similar appointments commission, nor are there any established criteria for appointments to the superior judiciary.

- The SJC responsible for receiving/dealing with complaints of corruption, bias or illegality on the part of judicial officers has rarely acted in such cases.

72. Although draft legislation for a National Human Rights Commission (NHRC) was first prepared 10 years ago, and although the creation of an Ombudsperson (which is constitutionally mandated) has also been in the pipeline for a considerable period of time, neither of these institutions have been established. Both of these could play a very significant role in ensuring access to justice for Bangladeshis, especially the poor and disadvantaged groups, since they traditionally offer services at no cost.

73. A proactive HRC in particular could also play a major role in raising awareness of the rights of women,, and of children, Adivasis and other disadvantaged groups and in ensuring legislation affecting them is brought in line with constitutionally enshrined human rights and international instruments signed and/or ratified by Bangladesh.

74. The Ombudsperson could also play an important role in dealing with complaints of corruption, although these institutions traditionally focus on maladministration and violations of administrative justice in the administration.

75. As mentioned above, no effective structures exist for receiving and dealing with complaints related to the police or prisons officials, or for monitoring conditions at prisons. As a consequence, these issues are addressed through PIL in some cases, through media exposure or ad hoc advocacy with the concerned officers in others.

Community-based justice

76. At the community level, Shalish is accused of bias against women and other marginalized persons and preferring to maintain the status quo in place of delivering a just result. The Asia Foundation report on Community Legal Services in Bangladesh found that community legal services provided by NGOs were available in less than 35% of the country and the Arbitration Council and Village Court account for less than 10% of community legal services provided.[28]

77. Existing programmes on access to justice have largely failed to reach Adivasis – the indigenous/tribal peoples – and been insensitive to their cultural distinctiveness.

[28] TAF CLS report supra at paras 26 and 29 (pp7/8)

78. There are clear opportunities here for research on the role and functions of Traditional Dispute Resolution bodies among Adivasis, to explore how they can be strengthened, operate within the constitution and legal framework, and made more inclusive of all sections of their respective communities, and alternatively to explore whether Alternative Dispute Resolution models would be appropriate in these contexts. [29] In the CHT, the Regional Council can lead on convening Headmen and Karbaris (TDR leaders) and providing effective training/orientation programmes in this respect, drawing on the experiences of ADR practitioners from the plains.

79. Public education programmes – including at school/college level (you and your constitution, simple language version) focusing on practical information regarding available rights and remedies and sources of support (medical, social etc) would assist in building greater capacity to access justice.

80. Existing quotas for recruitment of Adivasis to government posts need to be filled, and measures taken to ensure that there is a positive drive for further recruitment into justice sector institutions, eg the Judicial Magistracy/Police. The proactive steps by NGOs such as BRAC and BLAST to establish such quotas in their own recruitment policies may be cited as best practice for others in this field, and may be extended to the selection of lawyers, paralegals,[30] and target beneficiaries.

81. The implications of separation of the judiciary from the executive in the context of the Chittagong Hill Tracts need to be addressed at the earliest opportunity – currently the District Commissioner as well as other executive authorities exercise judicial powers (under the CHT Regulations).

Access to police and lower courts

False accusations

82. The prevailing law which gives the police powers of both investigation and prosecution, combined with the absence of any effective oversight mechanisms and weak and delayed scrutiny by the courts, facilitates the making of false accusations, and the institution of false prosecutions based

[29] Currently, due to specific exclusions operating for the CHT, there is no recourse within these three districts to family courts or to special courts on violence against women. Thus for family disputes, TDR is the only option; while the Adivasi TDR applies customary law and is arguably more flexible, appropriate and accepted, the traditional shalish customary among Bengalis, infused with gender-discriminatory norms and practices, leaves women in particular with no voice. Without greater mobilisation and capacity building among women to know and demand their rights, and to involve them in the process of dispute resolution, such bodies tend to push women back into the home in the name of 'reconciliation' and 'maintenance of the family' rather than addressing the grievance in question. In the plains, where Adivasi women are entitled to access family courts, they reportedly rarely do so given perceptions of lack of understanding or insensitivity to Adivasi laws and customs. Re vaw, in the absence of the special courts, there is limited redress, with the only court being located in Chittagong a journey of more than several hours, where the relevant Court does not even sit regularly.

[30] Paralegals could also play a role in translating where necessary from an Adivasi language into Bengali.

upon these. False accusations are also made where the police are under pressure to show results, but are unable to effectively investigate a situation. Political influence over the courts further distorts the situation.

83. False accusations are brought for the purposes of harassment of individuals in pursuit of private conflicts. So for example, Adivasi activists opposing land acquisitions for large scale developments, or Adivasi inhabitants of areas declared as reserved forests, have found themselves faced not just with displacement, but also the subject of a barrage of criminal cases. Researchers found cases[31] where a person with a disability and a dead person were accused in cases under the Forests Act.

84. In many cases of inter-religious or inter-community marriages, where women choose to marry without their parents' approval, false accusations are made against the husband of kidnapping/rape, resulting in immediate action to arrest him and to place the woman concerned in 'safe' custody. Ultimately, where the individuals are able to access lawyers, the case may be quashed, and prior to that the woman herself released through filing a petition for habeas corpus, but in others, the social cost of pursuing a personal choice become unacceptably high, and the individuals succumb to the threat of criminal penalties.

85. False accusations are also routinely made by powerful interests seeking to curb dissent or to pursue political vendettas. Journalists including top editors faced defamation cases for reporting allegations of corruption by politically influential persons. Writers and journalists have also been accused of 'hurting religious sentiment' instigated apparently by the religious right.

86. False accusations affect both the powerful and the powerless. The fact that they can be brought with virtual impunity even against people who are otherwise highly placed, if sufficient political muscle is exerted, not only encourages the public to fear the law enforcement agencies, but also suppresses the growth of any culture of claiming rights or seeking accountability.

87. In the absence of any effective independent police complaints authority, or an ombudsperson, there is only limited redress available against false accusations. In exceptional cases, it is possible to obtain relief from the High Court (see below on High Court's powers). Otherwise, the only remedy available allows the Magistrate to punish the offender to a fine (maximum Taka 3000) and/or imprisonment (s250 Penal Code). However, this remedy may only be invoked after a Magistrate's court makes a specific finding that an accusation or charge was false, frivolous or vexatious. Such action is not available if the case has been compounded (ie resolved by other means as per s345 CrPC). It may also not succeed if a police officer or other civil servant involved can show that s/he acted in good faith.

[31] Meghna Guhathakurta, Raa Devasish Roy and Sara Hossain, UNDP Access to Justice for Indigenous Persons Report.

88. But in many cases, the prolonged period between the accusation and the charge, and the 'rubber-stamp' approach of the magistrates' courts ensures that s250 remains largely unutilised, and false accusations flourish unchecked, with the accusers enjoying total impunity. Even if it succeeds, appeal or revision before the Sessions Court, then the High Court, and then finally the AD is likely to discourage any person from proceeding under s250.

Confession-based evidence

> 'When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.'[32]

89. It is at the police station that most ordinary people are at risk of abuse (see section on police in Annex 5). Where police officers are under-trained and under-resourced they are inclined and needs driven on occasions to take the simplest path to gathering evidence in a case, by seeking a confession from the accused.

90. A voluntary confession to a crime is the best evidence in a case. However, we have seen around the world how the process is abused by police officers with impunity.[33] The situation in Bangladesh is no different.

> 'the over-reliance on 'confession-based' evidence (as against investigation-based evidence), the practice of arresting first and investigating later (a process that can take years and often does if the accused is indigent), the tendency to over-arrest (for minor offences especially where a formal caution would be appropriate) or abuse of police powers (ie by arbitrary use of s54 CrPC and s86 Dhaka Metropolitan Police Ordinance 1976).'[34]

91. There is no bar to the provision of legal aid or assistance to the accused at the police station, but in practice it does not happen. Simple measures could be employed such as:

    - providing general advice and assistance at the police station to victims of crime as well as accused persons
    - visiting police cells or lock-ups

[32] UN Guidelines on the Role of Prosecutors 1990 at para 16
[33] Some of the most egregious examples concerned the investigation by Surrey and Brimingham police into a series of bombings by the Irish Republican Army (IRA) in the UK in the 70s. The evidence against the 'Guildford Four' was almost exclusively based on their 'confessions'. These were subsequently found to have been coerced and following the public outrage over the 'Birmingham Six'led to the Police and Criminal Evidence Act (PACE) 1985 which radically altered the way police could conduct investigations.
[34] EC:2005 at para 3.89

- monitoring custody time limits in the police station after which a person must be produced before the court
- attending at police interview
- screening juveniles for possible diversion programmes
- contacting / tracing parents / guardians / sureties
- assisting with bail from the police station.[35]

Poor treatment of vulnerable groups

92. While 'the poor' constitute the largest vulnerable group in Bangladesh, the term is used here to denote women, children and indigenous people (IPs – or Adivasis as referred to in Bangladesh reports). In common with most countries, all of these groups suffer greatly when attempting to access justice. The major causes of this are typically the prevailing attitudes in male-dominated societies towards women and children and the general marginalisation indigenous people face around the world.

93. With regard to women survivors of crime, particularly those involving sexual and domestic violence, the following all contribute to distrust and fear, lack of reporting and secondary victimisation for those who do report:

- lack of domestic violence legislation
- failure to recognise violence within the family as a crime
- the social stigma involved
- lack of specialised policing units or specially trained detectives
- limited training and sensitisation of key agencies (including the police, health care workers and social services) on victim empowerment (including how to create victim friendly facilities at police stations and how to interview traumatised victims)
- lack of adequate paralegals and lawyers to support survivors with instituting litigation or accessing other support
- lack of independent and properly trained prosecutors and the preponderance of male, poorly trained judicial officers to prosecute and hear such cases
- lack of available and secure shelter homes or viable alternative sources of emergency accommodation beyond the family

94. Although sexual offences against children are rarely reported in Bangladesh (except in custody, as identified in the PRSP), little research has been conducted into the incidence of such crimes[36] and no specialised training is provided to actors in the system. While efforts related to children are focused on juvenile justice, they could benefit from a closer study of good practice approaches being considered and followed elsewhere (as detailed in Annex 5).

95. And although protected from discrimination by the Constitution, no specific legislation exists to criminalise discrimination against any category of persons, and no specialised forum has been established to deal with such complaints. In

[35] EC:2005 Recommendation 3 at p95
[36] But see work of the group 'Breaking the Silence'.

addition, traditional justice systems for IPs in the CHT are under-resourced and poorly trained, while for those living in the Plains area, traditional systems are not recognised at all. Distrustful of the recognised courts, Adivasis find accessing justice difficult as a result.

96. Within the formal system, legal aid programmes whether within the GoB or among NGOs, have generally not engaged with Adivasi communities.[37] Issues around land-grabbing, and the ensuing conflicts including violence against women, provide particular areas in which support is urgently needed but lacking. Specific laws which protect Adivasi lands from expropriation are routinely flouted or evaded. Adivasis reportedly do not approach the formal system given prevailing perceptions of bias within the law-enforcement agencies.

97. In the informal system, traditional dispute resolution bodies within the Adivasi communities are active and their decisions respected across the CHT (where they are formally recognised by law) and to a lesser degree, within the plains. And yet there are no initiatives to build the capacity of such TDR bodies to ensure that they operate within the framework of constitutional rights, or that they enhance women's voice within their operations. Nor are there any ongoing attempts to build the capacity of existing local government bodies – such as the Regional Council in the CHT – to address relations with the traditional justice systems. The absence of such initiatives inhibits addressing how the TDR bodies themselves hinder effective access to justice. Adivasi women are almost totally excluded as decision-makers in these bodies, and even as complainants, they have very restricted opportunities to participate.

98. Further, TDR bodies among Adivasis often refuse to recognize acts of violence against women (in 'insider/insider' cases) or, wholly inappropriately, resolve these through mediation. Some also impose what may be considered to amount to degrading punishment, which impact disproportionately on women. In many cases, they are not familiar with developing understandings of women's or children's rights, and operate within very narrow parameters, which could easily be expanded through linking them to existing legal aid bodies such as ASK or BMP (Bangladesh Mahila Parishad) working within a women's rights framework.

Under-use of early release mechanisms

Bail

99. The power to grant bail rests with the police and with the Court before whom the person is produced by the police (and if it refuses, then with the Courts above).[38]

[37] Although this is now starting to change, with BLAST present in the CHT and also providing litigation support in the plains, in collaboration with BELA, ALRD etc.

[38] A person being granted bail means that they are released from police custody or from judicial custody (jail). Usually a person is released on the execution of a bail bond, that is a declaration that s/he will pay a sum of money if she misuses her bail or fails to return to the Court as directed, and on the

100. Although the police are permitted to grant bail, they seldom do so. This combined with their practice of never cautioning a person who may have committed or be suspected of committing an offence, directly contributes to increasing the number of people held in custody.

101. The law classifies offences as bailable and non-bailable. In the former, a person may be released on bail as of right. In the latter, the law requires the power of bail to be exercised more cautiously in relation to grave offences. In general, the principles taken into consideration in granting bail are whether the accused will tamper with the evidence or seek to influence witnesses or fail to appear at trial. In addition, the CRPC specifically provides that bail may be granted to the 'sick, women and the elderly'.

102. Refusal to grant bail affects the accused, and can be used as an instrument of oppression against the political opposition and voices of dissent. Allowing bail in certain cases without taking into consideration the extent to which this will expose the victim to violence also threatens her/his security and opportunity to seek access to justice.

103. It is widely perceived that bail is granted more easily to those with access to power and influence, rather than to the vulnerable and disadvantaged. A recent study by PPRC contrasts its research finding that 'criminals who have committed very serious crimes' obtained bail in 77% of cases, with the fact that children and juveniles continue to languish in prisons despite clear High Court orders for their release.[39] It should be noted that the PPRC Study creates an unfortunate dichotomy between 'those presumed innocent' and 'those suspected of serious crimes'. This may appear trite, but it is nevertheless worth repeating the fundamental tenet of criminal law that every person is presumed innocent till proven guilty beyond a reasonable doubt.

104. The Study further notes that in cases where 'criminals' were released, witnesses were often found to be unavailable (presumably due to intimidation), with the trials being jeopardized, thus resulting in a violation of the victim's right to justice and accountability. The Study also notes that in such cases, the accused while on bail committed further serious offences, contributing to an increase in insecurity.

105. While the data may indicate that in these particular cases there were no adequate grounds to deny bail, it may also point to the failure of the police or the prosecution to make the case for refusal of bail, or the failure of the Court to apply its mind to the risks inherent in granting bail. Such failures may be

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naming of sureties, that is persons who take responsibility to produce him/her before the Court at a particular time to answer any charges

[39] Regardless of the merit of these figures (and whether they have considered the grounds on which bail was granted in each case, rather than simply the character /background of the accused), this contrast clearly underscores the urgent need to match available data with action to ensure implementation of existing laws and secure rights.

due to sheer incompetence, or more troublingly, to the personnel concerned responding to financial inducements or to threats (from the executive or other powerful quarters). In some cases, it has been alleged that the police, acting under such influences, deliberately doctor the FIRs to ensure that less serious offences are listed, thus improving the chances for the accused to obtain bail.

106. The High Court has in some significant cases of public interest litigation (PIL), given orders directing that legal aid be provided to ensure the early release of under-trials held for prolonged periods, and that cases against children and juveniles held in jail be withdrawn under s494 CrPC, but where that is not possible, that they be released on bail. However, in the absence of concerted action to follow up on these, there has been only sporadic compliance by the state authorities concerned with these orders.

107. Arbitrary exercise of powers by courts to grant or deny bail, at the apparent behest of the executive or of powerful quarters, contribute to feelings of widespread insecurity. Such instances may be seen both in 'politically sensitive' cases and in those affecting ordinary citizens. A typical pattern of harassment seen in recent years involves an individual being falsely implicated in case after case, and then facing repeated denial of bail in circumstances in which such actions were wholly unwarranted. So for example, under the last Government, the head of PROSHIKA (one of the largest development organisations in the world) was arrested in one case, then as soon as he was granted bail, he was 'shown arrested' before the bail bond could be executed and denied bail in another. Thus, enabling the authorities to prolong his incarceration over a period of two months by filing over twenty separate cases. Despite the relatively trivial nature of many of the cases filed against him, he was routinely denied bail by the police and by magistrates, and even by the Sessions Judges, and was ultimately only released following appeals against the refusal of bail to the Supreme Court.[40]

108. In the current situation, the restrictions imposed by the executive on even the High Court's powers of granting bail have occasioned particular concern. The new emergency laws provide that no prayer for bail may be made before any court by any person accused of certain offences, or in cases where a sanction has been granted by the police bringing the case within the ambit of the emergency laws.

109. This has led to considerable pandemonium when it was interpreted by some High Court benches as curtailing their powers as well as those of the lower courts. However, one Bench gave a judgment holding that the High Court could continue to grant bail on a case to case basis, depending on the facts and circumstances. The High Court has continued to intervene and grant bail in specific cases, albeit in a highly restricted manner, and in greatly reduced numbers. However, following a Government appeal against the judgment – operational for the next five weeks until the SC reopens following the summer vacation – it is impossible to get bail in any such case.

[40] Amnesty International. Human Rights Defenders in Bangladesh; ASK, Human Rights in Bangladesh 2005.

110. The separation of the judiciary, along with effective case management and court administration related reforms and more effective oversight over the lower courts (in particular over orders in bail cases, and the nature of reasons provided), will help to ensure that the practice regarding bail conforms more closely to the law, and so reduce the insecurity of those otherwise incarcerated arbitrarily.

Compounding provisions

111. Under s345 CrPC, it provides that in cases of compoundable offences, parties may enter into a compromise or compound the offence between the parties. Such offences include assault and battery, neighbourhood disputes, offences relating to moveable property, cheating, breach of trust where the value or amount is below Taka 5000 and contracting a second marriage without consent of a first wife and dowry demands (where there is no element of violence). The Village Court provides for settlement of all these disputes.

112. Justice Mainur Reza Chowdhury argued that

> 'Offences like assault and battery, neighbourhood disputes, offences relating to moveable property, family disputes, dowry demands need to be resolved through mediation and conciliation.'[41]

113. In other words, that the courts should refer these matters back to the community for local settlement as being the most appropriate forum for resolution of these types of dispute rather than the court.

Diversion

> 'Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.'[42]

114. 'Diversion' can be simply defined as 'the referral of cases [normally of juvenile offenders but increasingly of adult offenders as well] alleged to have committed offences away from formal court procedures, with or without conditions'.[43]

[41] Second regional conference on access to justice and penal reform, Dhaka, 2002
[42] UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) 1990 at para 5.1
[43] South African Child Justice Bill (B49-2002)

115. Diversion can be as simple as a formal caution by a police officer or act of apology for the offence committed with or without an offer of restitution or compensation. The emphasis (as noted above) is on youthful, first offenders charged with offences at the bottom end of the criminal scale so as to avoid their future being tarnished by a criminal record. In Annex 5, we consider 'admission of guilt fines' as a mechanism for adaptation to Bangladesh in dealing with both adult and young offenders.

