ACCESS TO JUSTICE AND PENAL REFORM

Review and Recommendations

Second South Asia Conference, Dhaka, December 2002

PRI and REGIONAL PARTNERS

Contents

PRI OFFICES

PRI London
Unit 450 The Bon Marche Center
241- 251 Ferndale Road
Brixton
London SW9 8BJ
Tel.: (44 20) 7924 9838
Fax (44 20) 7924 9697
Email: headofsecretariat@pri.org.uk
Website: www.penalreform.org

PRI Paris
40, rue du Château d'Eau
75010 Paris – **France**
Tel: +33 (0)1 48 03 90 01
Fax: +33 (0)1 48 03 90 20
Email: priparis@penalreform.org
Website: www.penalreform.org

PRI's Regional Office for South Asia
GPO Box: 11424
Bansbari-3, Kathmandu **Nepal**
Tel: 00 977 1 370460/376528
Fax: 00 977 1 376528
Email: snanda@penalreform.org
website: www.penalreform.org

NGO partners in South Asia

Bangladesh Legal Aid and Services Trust (BLAST),
141/1 Segunbagicha, **Dhaka**-1000
Tel: 0088 02 9349126/8317185
Fax: 0088 02 9347107
Email: blast@bangla.net

Ain o Salish Kendra (ASK)
26/3 Purana Paltan
Dhaka
Tel: 00 880 2 8315851/9337173
Fax: 00 880 2 8318561
Email: ask@citechco.net

Madaripur Legal Aid Association (MLAA)
New Town, Madaripur – 7900
P O Box: 09, **Bangladesh**
Tel: 00 880 661 55518/55618
Fax: 00880 661 55192
Email: mlaa@bangla.net

Penal Reform and Justice Association (PRAJA)
7A&B Sector 14, Mehrauli Road
Gurgaon-122001, Haryana, **India**
Tel: 0091 124 6323564
Fax: 0091 124 6323959
Email: praja_email@yahoo.com

Centre for Victims of Torture (CVICT)
P O Box: 5839
Kathmandu, Nepal
Tel: 00977 1 373902/373486
Fax: 00977 1 373020
Email: cvict@cvict.org.np
Website: www.cvict.org.np

Advocacy Forum (AF)
P O Box: 21798
Maharajgunj, Kathmandu
Tel: 00 977 1 438799
Email: advforum@wlink.com.np

Human Rights Commission of Pakistan (HRCP)
Aiwan-I-Jamhoor
107 – Tipu Block, New Garden Town
Lahore 54600, **Pakistan**
Tel: 0092 42 583 8341
Fax: 0092 42 588 3582
Email: hrcp@hrcp-web.org
Website: www.hrcp.web.org

AGHS Law Associates (Legal Aid Cell)
E/1, Guberg III
Lahore 54600, Pakistan
Tel: 0092 42 576 3234
Fax: 0092 42 576 3236
Email: aghs@brain.net.pk

Consortium of Humanitarian Agencies (CHA)
#10, Kynsey Terrace,
Colombo 10.
Tel: + 94-1-674436
Fax: + 94-74-610943/4
website: www.humanitarian-srilanka.org

PRI and its regional partners are grateful to the Royal Netherlands Embassy, Bangladesh for their support for the Conference.

Access to Justice and Penal Reform Special Focus: Under-Trials, Women and Juveniles

Section 1. Introduction

The Second South Asia Regional Conference was organized by Penal Reform International (PRI) and its regional partners and hosted by Bangladesh Legal Aid and Services Trust (BLAST) in Dhaka, Bangladesh, from 12 to 14 December 2002. The Conference was attended by approximately 80 delegates and participants from four countries of the region (Bangladesh, India, Nepal and Sri Lanka), and included members of Human Rights Commissions, members of the judiciary, lawyers, representatives of the prison and police departments, 'juvenile justice' experts, human rights experts, non-government organizations, gender specialists, experienced penal reformers and concerned members of civil society.

Common problems and concerns were deliberated upon against the backdrop of current global developments and heightened contextual needs, and recommendations were formulated for immediate implementation. A commitment was made to take the whole agenda of penal reform and access to justice, including juvenile justice and the rights of children, forward with greater impetus, and to make determined efforts towards the much-needed changes that were commonly agreed upon.

Section 2. Objectives

The **main objective of the Conference** was to highlight the need for reforming penal systems and the juvenile justice system, and collectively identifying solutions that could be implemented with a sense of urgency to meet the pressing need for speedy and equitable justice in the region. The Conference was to bring together senior level officials from the criminal justice agencies to consider ways of making structural changes to improve penal systems and at the same time help bring officials into more direct working relationships with NGOs in order to effectively tackle identified problems.

This objective was to be achieved by (a) using the Conference to evaluate progress since the First South Asia Regional Conference on "Penal Reform in South Asia" in Kathmandu in 1999, and to develop a programme for the year 2002-03, and (b) undertaking such projects in South Asian countries that would further promote penal reform and access to justice in the region.

Some specific objectives were identified:

(i) to follow up the Kathmandu Conference (1999)
(ii) to share common problems relating to all the agencies of the criminal justice and juvenile justice systems and recommend solutions and good practices
(iii) to bring together relevant agencies in the region for exchange of ideas on penal

reform through intensive interaction

(iv) to bring together government agencies and civil society groups to stimulate cooperative relationships for strengthening networking and mutual assistance

(v) to help agencies involved in the criminal justice system to intensify their focus on human rights (including children's rights) and such good practices as alternatives to prison, humane prison administration, and other forms of custodial administration, and promote transparency and better observance of international standards

(vi) to establish a framework for regional cooperation and exchange

It became evident that the Conference needed to address socio-political realities and contemporary developments in the region but was committed to the same principles of justice and human rights that it had declared as its goal in the First South Asia Regional Conference in Kathmandu in 1999.

The Conference took stock of the work done by the partners after Kathmandu as part of the follow-up agenda and came up with further recommendations that went beyond the Kathmandu Conference and were particularly focused, through groups sessions, on the specific themes of the Conference: **Under-Trials, Women and Juveniles**. Country groups further worked through the themes and formulated a list of specific projects that could be implemented in each of the countries as soon as possible and before the next Regional Conference.

Section 3.
Guiding principles

The Conference reiterated the universal principles set out in the Kathmandu Conference (1999) document **"Penal Reform in South Asia"** which are not only fundamental to penal reform and in particular juvenile justice and better access to *(formal) justice,* but to all interventions for change and transformation for *social and economic justice:* that no person, whether in custody or not, may be deprived of his/her human rights arbitrarily; that prisoners are sent to prison *as* punishment and not *for* punishment and that on no account may a person's dignity be compromised in any situation including imprisonment.