High Court's response to abuse of process

116. The Supreme Court, including both the Appellate Division (AD) which is the apex court, and High Court Division (High Court), hear both civil and criminal matters. All executive authorities are bound to act in aid of the Supreme Court (Art. 112).

117. The High Court has powers to hear original constitutional petitions. These are generally of two kinds. The first are to enforce fundamental rights[44] and b) to give orders directing the government and any public authority to take action as it is required to by law, or to refrain from taking action which it is not so authorised to do or to determine if any person is being held 'without lawful authority or in an unlawful manner'.

118. The HC's powers under Art. 102 have been exercised in Public Interest Litigation (PIL), to protect the rights of the accused and of victims within the criminal justice system. It has issued guidelines to the police on arrests without warrant and on persons being taken into remand;[45] directed that women be taken out of 'safe' custody and set at liberty;[46] directed that the administration investigate and prosecute in cases of 'fatwa' violence where TDR bodies (ie the village shalish) hand down degrading and humiliating punishments such as whipping, being made to stand in an open pit, wear a necklace of shoes, or being forced to divorce, in cases where they make 'findings' of violation of community norms.

119. The HC has also given significant directions and orders in cases involving prisoners – for example: directing the release of foreign prisoners who were held even after the expiry of their sentence, and suggesting a scheme for cooperation between government authorities and foreign missions and the IOM for this purpose; calling for information from the government regarding the numbers of 'under-trial' prisoners without legal aid; calling for information on the numbers of mentally ill persons held in prisons; and in one of its more significant judgments, calling for the release of children from prisons.

120. In exercise of its powers in PIL, the Court is able to do much more than give a judgment deciding a point of law. In many cases, by keeping the

[44] These petitions cannot currently be moved or heard currently due to the SoE (Emergency Orders Nos 1 and 2, dated 12th January 2007).
[45] BLAST v Bangladesh (section 54 case) 55 DLR 363.
[46] Eg: Rehana's Case; Sufiya Begum's Case

matter listed before it and giving interim directions, it is able to facilitate the ongoing monitoring of the resolution of certain issues (as in the case of a forced eviction of a slum without compliance with an existing resettlement scheme).

121. It has also fashioned important new remedies – which address for example the issues of lack of information needed to design effective programmes and remedies – as in the under-trials case, and in other cases where it has directed the establishment of an expert committee to conduct investigations on particular issues (eg health and safety law compliance in the garments sector).

Anticipatory Bail

122. The High Court can also hear appeals and revisions from the lower courts. Its powers to grant bail and in particular anticipatory bail as well as to quash proceedings for abuse of process are two important ways in which the obstacles faced by those encountering the criminal justice system at the bottom end can be corrected.

123. Although the criminal law does not itself refer to the term (it merely provides powers to the Sessions Courts and High Courts to grant bail in certain circumstances), a practice has developed in which the High Court issues orders of 'anticipatory bail' to a person in whose name an arrest warrant or complaint has been made, and where it is 'anticipated' that he will be taken into custody and subjected to harassment, unless bail is granted. Bail is unlikely to be granted by the lower courts either because they do not have the powers by law, or, impliedly, because they may not be able to act freely.

124. In a sense this practice reflects the ubiquity of the understanding that the lower courts may be subject to external – that is executive – control, and therefore unable to act freely to grant bail. Anticipatory bail orders are now regularly obtained from the High Court and make up a significant proportion of the criminal benches 'motions' (newly filed cases) every week.

125. While they contribute to reducing abuse of process at the lower levels, and securing the liberty of the accused, they also of course increase the backlog within the High Court's dockets as hearing these cases takes up time which could otherwise be allotted elsewhere.

126. The Court also has powers to intervene, by giving orders in cases to 'prevent abuse of process or for the ends of justice'.[47] In cases where the proceedings are clearly based upon a false accusation, and there is no basis for them to continue, the High Court can intervene to stay the proceedings.

127. In practice, and with rare exceptions, the High Court usually requires that the proceedings should have reached the state of framing of charges before it will intervene – that is that the FIR/complaint should have been

[47] s561 CrPC

made, police investigations conducted, and a report made based on which the Magistrate takes cognizance of the case.

128. Again, this power allows the HC to check against abuse of process at the lower end. However, in the absence of the means or competent legal aid, it is not accessible to those without easy recourse to a Supreme Court lawyer. At the same time, while the exercise of these powers by the HC does prevent serious abuse of process, and thereby safeguard fair trial rights, it also further adds to the accumulated backlog of the SC itself.

Slow judicial process

129. There are a number of reasons given for the slowness of the justice process in Bangladesh, such as the sheer volume of cases and weak case management system; the 'loopholes and complexity in the procedural laws';[48] the shortage of courts, and 'the complex pattern of the existing system itself' which 'has created attitudes, values and traditions which would resist any attempt to change. Unless those values, attitudes and traditions are replaced by new ones, no meaningful achievement is possible.'[49]

130. With hundreds of thousands of cases pending in the lower courts,[50] there is an urgent need to identify the backlog and dispose of it. As we note below encouraging progress is being made in Gazipur under the Case Management Project of the World Bank. We also note the observations of the CMM in Dhaka that the 'majority' of his case backlog comprise 'traffic' cases which could be disposed of in another form of tribunal.

Lack of legal advice and assistance

131. There are approximately 30,000 lawyers to serve a population of 140 million people.[51] Of these 30,000, it is likely that the overwhelming majority will reside in the urban centres. It is noted that as yet there is still no professional cadre of paralegals, as the health service has developed cadres of paramedics.

132. It appears that the current system established by the Legal Aid Services Act 2000 was intended to create a national legal aid administration for funding legal aid services. However, this scheme still exists mostly on paper. The legislation provides for the establishment of a National Legal Aid Services Organization. The central office for the Organization has yet to be established, nor has a staffing or organizational structure been produced. There is only one Ministry of Law officer who is responsible for the NLAO. Even if it were fully operational, the NLAO is *not* an independent statutory body. Section 5(2) states that the Organization in discharging its functions shall follow the instructions given by the Government, and its composition reflects this.

[48] Justice Mainur Reza Chowdhury, speaking at the Second Regional Conference on Access to Justice and Penal Reform held in Dhaka, December 2002
[49] The Jail Commission Report 1980 ('The Munim report') at para 63
[50] EC:2005 Table 1 at p26
[51] EC report Table 5 at p52

133. The Act also establishes District Legal Aid Committees (DLAC),[52] which have become operational in 61 districts and form the vehicles through which money from the Government's legal aid fund has been disbursed (hitherto exclusively for so-called gaol appeals).[53] NGOs have developed a parallel system, which seems to be performing rather better than the NLAO-funded legal aid in terms of quality of service and effectiveness. The NLAO has established 61 district committees (DLAC) around the country and consistently under-spends on its budget.

134. CIDA is supporting a more co-ordinated approach to the DLAC in Jessore and Gazipur by placing a dedicated officer in those two courts. It is also piloting a duty counsel scheme in Dhaka.

The District Committees

135. The District Committee consists of the District Judge (chair), and various local officials (such as District Magistrate, District Police Superintendent; District Jail Superintendent; District Officers if any for Social Welfare and Women/Children), with only one position set aside for a 'non-government voluntary organization'. Some of the structural problems with the government fund include:

- *Lack of awareness amongst its intended beneficiaries:* most people (especially the targeted beneficiaries) are unaware of the availability of the legal aid fund and the District Committee;
- *Inaccessibility and procedural bureaucracy:* An ordinary person cannot access the District Court. S/he is intimidated by the District Judge and the bureaucratic process. There are no officers to assist in making applications (outside the two CIDA pilot project districts) and no human rights lawyers/NGOs/citizens' groups on the committees in most districts;
- *Inefficiency:* the District Judge is often too busy with day to day work in the court; the Committee rarely sits and does not go through applications quickly; the quality of "service" is often poor.
- *Lack of interest and commitment on part of lawyers assigned cases, and poor quality services provided:* the kind of lawyers who are allocated cases do not have the time or interest to undertake preparatory work; they are poorly remunerated;
- *Lack of monitoring by NLAO:* to oversee the quality of service provided by the lawyers.

[52] s9(1)

[53] The NLAO consistently under-spends on its budget. The money that has been disbursed has hitherto only been used for jail appeals. In over 90% of these jail appeals, the convictions are confirmed, because the cases at first instance were so poorly defended (disposed *in absentia* at trial/ no representation/ the lawyer was very poorly prepared) and that there is nothing on which to base an appeal. Further, lawyers are often appointed the day before the appeal is heard and have insufficient time to study and prepare for the case. Often appeal court judges repeat what is said during the trial at first instance; as there is nothing to rebut the testimony of prosecution witnesses etc.

136. There are the community legal services almost exclusively funded by the DPs and which operate in 30-35% of the country to provide legal advice and assistance to the poor.[54]

137. Save for a scheme operated by the Bangladesh Society for the Enforcement of Human Rights (BSEHR) to assist women victims of violence file FIRs in 30 police thanas, suspects in police custody do not have access to the prompt services of a lawyer or paralegal (as a matter of right[55]).

138. It may be then asked how the most basic procedural safeguards (ie presumption of innocence and right to silence) and most basic constitutional freedoms (ie from arbitrary arrest and torture) are to be protected in the absence of a lawyer or someone with legal training?

139. The majority of the 84,000 prisoners in the country's jails are 'under-trials'.[56] The Jail Commission observed in 1980 'no legal services are provided for the indigent and illiterate inmates who are awaiting their trials.'[57] The situation appears largely unchanged today, although significant measures have been taken to draw the attention of the High Court and obtain directions for the provision of legal aid or release from custody where appropriate for those under-trials who are being subjected to prolonged delays in being brought to trial; for foreign prisoner over-stayers; for children under-trials; mentally ill persons in prison; or women in 'safe' custody without their consent – and there have been directions for provision of legal aid and for release in various cases.

140. A visit to Dhaka and Tangail prisons found there was no designated area for lawyers to meet with their clients. In Tangail District jail, the authorities estimated that 98-99% of under-trial prisoners did not have access to legal advice or assistance.[58]

141. Many wait years for trial. Most are the poor who cannot afford the services of a private lawyer. DLAC empanelled lawyers do not enter prisons and NGO lawyers or paralegals are not granted access.

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[54] Promoting Improved Access to Justice, Community Legal Service Delivery in Bangladesh. The Asia Foundation. March 2007 at para 29, p8

[55] Article 33 of the Bangladesh Constitution as read with the High Court guidelines on arrests without warrant in BLAST v Bangladesh 55 DLR 363 and 56 DLR 324. Universal Declaration of Human Rights and ICCPR Art 9 freedom from arbitrary arrest - CRC Art 37 (d) 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance' - United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 17(1): 'A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after the arrest and shall be provided with reasonable facilities for exercising it; (2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.'

[56] Interview with Brig Gen Zakir Hasan, IG Prisons, 4 June 2007

[57] para 194

[58] Report of Formulation Mission on Penal Reform in Bangladesh, May 2004. UNDP at p24

142. At the lower courts, ordinary people throng around, easy prey for the 'touts' offering dubious advice at an even more dubious price. They have no advice centre or person to advise them on where to go or what to do, save in those districts where BLAST has offices on the Bar Association premises, or where they re involved in or know of other NGOs which offer legal aid. Before reaching the Court premises, people may be able to access legal advice and assistance through organizations like BRAC (with a presence at village level in 61 Districts) with which they are associated or of whose services they are aware.

Under use of sentencing alternatives

143. The Jail Commission observed
'fines, bail, binding over, restitution are found in our criminal justice system, while others such as community service, conditional discharge, suspended sentence are, by and large, unknown.'

144. The provisions relating to probation, it goes on, 'earned notoriety in their non-application and use.' [59]

145. In 2004, it is reported that 200 probation orders were made country-wide and approximately 100 in 2005.[60] However with only 26 probation officers to service the courts and follow up in the community, perhaps this low figure is not surprising.

146. In effect, a term of imprisonment – that should be a sentence of last resort – becomes by default the option of first, because it is the only viable, resort.

Overcrowded prisons

147. The capacity of the prison service is currently 27,254 against a population of approximately 84,000.[61] The service has 11 central jails and 55 district jails. Two new central jails remain 'under construction' in Gazipur and there are 16 other district jails in various stages of building according to the Inspector-General.

148. The choice facing government is simple: build more prisons or come up with viable alternatives to prison.

149. The warning by Justice Munim over 25 years ago is pertinent today: 'building of more prisons cannot be expected to reduce the overcrowding inside the prison.'[62] The problem is universal and no country has 'built' its way out.

[59] Munim Report para 78
[60] EC 2005 at p57 footnote 173
[61] Interview IG Prisons supra
[62] The Jail Commission report, 1980 at para 80

III. Analysis of donor interventions and gap analysis

150. The donor agencies concerned with justice meet within the Justice and Human Rights Working Group, which is itself under the Governance sub-group of the Local Consultative Group (LCG). The LCG is the main mechanism for donor co-ordination inside the country with the Economic Relations Division (ERD) of the Ministry of Finance.[63] This study was commissioned by the working group.

151. We have reviewed DP interventions in alphabetical order.

ADB

152. The ADB has noted a considerable change under the CTG in terms of openness to dealing with justice sector reform in certain key areas. As a result, they are seeking to provide immediate support aimed at addressing some of the priorities of the CTG. They have submitted a good governance proposal to the CTG for a soft loan in the sum of $120m in three tranches between 2007-2010.

153. The proposal is in three parts:

1) Support to the CTG's National Integrity Strategy
2) Support to anti-corruption institutions (such as the ACC, judiciary, an independent prosecution service and JSC)
3) Prevention and citizen empowerment (including the right to information; complaints mechanisms within each ministry and at local government level; participation of NGOs against corruption; and office of the Ombudsman. The establishment of this office to act as the 'trigger' for the release of the third tranche of funding).

154. The ADB reports a positive response from the Law Adviser to this proposal. In July, an ADB appraisal mission will issue its report which will include an analysis of the political economy of the proposed reforms.

155. For instance, in supporting the separation of the judiciary from the executive, the ADB proposes covering any transition costs (ie increased salaries for judges) so that the budgetary instrument can sustain the policy change and government cannot say: we do not have the money to achieve this. The ADB has noted some resistance from within the Executive to increase pay structures for judges. This is one area the appraisal team will examine.

156. In addition to the new financial package for judges, ADB is also in discussion with the CTG and judiciary about reactivation of several accountability mechanisms:

- regular inspection of district courts by the Supreme Court (as per

[63] The team were unable to meet with the designated focal point in the ERD as she was out of the country.

current rules)

- annual submission of declaration of wealth and assets (by civil servants, and by all judges to the registrar)
- review of the Judicial Code of Conduct and monitoring mechanisms in place to ensure it is implemented.

157. The ADB has also tabled a proposal to the CTG for establishing an Independent Prosecution Service based on the draft law (2004) which was never passed. [64]The support for this activity, if approved by the CTG, could continue to 2011.

CIDA

158. Justice sector is a priority within the CIDA Governance pillar. CIDA's support to the Legal and Judicial Sector forms two Parts.

Part A has focused on:

a) supporting the legislative drafting wing of the MoLJPA where it has developed a professional cadre of draftspersons; produced training manuals; established a regional association of legislative drafters; and produced a consolidated Bangladesh Code of Laws (in 38 Volumes at an average of 500 pp per volume) to be published in September/October 2007; as well as an English/Bangla Law Lexicon.

b) providing training to the Law Commission and books for the library; as well as support for website development

c) creating a policy development unit within the MoLJPA; as well as supplying some study tours, training and reviewing key criminal laws.

159. CIDA appears to have experienced most success with the legislative drafting wing. A cadre of draftspersons have been trained and retained within the wing which has provided the time to develop individual capacity and improve on the efficiency of the wing (unlike the Law Commission where the turn-over of newly trained personnel has proved debilitating). The policy development unit in the MoLJPA did not materialize. The project officially ends in December but will continue to end Feb 2008.

160. Part B has focused on juvenile justice, legal aid and ADR. In particular, CIDA has:

d) provided support for two Juvenile Development Centres (JDCs) in Jessore and Gazipur, where it has trained probation officers and case workers on juvenile justice; as well as promoted awareness of the Children's Act 1974;

[64] According to the team's discussions with other GoB officials, the draft law could be passed and necessary appointments made to kick-start the IPS within a very short period, possibly even six months.

e) activated the District Legal Aid Committees under the National Legal Aid Office in Gazipur and Jessore; initiated a duty counsel scheme in the court in Dhaka; and supported the Law Clinic in Dhaka University

f) it is conducting a study into different approaches and options to ADR

161. In the next phase, CIDA is likely to focus on Access to Justice.

Danida

162. Danida is in the middle of a long-term programme in the area of justice and human rights: the Human Rights and Good Governance Programme (HRGG). The first phase started in 2001. Currently it is midway through phase 2 (2005-2010) with plans to continue into a Phase 3. Phase 2 with DDK220m committed in funds is in three parts: Access to Justice, Transparency and Accountability and Promotion of Human Rights.

163. *Access to Justice:* Danida has supported the following under this pillar:
- Training through JATI (with the World Bank).
- Alternative Dispute Resolution and provision of legal aid

164. In 2006, the institute was part completed with residential accommodation for 30 judges, computer room with internet access, library and classrooms. Further building is being undertaken and it is intended to add a further two storeys (to the current six) that will increase to 60 the number of judges who can be trained at any one time. However the Legal and Judicial Capacity Building Project of the World Bank (under which construction costs fall) ends in the middle of 2007.[65]

165. JATI has not managed to attract a permanent cadre of five trainers in part owing to the failure of the government to establish these positions and in part owing to the poor terms and conditions offered (ie Tk14,000 pcm). Accordingly, trainers are contracted in (eg the former Chief Justice, Mustafa Kamal trains judges on ADR) and the training courses are provided in a range of subject areas, including civil and criminal law and procedure (criminal law and procedure aspect recently introduced), evidence, judicial administration, human rights and computer literacy. The training appears to be conventional, lecture-based rather than inter-active and practical.

166. Following the recruitment recently of 270 judges, JATI has trained 200 of them in the criminal law and procedure so that they might act as 'judicial magistrates' following the enforcement of the new rules on separation of the lower judiciary in July. The Director anticipates a delay of between six and eight months before a sufficient number of judges are trained and able to be deployed to the districts as judicial magistrates.

167. It is anticipated that JATIs' funding will continue from GoB, with the support of Danida to 2011 under JATI 2.

[65] GoB has requested an extension, and it is likely to be extended until the end of 2008.

168. In the area of ADR and Legal Aid, Danida is shifting focus to the Village Courts and Arbitration Councils, intending to support the reactivation of these Courts through the MLAA model that has been developed over the last three years in Gopalganj, Shariatpur and Madaripur. Support is also provided in this area to Banchte Shekha and Sushilon.

169. *Transparency:* Danida is, among other activities, supporting the local government strengthening programme under the World Bank as well as Public Finance Management reform (with RNE and DFID) and support to the ACC through ADB project scheduled to start in October 2007. In addition, Danida is supporting a dialogue on the national Human Rights Commission and the establishment of the office of the Ombudsman.