Understanding the purposes for which the state exists (for the needs of the society), the meaning and necessity of democracy (and justice) and the need for social, economic and cultural change for ALL – were equally recognized as urgent and pressing needs for the region. The region's generally impoverished socio-economic conditions and their effect on the crime situation was highlighted and it was recognized that poverty reduction and crime prevention had to be seen as inextricably linked for better understandings and actions.

The specific problems associated with under-trials, women prisoners and juveniles were discussed in depth, and several negative features relating to the

experiences of these groups in all the agencies of the criminal justice system emerged in the presentations and discussions. How each of these features could be addressed was also worked through. The involvement of civil society and the essential role it could play was duly emphasized.

The importance of all international documents pertaining to the rights of prisoners, in particular of women in prison and of children, of the standards laid down for better prison management in accordance with human rights was underscored at each juncture and references to the relevant documents were duly provided during the deliberations.

Th needs and lack of best practices in treatment of the vulnerable groups focused upon by the Conference were observed in each agency of the criminal justice system: *It was also felt that the mainstream agencies – police, courts and prisons – would have to be reworked for purposes of formulating recommendations pertaining to* ***juveniles****, in the light of the rethink and modifications that have been worked into particular international and national documents and standards pertaining to juveniles.* This was in keeping with the international requirements agreed by all signatories.

The various international instruments on the rights of the child stress the need for the full social and legal protection and development of the child. The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) seeks to ensure through various measures that a juvenile enjoys a meaningful and fulfilling life in the community.

The 1989 UN Convention on the Rights of the Child has stated "…. The child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth." The Second (1960) and sixth (1980) UN Congresses on Prevention of Crime and Treatment of Offenders set out the Minimum Standard Rules for the Administration of Juvenile Justice while safeguarding the human rights for all children, including children in conflict with the law. The 1985 Beijing Minimum Standard Rules and the 1989 UN Convention on Rights of the Child have identified a wide range of rights pertaining to children – their protection, survival, development and participation. These instruments have incorporated measures specially designed for juveniles, including the setting up of juvenile courts, and administrative and enforcement agencies. This means that the police would need to provide for special handling for children; courts would have to be either children's courts or juvenile justice boards and instead of prisons there would have to be a system of special custodial and non-custodial care.

Section 4.

Themes for Special Focus: Under-trials, Women and Juveniles

As a result of the various analyses undertaken during and after the Kathmandu Conference, when several problems and possible remedial

measures were discussed, it became clear that there were some themes that constituted a recurring problem in the functioning of the criminal justice and the juvenile justice system across the South Asia Region. Of these, three were specifically recognized as needing urgent and immediate attention – too many **under-trials** in prisons, the issue of **women** in prison (many with children), and the whole question of **juveniles** and the justice rules, regulations and mechanisms that needed to be worked out for them *but NOT within the mainstream of the existing criminal justice system*. Responding to the universal commitments to juveniles/children (below 18 years) an urgent and specific need was felt to create a separate juvenile justice system in each country of the region.

Under trials: Each country referred to its prisons being over crowded because three- fourths of the prisoners were those who were awaiting trial and spent years as under-trials as a result of several factors that had less to do with the prison and more to do with the police (arresting agency) and courts (sentencing agency). While prisons were admonished for bad management and neglect of human rights, it was also noted that prison officers passed the blame for bad conditions on *over-full prisons* and *over stretched facilities*. Prisons were housing three and sometimes four times their capacity and prison managers felt that some of the criticism relating to bad management could not be laid at their doorstep and was the result of over-crowding in turn the result of too many under-trial prisoners. While it was recognized that this was not entirely true, it was also felt that better coordination between the three agencies of the system could make for smoother, more effective functioning of the system

The delegates felt that it was necessary to reexamine very essentially the fundamental principle of 'presumption of innocence' until proven guilty, and whether long prison terms as under-trials did not violate that principle; that under-trials were sometimes in prison for periods that might exceed the imprisonment that they may be sentenced to for the crime that they may have committed. This was a matter of gravity and needed to be looked at with some urgency, immediacy and concern. Solutions to these critical issues, relating to under-trials, needed to be found through a review of the functioning of the arresting agency - the police, and the sentencing agency - the judiciary, and by looking at ways of ensuring an under-trial's fundamental rights in prisons.

Several recommendations were made at different levels that related to the way police, courts, prisons and indeed civil society could help in handling the problem of over populated prisons and better observance of human rights in every prison in the region. The fact that there were police officers, judges, prison officers and members of civil society present at the Conference enabled a face-to-face interaction between all agencies to see just where the malfunction and the failures lay. The question of pre-trial prisoners languishing for years in jails due to procedural impediments and hurdles, or because of the unavailability of such basic facilities as lack of transport to take them to court were all spelt out and discussed.

Women:

Women were considered a subject of special focus because the discrimination and marginalization they are subjected to in society is reflected and magnified in the criminal justice system. Generally women have fewer resources and assets independently available to them and their powerlessness cuts across lines of class, caste, race, region, and ethnicity. Women's imprisonment is more damaging for them, their families, and indeed for society for reasons that were set out clearly at the Conference.

The subject of women in prison posed problems at several levels. The nature of the offences they committed, their life-realities as victims of violence, their acute impoverishment, their physical and mental state in prisons, their lack of awareness of their rights, lack of access to legal aid and lack of awareness and understanding of legal procedures or prison rules and regulations, and their acute anxiety about their futures were considerations that were seen as reason enough to need a thorough review. In addition the negative experiences of most women at police stations, and in the courts also revealed their vulnerability and was discussed for purposes of specific reform and immediate action.

The recommendations took stock of the social circumstances of the women that were sent to prison and made every attempt to address these as well. Not the least of this was the subject of children who had to accompany mothers to jails. What damage this did both to mothers who were rearing the children in jails and to the children who were being brought up there was appropriately highlighted.

Juveniles:

It was made clear at the outset that juveniles were to be treated as a separate category and it was further clarified that while they were being discussed along with the mainstream of the criminal justice system, they were in fact *NOT supposed to come into the mainstream criminal justice system at all.* Neither as juveniles in conflict with the law nor as 'neglected children' could one justify their being handled by agencies or institutions that were not specially designed and equipped to meet the needs of juveniles. It was affirmed that children below the age of 18 should never be sent to prison. The question that needed to be asked and answered was: Where should they be sent if they 'offend'? This was addressed and debated.

The observance of the Convention of Child Rights of the United Nations 1989 was highlighted and recommendations took full cognizance of this and other international and national documents relating to the care and protection of juveniles. Children needed to be saved and protected from violence and discriminations of any sort and the law and justice machinery needed to evolve special laws and codes of conduct to help children grow and flourish in all aspects of their lives, and prevented from experiencing squalor and misery.