170. *Human Rights:* Danida's focus is on promoting the human rights of indigenous groups through Adivasi-led NGOs, which includes a focus on traditional legal systems. In the CHT, it is guided in its work by the Peace Accord of 1997 and is working through these NGOs to support regional councils and hill councils.

171. As with all its work, Danida mainstreams the rights of women and children and will pursue its advocacy work on their behalf. Specific projects (planned and ongoing) include:

- Support to the VAW programme (currently coming to the end of Phase 1 at end 2007). Key components are the establishment of and support to six One-Stop Crisis Centres (at Medical College Hospitals in Dhaka, Rajshahi, Barisal, Chittagong, Sylhet and Khulna) and the establishment of the National Forensic DNA Profiling Laboratory.
- Combating trafficking of women and children
- Children in conflict with the law (through support to IOM / MoWCA)
- Networking and Advocacy for Child Rights (through support to BSAF)
- Juvenile justice (together with UNICEF)

DFID

172. Aside from its support to Manusher Jonno (up to 2013) and to providing legal aid services through BLAST (ending in May 2008) , DFID is currently in the concept development stage (approved note will be shared with the other interested DPs) of an Access to Justice and Security programme over five years (GBP 20-25m/$40-50m). DFID is seeking to scale up proven Community Legal Services (mainly legal aid, community policing and ADR) to reach an additional 20-25% of the country (over and beyond the 30-35% reached under existing agencies, as per the TAF report of March 2007).

173. DFID's focus is on the bottom/informal end of justice in line with the PRSP. DFID has noted the 'solid poverty impact by ADR' (TAF report) and seeks to avoid duplicating the work of others in the formal justice sector.

Delegation of the European Union

174. The EC is channeling its funding into reactivating the Village Courts (Euros 10m) with UNDP as its implementing partner (+Euros 1m from UNDP). It aims to establish 400 VCs over four years (staffing, training, equipment, IT, but not construction costs). Following approval in the second half of 2007, an inception phase will draw up criteria for selecting sites around the country and a likely start date is in the second half of 2008.

175. In principle, there is no bar on providing further support to the VC programme once the initial four year funding period has run its course.

GTZ

176. GTZ is implementing/planning three components to its Gender, Governance and Access to Justice programme:

1) *Promotion of Legal and Social Empowerment of Women* is being jointly implemented by GTZ with MoWCA in nine districts and aims at addressing the legal obstacles women face at the local level. The project includes: building capacity of locally elected representatives to dispense lawful, gender/poverty sensitive justice and arbitration to poor women; developing capacity among shalish members, community leaders and change makers for TDR in line with the law; and linking poor, vulnerable women to practical legal education and legal services.

2) *Gender and Community Based Policing* will start as a three year pilot scheme building on on-going initiatives and projects and working with existing structures, resources and mechanisms (the police, village police, UP, ADR, women's groups etc) at the local level while initiating a process that inter-connects four ministries concerned with gender-responsive community-based policing: MoWCA, Ministry of Local Government, MoHA and MLJPA. This project is being implemented jointly with the **RNE**.

3) *Gender, Prison Reform and 'Safe Custody'* is in the planning stage. In view of the overcrowded prisons made up of under-trial prisoners and disproportionately large numbers of women and children incarcerated for their own protection,[66] GTZ is designing a project to address this situation later in 2007.

Netherlands (RNE)

177. The RNE's *Legal Education and Gender Awareness Leadership Programme i*s aimed at reducing gender-based violence (GBV) and at promoting and protecting women's rights through a range of activities that address legal and institutional issues (such as birth and marriage registrations,

[66] The numbers involved are unclear, and it may be that many women/children are being held against their will and in circumstances which may amount to ill-treatment either in jails or in other institutions; holding any person in 'safe custody' in jail has been prohibited by law since 2000.

prevention of early marriage and dowry payments) and GBV issues (such as rape, sexual abuse, acid and domestic violence).

178. RNE is also supporting a MA course in Governance and Development at the Center for Governance Studies, BRAC University tailored to the needs of civil servants and including components on human rights law (all of whom are persons who have served as Magistrates and therefore have direct experience as actors within the CJS); as well as strengthening the Centre for Governance Studies (CGS).

179. In its programme for the *Promotion of Women's Human Rights*, RNE focuses on the prevention of early marriages, combating violence against women, increasing women's participation in decision-making processes and encouraging greater responsiveness from urban and rural governance.

180. The RNE provides medical and legal support for victims of acid attacks through its support to the Acid Survivors Foundation and is planning with GTZ to support gender responsive community based policing within existing legal empowerment activities in Bangladesh.

Norway

181. The Royal Norwegian Embassy has been gradually reducing its NGO-based projects as it has taken a central policy decision to focus more on post-conflict states. Norway has been supporting BLAST, ASK and MLAA in the past, as well as the Bangladesh Mahila Parishad,[67] and a network of women's organizations,[68] but recently has decided to reduce its individual support and focus on larger projects.

182. In the main this is due to a reduced staffing component in the embassy. Accordingly, the Embassy has agreed to channel more funds through Manusher Jonno as 'an efficient way of supporting good governance and human rights.' In 2008, Norway will agree a new phase with BLAST.

The Asia Foundation (TAF)

183. TAF has extensive experience in the justice sector going back several decades. Many of the reforms and initiatives underway arose from seeds sown by TAF and the Ford Foundation back in the early 90s – especially in the area of ADR and legal aid.

184. In the area of community legal service (CLS) delivery, TAF produced a baseline study report on community-police relations in 2004 and proceeded to develop a pilot Community-Oriented Policing scheme (COP) in three sites (Bogra, Jessore and Madaripur). TAF intends in the coming period to develop further the COP scheme and in the short term provide a forum for defusing violence in the run-up to the next elections (through Prevention of Violence

[67] The largest national women's organisation of 40,000 members.
[68] ie Doorbar supported by Naripokkho

Committees) as well as to provide incremental and complementary support to the top-down UNDP/DFID police programme.

185. TAF is also focusing on its ground-breaking work promoting legal empowerment. It is currently piloting through Ain O Shalish Kendra (ASK) a scheme in Mymensingh.

186. Most recently in CLS, TAF completed a report: 'Promoting improved Access to Justice: Community Legal Service Delivery in Bangladesh'[69] which maps community legal service delivery, provides a comparative assessment of ADR models and puts forward a number of recommendations on CLS.

187. The timing of this report is fortuitous for the purposes of this analysis as it puts forward seven recommendations for a 'comprehensive national strategy to promote improved citizen access to justice through the refinement and expansion of community legal service programmes conducted by non-governmental organizations in Bangladesh'[70] and we have drawn on its findings to inform our gaps analysis below.

USAID

188. USAID has recently completed a range of interventions, projects and programmes in support of human rights in Bangladesh (including support on developing legal remedies for domestic violence) and continue with the following.

189. *Counter Trafficking Interventions* in prevention, protection and prosecution for victims of trafficking in persons in Bangladesh to 2008 through IOM. The overall objective of the project is to strengthen counter-trafficking interventions in prevention, protection, rescue, voluntary repatriation, reintegration and prosecution for victims of trafficking in persons in Bangladesh.

190. The purposes are firstly to prevent trafficking, by raising awareness of trafficking in persons among the general public as well as specific targeted groups in 18 districts; as well as creating income generation opportunities for 975 trafficking victims / survivors / rescued persons from harmful situations.

191. Secondly, to protect victims by providing direct return and reintegration assistance to them; and strengthening the capacity of locally elected bodies, law enforcement agencies and NGOs to better identify and assist victims of trafficking.

192. Thirdly, to prosecute those responsible by strengthening the capacity of police officers including Thana Officer in charge (OC), prosecutors and lawyers to manage trafficking cases.

[69] March 2007
[70] TAF CLS report (March 2007) at p38

193. USAID is also working with the Ministry of Home Affairs to enhance police professionalism by assisting with the recruitment and training of new police officers in anti-corruption and forensic investigation.

UNDP

194. UNDP is not strictly a donor but is a development partner and for this reason is included. UNDP is managing an extensive portfolio including: support to local government, police, village courts and access to justice.

195. The Police reform project (jointly funded by DFID and JBIC) has been extended to 2008. On 23 May, UNDP reported the opening of the first 'model' police *thana* in Mymensingh. It is intended that a further 11 model police stations will be established under the project as well as six more provided by the CTG. These are in addition to the 25 already established by the JBIC (ie a total of 42 across the country).

196. Currently, UNDP reports that it is in the process of finalizing its Access to Justice project with MOLJPA which will include:

- Support to the dialogue on the establishment of a Human Rights Commission and to a committee of secretaries that has been set up under the Cabinet division which is reporting to the Chief Adviser
- a study to improve the National Legal Aid Office (NLAO)
- training of law officers in the Attorney-General's chambers
- Information sharing among countries in the region: colloquium of judges and law officers (Asia Pacific Forum on Judicial Reform)

197. UNDP is not pursuing its preparatory assistance project on penal reform (2004). UNDP will implement the Village Court project with funding from the EC at some time in 2008.

Gaps analysis

198. The 'gaps analysis' compares the assistance provided by DPs (as summarised in Annex 4 and mentioned in the table below) with the 'major challenges' identified in the system in graphic 2. These challenges may be summarised as:

- Corruption within the Judiciary
- Executive interference with (and at the lower levels, control over) over the Judiciary
- Lack of oversight mechanisms
- Delays caused by blockages at all stages of the process, including:
    - Non-functioning Village Courts
    - Largely dysfunctional and poorly trained Arbitration Councils
    - Non-inclusive and biased traditional dispute resolution
    - Inadequate reach of alternative dispute resolutions
    - Large numbers of false accusations (estimated at 50%)

  - Refusal of police or prosecution to proceed with genuine complaints
  - Lack of independent investigation
  - Torture and ill-treatment in custody
  - Under use of bail, compounding and diversion options after arrest
  - As a result, the need for applications for anticipatory bail and stays of proceedings to the High Court
  - Lack or inadequacy of legal advice and assistance, primarily as a result of non-independence and ineffectiveness of the National Legal Aid Office.
- Discriminatory attitudes and practices – impacting in particular on women, religious and ethnic minorities, people with disabilities
- Lack of victim support schemes
- Minimal focus on prisons and penal reform, including:
  - Under use of alternatives to prison during sentencing
  - Overcrowding of prisons and poor access to legal services by those in detention.

199. From Annex 4, it would appear that the support being provided by DPs broadly addresses most of these issues. However we note the following.

Informal level

200. Although DP support is already being provided to improve Community Legal Services (CLS) at the informal level and to provide legal assistance, CLS does not seek to substitute for nor can it substitute for the formal justice sector.

201. The TAF CLS report notes however that

> 'there is a strong and mutually reinforcing connection between the two systems – as well as untapped potential for greater public-private synergy through legal aid, village courts, community-oriented policing and other program activities that link civil society capacity with the needs and corollary capacity of formal justice sector institutions.'[71]

202. This indicates the need to **enhance interaction between the formal and informal justice** system and place greater emphasis on developing **public-private partnerships**[72] (especially in exploring 'reciprocal linkages'[73] with the government legal aid fund).

203. At the same time, while Bangladesh is in the forefront of developing community legal services, the TAF CLS report recognizes that 'CLS is not a static field' and that it is constantly 'enhanced by new learning and exchange

[71] TAF's report on CLS delivery in Bangladesh is based on 69 responses (out of 140 NGOs) to a survey, field research to 24 rural CLS providers, interviews with major CLS providers and literature review.
[72] TAF CLS report: Recommendation 3 at p47
[73] id at p48

of experience.'[74] DPs can use their international network to draw on **'good practices'** from elsewhere to inform this learning and exchange.

At the formal level

204. We note the excellent work in juvenile justice that is being co-ordinated through the Juvenile Justice Network. However, very little focus has been placed on developing and implementing **diversion options** for ensuring juveniles are removed from the formal system and protected from the negative effects of incarceration with hardened criminals (noting that similar diversion options could also be used to divert adults from the formal system which would in turn ease current case backlogs).

205. Despite government's duty to provide effective and meaningful legal aid services[75] at 'all stages of the criminal justice system,'[76] and the existence of a national body specifically tasked with this (the NLAO), considerable reliance has been placed on the provision of legal assistance by NGOs/CBOs rather than on identifying why the NLAO is dysfunctional and what could be done to allow it to provide legal aid to those in need of it. This has perhaps been a pragmatic response to the recognition of the inherent difficulties, arising from its composition and consequent conflict of interest issues, in activating the NLAO. There may be an opportunity to **take a fresh look at the national legal aid scheme** operated by the government in the context of the current changed political scenario.

206. The issue of **separation of the Judiciary** has been on the agenda for some time, with the CTG having finally brought into force legislation which had been pending approval and enactment for over six years **and** with plans for formal separation (by moving magistrates under the control of the Judiciary) to commence in July. However, little attention has been given by DPs to the **support required by the Judiciary to implement and pay for this** (with the notable exception of ADB).

207. Although support exists for the creation of legislation guaranteeing the right of access to information, and draft legislation has been prepared, no attention has been given to **legislation on the right to administrative justice**

[74] id at p45 and see Annex 5

[75] ***ICCPR*** Art 14(3)(d); ***CRC*** Art 40(2)(b)(ii); UN Standard Minimum Rules for the Administration of Juvenile Justice (The '***Beijing Rules***'), R7; UN Rules for the Protection of Juveniles Deprived of their Liberty, (***JDLs***)Art 18(a); UN ***Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,*** Principle 17; UN Standard Minimum Rules for the Treatment of Prisoners, (***SMR***) Art 93; ***UN Basic Principles on the Role of Lawyers, Principles 1-11***
Note: The European Court of Human Rights has ruled that the "interests of justice require consideration of the seriousness of the offence, the complexity of the case, and the ability of the defendant to provide his own representation. Free legal assistance should be granted even if there is little likelihood that the three year maximum potential sentence will be imposed. *Quaranta v Switzerland*, (judgment of May, 24, 1991). And in *Benham v. United Kingdom*, the court ruled that where deprivation of liberty is at stake, the interests of justice mandate legal representation. A potential sentence of three months imprisonment, along with the legal complexity of the case, triggers the state's obligation to provide free legal assistance (decision of May 24, 1996).

[76] Kyiv Declaration on the Right to Legal Aid (2007) and Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004), ACHPR Res.100 (XXXX) 06

which, together with the right to information, provides a formidable tool for ensuring transparency and accountability in government decision making (and in decisions made by an independent prosecutorial division should one be established).

208. **Legislative reform** is required to address some of the systemic problems facing the criminal justice system and **to introduce a more rights based approach** in compliance with international human rights instruments to which Bangladesh is party. In addition, outdated offences remain in Bangladesh that ought to be depenalised since they clearly discriminate against the poor and marginalized (eg vagrancy, 'immoral traffic' laws and other anti-poor laws).

209. In addition, there are gaps in co-ordination as and between the justice actors, CLS providers and even the DPs. For instance, **data collection** is poor[77] which undermines programme development and, crucially, policy change. Little recognition is given to the gap between collecting data – that is simply documenting incidents – and acting on this to support the affected person to claim and obtain redress. Greater effort could be made to disseminate international good practices, as many problems in the justice sector are similar all over the world (ie overcrowded prisons, case backlogs, weak legal aid service provision etc).

210. DPs are currently providing considerable support to the justice institutions – with the exception of the Prison Service. In 2004, a report for UNDP[78] found the recommendations of the **Jail Commission report** (1980) remain relevant today.

211. As can be seen from the above, a substantial amount could be done in the short term to relieve pressure on the system and to improve the services being offered to victims and offenders. Work in many if not all of these areas is already being supported by DPs, although room exists for these efforts to be better coordinated.

212. In the table below, key areas currently being supported are identified in the first column, with the second column illustrating which DPs are providing support. The third column suggests some ways in which coordination might be improved.

Support to	Currently supported b y / planning to support	Comments
Support to ADR and Legal Aid	CIDA, Danida, DFID, Norway, UNDP (support to NLAO), WB	Most DPs have identified this as the area where support can best be used to address access to justice for the poor and disadvantaged groups. DFID may provide substantial support to this area. Other DPs could discuss ways of linking with this or continue to direct support to the NGOs they are currently supporting. There will be a need

[77] Dr. Mushtaq Khan, Human Security report 2005, DFID.
[78] Formulation Mission on Penal Reform in Bangladesh, May 2004. Penal Reform International

		for good coordination to reduce overlaps and extend services to groups largely excluded eg Workers, Adivasis, or Persons with Disabilities – possibly a sub-committee of the LCG.
Community policing	GTZ, RNE, TAF, DFID/UNDP (Police Reform Project)	GTZ and RNE already in partnership and planning to support existing initiatives rather than setting up their own – easy to align GTZ, RNE and TAF initiatives.
Juvenile justice	Danida, CIDA, UNICEF	Danida already leading in this area and other DPs could align with and support this. Ideas for diversion to be investigated and piloted. SCF is co-ordinating the development of a joint plan of action end June within the JJ Network.
Gender Discrimination/Violence against Women	CIDA, Danida, GTZ, RNE	Room for partnerships and joint projects – lead to be determined
Indigenous people	Danida, UNDP-CHTDF	Danida already appear to be the lead in this area providing support to particular Adivasi led groups, but few of them focus on access to justice; UNDP supports various socio-economic projects with organizations serving Adivasi communities in the CHT only. Note: while not explicitly focused on IPs, some mainstream CLS groups building links with IPs and taking up cases as instructed Room to link up with existing ADR and Legal Aid bodies, as well as community policing initiatives (such as those supported by DFID, TAF)
Children	Danida	Mainly focused on child labour.
Workers	DFID, USAID	DFID and USAID currently support legal aid for civil claims by workers, as well as public interest litigation and related advocacy in cases relating to workplace deaths and injuries; this could be extended to provide support for private prosecutions in such cases, and for public education
Trafficking of Women and Children	Danida, EC, UNDP, DFID, USAID	EC, UNDP and DFID already working together in this area – Danida to consider how to coordinate and work together with them
Prisons	GTZ (focus on women)	Other DPs to consider ways to address overcrowding and penal reform. Links with ICRC activities to be investigated. DFID /NORAD/DANIDA – already supporting Jail Appeals and PIL which has focused adhoc on rights of prisoners by BLAST ASK BNWLA (undertrials and prolonged delays in trial, foreign prisoner overstayers, use of bar fetters, safe custody) – this could be more coherent and work together with an advocacy approach (on implementation of Munim recommendations, establishment of jail visitor schemes, supporting legal aid for prisoners)
Police	DFID/UNDP, USAID	Critical area requiring sustained interventions, especially in ensuring victim friendly

		facilities, victim empowerment and support. Links to community policing above. DPs focused on juveniles and women to consider increased support to this, perhaps with DFID as lead.
Judicial training	Danida, WB, CIDA	Already working together – support to JATI. Additional role for JATI in standardising training to informal level dealt with below DFID/NORAD/Danida could link JATI support to their CLS support initiatives – so that experiences of latter re obstacles to access for the poor are fed into the training
Improving the Judiciary	WB, Danida, ADB (interested)	Support provided to case management in pilot sites and plans to scale up. Plans for SC could be implemented now with changed leadership. Support to establishment of second Metropolitan Magistrates Court in Dhaka and to the office of the Registrar (possibly under 'separation of judiciary') encouraged.
Improving services in Village Courts / Arbitration Councils	Danida, GTZ, UNDP and EC focusing on support to these (UNDP implementing with EC funding) and Danida, WB and CIDA supporting JATI	DPs to agree a lead in this area and to improve coordination. Those providing support to JATI to consider supporting an analysis of JATI's capacity to develop standardised courses and provide accreditation. Capacity building to be provided to JATI based on this.
Establishment of national institutions (NHRC and Ombudsperson)	ADB, Danida, UNDP	Engagement with this process needs to focus immediately on ensuring the enabling legislation creates sufficiently independent institutions with sufficiently wide powers. Once achieved, support to be provided to both for their promotion and protection responsibilities. Many DPs said to be waiting for establishment of these so that they may support them. CIDA to consider how to share the wealth of experience in the Canadian HRC. Depending on what the NHRC finally looks like, support to Adivasis could be concentrated here.
Separation of Judiciary	ADB (primarily through funding the budget required), Danida, WB (support to judiciary and registrar)	ADB will provide substantial support to cover the budget required (including increased salary costs). Other DPs to provide assistance to equipment and running costs – either as joint projects or individually Support will also be needed to the CJ to steer through and plan administrative changes needed to ensure separation, and activate effective oversight and monitoring and evaluation mechanisms.
Legislative reform / Law Commission	CIDA, WB	An energised Law Commission could play a major role in law reform and alignment with Constitution and international human rights treaties. DPs interested in this area could lend support to WB and CIDA particularly with a view to linking LC's work to public consultations with NGOs and others

Public education and awareness on law and human rights	GTZ, Danida, RNE, DFID (legal literacy for ultra poor through BRAC)	Room for a joint project to be established to agree common messages and methods, GTZ already taken the initiative with pilots on domestic violence.
Independent prosecutorial service	CIDA, ADB	This is a critical and insufficiently supported area, since properly trained prosecutors could assist in weeding out false allegations, improving investigations, higher rates of convictions in GBV, and in cases of human rights abuse, using plea bargaining and other measures to reduce backlogs

IV. Government Policy

213. In 2000, the GoB launched its 'Strategy for Legal and Judicial Reforms'. This policy that was set for a 15 year period appears to have been abandoned. Its focus was on creating an efficient justice system to facilitate commercial dispute resolution: it failed to address the good governance and poverty alleviation agendas and implementation levels failed to meet targets.