The recommendations that followed covered each aspect of the encounters that under-trials, women and juveniles had when faced with law and justice agencies, and better and more humane

and dignified ways of handling these vulnerable groups were deliberated and agreed upon

Under-trials, Women and Juveniles were thus the three focus themes of the Conference and each needed to be discussed separately at the different levels of functioning of criminal justice (police, courts, prisons and civil society) to determine the problems that lay in each agency's handling of these themes (juveniles being considered separately for reasons that were spelt out again and again). This was done by dividing the Conference participants into Groups (i), (ii), (iii), and (iv) each group addressing all the three Conference themes at the four levels representing the agencies of (i) police, (ii) courts, (iii) prisons and (iv) civil society.

The recommendations that emerged were placed in the three (thematic) sections of the Conference – **under-trials, women and juveniles** and the specific recommendations relating to each theme were set out and divided into classifications along the four levels (police, courts, prisons, civil society) at which the groups made an input. The idea was to home in on what could be done at each level to address the problems relating to the specific themes of the Conference.

Once the recommendations had been collated and circulated for further input they were discussed in the plenary session at which point further amendments were made and they were finally agreed as the common agenda for the region on the specific issues at hand.
There was a further exercise that the Conference set itself: The delegates assembled in **country groups** to discuss the priorities of their countries for follow up programmes that could be implemented immediately. It was suggested that three priority areas for projects might be put forward at the last session of the Conference by each country, and that one could be selected as the follow up Country Project much in the same manner as was done after the Kathmandu event in 1999. The countries were able to do this without difficulty and PRI undertook to pursue the matter and assist in facilitating funding and other requirements wherever possible.

Section 5:
Recommendations on Theme 1: Under trials

(i) Police

The question that the participants asked themselves in this regard was what role the police could play to reduce under trials in prisons or facilitate the plight of long delays in cases coming for trials.

The recommendations covered a wide range of issues that in one way or another affected the number of persons that could be sent to prison. These were directly related to the numbers that the police arrested; but this in turn was affected by other features and factors that pertained to the police such as their training, their conditions of service, their morale etc. The recommendations sometimes went beyond the actual process of arrest to the police as a service. The recommendations concerning under-trials agreed upon were:-:

1. The police are prone to **over-arrest.** It is suggested that reducing the number of arrests wherever possible would affect the number of those sent to prisons as under-trials. Arrests without substantial grounds need to be avoided. There are other ways that could be attempted:
    (a) In many cases 'caution' should be used instead of arrest
    (b) The police should compound offences
    (c) They should levy fines instead of arresting and locking up offenders
    (d) Arrests should be delayed until police had sufficient evidence
    (e) Efforts towards guidance and counselling should be made at this stage
2. Procedures of arrest need to be followed meticulously; offenders being duly informed of their rights and their relatives being informed of the offender's arrest and whereabouts
3. While the alleged offender is in police custody there should be humane treatment meted out to him/her and all procedures carried out at the police stations should be transparent
4. If the arrested person is a woman all the rules laid down for special handling must be followed
5. 'First Information Reports' (FIRs) which are the first complaint about any activity that is brought for police attention must be accepted and filed according to the procedures laid down, and it should be ensured that names of innocent uninvolved persons are not unnecessarily placed in the Report
6. Proper records of cases brought before each police station should be maintained and should be readily available for examination by those who are entitled to examine them.
7. Investigations carried out by the police into alleged filed cases should be speedy and undertaken with a sense of urgency so that unnecessary detention of 'suspects' is avoided
8. Those officers who are in charge of the investigation of cases should not be a part of the prosecuting agency as this is likely to lead to tough stances against arrested persons to justify the arrests, with a likelihood of their being sent to jail pending investigation
9. During investigations and when ever required experts, constituting special investigation teams (forensic experts for instance) should be engaged for speed and efficiency
10. Independent inspection systems for the police particularly at police stations must be instituted to ensure that rules, written and unwritten, are observed and undue and excessive use of power is curtailed including the proclivity to 'lock up' unnecessarily
11. Police could be given the power to use pre-trial diversion measures that might prevent too many persons from being sent down the long and arduous road of the legal process surrounding court appearances

12. Where the police have the power to grant bail the power should be used and in areas where they do not, such a power should be given so that those offenders who qualify can avail themselves of that service.
13. Prisoners that have to be brought before the judge for extension of remand or trial depend on police escort for being taken to Court: This facility should be provided with a sense of priority and with the realization that the further imprisonment of a prisoner depends on it.
14. Prisoners should not be handcuffed when being escorted for Court appearances unless they are a threat to public security and/or likely to escape.
15. Improving the conditions of service of police personnel and of their places of work should be undertaken so that efficiency and alertness is ensured and casual detention is avoided
16. Community policing in the interests of crime prevention should be encouraged so that unnecessary arrests do not occur and vicitmization is avoided
17. There must be adequate training for police personnel in all aspects of handling offenders: gender training, human rights, etc

(ii) Courts

There was a general consensus that whereas the problem of under-trial prisoners was one that could be alleviated by each agency of the system the problem of large numbers of under-trials in prisons was above all related to what was happening in the Courts and more particularly the lower Courts. While slow investigations on the part of the police led to judges feeling compelled to adjourn hearings of cases, the slackness of lawyers, their absences and unavailability, lawyers' lack of interest in poor, ill-informed clients, judges being on leave, or simply not taking pains to engage in a speedy disposal of cases, - these and other supposedly small, but for the alleged offender, crucial, problems delayed hearings and the disposal of cases.

The Conference felt that it was imperative that measures be taken to tackle the problem of delays at the Court end and several recommendations were made to that effect.