214. In 2003, GoB began work on its poverty reduction strategy paper (PRSP) which after consultations was finalized and signed by GoB in 2005.[79]

215. The PRS is jointly managed by the Planning Division (which is responsible for the Development Budget which includes most of the ODA) and the Ministry of Finance (which manages the Revenue Budget).

216. The PRSP makes justice and access thereto a central plank of its strategy and includes *Criminal Justice*[80] in its Eight-Point Strategic Agenda. The document goes on to state that 'reforming criminal justice and enhancing affordable justice for the poor are the crucial policy priorities in this area.'[81]

217. The PRSP notes the 'formidable challenges'[82] ahead including the 'weak' state of community policing and 'mistreatment' of women and children; 'decayed' state of inspection and supervisory mechanisms; 'horribly over-crowded' prisons, 'insecurity' of women placed in 'safe custody'; and the 'problems' that 'pervade the judiciary' (citing delay in disposal of cases, prevalence of vested groups, lack of inspection and supervision, intrusion of political considerations etc).[83]

218. The key policy priorities cited are:

- meaningful progress on the separation of the judiciary from the executive
- development of a comprehensive police reform agenda
- strengthening safeguards in application of speedy solutions such as RAB
- speedy establishment of the independent government attorney service
- consolidation of jail reform
- standards setting on lower judiciary
- promotion of ADR
- community policing
- building on the initiative for a Child Commisssioner[84], and
- expediting establishment of the National Human Rights Commission[85]

[79] 'Unlocking the Potential – A National Strategy for Accelerated Poverty Reduction'. GoB. 2005
[80] PRSP at pxx
[81] id at para 5.448 p 169
[82] id at para 5.449 p 170
[83] id
[84] Interviews for this report indicated a variance of views as to whether such a body was actually needed, and indicated that there was unlikely to be much support for it currently.

219. Some of the 'key issues in building strategies' are set out in the PRSP. We refer to those that are most relevant to the criminal justice sector.

Building on past achievements

220. The section starts with a large sign: 'No road-map is or can be wholly new.' The 'critical priority' here is to 'consolidate' the gains that have been made and 'move on to the next challenges'.[86]

221. The significance of the role played by NGOs in the delivery of community legal services and PIL cannot be understated in an area where, in the past, GoB has all but abrogated its responsibility. The most recent report from the Asia Foundation is 'striking' in its findings that 96% of beneficiaries interviewed believe that CLS helps people to become less poor; and 88% of opinion leaders believe CLS helps the government to become more responsive to the poor.[87]

222. The importance of this last figure is that it holds real potential for donors to facilitate public-private partnerships in promoting improved access to justice.

223. We have heard some within the donor community voice doubt over continuing support to NGO service providers and favouring a move away towards more direct support to local government mechanisms such as the Village Courts.

224. Such a tendency appears to the team to run the risk of undermining the gains made to-date.

Preventing slippages

225. While it is generally recognized that justice reform is a process of years and there are no 'quick fixes', experience suggests that momentum has to be built up and maintained if the gains that are made are to be consolidated and make space for new initiatives to be explored. Otherwise, practitioners become disenchanted as they see a bright initiative turn into a 'gimmick' as the government or donor move on to the next 'enthusiasm'.

226. A robust view (in the Bangladeshi context) is that if an arrangement works for the poor (ie community legal services), it should be supported. The evidence that the arrangement does work needs to be tested (to avoid 'capture') and analysed in a way that makes the case for government assuming some or all of the costs at a future time.

Addressing implementation

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[85] id at para 5.452 p 170
[86] id at para 4.2 p45
[87] TAF March 2007 supra at p15

227. The PRSP calls for a 'sharper engagement' with implementation challenges.[88] The reference here is to the 'consistent burden' of under-completed or under-funded projects within the Annual Development Programme (ADP). In 2002, a report to GoB found a project completion rate at 56% with 15% of projects showing 'zero progress.'[89]

228. The Inspector-General of Prisons stated that there were 16 prisons in various states of completion around the country, with building on some having started in the 1980s.[90] We have heard a number of comments to the effect that the police reform project has been slow to get off the ground. We have heard also that the case management component of the Legal and Judicial Capacity Building project could have benefited from 'sharper engagement' at the outset by the contractor retained for the assistance of the Supreme Court and from more leadership from within the judiciary.[91]

Strengthening the focus on women's rights and advancement

229. The PRSP refers to the 'entrenched patriarchal attitudes'[92] within society and notes that further progress will need to contend with – inter alia – the police and courts which 'remain extremely women un-friendly'.

230. While such attitudes remain, there have also been significant shifts, reflected most visibly perhaps in the changing discourse on violence against women, and the widespread recognition and condemnation of certain forms of violence such as acid violence, or 'fatwa' violence. The sustained interventions made by women's organizations in providing paralegal support to women to enable them to navigate the hostile terrain of police stations and trial courts, as well as the deployment of paralegals and/or duty counsel at police stations need to be further built upon.

Bringing the policy process into focus

231. 'Ideal solutions innocent of the challenges of grounding policies in political and administrative implementation are …often off the mark.'[93] If the political challenges have been reduced to some degree by the action of the CTG, the 'inertia' within the bureaucracy is attested to in countless reports going back to the colonial period, including that of Justice Munim.[94]

232. These challenges can be negotiated however by focusing more on what the PRSP terms 'norm graduation' rather than policy action. We understand this to mean that change can be 'cooked' through a sensible action that gains popular

[88] PRSP at para 4.7 p 46
[89] id
[90] Brig General Md Zakir Hasan, interview 4 June 2007
[91] Justice Mustafa Kamal, former Chief Justice of Bangladesh; also former Project Co-ordinator of the World Bank Legal and Judicial Capacity Building Project, and current Chairperson of the Law Commission, interview 28 May 2007.
[92] PRSP at para 4.17 p48
[93] id at para 4.22 p50
[94] The Jail Commission report 1980

support (ie because it works) without going through all the rigmarole of getting government 'buy-in' at the outset.

233. The PRSP cites the example of queuing at a bus stop in Dhaka. We observed another example of 'norm graduation' at the Community Police Forum in Madaripur district where the community's attitude towards the police was changing through a process of dialogue and active collaboration from regarding police as a fearful 'them' to a more familiar 'one of us'.

Making governance work for the poor and for women

234. The benefit of these 'small solutions' as exemplified in the preceding paragraph is that they 'can get started right away with much less of a challenge in policy innovation.'[95]

235. In the area of penal reform, for instance, security institutions like police and prisons are wary of allowing 'outsiders' (accredited or no) into their 'space'. Door-opening, 'small solutions' (such as the BSEHR project assisting women survivors of domestic violence to file FIRs at the police *thana*; proposed joint initiative of GTZ/RNE to mainstream gender concerns in the community policing projects around the country; and discreet but targeted efforts to decongest prisons) can and do lead to more ambitious reforms in a short space of time.[96]

Bench-marking for monitoring progress

236. The PRSP echoes the language of the Paris Declaration in emphasizing the importance of a 'result-oriented'[97] strategy for poverty reduction. It calls for 'credible and conceptually sound benchmarks' against which progress can be measured.

237. However, the gathering of data in the justice sector is not as yet a precise science. A report on human security found that

'the type and quality of secondary data available in Bangladesh precluded any scoring of human insecurity in any category or sub-category that we looked at. This was an unexpected finding, particularly given the large amount of data that was being collected on human insecurity in Bangladesh by NGOs and others. Unfortunately, all of this data is 'collected' in a way that makes it unsuitable for reaching informed judgements about the levels of insecurity that could be compared over time.'[98]

[95] PRSP at para 4.31 p 52
[96] See: the Paralegal Advisory Service in Malawi, Kenya and Uganda. In Malawi, the paralegals gained access to police stations by initially offering to assist police trace parents of juvenile offenders. A code of conduct was drawn up with police. Paralegals made daily visits. Parents were traced. Paralegals suggested 'screening' the juveniles to see if they might qualify for simple diversion. As a result, 77% of juveniles entering police were released (where the practise before was to remand the majority in custody). Within 18 months of starting in four police stations, paralegals were permitted to assist adult accused in their interviews under caution – which was the original aim.
[97] PRSP at para 4.32 p 52
[98] Human Security Report. Mushtaq Khan. DFID. 2005

238. NGOs are under-resourced to meet all the burdens placed on them. Aside from 'doing' their work and delivering community legal services or investigating cases for mounting individual legal actions or public interest law suits, they have reporting requirements (made more heavy by having to be submitted in English, with repeated iterations and calls for clarification, separate reporting requirements from some donors in the same consortium) and M & E obligations. They have consequently not been able to act on existing data effectively to respond to the situations highlighted therein.

239. Donor missions are similarly taxed by their capitals and find themselves having to do more with less resources. As a result, the gathering and analysis of data suffer.

Child rights issues

240. The PRSP notes that over 68 million children are under 16 (approximately 50% of the total population). It calls attention inter alia to urban poor children who are picked up and detained 'without reason' (often under colonial era 'Vagrancy Laws' which effective criminalize the poor simply for being poor) and those placed in 'safe custody' who experience 'sexual and physical abuse.' It calls for 'special attention' to their situation.

241. The Chief Metropolitan Magistrate has impressed many with his systematic approach to the numbers of children in custody in Dhaka Central (by reducing the numbers in custody from hundreds 18 months ago to five under 16s today and 49 under 18s).[99] The Juvenile Justice Network recently renamed the 'Child Justice Network' has formed a sub-group called the 'Juvenile Justice Roundtable' which is chaired by UNICEF. SCF (UK) is co-ordinating the development of a joint plan of action in juvenile justice at the end of June (2007).[100]

Land administration reforms and land use policy

242. Land disputes clog the cause list in both civil and criminal courts. This area lies outside the competence of this report because the issue is both complex and considerable in scope and it needs sustained attention and action.

Urban poverty

243. The issue of rapid urbanization and its bearing on the justice sector has been mentioned by several of the people the team met with.

244. The PRSP states that the proportion of urban population is expected to rise to one-third of the total population in less than three years (ie by 2010).[101] Access to basic services – such as police and courts – will require forward

[99] Interview with Jalal Ahmed, CMM supra
[100] Habibun Nessa, head of protection, SCK (UK), interview 6 June 2007
[101] PRSP para 4.53 at p 57

planning. There is not much evidence of this from the point of view of the courts.

245. The Chief Metropolitan Magistrate has 21 magistrates to service Dhaka City (+/- 10 million persons) from one court centre in the south covering 15 police stations. His backlog of cases mounts monthly as the magistrates cannot keep pace with the new cases coming in. He states that the majority of the backlog comprises traffic cases.[102]

246. In 2005, the case backlog in district and magistrates'courts was given as under a little under 500,000 in both civil and criminal matters.[103] The IG Prisons estimated 80% of the prison population were 'under-trials'.[104]

247. The CMM has submitted a proposal for a new court site to be established in the north of the city (covering 18 police stations) and that the establishment of magistrates at each site be increased to 40 per court centre. He further recommends the police be delegated greater powers to deal with traffic cases.

Supporting strategies

I. 'Ensuring participation, social inclusion and empowerment.'

248. In this section, the PRSP considers those groups and categories of the population most marginalized and at risk.

Women's rights and advancement

249. In 'Actions to be taken' a particular focus is placed on combating Violence Against Women (VAW).

250. The PRSP lists as one of the goals to be achieved by GoB 'to ensure 100% reporting of violence against women'.[105] Other goals include:

- to reduce reported VAW by 50% (at least)
- to include domestic violence in the Women and Children Repression Act 2003 as a punishable crime (but as women's groups have since pointed out, in commenting on the draft law prepared by the Law Commission, that criminalistion of domestic violence is less significant than putting in place civil remedies, and have accordingly been engaged in work on public education on domestic violence (including through spots on television), and on consultations on the proposed bill)
- to ensure protection of women in the custody of law enforcement agencies;
- to provide VAW training to police and medical personnel
- to increase awareness and disseminate information about services available for victims of VAW

[102] Interview with Jalal Ahmed, CMM supra
[103] See EC 2005 at p26
[104] Interview Brig Gen Md Zakir Hasan, IG Prisons, 4 June 2007
[105] id at para 5.388 p 152

- to increase allocations for the police service and the judiciary aimed at counteracting VAW;
- to sensitise the judiciary on the application of CEDAW in cases affecting the rights of women.

Children

251. The section moves on to a consideration of strategies in support of children's rights and calls for a review of the existing laws in light of the CRC. 'Children in difficulty with law should be treated with the objective of reintegrating them with their families/communities rather than to "punish" them.'[106]

252. Several considerations arise here: firstly, it is often the family who brings the child to the police;[107] secondly, the number of social welfare officers or probation officers who can facilitate this reintegration are negligible.[108] More creative and innovative solutions will need to be found.

Adivasi/Ethnic Minority groups

253. There are about 45 Adivasi communities/indigenous peoples with a total population estimated to number around 2 million people. Recommended action points in the PRSP include the expansion of NGO activities in support of indigenous peoples' groups (see paras 95ff above).

254. *Other disadvantaged groups* include foreign nationals in prisons who languish without the assistance of diplomatic missions and are unable to communicate with their families in their home country or afford the services of a lawyer(numbers in the 100s); as well as commercial sex workers, River Gypsys, Dalits, and people with disabilities.

II. Promoting Good Governance - strategic considerations

255. The PRSP is explicit in taking a 'pro-poor' approach when it comes to justice: 'judicial reform is a worthwhile goal in its own right but viewed through the poverty lens, this goal is better prioritized as on ensuring cheap and accessible justice.'[109]

256. In this section, the PRSP makes the case eloquently for 'producing tangible benefits in the short term … [as] … a wise first step to opening up larger reform agendas.'[110] It talks of 'high visibility changes that build citizen trust in the possibility of reform.'[111] It remarks that 'The challenge really is

[106] PRSP at para 5.399 p155
[107] Habibun Nessa SCF (UK) supra
[108] The latest estimate (source: CIDA) is that the number of probation officers has increased from 22:140m people to 26)
[109] PRSP para 5.427 at p161
[110] id at para 5.429 at p162
[111] id

not on the length of the reform agenda but rather how reforms are introduced and sustained in the real world.'[112]

257. It finishes this section by noting that it is 'important to build on the many good practices and islands of excellence which have sprouted despite generally poor governance environments.'[113] It then lists a number of institutional aspects contributing to better performance such as: i) decentralization ii) professional work culture iii) strong monitoring system iv) informal decision making v) leadership vi) team-work and vii) sense of mission.

258. 'Aspects', which from the reports we have read and the meetings we have conducted, appear epitomized in the work of the many NGOs and CBOs working to make justice accessible to ordinary people.

- *Cross-cutting themes for an institutional strategy*

259. The PRSP lists four: systemic improvements, quality institutions, partnerships and culture and values. Again the PRSP calls for balance between 'big' and 'small solutions'.[114] It notes that systemic improvements take time (a similar approach underpinned the GoB 'Strategy for Legal and Judicial Reforms' over 15 years) and that an 'active policy of nurturing quality institutions'[115] should supplement the broader focus on systemic improvements.

260. Many of these 'quality institutions' we find elsewhere to be directed by 'drivers of change' within the establishment and to include civil society organizations without.

261. The 'theme of partnership' comes third and here the PRSP notes with approval the 'wide range of innovative ideas about how to improve service delivery through community engagement…; how to build partnerships with NGOs, the private sector and communities in a wide range of service provision sectors.'

262. Later on, the PRSP picks up on the 'scope' of these public-private partnerships[116] and enjoins government to design concessions that 'call for bidders to provide services where it will not otherwise provide to the poor.'[117]

263. This part closes with the reflection that 'The truth is that the ground reality is increasingly a multi-agent one.'[118]

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[112] id
[113] id at para 5.430, p162
[114] id at para 5.432
[115] id at para 5.433
[116] id at para 5.462 p 173
[117] id. This is the case in the UK where government signs 'service agreements' with legal aid service providers. These are also called 'co-operation agreements' in South Africa and Malawi where the Legal Aid Board/Bureau enters into an agreement with accredited service providers (usually NGOs) to provide services against an agreed contract price. This is one way out of the 'sustainability' trap that NGOs are confronted by.

264. It is the 'ground reality' certainly as far as the justice sector is concerned and one of the reasons why it is so difficult to get right. The observations of Lord Justice Woolf on the criminal justice in UK resonate in Bangladesh today (see p66). In the same way that the problems facing the CMM in Dhaka, IG Prisons and SP police in Madaripur will be all too familiar to their counterparts on the other four continents of the globe.

[118] id at para 5.434

V. Challenges and opportunities

265. We agree with the view that this period under the current Caretaker government offers a real opportunity for moving ahead with a number of justice sector reforms. The momentum gathering behind the passage of secondary legislation that takes the independence of the judiciary several steps closer to completion is a favourable sign of the CTG's commitment. So too is the extension of the PRSP by 12 months as it provides a pro-poor perspective against which all the DPs can align.

266. The concern that the PRSP is insufficiently prioritized and the CTG is not providing leadership to DPs in the justice sector we view, perhaps with undue optimism, as an opportunity rather than a challenge as it enables DPs to use the space provided (ie the absence of political bias) to set an example by building on what works, maximizing the participation of all justice actors and forging public-private linkages, so that when a new government is elected, a medium term strategy can be designed from a solid base.

Challenges and Opportunities	
Challenges	**Opportunities**
Independence of the judiciary and the implications thereof	Support to the CTG and laying the policy framework for the new GoB
Accessing legal advice and assistance at all stages of the process	Broadening the definition of legal aid to include a range of service providers and building on existing partnerships
Reducing prison overcrowding	Applying international standards and drawing on good practices developed elsewhere to initiate pilot schemes
Engaging with the police as a service	Building on the COP pilot schemes and linking with CLS to provide a community service.
Scaling up Village Courts and NGO-mediated ADR and issues of sustainability	Increasing levels of support to civil society groups to expand their range of services and forge partnerships at the national as well as district levels
Developing a media strategy + public awareness campaign to inform and provoke public debate on the kind of justice system best suits the needs of Bangladesh today	To engage public opinion to drive through reform measures in the medium to long terms

Independence of the judiciary

267. The DPs are well placed to support the judiciary address the capacity deficit as a result of separation. It is understood the executive magistrates will return to their line ministry en bloc or at least in large numbers, requiring the recruitment and training of 'judicial' magistrates who will replace them. This we are told will be especially urgent in the districts.[119]

268. Judges in the main are not trained as administrators. This will need to be addressed as an urgent concern to enable the judiciary to oversee and manage the separation process and its aftermath. While the ADB has proposed a substantial loan to cover much of the transition costs, this does not include support to the proposal (by the Supreme Court) to establish an office of

[119] Jalal Ahmed, CMM, interview supra

Registrar-General (supported by six additional Registrars who will plan and administer the judicial budget).

269. We also see an opportunity to provide support to the dynamic Chief Metropolitan Magistrate Dhaka who has demonstrated a consistent effort to improve the administration of justice in his jurisdiction and to determine whether similar support can be extended in other metropolitan areas.

270. Development partners are familiar with conducting rapid capacity assessments and needs analyses and could contribute here by working in close association with the CTG and Supreme Court to inform their thinking in developing proposed action plans through providing technical advice and support in this area. They may also assist with sponsoring dialogues between key actors within these bodies and experts (including retired bureaucrats, or senior judges or lawyers, as well as CSOs) to enable an early focus on the development of time bound action plans.

271. A cautionary note in an earlier report adverted to the problem of corruption in the judiciary.[120] Drawing from experience in Indonesia and parts of Africa, reforms that proceed without dealing with corruption in the judiciary only serve to 'perpetuate the problem' and end up with finding that '[r]ather than improving its performance, a judicial independence law instead served to insulate the institution from accountability.'[121]

272. Institutionalised checks against corrupt practices within the court administration will need to be factored into the support offered. There are already important examples of how some judges have taken a lead in such matters, through 'small steps' with demonstrable change already felt - for example by maintaining double copies of the list of new cases to be heard, and checking off cases as they are heard, so that the list cannot be manipulated by the bench officers.

Accessing legal advice and assistance at all stages of the justice process

273. Legal aid can be a bottomless pit consuming ever increasing sums of money. The cost per capita of legal aid ranges considerably from country to country.[122]

274. However where lawyers are in short supply, highly innovative solutions have been found that employ paralegals who can carry on the basic preparatory work that does not require the expertise of a lawyer and which cost less than US$0.50 cents per capita.[123]

275. We have noticed that contrary to growing trends elsewhere, legal aid (within the GoB scheme) is construed narrowly in Bangladesh to mean legal

[120] See EC:2005 at paras 1.18-1.20 pp8/9
[121] id at para 1.19
[122] $1.20 for South Africa, $15 for the US, $30 for Canada, and $60 for the UK (source: Prof David McQuoid-Mason, University of KwaZulu Natal, Durban, South Africa)
[123] One such scheme has been developed in Malawi.

representation in a court Current trends appear to broaden the definition to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

276. These trends further promote a role for non-lawyers (such as law students and paralegals) in providing legal services provided they are trained and duly accredited. They emphasise that government is under an obligation to provide legal assistance 'at all stages' of the justice process and to make legal information readily available. They promote partnerships and co-operation agreements between government and other service providers to increase outreach and ensure sustainability.[124]

277. Seen from this perspective, the provision of legal aid services can cut across the full range of justice institutions and actors. In Africa, paralegals have long served rural communities in offering advice on matrimonial, inheritance and other civil matters. More recently, paralegals have 'energised' the criminal justice system[125] as they: push cases through the system (by following them up from prison to police and so to court); bring the court to the prison to screen cases (drawing up lists of overstayers and unlawfully remanded in consultation with the prison authorities); help ordinary people find their way around courts. Field workers used by ASK and others to support legal aid clients to navigate both court premises and court procedures, and to accompany clients to police stations or to courts provide a similar model already used within Bangladesh.

278. We find there is an opportunity here to learn more from these practices that have developed out of necessity in other parts of the globe[126] and in a small scale within Bangladesh, and, in particular, how they have forged partnerships with government funded schemes and concluded service agreements.

279. A fundamental flaw with the current arrangement is that the NLAO is established within the MoLJPA. This raises a number of issues turning on a very real conflict of interest between the best interests of the plaintiff/defendant and the role of the legal aid lawyer (employed by the state). We have not seen any documentation that addresses this situation.

[124] Aside from UN standards and guidelines mentioned elsewhere. See in particular: Kyiv Declaration on the Right to Legal Aid, 2007; Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004 (adopted by the African Commission on Human and Peoples' Rights (2006) and UN Commission on Crime Prevention and Criminal Justice (2007))
[125] First evaluation of the Paralegal Advisory Service in Malawi. Fergus Kerrigan, Danish Institute for Human Rights, 2002
[126] Refer to Annex 5

Reducing prison overcrowding

280. The current capacity at +/-27,000 has swollen to a current population at +/-84,000. At overcrowding levels of +300% the situation is intolerable. In some prisons (ie Dhaka central) it will be worse than in other district jails.

281. Seen in context, the prison population per 100,000 people stands at around 50.[127] Comparative figures show 29:100,000 in Nepal and India and 55:100,000 in Pakistan.[128]

282. The reasons for such low figures at the macro level may be because crime rates are low and social capital is high; or it may mean levels of reported crime and/or conviction rates are low.

283. We have seen little signs that any concerted strategy is underway to address the problem at the micro level (ie current untenable situation in individual prisons) or plan for the future at the macro level (instigate penal reforms which will maintain a relatively low rate of incarceration). We endorse the view of the EC report that the recommendations contained in the report of the Jail Reform Commission although made in 1980 remain valid today.

Engaging with the police as a service

284. The police reform programme under UNDP has been extended to May 2008 by when 42 'model' police stations at the *thana* level will have been established across the country.

285. The community-oriented police programme (COP) under the Asia Foundation shows encouraging results from the pilot stage and they propose to expand the programme. TAF notes some impressive outcomes:

- visible decline in crime resulting from collaboration between citizens and police in addressing drug addiction, gambling, harassment of women and other issues of common concern;
- participation by police superintendents and other senior police officers in events organized by community members in local neighbourhoods
- readiness of police to participate in community police forums (CPF)
- willingness of different political parties to work together as members of the CPF.[129]

286. The team's own observation of a CPF in Madaripur[130] bore out these findings which were endorsed in a follow up meeting with the Superintendent of police in Madaripur.[131]

[127] World Prison Brief, 6th edition, 2005, International Centre for Prison Studies (www.icps.org)
[128] Compare with 142 in England and Wales, 70 in Denmark, 116 in Canada and 714 in the USA
[129] TAF: Community-Oriented Policing. May 2007
[130] Observation of a CPF in Kendua UP, 1 June 2007
[131] Madaripur, 2 June 2007

287. At the CPF (attended by 20 persons including women and teenagers), we observed that the minutes of the last meeting had been typed by the MLAA worker who read them out. This consisted of one page which set out the problems faced and how they had dealt with them and new issues arising.

288. The CPF chair stated that gambling was the major problem and with police assistance, they had stopped the practice in the ward by pointing out the sites to the police who had swooped on the gamblers.

289. They went on to say they were now tackling the issue of dowry since it was the cause of many disputes following a resolution they had taken at the last meeting. By way of follow up to that meeting, they reported that they had conducted door-to-door visits to people with adult girls or people who were about to celebrate a marriage and advise the parties that no dowry should be taken.

290. A NGO (woman) representative in the CPF said even after marriage, problems associated with dowry recurred, and that people now had another local mechanism (ie the CPF) to which a woman could turn for assistance.

291. The Sub-Inspector advised that the police had limited manpower[132] and that a pro-active CPF assisted police to identify and focus on problems. This had not been possible before - especially in remote areas - as police 'do not go there'.

292. For their part, the CPF members observed that before they had been afraid of the police and when the police came down the road, they would go the other way. Now they were no longer afraid and viewed the police as 'our' people.

293. The outcome of the meeting was a resolution to hold a public community awareness meeting on dowry and continue door to door meetings with elders.

294. We note that while there is already much public debate, and ongoing legal awareness programmes (eg by BRAC and others) to spread the message that dowry taking or giving is wrong, the practice continues seemingly unabated, as does early marriage, prompted by the understanding (however flawed) that women's physical and economic security will be better ensured through marriage. It will become increasingly important to test what impact such awareness raising actually has on behaviour regarding dowry.

295. This said, the additional role of the CPF *qua* crime prevention panel was particularly impressive.

[132] The Police Superintendent advised that currently Madaripur district is serviced by 595 police officers (439 constables including 9 women) against a population of +/- 1m – ie: ratio of 1:1680.

296. MLAA is discussing how to scale up the initiative.[133] One proposal is to place the CPF at UP level and invite representatives from each ward to attend the CPF, identify problems, prioritise them and score them and action one particular ward at a time.[134]

297. They are also considering linking the CBOs who assist at the mediations to the CPF so as to provide one forum that could deal with mediation as well. The presence of a framework of this kind easily lends itself to closer links with local police stations so as to facilitate diversion mechanisms as well as to support Community Service Orders and alternatives to prison made by the courts. It could also act to prepare the community for the release of an ex-offender (and assess the viability of a woman or young person held in 'safe custody' being returned to the family).

Scaling up village courts and NGO-mediated ADR and issues of sustainability

298. The planned injection of considerable sums of DP assistance into activating the Village Courts and NGO-mediated services is supported by recent research[135]which merits close review and consideration.

299. The mapping exercise of CLS activities around the country found the following[136]:

- CLS services available in 35-40% of the country
- Certain areas are not adequately served (including: CHT and northern districts of Chittagong division, much of the northern Dhaka division, central Rajshahi and Sylhet divisions)
- Large NGOs focusing on CLS guide activities in approximately one third of the country; though no single NGO serves more than 10% of the country
- Mediation and legal aid constitute the most common types of CLS delivery; fully operational Village Courts or Arbitration Councils account for less than 10% of CLS

300. Most disputes are family-related (over 50%) with financial disputes (13%), land (12%), assault (10%), social disputes (7%) and miscellaneous (4%). Only a 'small fraction' involved serious crimes.[137]

301. CLS has developed perforce over the years generally due to the 'failure of governance'[138] and specifically due to the remoteness of the formal justice

[133] The pilot phase consisted of 10 units over 12 months employing five MLAA staff at a cost of 17 lakhs taka.
[134] Since one police thana is responsible for 15 UPs; and each UP consists of 9 wards, monitoring all the wards is not practicable.
[135] TAF CLS report supra which is based on 69 responses (out of 140 NGOs) to a survey, field research to 24 rural CLS providers, interviews with major CLS providers and literature review.
[136] id at iii
[137] id
[138] id at p2

system from the villages in which most people live[139] and where 'those who lack financial resources and social leverage must depend on a more limited range of options and are more susceptible to manipulation or abuse when accessing available support mechanisms.'[140]

302. While NGOs have developed tried and tested models for delivering Community-based Legal Services, the TAF CLS report recognizes that 'CLS is not a static field' and that it is constantly 'enhanced by new learning and exchange of experience.'[141] The creativity and energy of civil society in Bangladesh is attested to in many of the reports we have read.

303. The DPs have recognized the extraordinary achievements made over the past few years. Several DPs are contributing substantial sums into scaling up these services, especially in the area of NGO-mediated ADR and the Village Courts.

304. The TAF CLS report finds that

- 96 percent of beneficiaries interviewed believed that CLS helps people to become less poor;
- 88 percent of opinion leaders….believe that CLS helps the government to become more responsive to the poor[142]

305. It goes on to observe that 'the work of NGO partners is recognized as an essential complement to concurrent formal justice sector reform initiatives'[143] and how '[e]xperienced NGOs…continue to play valued technical resource roles in supporting the work of other organizations'[144]; and, admiringly, reflects that the 'growth and refinement of these collaborative networks in the last decade is one of the single most important innovations in NGO-based legal service delivery in Bangladesh.'[145]

306. Notwithstanding these accolades, we have perceived a tendency now to shift focus away from NGOs to government under the colours of 'sustainability'. We urge a wider perspective here and offer four reflections and one concern.

307. Firstly, we view the challenge now to explore further the linkages or partnerships with government so that NGO outreach can increase exponentially.

308. Secondly, we venture to suggest that while donor assistance will phase out over time as government assumes its responsibilities that time has yet to come. There is still an important role for civil society to play:

[139] UNDP: Human Security in Bangladesh 2002 et al
[140] TAF CLS report at p2
[141] id at p45
[142] TAF CLS report at p15
[143] id at p3
[144] id
[145] id at p39

'Reform initiatives are invariably driven by a combination of internal and external forces and incentives of various kinds…there is no single pattern or progress in governance reform…While commitment on the part of responsible public officials from the outset inspires confidence, reforms may ultimately be secured through bottom-up pressure applied by civil society, the private sector or a combination of stakeholders.'[146]

309. Thirdly, the investment in CLS in Bangladesh should not be viewed in isolation. The Asia Foundation's COP initiative is adapted from a proven model in Indonesia. Recently, MLAA were invited to Malawi to explore piloting its mediation model in rural areas there and the visit was accompanied by a leading Kenyan ADR specialist who conducts training courses around the continent.[147] The significance of 'tried and tested' models is that they often can be easily adapted to suit the country-specific context and at enormous savings in terms of design costs and start-up forays.[148]

310. Fourthly, 'justice' is a core function of government, which to-date successive governments have chosen to ignore. It is a cost that is recoverable through the levying of taxes. The imposition of fines is seldom profitable as the cost of their recovery is substantial. CLS providers cannot charge for their services because they serve the very people who cannot afford any services.

311. We suggest that as DPs seek to 'mature' their relationship with government through efforts to harmonise and align their support, it is time DPs treat civil society organizations in Bangladesh more as 'partners'. The level of commitment evidenced by their achievements and scores of reports attesting to their capacity to deliver (if not always to monitor that which they deliver) is deserving of greater respect, especially when compared with the track record of civil society elsewhere for whom Bangladesh sets a shining example.

312. Our concern is that DPs (and justice institutions) in the pursuit of 'scaling up' and in furtherance of the 'model' developed by a NGO, then lose those NGOs in the 'language of big solutions' arguing that these NGOs do not have the capacity for such large scale enterprises; or because the DPs' procedures dictate an open tender process that is won by an external agency with no prior engagement in the particular field.

313. The successful bidder then instead of building capacity within existing NGOs, and developing their capacity in policy advocacy, for example, tends to 'occupy the available space' and to arrogate to itself this more high-profile work while leaving the mundane tasks of service delivery to the NGOs – at the same time recruiting their brightest and best with payscales that are unmatchable within the NGO sector.

[146] Draft Country Governance Assessment Bangladesh, Asia Development Bank, May 2004, at para 882
[147] The Dispute Resolution Centre, Nairobi, Kenya; Dir: Brenda Brainch
[148] The Paralegal Advisory Service

314. Time and again we have observed excellent initiatives fail due to poor implementation (and not because of weak conceptualization).

315. This said, there remains the challenge for civil society to prove their cost effectiveness and substantiate through empirical data the impact of their work on the ground, especially on the lives of the poor. For instance, community legal services not only provide prompt relief to individuals at the community level, they also prevent cases going through for adjudication in the courts. There is a benefit to the community to be valued and a cost saved to the police and judiciary. NGOs may not always be best placed to lead such research directly, for reasons of capacity, but can work closely with available research facilities, for example at BRAC RED (Research and Evaluation Division), Centre for Governance Studies, CPD or PPRC for this purpose.

316. Again, while the costs of incarceration to the state may be minimal (unlike in the west, developing countries do not spend vast sums on their prisoners, so cost savings from alternative sanctions such as probation are not a strong argument in their favour), the **impact** of imprisoning a breadwinner is often devastating in economic terms alone to the lives of his family and others on whom they depend. This can and should be measured.

317. The DPs can provide technical assistance to measure with greater science than has been mustered to-date the poverty impact of CLS **and** savings to the State. When the case is made on strong and credible evidence and the advantages of partnership are demonstrated, the argument for the state to contract with civil society partners for its services becomes compelling.

Developing a media strategy

318. There is a vibrant print and electronic media in Bangladesh. Despite its having highlighted many key justice related concerns, it remains under-used as a vehicle for galvanizing public debate on such key issues as ‘corruption’, ‘the independence of the judiciary’, ‘the role of a Human Rights Commission’, ‘the state of our prisons’ and so on.

319. Soap operas can carry important social messages. Radio is a cheap and accessible way to communicate conflicting views and provoke debate. Newspapers can run a series of columns – and existing Law Pages can include a focused strand of writing on some of these issues.

320. The flurry of current affairs ‘talk shows’, which are closely watched, and already follow the political reform agenda and developments in the anti-corruption drive, provide an opportunity to engender a more concrete debate on justice related issues.

321. While much of the national debate, as driven through the media, has been limited to concerns regarding process issues regarding the elections, it is time now to turn to the content: to what will be delivered to people before and after elections in terms of services to ensure their safety and security, and in terms of the functioning of mechanisms of accountability.

322. Public education and awareness needs to focus on both law and human rights (including those protected under international instruments). Considerable work has been done in this area (including by Danida, GTZ, Oxfam and others), but it is not synchronized and there is no apparent agreement on messages and methods.

323. The formal education curriculum might contain 'life skills' or 'civic education' that focuses on a wide range of issues, from opening a bank account and applying for a loan, to the justice system, human rights, what to do if you are arrested and so on.