1. The process of extending remand for prisoners (every fourteen days a pre-trial prisoner must be produced before the magistrate to have his remand extended) should not be done automatically and mechanically; possibilities outside of remand-extension should be explored.
2. Police and judicial custody should be used as sparingly as possible and only where necessary in cases awaiting or pending trial
3. In the absence of sufficient evidence or cogent reasons judges should not remand offenders in custody
4. For those who do not have legal aid Legal Aid Boards should be set up wherever necessary
5. There should be appropriate and positive guidelines set up for the judges to grant bail and judges should be trained to follow these

guidelines with humanity and taking cognizance of the circumstances of the accused

6. When applications for bail are rejected the Court should be required to give reasons for the rejection in a manner easily understood by the accused
7. Sureties required for granting bail to accused persons should be reasonably determined – they should have some relationship with the nature of the offence and the means of the accused
8. Judges should also use alternative sanctions (other than imprisonment) as punishment for offenders (e.g. Community Service), and they should be trained in the advantages and uses of non-custodial sanctions for particular offences
9. Magistrates and Judges should regularly visit jails without prior notification in order to be familiar with jail conditions and the plight of prisoners who might want an opportunity to speak with them.
10. Special orders should be issued to set up 'Special Courts' (makeshift) at the jail premises where petty offenders are tried and their cases disposed of.
11. To clear the back-log of cases vacancies for new judges should be filled as soon as possible
12. To facilitate the observance of many of the above some orientation in reform and change should be imparted to judges

(iii). Prisons

The problem of under-trials had its greatest adverse effects within the prison environment. In most prisons in the South Asian region more than 75% of the prisoners are under-trials, in some jails the figure going up to as much as 85%. Over-crowding, and over-stretching of facilities beyond their capacity leads to many compromises with human dignity and human rights in prisons and to a lack of professionalism among staff that finds it difficult to handle the numbers that are in their charge. It is, therefore, felt that some steps should to be taken that would alleviate the problem somewhat.

The recommendations that resulted are expected to restore some decency in the prison regime

1. When prisoners are admitted to prisons particular care (professional screening according to accepted standards of decency and dignity) needs to be taken for classification according to needs and vulnerability so that those requiring particular attention are diverted to appropriate facilities)
2. Under-trial prisoners should be adequately informed about the dates of court appearances, trial proceedings, and their rights and privileges relating to judicial issues
3. Prisoners should be made aware of their rights while they are detained – including the rights of visits from family and friends and their right for legal representation
4. To help under-trial prisoners obtain speedy justice prisons should collate as much information as they can to facilitate speedy disposal of cases

5. Financial resources and other facilities should be ensured to enable prisoners to attend their 'hearings'. This includes the facility of being transported to the place where the hearing is being conducted (a facility usually provided by the police)
6. There should be a review of cases of under-trial prisoners every three months (bearing in mind the many cases reported of 'forgotten prisoners' that languish for years because their cases just did not come up or they never got to the Court for one reason or another)
7. Innovative practices such as video linkage between prisons and courts should be considered where possible so that prisoners do not under any circumstance miss the opportunity to be presented before a magistrate on a stipulated date
8. Under-trial prisoners (who by rule cannot be compelled to work) might be encouraged to engage in activities vocational and recreational including income generating activities to prevent and avert the damage caused to them and the prison regime of idleness and sluggishness
9. Civil society involvement should be encouraged in a prison and under-trial prisoners should also be encouraged to interact with them to inculcate positive and integrative attitudes and outlook among them, thus addressing an oft-made complaint made about under-trials that their inactivity could be disruptive in a prison
10. Home leave in particular circumstances should also be allowed for under-trial prisoners to avoid frustrations that could be disruptive

(iv). Civil Society

Although the theme at hand was under-trials lodged in prisons it was felt that civil society could play a constructive role in many ways and the resulting recommendations suggested some ways that civil society groups could assist:

1. Interested civil society groups should serve as a bridge between the prison and the general public to clear existing misinformation about prisons and prisoners in the public mind: a thorough understanding of the under-trial problem is a good way to begin.
2. Civil society should assist under-trial prisoners by enabling them to be better informed about their rights within jails and about the legal procedures related to their incarceration, both those related to jails and those related to courts (women under-trials would need this with some urgency)
3. The provision and facility of paralegal services and legal aid by the state for those who need it should be augmented by civil society groups that are in a position to do so.
4. Assistance can be given by civil society groups in payment of fines and bail securities under agreed conditions of repayment.
5. The proper implementation of rules and laws relating to under-trials in prisons and the

introduction of new policies for better facilities and practices should be ensured by civil society through the pressure it can bring to bear on policy makers

6. Civil society can play a role in encouraging community based sentencing to ensure that prison is used as a last resort and prisons are not over-crowded with prisoners awaiting trial
7. To alleviate the stresses and tensions of being in prison and ensuring the mental health of ALL those in prison Counselling Units should be set up inside prisons; civil society could assist in this process and set up a service that could then be a model that becomes a permanent part of the jail system
8. Thorough research and analysis with the object of conducting awareness campaigns on all fronts, inside and outside the prisons, should be carried out by agencies in civil society that can pool their know-how and assist in alleviating the problems of the prison
9. Training and sensitization programmes should be arranged by civil society groups that would make for better relations between prisons and staff: these would reduce the indiscipline that staff supposedly face from under-trials who have different rules and guidelines laid out for them than convicts

Section 6

Recommendations on Theme 2: Women

The subject of women in prison was as difficult as it was sensitive. All the negative aspects of locking up people to punish them were twice as damaging when they pertained to women as they did to men. This was related both to the (gender) aspect of their being women and to the fact that they were in prison, where their vulnerability was doubled and their inability to cope multiplied many fold. The Conference discussed the subject of women in society and the extent to which their disadvantaged and powerless circumstances were not unrelated to the kinds of offences they committed and the kinds of coping strategies they did or did not possess.

The fact that women are no more than 5% of imprisoned populations in most countries was considered irrelevant to the question of improving their lot in the prison: the intensity of the effect of their imprisonment was greater on the families they left behind and so was the effect of their stay in jail more damaging for them and the children that accompanied them into jails. There was general agreement that women needed something quite different from what men needed in prison, and that many women really did not belong inside at all.

The experiences that women went through at the hands of all the agencies of the criminal justice system were discussed and it was emphatically suggested that for women to come out less damaged and also for them to be encouraged to play a more positive role in society there was much that the justice system could and should do. The

system's handling of women reflected the manner in which women were perceived by society, which perception was in turn related to the subordinate role that they had been assigned over the ages in what were generally patriarchal societies.

Starting with what happened to them in police stations, through the court machinery and finally in prisons, the Conference made recommendation designed to enable women to be the constructive 'carers' in society that they were expected to be.