324. Although Danida have commissioned research into a media campaign, the results of this were regarded as less than satisfactory, although one idea that was supported was the use of rickshaw art to convey VAW messages (which have been discussed with BLAST as well). There are other low / no-cost activities that could also be tried, such as:

- Using packaging of products usually purchased by the poor to carry messages (which producers agree to and which adds nothing to the cost of printing the packaging)
- Carrying sponsored messages on popular transport eg rickshaws, three-wheelers etc
- Holding discussion panels on radio and TV (as part of normal programming)
- Adverts carried by corporates, such as those by Grameen phone and Bangla link tapping into (positive) nationalist sentiment
- Linking to stories of independence, to push through ideas of inclusivity (re religions) or basic humanity
- Spots for MoWCA on child workers and domestic violence

325. Increasingly, DPs are aware that running a media strategy in parallel to reform programmes enhances the chances that the reforms will be sustained in the medium to long term.

Lessons learned

326. While justice as a 'sector' is relatively new in development circles, we have learned a number of lessons along the way, for instance:

- that the sector has to be seen as a whole, because it is a chain of events and each links up to another; by addressing one and not all, will create a new blockage and malfunction;
- that problems in the justice sector are remarkably similar around the world – only they may vary in degree; therefore there is much to be learned from one another;
- that by maximizing participation and taking an inclusive approach, change will appear less threatening as everyone is involved in bringing it about;

- that the solving of practical problems is more likely to change entrenched attitudes than elaborating ambitious justice reforms; and
- that seed money for pilot schemes and action-oriented research is vital to the development of larger scale reform programmes;
- that the state can not 'go it alone' and needs to partner with, and harness the energy and experience of, universities, civil society and the Bar
- that drivers of change need not be state ministers and may be only prison officers, local policemen or the DC, or individual judges
- that ordinary people need to be brought on board for it is they who will monitor progress and evaluate the success of failure of the programme (by voting with their feet)

327. In a "lessons learned" review of DFID's justice programs across the globe,[149] the report recommends a greater focus on primary service provision at the community level (note: DFID estimates that "in many developing countries, traditional or customary legal systems account for 80% of total cases"[150] and OECD similarly suggesting that "non-state systems are the main providers of justice and security for up to 80-90% of the population" in fragile states[151]).

328. The report further recommends that support provided to formal justice proceed cautiously and concentrate on primary providers such as magistrates and trial courts. It adds that participatory poverty assessments show how civil justice and gender issues are major concerns for poor people and that greater emphasis should be placed on these accordingly.

329. The DPs in Bangladesh appear to have arrived at the same point as their planning indicates (see Annex 4). This renders the task of drawing a road map less inhibiting – and to this we turn next.

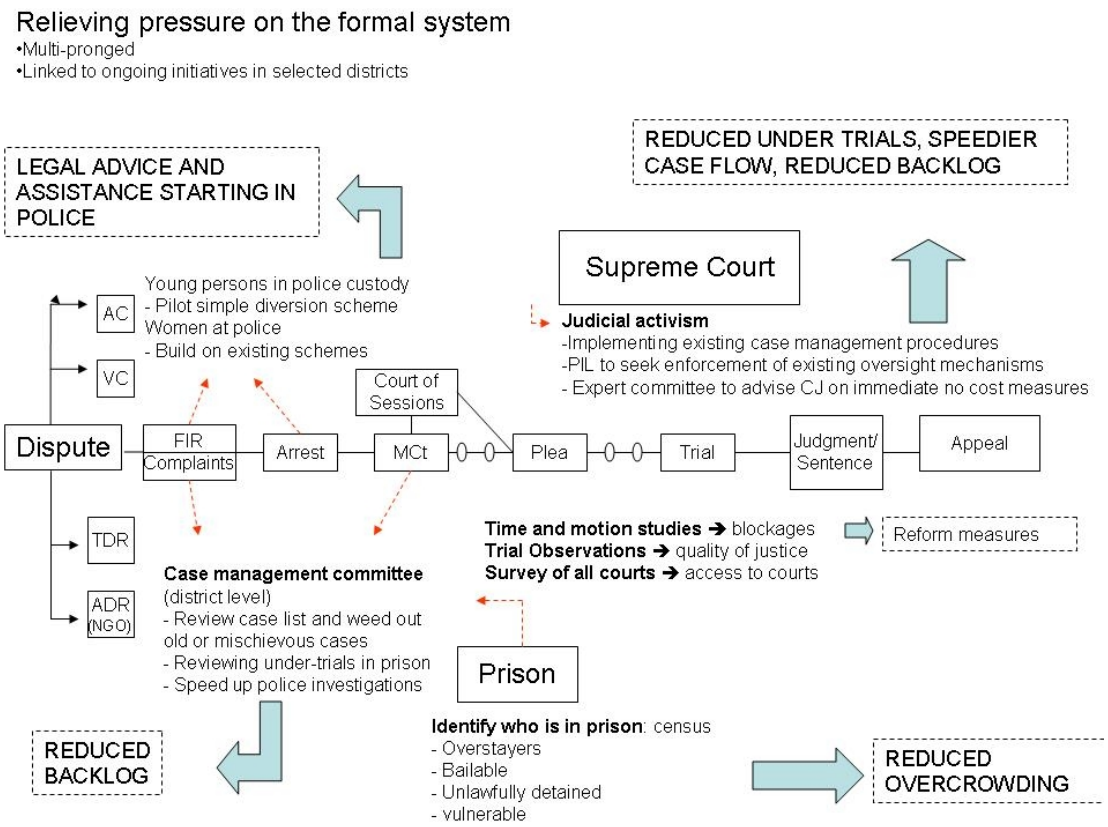
[149] The Law and Development Partnership, *DFID Safety, Security and Access to Justice Programmes: Practical Lessons from Experience*, 6 September 2006.
[150] DFID, *Safety, Security and Accessible Justice: Putting policy into practice*, 58.
[151] OECD/DAC Network on Conflict, Peace and Development Co-operation, *Enhancing the delivery of justice and security in fragile states*, August 2006, at 4.

VI. A Road Map for the Justice Sector

330. The paths to justice are many and we do not seek to impose one here. Rather than set out 'what' to do, we seek to consider ways of doing and 'how' to approach these. So we emphasise improving communication, co-ordination and co-operation between all actors across the sector (rather than gazing suspiciously at each other from their respective police, prison, court, NGO silos). Our approach is to explore linkages, partnerships and so build consensus and trust.

331. We recognize too the need for DPs to be strategic in their interventions. We see no contradiction between individual DPs focusing on what they do well within the sector, while developing a joint programme for the whole sector based on what works in the context of Bangladesh and informed by what has worked elsewhere.

332. We focus on outcomes, as we agree with the PRSP that enjoins GoB and DPs to focus on a 'result-oriented' strategy and 'to establish credible and conceptually sound benchmarks against which progress can be monitored.'[152]



[152] PRSP para 4.32 at p52

Relieving pressure on the formal justice system

333. As observed previously, we find a system under pressure and, applying the justice approach we have adopted, we have looked at ways to relieve some of that pressure on the formal system that are

- linked to ongoing initiatives
- focus on immediate measures that can be taken without much cost and
- demonstrate visible results

They will require co-ordination and we discuss this aspect further below.

Providing legal advice and assistance in the police station

334. Getting access to police stations is notoriously difficult in any country even where there is a tradition of accredited paralegals attending at the interview stage.[153] Juveniles, in particular, offer a useful entry point since police officers are usually uncomfortable having children in the police station.

335. The Inspector-General of Police, issued a directive that police officers should be more child friendly and there should be a designated child officer at each police *thana.* Training has been conducted by various agencies including: UNICEF, BNWLA, SCF applying a manual developed by CIDA. BNWLA is leading on the introduction of Victim Support Units in various police stations.[154]

336. The scheme operated by the BSEHR to assist police among others to record FIRs in cases of domestic violence against women demonstrates how, notwithstanding police reluctance initially (at the thana level), the group has gradually managed to obtain acceptance inside the police station (ie in police space). This opens the way to further activities with the police, ie in gaining admission as 'lay visitors' and eventually attending at police interview with adult suspects (and so deterring torturous practices).

337. As one senior NGO worker observed, 'not all people are cruel, many just do not understand.' It is an observation shared by human rights monitors generally, that many police officers work in degrading conditions in a brutal working culture and that where a practical rights-based approach is demonstrated which a) enhances their esteem in the eyes of the public and b) enables them to do their work better, they tend to respond.

Managing the caseload

'At the present time there are, within the system, serious problems which, if they are to be solved, require legislation. But legislation is only part of the answer. There are other areas where what is required is good management to

[153] In the UK, solicitors send usually young 'legal executives' or paralegals to attend on their clients at police and in prison.
[154] Habibun Nessa supra

achieve the necessary co-operation between the multiplicity of different agencies involved in the criminal justice system.' [155]

338. As part of the World Bank's support to case management and court administration, the pilot site at Gazipur District Court[156] has implemented various measures that have succeeded in reducing the backlog in cases from around 8,000 civil cases in 1999 to approximately 5,000 (and which has cleared cases pre-2006). These measure include (in respect of civil cases only):

- Centralised filing of all cases
- Appointment of a Judge to act as Judicial Administrative Officer (thereby releasing the remaining Judges from this responsibility and allowing them to concentrate on trying cases)
- An electronic case management system that users have been able to simplify from the original design given to them by the Consultants and that is accessible to all Judges and other Court staff, that allows tracking cases by date, name, subject, and also identifies whether the case has been referred to ADR, or whether it is part of the Government's legal aid – and that also allows for Court records to be speedily provided to lawyers and litigants in the area, and for speedy service of process
- Computerisation of legal materials (being done while waiting for the CIDA supported project to update the statute book to be provided in electronic format)
- Establishment of a local area network and provision of computers to Judges to allow them to access documents and which allows the District Judge to monitor progress at various stages, including service of process and provision of records
- Establishment of a Lawyers Media Centre (although still under development) that allows lawyers to access the system
- The introduction of a monthly Scheduled Conferencing System between the Judicial Administrative Officer and lawyers in the area to agree when to schedule upcoming cases and to determine how much time to set aside for these.

339. The DLAC (also headed by the District Judge) in Gazipur is supported through the CIDA Legal Aid Project. It has very clearly marked information on the façade of the court building and separate rooms at the Court for mediation to take place once cases referred there from the Courts. It has supported a law clinic at the local college to train paralegals to do public awareness (including awareness on how to approach the Court and mediation services offered). The DLAC is also working closely with local legal aid organizations.

[155] Woolf LJ: The 2002 Rose Lecture 'Achieving Criminal Justice' Manchester Town Hall, 29 October 2002

[156] Gazipur is one of five pilot sites, with the project now being rolled out to reach a total of 20 more sites within the next year when the WB Project is due to end. Interview with World Bank, Dhaka. 24 May 2007.

340. However it is not only a matter of technology. Part of the simplicity of the Gazipur Case Management model, is that it necessarily requires regular communication between the District Judge, at the head of the local judicial hierarchy, and other key actors within the justice sector, including CSOs. Monthly gatherings of local actors (magistrates, police, prisons, social services, the Bar and civil society) to discuss local problems, often produces local solutions at low cost (see Annex 5).

341. By rationalizing the caseload, it can be categorized, prioritized and managed. For instance, the CMM (Dhaka) has sought to reduce the number of young persons in custody in Dhaka Central. He has called for a list each month from the prison of young persons under 16 and under 18. He has had the cases listed in his court each month and applied the 1974 Act. As already noted, from 74 under 16s in January 2005, he has reduced the number by April 2007 to: 5; and from 293 under 18s to 49.[157]

Encouraging greater leadership and activism from the superior judiciary

Plea bargain and credit for early plea

342. The plea bargain is a common, legitimate device to encourage an accused to enter a plea of guilty to a lesser charge than the one on which s/he was originally indicted. Thus, where the indictment charges murder, but it is a borderline case, the prosecution may indicate to the defence (through the lawyer) that s/he might accept a plea to the lesser charge of manslaughter. The pre-trial hearing listed above facilitates this type of 'bargain'. Where there is no pre-trial hearing and the matter is simply listed for trial, this type of discussion and reflection may take place in court before the trial starts. Many cases 'collapse' at court in this way. As has been noted:

> 'Entering a guilty plea…saves the prosecutor trouble of time consuming process of proving the case against the accused by bringing the witnesses to the Court and also cost of such a trial…achieving quick disposal of a case.' [158]

343. This type of plea bargain is to be distinguished from the American version which goes further and offers the accused impunity on the condition s/he gives evidence against another or others.

344. In a number of countries the plea bargain is less a 'bargain' than a request that the police or State prefer the right charge. For instance, in many jurisdictions the police routinely charge 'murder' where a person dies, notwithstanding the facts of the case plainly disclose manslaughter. In this situation, the plea to manslaughter is entered less on the basis that 'if you reduce the charge, I will plead guilty' and more on the basis that 'I am not guilty of murder, but I am guilty of manslaughter'.

[157] Interview with Jalal Ahmed, CMM, 29 May 2007 – supported by SCF (UK) at an interview on 6 June 2007. Other matters can be dealt with at these meetings such as the under-trial list – see Annex 5.
[158] Justice Kazi Ebadul Hoque, former judge, Supreme Court: 'Plea Bargaining and criminal work load', Vol 7 Nos 1&2, Bangladesh Journal of Law, June and December 2003 at p 81 ff

345. Many people in prison are guilty of something (not all are innocent) and by preferring the right charge many will enter a plea. Safeguards against abuse may be included, such as requiring consent of the victim, victim impact statements, and judicial overview and approval of the plea.

346. Further encouragement is provided by the courts giving credit for a guilty plea (in the UK, a third off the sentence is given that would have been imposed had the accused been found guilty after a contested trial). Sentencing guidelines also focus the minds of those in custody so that they know the tariff (or 'going rate') for an offence of burglary, rape, wounding, and so forth. These simple directions are easy to introduce and enable the courts to reduce the backlog of cases and increase efficiency in pushing cases through the system.[159]

Benchbook

347. The publication of the updated 38 volumes of the laws of Bangladesh is a major undertaking. It is unlikely the average magistrate or district judge will need to refer to most of them. In India, a Benchbook has been developed which captures all the common laws used on a daily basis, with commentary and caselaw in one volume.

348. A looseleaf volume of a similar kind could be produced for the lower judiciary in Bangladesh and kept updated on a regular basis.[160]

Identifying blockages

Trial observations, time and motion studies and court surveys

349. It may be that backlogs are reduced and *x* number of cases disposed of in a certain period – ie the system becomes more efficient. But then what of the quality of the justice rendered and the fairness of the proceedings?

350. Did those awaiting trial have 'adequate opportunities' to consult with a lawyer[161]; or access to a lawyer 'of experience and competence commensurate with the nature of the offence'[162]? Did the 'opportunities' ensure that time was available for counsel to canvas a plea or reduce the charge?

351. Trial observations are useful in providing a snapshot of the workings of the criminal justice system and its fairness and in informing the judiciary on some priority measures.

[159] More examples of provided in Annex 5
[160] A Handbook for Magistrates produced for the Public Administration Training Centre (third edition, 2005, with support from TAF) provides a step in this direction, with information relevant for magistrates compiled in one place.
[161] Annex para 8 UN Basic Principles of the Role of Lawyers 1990
[162] id para 6

352. A structured research study of a number of courts (at all levels) over a period of time provides information on the blockages and delays that protract cases and slow down process. Such a study also casts a light on the facilities available to judges, lawyers as well as members of the public; and come up with recommendations on how courts can be made more user-friendly.

Reducing prison overcrowding

353. The level of overcrowding has long passed acceptable parameters. There are a range of measures that are needed by all justice actors to converge at the same time and many are recommended in the Munim Jail Commission report (1980). However introducing them now is not practicable.

354. What is practicable and works is: to identify who is in prison. Many will be held unlawfully or unnecessarily, many will have overstayed. These cases are not controversial. Prison officers recognize them but are often voiceless when it comes to alerting the courts and police about such cases.

355. Amnesties and pardons are generally not a good thing as they undermine public/judicial confidence, are susceptible to corrupting influences and dismay the prisoners. At best they let some of the steam off, but they do nothing more.[163] At worst they reinforce widespread notions of impunity for certain crimes. What is needed is something systematic and continuing: a census will start that ball rolling and immediately secure the release of a significant percentage. The continued oversight of a magistrate (such as the CMM, Dhaka has demonstrated) ensures cases keep moving.

Laying the ground for broader reforms

356. In building this system, attention needs to be constantly paid to pushing the boundaries (ie at police), looking for tried and tested practices from elsewhere, and gathering the information that will inform future reforms. Early on therefore we propose

- Piloting a simple diversion scheme in selected police stations (for instance where there is an active project under way whether under TAF COP or BSEHR)

- Sending prison officers to India to observe their open prison camp models there; as well as their ‘camp courts’

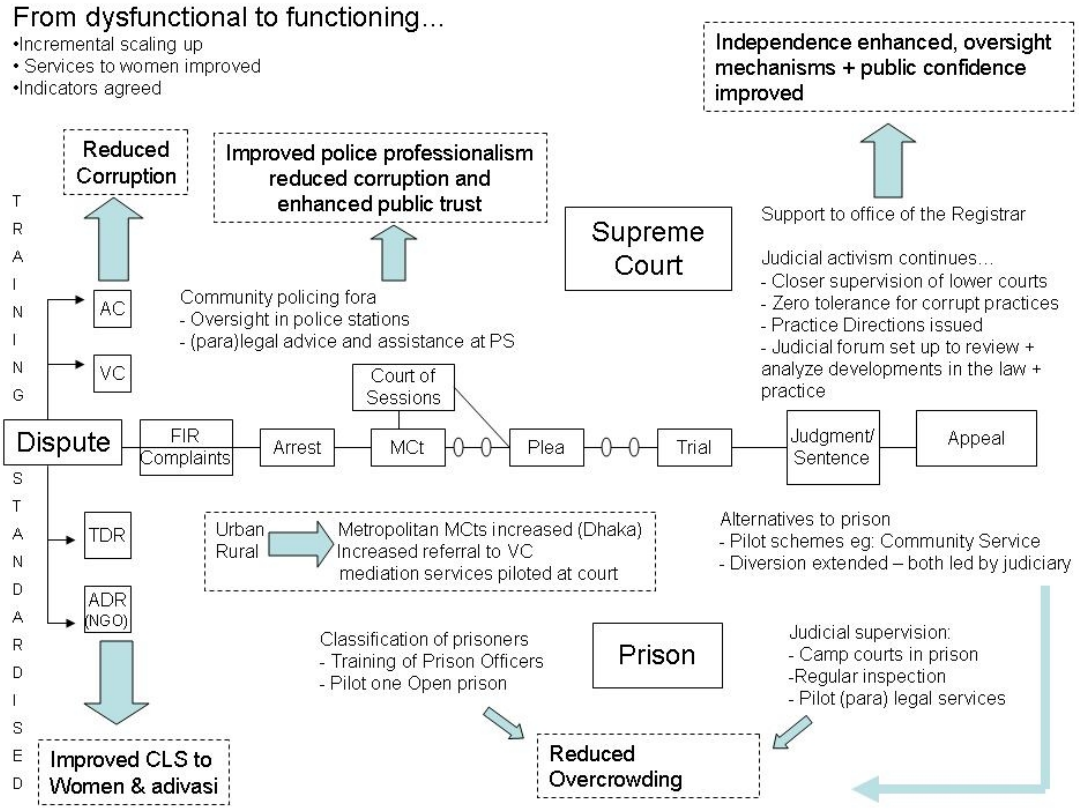
- Trial observations and other studies of the workings of the court to identify the blockages in the system as well as look at the quality of justice delivered (it is no good making the system more efficient if the quality of the product is poor).