(i) Police

Women feel intimidated at police stations and generally by the police as a force: This relates to two factors particularly relevant in the region:

(a) The reputation of the police generally as power wielders and 'bullies'

(b) The general lack of awareness of women about the procedures that the police are bound and required to follow at any point of their interaction with women

(c) An ignorance about their rights and entitlements vis-à-vis agencies of the system

The recommendations that emerged took into account the above features relating to women and perceptions of and about the police:

1. It is advised that the arrest of women offenders should be avoided between sunset and sunrise to prevent their spending the night in police lock up and being exposed to those ills of molestation and ill-treatment that were reported to the Conference
2. Without jeopardizing the security of the State the arrest and detention of women should be kept to a minimum
3 The arrest of women by male police persons is to be avoided; and if absolutely necessary needs the presence of a woman police officer so that the arrested woman can have a chance to communicate freely and some standards of decency are observed
4 The interrogation of women and the searches carried out of their persons and personal belongings has to follow the strictest standards of decency and according to rules established by law (this included a bar on the use of indecent language). If there is an absence of such rules they should be put in place forthwith.
5 Police stations are required to have separate facilities for detaining women, and women can not be kept where there are no women officers present
6 The families of arrested women should be informed of the arrest and the whereabouts of the woman, and visits by family have to be permitted
7. Pre-trial diversion measures are recommended to prevent the path of litigation involving long procedural transactions between the 'accused' woman and the machinations of the State
10. Awareness of rights and entitlements should be created at places of arrest and at police stations, including the law and

sections under which the arrest is made and the procedures related to these

11. Police persons handling women should be specially trained by experts including psychologists, social workers and human rights specialists and duly apprised of the standards that should be maintained in such situations
12. Children of arrested women should be properly taken care of if there are no family members who are prepared to take care of them
13. If women have been arrested following disputes, the exploration of attempts at conciliation should be made by trained mediators and counsellors
14. Women officers with special training in handling difficult or disturbed women should be involved in such situations as demands their interventions

(ii) Courts

If police stations and policemen intimidated women then courts and judges and lawyers baffled them. Most of the women being uneducated and ill informed found the intricacies of courts and court proceedings difficult to follow. Getting justice when they hardly understood what they were seeking seemed a formidable task and it remained for the Conference to suggest how this might be remedied

1. Women should be apprised about the structure of the legal system while they are in prison. This should be done by legal experts but in a manner that is simple; the words and imagery should be such that they are enabled to have some basic understanding of the process and procedure of the courts
2. When women enter the prison they should be informed about their cases and the dates that they would be required to appear and the procedures and facilities that the prison would make available for court hearings
3. They should also be apprised of legal aid facilities (lawyers and other legal aid when they need it) and efforts should be made either directly or through NGO intervention to obtain these on a priority basis
4. When the women are taken to Court they should be assisted and handled without unnecessary waiting and delays so that they do not spend long periods in prison awaiting trials due to procedural delays and adjournments for unnecessary reasons
5. While the women wait in Courts for long stretches of time (sometimes the whole day) adequate provision should be made for decent toilet facilities for them and the children who have accompanied them to the prison
6. Judges should be adequately informed about the circumstances of the women offenders that appear before them
7. Periodic gender orientation should be carried out for judges/magistrates

(iii) Prisons

The most demanding scenario was that of the jail itself where women could spend anywhere from a few days to ten years depending on the nature of the offence and the policy of the State on remissions, premature release etc.

That the women that were locked up were of different types and could not be lumped into a broad category called 'women prisoner' was clear. That they were stigmatized as 'jail bird' soon after they entered the prison; that the experience of being in prison was harrowing for them and that there were many features of the prison and many aspects of their response to the regime that needed to be analysed and addressed, were emphasized at the Conference and were reiterated in the many recommendations that were made in the groups

Whereas it was recognized that women and men should and would be treated with equality before the law it was also thought that women needed a *different* kind of handling when they were locked up in prison and that difference in treatment did not amount to discrimination. This difference in handling and treatment was related to their being women and to their vulnerability as a result of being women particularly in societies where they were considered 'doubly deviant doubly damned'.

The recommendations made at the Conference took into account the status of women in the social context in which they were being considered (i.e. South Asia)

1. The first observation was related to an earlier recommendation relating to the Courts that sending women to prison should be avoided as far as possible
2. Each prison should be made aware that its purpose is to keep in their custody those persons sent there by the Courts; this should be done according to the universal minimum standards agreed by all nations.
3. For a woman (especially a first time offender) the trauma of the prison begins as soon as she enters the high walls of the prison: the process of admission and search must be sensitively carried out by trained staff. When women are brought to the prison they should be handled with utmost care because (except for the seasoned few) this is the moment of maximum trauma and fear, and needs to be carefully addressed
4. Body and other (possession) searches must be undertaken with sensitivity by women staff who have been trained for such a task
5. There should be a proper process whereby new women prisoners are informed about the rules and regulations, and curriculum and routine of the prison. Being illiterate the women should be imparted all this information with ingenuity and imagination
6. The different rules for convicted and 'under-trial' women should be clearly spelt out and explained to the women of each of these categories
7. Women with special needs should be identified (the needs being related to age, physical

health, dietary requirements, pregnancy, lactating mothers, etc) and provision made for their special needs and those of their children.

8. Women should be treated with dignity and decency and not taunted with references to the offences they have committed.
9. Women should be engaged in appropriate activities and educational programmes designed for them so that they can be encouraged to be self-reliant when they come out of prison.
10. Under-trial women (who according to the rules cannot be compelled to work) should be given incentives to work if they are there for sufficiently long periods of time; so that they are not idle and also develop a skill that could serve them in good stead when they leave the prison.
11. Sufficient attention should be paid to the women's (and children's) diet, nutrition and medical needs.
12. Mental health an area that is generally neglected in the region needs special attention and it is necessary to both investigate women's mental disorders and arrange for expert interventions that would help them to cope.
13. Training must be given to staff about minimum international standards, about human rights in prisons, and about the importance of observing decency in language and other communication between staff and prisoners.
14. Women staff also need attention in terms of their conditions of service, their emotional lives, their promotion prospects

(iv) Civil Society

The role of civil society was considered particularly important when it came to women in prison. Non-government organizations and concerned citizens could give considerable help to women in jails who were handicapped both in handling offence related matters and matters pertaining to their coping abilities because of their general ignorance, lack of awareness and education, and powerlessness.

1. Non-government organizations that have expertise and skills should be involved in providing education, legal awareness, and skills in vocations to help women become confident and self reliant. This should include teaching women how and why legal and social rights were important for them and how these must be obtained without violating the rights of others
2. Bearing in mind that women are mentally damaged by the prison experience one of the most needed features of women in jails is attention to their mental health: detailed studies of women and children in prison with a view to addressing their special mental/personality needs should be carried out by civil society groups and these could be used for making prisons more humane and civilized places
3. Members of civil society should assist in ensuring that mentally ill women are shifted from prison to a mental health care institution.