[163] In 1998 in Nigeria, a presidential taskforce on prison decongestion and reforms was constituted which approved criteria for release of prisoners and visited every prison in the country to verify data. Trials were speeded up and magistrates visited prisons. Between December 1998 and October 2000 over 8000 prisoners were released. Within three months the prisons were even more congested.

- Establishing a pilot paralegal scheme to operate in several thanas in Dhaka and in a rural area where there is already a strong NGO presence.

Moving towards a functioning justice system

357. The strengthening of community legal services will serve to filter many more cases out of the formal justice system (civil and petty criminal matters) and enable the formal system to refer cases back – especially if magistrates/judges are confident there is an effective mechanism (ie the reformed and activated Village Court/Arbitration Council) to which to refer cases.



358. We have sought to acknowledge and factor in the fact that priorities for addressing the justice sector will differ among distinct reform constituencies. Politicians, bureaucrats, DPs, elites and the poor will have their own priorities: 'homogeneity…cannot be assumed and the challenge lies in the intelligent and productive resolution of the trade-offs.'[164]

359. The target constituency here are the justice actors and practitioners.

'It is my belief that the proper role of government is to provide the framework while those who have first hand experience of how the system works in practice provide the detail. Unless those who have the experience and the day-to-day responsibility on the ground, are intimately involved in the process of

[164] PRSP at para 5.428 p 162

change they will not feel the sense of ownership which is required to make the change a success.'[165]

Community Legal Services

360. The DPs have been supporting a range of community legal services (CLS) over the past few years.[166] Currently, DFID is considering scaling up this support as concerns NGO-mediated ADR; while the EC with UNDP are initiating a major programme in support of the Village Court/Arbitration Council. The World Bank is also looking at options in attempting to institutionalize successes in CLS.

Standardising training

361. The services provided by civil society organisations in the area of both ADR and provision of legal assistance are invaluable to victims of crime and in addressing a wide range of disputes – both civil and criminal – that might otherwise escalate.

362. Without in any way seeking to diminish their value, and while many of these replicate tried and tested approaches and training programmes provided by well-established actors (such as MLAA), training is not standardized. This leads to very different levels of skills amongst those charged with delivering services (particularly through shalish, Village Courts and Arbitration Councils). To address this, consideration might be given to the following:

- firstly, a 'Body' should be designated as the accreditation body for all such training programmes – JATI would be the obvious place for this. However, to be able to perform this function, some capacity building within JATI would be required to train members on outcomes based education, accreditation and developing unit standards and assessment tools.
- This Body should then conduct a scientific learning needs analysis (LNA) with all training targets.
- The results of this LNA should then be compared with training programmes already developed by NGOs with experience in this area.
- Based on the analysis of the LNA and the training already being provided, unit standards should be developed by the Body. These are the minimum standards that any training programme would have to meet. These must be outcomes-based – that is, they must clearly identify what training targets **need** to know **and** be able to do to discharge their duties.
- Once unit standards are in place, assessment criteria need to be developed so that those providing training are able to assess whether the trainees have assimilated the required knowledge and learned the required skills. Training on how to conduct such assessment will also have to be provided by the Body to NGOs conducting these programmes.

[165] Woolf LJ *supra*
[166] See above and matrix at Annex 4

- Those wishing to conduct training can now develop their own programmes, which will then be submitted to the Body for accreditation.
- Trainees attending accredited training programmes will then be assessed by those providing the training. Should they satisfy the assessment criteria, they should then be certified competent to perform specific tasks within the Village Court or Arbitration Council.

Police professionalism and public trust

363. Although some training has already been provided to police through the UNDP police reform project, and although DFID are involved in establishing model police stations, a lot more could be done to ensure police at all stations are better equipped to provide services to survivors (especially women survivors of domestic and sexual violence).

364. This might include training on the effects of such crimes on victims (traumatisation); how to (and not to) interview victims of crime (including the need for privacy, not to touch the victim, how to show empathy during interviews); how to identify NGOs and CBOs providing services to victims; and how to refer victims to these. As well as provide practical information on the relevant NGOs/CBOs and means for contacting them and accessing their services (shelter, legal aid, counseling).

365. In addition, consideration should be given to allowing police to release juveniles into the care of adults (parents, guardians and family members) on warning to appear in court in less serious offences, and to allowing 'police bail' in less serious offences to adult offenders.

366. Current efforts to establish Community Police Fora (especially those that prioritise gender issues in line with the GTZ approach) should continue since these too go a long way to building public trust as the team observed at a meeting of a Community Police Forum.[167] Existing Human Rights Implementation Committees, run by BRAC's HRLS, and including local government members, local teachers, etc could play a role.

First line courts

367. The EC report paints a vivid picture of the pressure the courts work under in the capital and in the district.[168] The rapid pace of urbanization is overtaking the capacity of the metropolitan courts Dhaka to deliver (notwithstanding the efforts of the magistrates).

368. At the time of the team's visit,[169] the metropolitan courts in the south of the city employed 21 magistrates to cover 33 police stations, Dhaka central jail – with 10,000 prisoners of whom 80% are under-trial – and service a population of +/-10 million inhabitants.

[167] Madaripur visit supra
[168] EC:2005 at para 3.43 p 35
[169] 29 May 2007

369. The CMM reported[170] that he divides his magistrates (including himself) among the lists they have to attend to (eg: CR list, Police, Narcotics, ACC etc). He described the average day in the life of one of his magistrates as follows:

10h00: court sits
10h30: sits on own trial list
12h00: sits on 'put-up' files
14h30: sits on production files
16h30: court rises

370. The CMM advised that government has created 12 new positions leading to an establishment of 35 magistrates (note: currently 14 are vacant). He has submitted a proposal to open a new court site in the north of the city. This would the current site in the south to cover 15 police stations and the proposed site to cover 18 police stations. He estimates he would need 40 magistrates in each site: total 80 magistrates.

371. He further observed that 'most' of the case backlog comprises motor vehicle cases. In his view, many of these could be dealt with promptly by the police themselves or by special 'traffic' courts.

372. In the districts, the situation is not much better with under-staffing leading to congestion and slow process

'The conditions militate towards a battle against time and numbers rather than the administration of justice. Cases are not dealt with 'expeditiously' but protracted for months and even years since the judge/magistrate will only sit for a couple of hours a day before moving on to the next case or set of duties. Thus, the court will hear one witness and adjourn for a month without hearing cross-examination from the defence.'[171]

373. The lower courts in Dhaka were constructed at their present location in 1772. In view of the scale of urbanisation, the construction of new courts in different sites around the major cities (eg Dhaka and Chittagong) may need to be considered with greater urgency than such a proposal has been given to-date.

374. However, building more courts is not the only answer. More attention can be given to low cost ways of rationalizing the caseload so that the formal courts only deal with the most serious and complex cases. For instance (and as mentioned above), by strengthening community legal services, more cases can be referred back from Magistrates, District Courts and even Courts of Session;

[170] Interview with Mr Jalal Ahmed, CMM, 29 May
[171] EC:2005 para 3.45 p35

and by offering mediation services at court (as is the practice in Gazipur)[172] appropriate matters can be referred at once for mediation.[173]

375. A 'restorative justice' approach allows for adult offenders to be diverted out of the formal system by, for instance, referring minor / compoundable offences to mediation (with a focus on compensation and restitution) where they can be dealt with as a 'civil' rather than criminal matter (where the prosecution, court and parties agree).[174]

376. Reforms such as those just mentioned are neither complex nor costly and can be piloted with relative ease. However, experience (and the team's field visits[175]) shows they do require a 'champion' or 'sponsor' in authority to drive the process forward. Accordingly the selection of pilot sites is important since these sites can become the 'models' for others to visit and see for themselves what can be done. In this way, coalitions are developed, attitudes changed and reforms appear less threatening.

Supervision and direction from the Superior courts

377. The Supreme Court (SC) already has considerable powers of oversight regarding the performance of the lower judiciary. Politicization at all levels has affected the SC's capacity and will to exercise these powers, the impact of which, combined with the current emergency situation, is felt in the serious constraints operating on the availability of judicial remedies. However, there is hope that the current 'reform' initiatives may still extend to the judiciary, with long-overdue steps being taken from the top to put in place working systems of supervision and control.

378. As already discussed, the SC – and in particular the High Court (HC) – through PIL and otherwise has set out guidelines to curtail arbitrary powers of arrest without warrant being exercised by the police, and to mitigate some of the excesses of custodial ill-treatment whether by police or prison officials (by directing the police to ensure that a person is 'treated in accordance with law' while on remand, or directing release of women held in 'safe' custody in prisons). It has also held the state to account for its failure to take appropriate action to ensure rights to physical security and bodily integrity, for example by directing concerned authorities including the police and local functionaries to act in cases of violence against women resulting from illegal 'fatwas' pronounced by the participants in traditional dispute resolution bodies such as the shalish.

379. In giving landmark judgments and in directing that the executive consider framing appropriate legislation and policy, the Court has effectively responded to calls for such changes from NGOs and civil society in general,

[172] Team visit of 10 June 2007 supra
[173] Observing proceedings in one of the magistrate's court in Dhaka, we noted in one case that the husband had appeared to withdraw the case (against his wife) as they had 'compromised' the matter (visit of 29 May 2007)
[174] See Annex 5
[175] The district judge in Gazipur, CMM in Dhaka and Superintendent of Police in Madaripur

and has, by formulating its own guidelines, which can be enforced as law, to some degree also filled a legislative vacuum. In other cases, by issuing interim directions requiring the government to provide information, the Court has also effectively previewed the operation of the right to information act, making it possible to obtain materials and data that otherwise remain unavailable to public view.

380. The HC has suo motu powers to act to enforce fundamental rights, and to ensure that the executive complies with its statutory duties – and greater use of such powers, as well as more strategic PIL could enable the Court to intervene effectively where cases of dysfunction within the legal process are brought to its attention.

381. The HC also has powers of inspection over lower courts. However they are not exercised effectively. They need to set clear criteria, interact with local civil society (in particular legal aid organizations), as well as the local court, police and prison authorities, if they are to prove truly effective in monitoring and evaluating the functioning of these courts. Such exercises could help to identify problems faced by court users, and to agree clear targets by which to measure improvement.

382. Similar inspections of prisons would identify those cases of under-trials unable to access legal aid, as well as more general inspection duties governing conditions in general. Such high-level scrutiny would help join up the dots between the prison service, legal aid office, and prosecutors office, as well as open up access for NGOs willing to provide services but unable to obtain the necessary information required to do so.

383. The HC has already begun ad hoc implementation of many of the case management techniques that had been recommended as part of the World Bank LJCB project. However, these need to be systematized and shared across all Benches. This could be done by the Chief Justice identifying in dialogue with the judges the key measures taken, noting these in a practice note and circulating these for implementation by all judges in the SC.

384. This process could be generalized. The issuance of practice directions by the CJ could be made routine, with a process established whereby problems are identified, possibly responses and remedies addressed through dialogue and discussion within a small committee of judges (eg: the existing General Administration Committee, with co-opted members, either judges with hands-on experience or particular facilities – or other experts - if necessary), and then noted and disseminated to all judges concerned across the entire system, not just within the SC.

385. In order to address the immediate needs arising with the implementation of separation of the judiciary, urgent action should be taken to establish an expert committee to support and assist the CJ in designing and steering through the changes needed, in particular in ensuring that there is sufficient management and administrative expertise – if necessary drawn in from among retired civil servants – to facilitate and guide the process.

386. The SC could also establish a judicial forum – consisting of a number of Appeals Division (AD) and HC judges reviewing latest developments and concerns arising within the Courts regarding obstacles faced by the poor in accessing justice, as well as examining legal and jurisprudential developments that require wider consideration. The forum would then be responsible for drawing up responses and disseminating these among other judges.

387. This Forum could also spearhead organizing dialogues with their counterparts in the higher judiciaries within South Asia and beyond – judicial colloquia or dialogue either within and among the superior judiciary in the region, or with judiciary at all levels, and focused thematically, have been shown to be a very effective vehicle for changing attitudes, perceptions and deepening the understanding of issues relating to access to justice for the poor.[176]

388. Some significant and serious actions to address allegations of corruption within the judiciary at various levels would go a long way to instilling public confidence and to demonstrate that real changes are in store. Activating the Supreme Judicial Council or setting up an ambitious but much needed Judicial Review Commission, as proposed by senior leaders of the Bar, may be in the long term interests of restoring the image and prestige of the judiciary.

389. Improving communications would also be important. Thus an annual conference of judges, and perhaps publication of an annual report – providing clear data on the numbers of cases pending, disposed and other actions taken to facilitate justice for court-users – eg on provision of information booths, family rooms, etc, putting up maps or signboards clearly locating courtrooms and their functions, would be a step in this direction.

Alternatives to prison

'If rehabilitation is one of the goals of criminal justice, courts in Bangladesh must be empowered to control criminal conduct by the adoption or application of various methods which are more constructive and less severe...'[177]

390. Courts need access to community-based sanctions as an alternative to short prison sentences. Community Service enables offenders to restore the harm they have done by unpaid work for the benefit of local people rather than wasting scarce resources on maintaining them in prison. These can be combined with education and rehabilitation programmes designed to equip offenders to make a positive contribution. Ordinary members of the public can play a role in monitoring community sentences.

'The primary effect of greater stress on reforms and rehabilitation would be the increasingly wider use of such alternatives to imprisonment as adequate use of bail system, a strong, effective and frequently utilized probation system,

[176] See CHRI/Interights Judicial Colloquium Series on Access to Justice for the Poor, in particular publication of Chennai Colloquium.
[177] Munim report para 79

community service order, semi-custodial penalties, compensation and restitution, binding over, conditional discharge, suspended sentence and disqualification.'[178]

391. By way of direct alternative to imprisonment, the Community Service Order is one immediate option.[179] There are various schemes in operation around the world.[180] It is allowed for under the CrPC[181] where a number of hours could be ordered as a condition of suspending a term of imprisonment.

392. The Community Service Order does not require an expensive support structure (like probation or social services) and depends instead on the voluntary assistance rendered by heads of 'placement institutions' (clinics, schools, and other public facilities) and NGOs. The scheme also relies on close co-ordination between the court and the local placement institution so that the court only makes the order if the place exists at an identified institution which then undertakes to supervise and monitor compliance with the order.

393. The completion rate in rural areas is over 90% in most countries that have introduced this model. The community benefits from the hours of free work performed on its behalf, the offender keeps his/her job and family together and avoids the stigma and ruination of prison and the State saves money – these are some of the 'beneficial results hitherto unknown' as foreseen by Justice Munim.[182]

394. Community Service orders based on this model closely involve the community in the criminal justice process. The work of BLAST and MLAA (among others) plays the same role. It is submitted that greater use could and should be made of the 'compounding offences' provisions in the CrPC and that minor offences be dealt with where appropriate outside the State justice system. Referral mechanisms will need to be developed in consultation with community leaders and NGOs to give effect to these provisions.

The start of Prison reforms

395. Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures.

[178] id para 335
[179] In brief, where a first offender commits an offence that is not serious but would qualify for a short term of imprisonment **and** s/he admits the offence **and** s/he has a fixed place of abode **and** s/he has a job **and** s/he accepts the order of the court, then rather than send the person to prison, the court may pass an order substituting a number of hours of work to be performed free of charge for the benefit of the community.
[180] The scheme developed by the High Court in Zimbabwe has proved to be one of the most effective. Currently it operates in 12 African countries and is being introduced in Cambodia and Nepal with the assistance of Penal Reform International.
[181] s401
[182] Munim report para 80

396. The general public and members of the judiciary are unaware of the profile of prisoners in prisons. Judicial ignorance would be less if judicial officers conducted regular visits (as they are required to do in Bangladesh) and conducted systematic and prompt reviews of sentencing practice in the lower courts. Public ignorance would be less if the prisons were more open to admitting responsible groups of visitors (ie the media, NGO community, religious organisations, parliamentarians and others) and if public debate on penal reform was awakened and properly informed.

397. It is claimed that a harsh and severe sanctions policy is popular with ordinary people; that people want retribution and to make the person who caused the harm / loss or suffering to suffer in equal and even worse measure.

398. Where the questions are crude and loaded, the answer is predictable. However, penal reformers have demonstrated that when an approach is used which discusses crime and punishment in more depth, the response is more complex.

'The research…shows that the more knowledge people are given and the more choices are presented to them, the more varied and thoughtful become their responses.'[183]

399. The author goes on to cite a sentencing exercise where a representative group of 432 were presented with 23 hypothetical cases to deal with ranging from petty theft to rape and armed robbery. In the first part of the exercise 'they decided to send 17 of the 23 to prison and gave probation to the other six.' The group then 'watched a video outlining the problem of prison overcrowding and describing five alternative sentences: intensive probation, restitution, community service, house arrest and boot camp.' The result was that 'they wanted to send only five of the 23 to prison (being the violent offenders and a drug dealer on his fifth conviction). The group sentenced the other 18 to alternative sentences.' [184]

400. Where sentencing options are effective and sentencers believe in them; where the public can appreciate the benefits (eg Community Service) then they will support non-custodial measures.

401. In 2004, the state of prisons and areas for penal reform were reviewed from two perspectives: the first focused on areas of concern **inside the prisons** and found:

- lack of space
- absence of prisoner categorization or classification
- poor standards of health, hygiene and sanitation
- inadequacy of nutrition

[183] Vivien Stern: 'A Sin against the Future: Imprisonment in the World'. Northeastern University Press, Boston. 1998 at p315.
[184] John Doble and Stephen Immerwehr, 'Delawareans favour alternatives' in Michael Tonry and Kathleen Hatlestad (eds) 'Sentencing reform in overcrowded times', OUP, Oxford, 1997 pp263-4 cited in Stern at p315

- the way visits are managed
- how security and discipline are maintained
- the lack of effective grievance mechanisms
- the absence of pre-release and after-care services
- the high number of prisoners under-trial who have no access to legal advice
- the absence of an independent inspection mechanism; and
- current management practices and state of staff conditions

402. The second focused on areas of concern **external to the prisons** but directly bearing on them and found:

- an antiquated legal framework
- a need to separate the judiciary from the executive
- an under-resourced and poorly trained police force
- a shortage of courts and delays in case disposal
- absence of legal aid, advice or assistance for persons in police custody and prisoners
- poor communication and co-ordination between criminal justice agencies
- the positive role civil society can play[185]

403. Prisons need to be seen in the context of the criminal justice system as a whole and for as the previous Minister for Law, Justice and Parliamentary Affairs observed:

'…unless the criminal justice system is made effective and made meaningful, the conditions of the prisons will continue to be the same.'[186]

404. The prison service is run by the military under whom come the prison officers. As in many countries under colonial rule, the style is paramilitary. This goes against the trend in many parts of the world of 'civilianising' the prison service and training prison officers in principles of 'dynamic' security.