4. Recreational activities should be undertaken by civil society groups to assist prison authorities with creative and constructive ways of handling prisoners
5. Children of (women) prisoners, who have had to accompany mothers to prisons, should be assisted in many ways by civil society groups, both for their education and entertainment.
6. Counselling Units should be set up in the first instance by non-government organizations and then encouraged to become part and parcel of the jail establishment
7. Alternative sanctions should be considered for those women that fit the requirements for such sanctions

Section – 7

Recommendation on Theme 3 Juveniles/ Children

The thematic section of juveniles was discussed in the larger societal context of juvenile delinquency and neglect, while creating *a distinction between juveniles in conflict with law and children in need of care and protection, delinquency being considered as an offshoot of neglect.* International and national commitments towards the juveniles or children have mandated the countries to undertake various legal, administrative and executive measures to fulfill the basic rights of the children, which appeared to be synonymous with their basic needs. 'Juvenile Justice' was therefore understood in its wider meaning of care, protection, treatment, development, rehabilitation and social reintegration of marginalized children and not simply as a legal mechanism delivering formal justice. Issues were addressed not only in terms of children's basic needs, best interests and 'rights of survival, protection, development and participation' but also in relation to various corrective measures including a blueprint of programmes and activities for their social mainstreaming.

It was accepted that, besides the legal framework for the children in conflict with law, the juvenile justice system needed also to cover other categories of children requiring legal protection, such as those at risk without a home or settled place or abode or ostensible means of subsistence; those under threat of being killed or injured, the mentally and physically challenged; those ailing or suffering from chronic diseases, those having parents and guardians unfit or incapacitated to control, the abandoned, vulnerable to drug abuse or trafficking, those abused for unconscionable gains or, those that were victims of armed conflict, civil commotion or natural calamity.

It was further recognized that, in the larger context of the criminal justice system, the **juvenile justice system had to create a separate mechanism for safeguarding the rights and interests of children coming within the purview of the law at various stages of their apprehension, processing, disposition, placement, treatment and reintegration into their communities.**

With this in view the divisions under which the recommendations relating to

juveniles were made were (i) special police (ii) (a) juvenile courts or boards and (b) child welfare committees and (iii) institutional and non-institutional services. (iv) NGOs and social workers

(i) Special police

1. The police should be oriented towards a philosophy that is aimed at protecting society not merely by dealing with children who deviate from the accepted social norms but also by ameliorating conditions that generate juvenile social maladjustment.
2. Police officials should be encouraged to initiate and undertake activities and programmes for the prevention of juvenile delinquency in the communities they serve.
3. The police should function in close conjunction with the community-based welfare agencies so as to reach out to all categories of children in need of care and protection.
4. Police officials associated with the children in need of care and protection and juveniles in conflict with law under the juvenile justice system should be specially trained / oriented in the relevant legal provisions, in child psychology and child development.
5. Each police station should have *special police personnel* trained to deal with the children in need of care and protection and those children in conflict with law.
6. Special juvenile police units should be created in every police organization and a special juvenile police officer (SJP) assigned to every police station.
7. Special juvenile police officers and units should be authorized to enquire into the case of a juvenile and to produce a juvenile / child before competent authorities, such as children in conflict with the law before juvenile courts, juvenile justice boards and neglected/at risk children before child welfare committees.
8. The special juvenile police officer - the only competent police official to deal with juveniles - must not be in uniform while dealing with juveniles / children
9. The special juvenile police officer while apprehending juveniles / children must not use handcuffs, fetters and undue force likely to harm them
10. The special juvenile police officer must not keep any juvenile / child in a lock-up or place of captivity.
11. In case of the apprehension of a girl juvenile / child, she must be accompanied and looked after by a woman police official or, in the absence of such an official, by a woman social worker or a close family member. Such a girl juvenile / child must also be medically examined

immediately after being taken into custody or charge

12. Except in cases of overriding need for custodial interrogation or for prevention of possible harm or escape, the special juvenile officer should see that, as far as possible, juveniles are released on bail or sent to non-institutional care, so as to ensure that institutional care is used only as the last resort.
13. On apprehension of a juvenile / child, the police should make an effort to trace and inform the parents / guardians.
14. The special juvenile police officer should simultaneously inform the Probation Officer of the area about the details of the juvenile apprehended.
15. The cases of atrocities / crimes by adults against children must be made cognizable offences, and, as such, special juvenile police officer must file an FIR against the offender
16. The special juvenile police officer should also provide appropriate escort services to juveniles / children in case of their transfer from one place to another and from one institution to the other.
17. The special juvenile police officer should complete the investigation of the cases within a prescribed timeframe.
18. The special juvenile police officer should conduct himself humanely while dealing with the juveniles / children coming within the purview of the law.
19. Negative expressions like arrest, custody, trial, offender, remand, court, etc., which may stigmatize the juvenile / child, should not be used in the relevant legislation as well as in day-to- day parlance.

(ii) (a) Juvenile court or board

1. The competent authority to conduct judicial proceedings, adjudicate and dispose of the matters pertaining to the juveniles in conflict with law should either be a juvenile court or board, to be specially constituted.
2. Under no circumstances should a child offender be made to undergo proceedings in adult courts along with adult criminals within the framework of the criminal justice system.
3. The juvenile board should be able to dispose of the cases within the maximum prescribed period of four months so that the juveniles are not made to stay in the institution unnecessarily.
4. The juvenile court or board should consist of a principal magistrate from the judiciary and a few eminent social workers as members, with at least one woman qualified in child psychology, child development or social work and having some experience in the field of child welfare.

5. In order to avoid any hardship, a special juvenile police officer can produce the juvenile before any of the members empowered to give preliminary directions during the proceedings. The final disposal of the matter should be made by a 'bench' through a majority decision.
6. The juvenile himself/herself and his/her parents should be permitted to appear before the juvenile court or board during the hearings and their views should be taken into consideration in disposing of the case.
7. As a matter of policy, the juveniles involved in petty crimes should be released on bail forthwith under the care of parents, guardians or voluntary organizations. Only in serious crimes and on justifiable grounds may the juveniles be kept in institutions.
8. Sentences of capital punishment and life imprisonment must not be passed on any juvenile by the juvenile court or board.
9. If a juvenile is found guilty, the juvenile court or board may order the juvenile to stay in an institution for a particular period of time, only if his placement in the community through probation or counselling, or an alternative service under the supervision of some reputed and / or recognized voluntary organization is not found conducive.
10. Following scrutiny and enquiry at an appropriate level, the juvenile court or board should also be empowered to give the juvenile / child in adoption / foster care.
11. Publication of records, case histories and the photographs of juveniles should be prohibited by the juvenile court or board. Provision should also be made to prevent juveniles from any stigma or infirmity in future.
12. In case of escape or death, the juvenile court or board should conduct proper investigation while taking into consideration the reports and explanations submitted by the concerned officials in whose charge the juvenile was at that time
13. The board must obtain social investigation report from the Probation Officer in every case and the same should be taken into consideration before finalizing the disposal of the case.

(ii) (b) Child welfare committee

1. Sufficient number of child welfare committees should be created to handle the cases of such categories of neglected children who do not happen to commit any offence and are in need of care and protection.
2. The children in need of care and protection may include children who are homeless or without any settled place of abode, living in a situation of threat to life, mentally or physically challenged or ailing or suffering from terminal diseases, abandoned, missing or run-away children, victims of drug, sex abuse,

child trafficking, armed conflict, civil commotion or natural calamity.

3. The child welfare committee should consist of a fixed number of members of whom at least one should be a woman, and specialized in child psychology, child development or social work and having experience in the field of child welfare.
4. The child welfare committee should be able to dispose of the cases within a prescribed period of maximum four months so that children may not have to stay in an institution unnecessarily.
5. The child welfare community must obtain the social investigation report from the case-worker / child welfare officer in every case and take the same into consideration before finalizing the disposal.
6. The child welfare committee should strive to either restore the children to their families or attempt to rehabilitate and socially reintegrate them through non-institutional methods including adoption, foster care and sponsorship.
7. The transfer of the child from one place to another and from one institution to the other should be carried out by CWC after due enquiry regarding the place of reception and with proper escort.
8. The child welfare committee shall be responsible for the care, protection, treatment, development and rehabilitation of the children. As the competent authority, the committee may also supervise the functioning of other concerned agencies.

(iii) a. Institutions (observation homes, special homes, shelter homes)

1. Separate institutions, particularly 'homes', should be created for 'juveniles in conflict with law' and 'children in need of care and protection'. Similarly, separate institutions for boys and girls in sufficient numbers and capacity should be set up to cater to the actual requirements.
2. The institutions for juveniles in conflict with law may be of two types i.e., observation homes for their stay up to four months, while enquiries are being conducted and cases being processed, and special homes where the juveniles may be transferred for institutional care following the orders of juvenile courts / boards.
3. Institutions for children in need of care and protection may be of two types i.e., *shelter homes* that shall operate as drop-in centres to provide shelter facilities for those children who are in urgent need; and *children's homes* that may provide comprehensive services to such children till they are rehabilitated.

4. The institutions should provide a friendly and family-like ambience, with sufficient opportunities for their growth and development.
5. Each institution should have professionally qualified and trained staff, with such supporting staff as is deemed necessary.
6. Each institution must have facilities and provisions to meet emergencies including medical services to take care of the health problems of juveniles / children.
7. Each institution should have a proper reception and classification centre to accept a juvenile / child round the clock.
8. The institutional treatment should be so individualized as to cater adequately to the specific needs of each juvenile / child.
9. Institutions should organize extra curricular activities, out door programmes, cultural functions and festivals to provide a natural environment for children to grow, similar to that in society.
10. Institutional care should be taken recourse to only as the last measure in dealing with children coming within the purview of the juvenile justice system.

(iii) b. Non institutional services

1. The range of non-institutional services should be so widened as to ensure that the children / juveniles covered by the juvenile justice system, as far as possible, are treated within their families and communities.
2. Community participation should be encouraged to the maximum in the development of the juvenile justice system.
3. Resources of the family and the community should be utilized to the maximum in providing services for the care, protection, treatment, development and rehabilitation of juveniles / children processed through the juvenile justice system.
4. A high priority should be given to the development of probation services with appropriate linkages with social support systems including the family and the community.
5. The juvenile justice system must provide for ample avenues for the diversion of cases at the pre-trial, trial and dispositional levels.
6. The juvenile justice system must constantly interact with social welfare and development agencies in securing for children coming within its purview all the necessary inputs for their appropriate care, treatment and rehabilitation.

(iv) Social workers/ NGOs

1. The NGOs working in the field of child-care, child-protection or child-welfare should have a prescribed role in the functioning of the juvenile justice system.
2. Reputed NGOs may be authorized / certified to run institutions for the juveniles / children and the institutions run by the NGOs may be declared as fit institutions. The government may also consider running their children's institutions in partnership with NGOs.
3. Advisory boards / inspection committees may be set up to oversee the functioning of the juvenile justice system with assistance from experts, social workers and representatives of NGOs.
4. Selection committee for the members of juvenile courts or boards and child welfare committees should have representatives of NGOs and social workers.

Section 8

Conclusion

The entire exercise was of much benefit for participants: There were agreements and disagreements, discussions and debates, questions and answers, exchanges and understandings, and in the end there was the common agreement that whatever was being said was commensurate with the standards that were agreed by all, declared as universally acceptable and in keeping with the human rights agenda that sought to promote human dignity and decency for all no matter what class, sex, race, religion or region.

These were the best practices collectively selected from the codes, documents and applications of the countries of the region and placed within the context of the region, but without compromising the standards of equality and liberty held to be the universal goals across the world. The most striking feature of the whole event and the recommendations following was the general feeling that there was a dire need for better living standards and reduction of poverty in order that crime prevention and penal reform could be considered important enough. The repeated references to public quotes such as 'if they don't have it outside why should they have it inside' were a reminder of the uphill task that face penal reformers in contexts such as South Asia. The determination of the participants was commendable however, as was also the commitment and decision to incorporate as many recommendations within the country's codes and rules as possible and implement them.

Section 9

Appendices

Presentations and Speeches

****

WHERE ARE WE NOW? Follow-up after Kathmandu

****

Rani D. Shankardass

Vice Chairperson, Penal Reform International

I address you in more than one capacity: as a guest (from India) and as a host (from PRI the organization that has enabled this Conference to happen). We as South Asian partners have all assembled once again to take stock of the delivery of justice in our region and I hope we are able to come nearer and nearer to our goals as we proceed.

Many of us met three years ago in Kathmandu and agreed upon a common agenda on penal reform and access to justice. This was based on frank and open discussions of our problems and the practices we were following in the area of criminal justice. We decided to continue to share views and ideas, and indeed skills and expertise so that instead of reinventing the wheel when things were not going well in any part of our system we could call upon our partners in the region to share their wisdom and expertise and work towards newer ways and improved practices. As we proceed with the Conference we will realize that some of the practices and ideas that we in the region are trying to develop in the area of penal justice are both holistic, and innovative. Not everything is black and gray: there are bright areas too, and we intend to talk about the good, the bad, and the ugly in our deliberations.