'It is now generally acknowledged that prisons run safely and positively with the co-operation of prisoners. External security (freedom from escapes) and internal safety (freedom from disorder) are best ensured by building positive relationships between prisoners and staff. This is the essence of dynamic security: security depends upon good relations within prisons and on positive treatment of prisoners.'[187]

405. The extent to which the Ministry of Home Affairs and prisons department in Bangladesh is open to reform has yet to be considered.

[185] UNDP:2004
[186] 'Reforming the criminal justice system in Bangladesh'. Keynote address by Barrister Moudud Ahmed, Minister for Law, Justice and Parliamentary Affairs, Second Regional Conference on Access to Justice and Penal Reform, Dhaka, December 2002
[187] Making Standards Work: an international handbook on good prison practice. Penal Reform International. March 2001 at section VI.para 6 p118. www.penalreform.org

However, the severe state of overcrowding may encourage those in authority to consider options and examples from the region.[188]

[188] The state of Rajasthan, India, has achieved notable success with its Open Prison Camps. GTZ is considering engaging with the prisons and will field an assessment mission in September/October 2007.

VII. Increasing Aid Effectiveness

406. The PRSP describes poverty as 'multidimensional'.[189]

> 'It is about income levels. It is about food security. It is about quality of life. It is about asset bases. It is about human resource capacities. It is about vulnerabilities and coping. It is about gender inequalities. It is about human security. It is about initiative horizons. It is each of these and all of these together.'[190]

407. It may be useful to consider 'justice' also in terms of a 'broad front'[191] being about: equality, fairness, accessibility, openness, timeliness, inclusivity, equitable remedy, enforceability and notions of this kind. If the 'battle against poverty' (again to use the language of the PRSP) has to be waged on many fronts then support to the justice sector needs also to consider a multi-faceted approach.

408. This appears to be well understood by the development partners active in the justice sector in Bangladesh. The problem with such an approach is that it is resource intensive. As donor governments increase their ODA, they seek at the same time to reduce their administrative staff on the ground.

409. This has exerted pressure on country mission personnel who understandably gravitate towards 'the language of big solutions' as they are under pressure to 'do more with less' and do not have the time to invest in the pilot schemes and 'small solutions' that provide the basis on which large reforms are built.

410. The call by DPs for better coordination and harmonisation among themselves, we recognize, is not just about complying with new policy directives, it is born out of the ground reality in Bangladesh. This lends some urgency to the matter.

The Paris Declaration on Aid effectiveness (2005)[192]

411. The OECD DAC Aid Effectiveness pyramid below is helpful in clarifying the issues.

412. Read from the top down, countries establish their development agenda, DPs align their support with that agenda and harmonise with each other to deliver that support. Read from bottom up, the pyramid suggests stages in the 'maturing' of the development partnership (with DPs taking the initiative where the government leadership is weak and leading by example).

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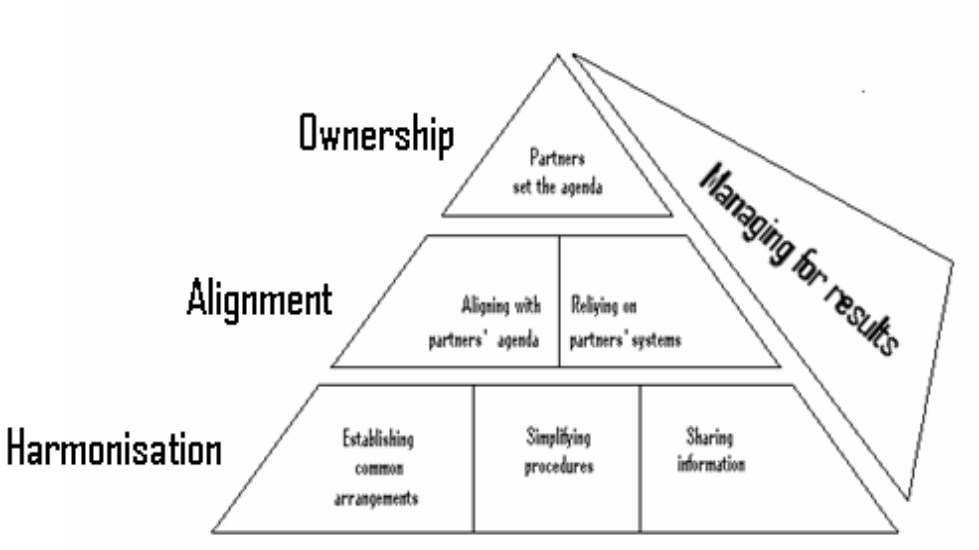
[189] PRSP para 1.6 at p2
[190] id at para 1.5
[191] id
[192] Much of the discussion below is drawn from the 2006 Asian Regional Forum on Aid Effectiveness: Implementation, Monitoring and Evaluation, Thematic case Study No 3, Bangladesh, Cambodia and Indonesia. Draft 1 September 2006.World Bank



413. This then for the theory, if only life were that simple.

Ownership

414. The driving force behind increasing aid effectiveness in most countries has been the political will emanating from government (viz: South Africa post 1994). The DPs have observed that 'it has not been present in Bangladesh and the CTG has not the resources to lead'.[193]

415. Doubt has been expressed to the team whether 'ownership' of the PRS is uniform across the administration. Some civil servants are reported to see the policy as an 'academic exercise',[194] while one leading commentator described it as a 'donor driven exercise' which 'does not mean much'.

416. Another concern expressed to us was that the absence of prioritization in the PRSP did not assist DPs in terms of budgeting and planning, nor address the issues of efficiency around implementation.

417. The lead author of the PRSP[195] responded to these challenges as follows. He conceded that the lack of prioritization was a 'valid perception' but did not agree the PRSP was no more than a 'paper document'.

418. He observed that the PRSP 'picks up' a strategic planning process within GoB and especially as concerns the budgeting process where there are 14 ministries within the Medium Term Budgetary Framework (MTBF) and to this extent it helps government. This, he posited as one reason why the lifetime of the PRSP was extended by 12 months: 'the CTG is taking

[193] DFID supra
[194] World Bank supra at para 15 p 4
[195] Dr. Hossain Zillur Rahman, PPRC interview 4 June 2007

advantage of the existing policy framework it offers'.[196] However, it may be noted that the CTG has little leeway to divert from existing policies, unless there is a necessity to do so, given its central mandate of preparing to hold free and fair elections.

419. He fully conceded that in terms of action plan and budgetary priorities more needed to be done in terms of what he described as 'required follow-ups'.[197] He saw 'progress' in terms of 'competition' between ministries whereby one progresses ahead of the others and sets the example.[198]

420. He urged development partners to view the PRSP rather as:

- a policy document that is
- mainstreamed within government ministries and provides
- a competitive space for 'required follow-up' (ie sectoral prioritization with concrete action plans) while
- acting as a reference point for more pro-active ministry officials and
- civil society to use to drive for change and concrete outcomes

421. He added the caution that while there is considerable political change afoot, 'there has been no change in the bureaucratic process.' Again he characterized the 'value' of the PRSP as 'an organizing reference point understood by actors across the government, not as offering priorities and actions'. Although it does not appear to be used as such in the justice sector by the actors within the GoB or among NGOs .

422. We find the PRSP to be an extraordinarily thoughtful document and an unusual example of its kind (when compared with those produced elsewhere which are clearly donor-driven and no sooner presented than conveniently shelved), which is why we have summarised it at such length above.

423. Its absence of prescription is its strength since it manages to capture thereby the complexity and nuances of the enormous challenges that it seeks to address and provides an enabling framework with which DPs, civil society and practitioners can work. Accordingly, these actors (with the exception of DPs) could be better familiarised with its content so that it might inform their work and support their partnership with government.

[196] This view appears to be supported by the Finance Adviser who, in his recent Budget Speech stated that 'the proposed budget has been prepared within the framework of our national poverty reduction strategy…[which]…has been extended to June 2008...The NSAPR is being operationalised through budget process.' Source: Speech of the Finance adviser reproduced in the Daily Star, 8 June 2007 – see: Budget management reforms at para 37

[197] The 'critical follow up issues' cited in the PRSP (pxxii) are: 'firstly, *implementation and coalition building;* secondly, *costing and resource mobilization for target attainment;* and thirdly, *benchmarking and monitoring of progress.'*

[198] This can be presently observed in the Sudan where a 'scientific' capacity assessment of the Ministry of Justice was closely followed by a strategic planning process which was fully owned by ministry officials and posited as a 'model' for other ministries to follow.

Alignment

424. Alignment in terms of reflecting national priorities, in our view, poses no problems.

425. The focus is 'unwavering' (to use that document's own language) on relieving poverty and prioritises 'cheap and accessible justice'.[199] We have not noted any activity supported by the development partners which does not seek the same ends.

426. The inclusive approach taken towards the justice system (both formal and informal, institutions and service providers, stakeholders and beneficiaries) together with the prioritisation of the criminal justice system covers 'virtually everything'.[200]

427. The challenge before the development partners is how to harmonise their efforts in supporting reforms to the justice system. We turn to this next.

Harmonization

428. Some donors with long experience working in 'justice' have noticed that more DPs are entering the sector with the result that it is not necessarily a case of 'the more the merrier' since this has produced more budget lines and relationships to manage. As one adviser put it 'harmonization does not mean we all do the same thing'.

429. The devil is in the detail and has been well summarized elsewhere:

> 'Harmonisation is a highly negotiated process, which requires donors to compromise on established procedures and habits of working. The opportunities to move forward on harmonization emerge at country level…Managers need authority to negotiate on behalf of their agencies.'[201]

430. Implementing the Paris Declaration is 'as much a diplomatic challenge as a technical one.'[202] The decision of the World Bank, ADB, JBIC and DFID – who collectively contribute 80% of ODA – to develop a common strategy and implementation document outside the LCG was a logical one (from a 'technical' perspective) if diplomatically not without some fall-out.

431. Developing partnerships is also very time-consuming. The NGO group explained that when it came to co-ordinating more closely, it was not that there was a lack of will – since several of them would always come together on a given issue of common interest – so much as knowing from past experience that co-ordination takes time and resources and 'someone has to manage it!'[203]

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[199] PRSP para 5.427 at p161
[200] DFID interview 31 May 2007
[201] 2006 Asian Forum on Aid Effectiveness supra at para 74, p17
[202] id at para 75
[203] Sheepa Hafiza, BRAC 3 June 2007

432. The 'time' element emerges as critical. We have heard the observation that there is no 'time' in the formal courts to 'hear' a complaint and come up with a remedy; while one of the major advantages of the informal system is that time is taken to listen and help solve the issue so that the parties can live in peace.[204]

433. We have noted from reports and observations in the field that local partnerships with the GoB appear to work well. This observation was confirmed at the NGO meeting. One NGO representative added: 'the problem lies at the central level where everything depends on who your point of contact is. Government people are too busy and do not have the time.'

434. It is the pressure of time that NGOs felt acutely when discussing the 'time-bound' reporting requirements of donors since the time spent on completing reports in complex formats in a foreign language is time taken away from concrete activities for facilitating access to justice for the poor. And it is the lack of time that impacts on the collection of 'statistically useless'[205] data to inform policy and decisions.

Projects, programmes and SWAps

435. Aid is packaged broadly in three kinds which we understand in broad terms as follows:

a) a *project* approach is a single activity administered through a project implementing partner. It is a time-bound contract for services between the donor and the partner. It need have no relation to government policy. Seen from an incremental aspect individual projects – where they are well co-ordinated towards a common purpose – they can (and do) lead towards a programme approach. Individual projects are also important in programme development (by testing through pilots what works).

b) a *programme* approach describes an action or series of actions within a sector (eg Community Legal Services, Legal and Judicial Capacity Building) that seeks to include the participation of a range of actors within the sector; that is in line with policy; implemented by a co-ordinating unit that may or may not be hosted within an institution or governmental agency; and is funded by one or more development partners;

[204] Observing a Village Court in Angaria UP (2 June 2007), the team noted the time the Village Court took to resolve a case of alleged poisoning of three ducks (over 90minutes). It emerged through extensive discussion and questions that the real issue was not the ducks at all (though they had died in mysterious circumstances) but a neighbourly spat between the parties that was threatening their peace and the harmony of the community. The Court reached their decision on the matter (not proven) and promptly suggested the parties all meet with the members of the bench (not sitting as a Village Court) at their respective residences on a fixed date to come to a peaceful settlement.
[205] Human Security report 2005 DFID supra

c) a *sector-wide* approach (SWAp) offers comprehensive support to the whole sector funded through, and fully owned by, government.

436. It is the consensus that while the last is desirable, a sector-wide approach in the justice sector is not feasible as yet. We have noted a firming up in the view that a project approach is no longer 'sustainable'. We urge some caution here in view of the comments in a) above.

437. We have concentrated on developing a 'programme' approach out of some of the existing projects currently in operation and planned on the ground. We now turn to how this road map might be implemented.

438. The Paris Declaration commits development partners to the pursuit of three goals:

- implementing common arrangements at the country level for purposes of planning, funding, disbursement, monitoring and evaluation, and reporting to government on their activities and aid flows
- working together to reduce the number of individual missions and diagnostic reviews
- making full use of their comparative advantage at the sectoral or country level by delegating authority to lead donors for the execution of programmes.

439. We have discounted any use of parallel implementation units. We have also discounted any use of 'joint donor teams' as experience from elsewhere has not been positive.[206]

440. Co-ordination requires time and management. Someone needs to take the lead. In view of the resource constraints on all stakeholders (be they governmental or non-governmental, institutions or DPs), we have discussed with those we met what mechanism could be applied that would assist to 'harmonise' activities and reduce the onerous transaction costs.

441. What emerged was the clear need for some form of central co-ordination unit that could receive raw data from the field, analyse it and turn it into information for policy and decision makers. In addition, this unit would serve to co-ordinate programme implementation (and develop monitoring and evaluation tools) as well as inform programme design and development by drawing on good practices elsewhere – not to replicate them so much as to find 'the right tools for the particular challenges of the moment.'[207]

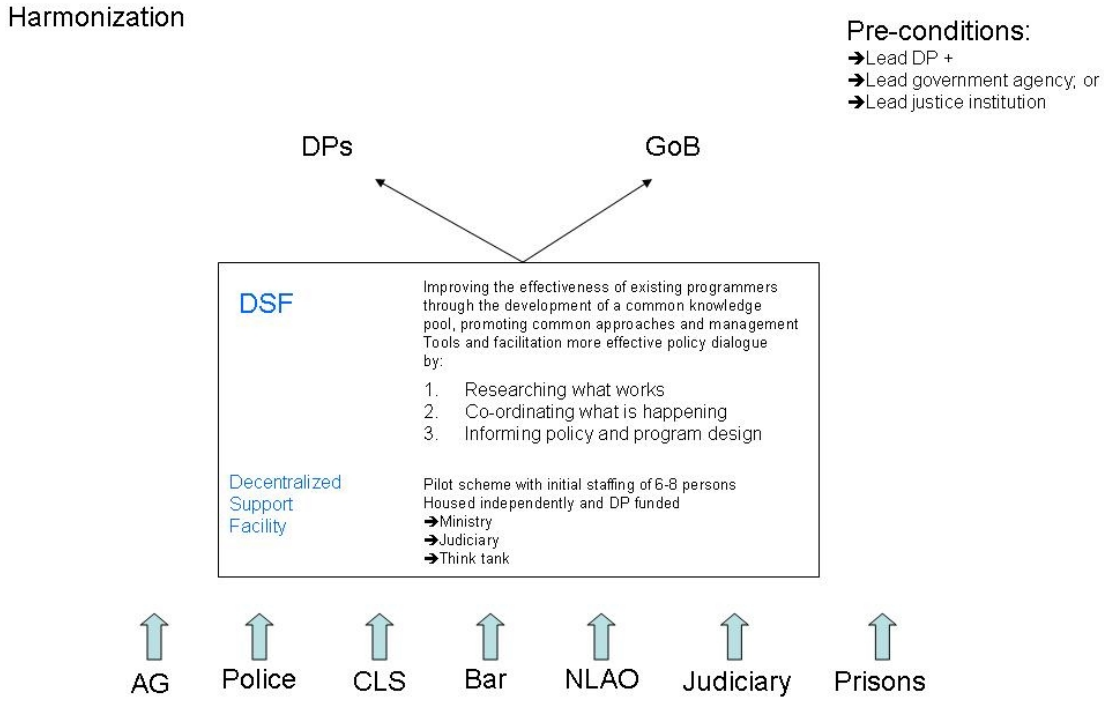
442. An initiative established by donors in Indonesia and described in some detail by the report on the 2006 Asian Regional Forum on Aid Effectiveness

[206] See the Joint Donor Team established in Juba, Southern Sudan and comprising six donor partners in a joint initiative. Members of the team are pushed one way by their embassies (in Khartoum) and pulled another by their capitals. They have no funding to disburse and monitor the implementation of the Multi Donor Trust Fund (MDTF) and co-ordinate the activities of the principals they represent.
[207] 2006 Asian Regional Forum on Aid Effectiveness supra

known as the Decentralisation Support Facility (DSF) may be adapted for the purpose here.

443. In common with the Indonesian model, the mandate of such a facility would be: to analyse, simplify and facilitate innovative interactions between donors, the government and civil society organizations.

444. The graphic below illustrates how it might operate in the justice sector.



445. In the first instance, the DSF provides a central repository to which data from the justice actors (prosecution, police, community legal services, lawyers, legal aid, judges and magistrates, as well as prisons) could be sent for analysis. This information would then be sent back to the various agencies and organizations concerned and on to the DPs and decision makers to inform policy and programme development.

446. The DSF might also act as a central co-ordinating body, organizing meetings with justice actors and government. Additional support could be provided from management to procurement, subject to the wishes of those concerned.

447. The DSF in Indonesia has been operational barely two years. There will have been lessons learned. The precise terms of reference for such a mechanism will need to be determined by DPs among themselves and in consultation with partners.

448. We caution against seating it in government or a lead institution as yet. It may possibly be based in a civil society think tank, which may have more capacity to address the issues raised. However we do advocate for linking it at the outset with a governmental/institutional focal point (we suggest one of the line ministries and/or the judiciary while stressing the importance of establishing partnerships/linkages with NGOs/CBOs). Further we caution against staffing it with representatives from donor missions as this will lead to the push/pull effect we have mentioned above.

449. The DSF began in February 2005 with a $8m grant from DFID. A second phase began with $45m in funding over a three year period and an operational team of six (drawn from whom, and with what specific ToR). The DSF draws on inputs from ADB, AusAID, CIDA, DFID, GTZ, RNE, UNDP, USAID and the World Bank.

450. While we do not recommend this kind of expenditure here, we propose a pilot stage that tests the utility of such a vehicle to carry more of the burden on DPs, NGOs, GoB and justice actors, at the same time as it informs policy and activities on the ground.

451. In conclusion, we have suggested a programme that is low-key and strategic in approach and focused on achieving measurable outcomes in the short term. We have sought to emphasise 'how' reforms can be introduced (and sustained) and expose government and formal justice actors to the 'islands of excellence' within the country and good practices that have been developed without – and so build coalitions of interest and 'cook' change in the medium term.

452. We have attempted to demonstrate that, in this way, the DPs provide a lead by example and, by supporting measures 'that can get started right away', produce those tangible benefits in the short term that may lead to larger reforms under a newly elected government.