After the Kathmandu deliberations we set ourselves a practical exercise: We decided two things. (1) that we would all meet after two years, this time in Dhaka, to revisit the themes we discussed and to see what other areas we could collectively develop as areas of work and (2) that instead of just returning to our respective countries after a talking exercise we would take up a challenge to implement some change-seeking projects *immediately* over the next year. With funds allocated for that exercise by the Foreign and Commonwealth Office of the UK we did just that. The Projects were challenging exercises and we came up with some very fruitful examples and models of programmes that we could sell to our counterparts in the other counties. The project in India was on *the Mental Healh and Care of Women and Children in Prison in Andhra Pradesh*. Projects in the other countries of the region were as effectively carried out: The programme in Bangladesh was a human rights training for prison officers called 'Good Prison Management'. It was subsequently repeated. Some training schemes in the area of Mediation and Alternative Dispute Resolution have also been promoted with PRI's cooperation and assistance. In Nepal we had a follow-up programme on legal aid for women and juveniles in Eastern Nepal; and in Pakistan too legal aid schemes were promoted and work on Juvenile Justice was planned. So something was implemented in each country with a sense of immediacy

In recounting this the intention is not so much to pat ourselves on the back for

some small achievements but as Justice Krishna Iyer would say to remind ourselves of the vast not done. We have assembled again: and this time apart from discussing, we wish to draw up implementation plans for the *specific focus themes* of the Conference. But what is new at this assembly? Is there some new light, are there some new developments that we need to consider as we plan here for the future of penal reform.

I would like to put to you that this is an assembly with a difference. We are meeting under a worldwide cloud of doom and gloom. No one feels that things are getting better, no one feels secure and safe, no one sees a light at the end of the tunnel and we are all full of despair. I would like to elaborate this a little so that we bear in mind the state of our minds and attitudes when we deliberate on penal reform and access to justice over the next three days – with our special focus on under-trials, women and juveniles.

When we *entered* the 21st century we still had hope and expectation. We said the world had become smaller and that communication had broken barriers that we had not dreamt of. There was now that much more we knew about each other; everyone talked about globalism, of globalisation, of opening up and looking outwards not inwards; and we thought it would lead to better understandings because we knew more. But it didn't happen: there are features in the world of the 21st century that are disturbing and frightening. There is more hate, more intolerance, more agendas that are exploitative, more walls around, more myopic visions, and above all more fear. The world did not become smaller: we became smaller, our outlooks became smaller and now we have reduced ourselves to a size so miniscule that we seem to be unable to conquer anything, not even ourselves. As individuals, and as collectivities and communities we are doing things that make our heads hang in shame. I think each of us, as representative of our specific countries knows we have blemishes that we cannot justify.

For the most part we do not really know how we can handle the disparities and inequalities in the world. Sometimes particular things trigger off a chain of reactions and things can take a turn for the better or for the worse. One of these was the event on 11 September 2001, an event that is discussed universally but affects everyone differently. I think all our thinking about safety, security, justice, harmony, has been affected by that event. The word terrorism has become a part of our daily vocabulary and although, in many parts of the world, the concept of terror had been alive for a long, long time, the immediate effect of 11 September was that many countries, and this applies to our region as well, started altering their laws, their rules, their statutes to combat this terror specifically. It was stated that this terror could spread everywhere without differentiating, and so the laws we put in place should also operate universally without differentiating. The fact is of course that the laws do differentiate between people and people.

What is the connection between all this and our quest for penal reform and the present agenda for work in this area? I would like to suggest that there is a very intrinsic connection between the present pervading fear and what we might

develop at this gathering: This stems from the fact that you *cannot take reform OUT of the context it has to be placed in*. We cannot tinker mechanically with some parts of the justice machinery and believe we are bringing change. The context and its ugly realities have to be kept in mind at all times.

So far the world has been functioning at the developmental level with the philosophy of "each for himself and the devil take the hind most". **We** of this region were among the hindmost and the devil did take us. The rhetoric was about one world; the reality was about two worlds. The developed world had one *way of life*, the developing or undeveloped had *quite another way of living*. South Asia has been quite superfluous in the global schemes of power, development and invincibility.

The horrific incident of 11 September did do one thing – it made us all think. We all pondered and rethought our postures and our vulnerabilities. People in the USA were actually taking out their maps and atlases to locate particular places in South Asia! They were educating themselves!

But I think the real lessons of 11 September still remain to be learnt. We continue to live in two worlds: rich and poor, prosperous and impoverished, healthy and unhealthy, clinically sterile and filthily squalid, and the dichotomies could go on. The new interest in South Asia is piece meal and disjointed and not enough to reverse the socio-economic trends that have been perpetuated for so long. And these trends DO affect the agenda of penal reform as much as the actual event (11 September) that triggered some new political thinking.

The trends do affect the justice we are seeking for our women and youth: we cannot forget that of the world's poor population of 1.3 billion people (1995), 515 million came from South Asia. In 1999 of the one and a half billion population in the South Asia region 35% were not expected to survive to the age of forty. In 1999 half our total population was illiterate, in 1995 over one fifth did not have access to health; in the year 2000 63% did not have access to sanitation: These are NOT irrelevant figures!

Am I blaming someone for all this? Yes, I think we need to blame ourselves. How did we come to tolerate this neglect by the world and our own leaders. No! I do not believe I have strayed from the subject of the Conference: ***Penal Reform and Access to Justice***. I believe we need to take all these ground realities on board when we talk of justice. For what reform and access to justice are we talking about if our children feed on garbage dumps, our battered women suffer violence day in and day out without reprieve, the uneducated and impoverished do back breaking jobs for a pittance **(47% of this region's population lives on less than a dollar a day*)*** and most of our youth has no work to do.

Each major city of our region has at least a hundred thousand children on the streets either in the form of beggars, or as abandoned, abused or neglected children. There are too many with no work and most of them are young. In Bombay, Calcutta, Dhaka, Karachi or other major cities of the region when

night falls homeless people swarm on pavements to rest their skimpily clad bodies for the night. Women sleeping scantily clad are subjected to molestation and their 'indecent exposure' only gets them into social, moral and legal trouble all the time. This is not a melodramatic portrayal Bollywood style: It is a sordid reality that has begun to anger many in all of our countries. And most of the angry are also the young.

And those among the young whose anger has turned to rage want to know what justice are we talking about in our part of the world: what is this liberal justice that talks of the rule of law and of equality before the law, but is powerless to give the deprived and marginalized their self-respect, dignity, and sense of decency. As the destitution and squalor increases, the angry get angrier, and finally there is an explosion. And we have that now. And angry people usually grab at the first hand that offers something, even if that hand is tainted with its own vested interest. In this I include political and religious interests. Political and religious interests are using the angry, the young and the ignorant as fodder for their ends.

That has begun a fresh circle of responses and counter responses: the labeling game has begun. Those who strike terror are called terrorists. To combat them we build up anti-terrorism: new offences are created on our statute books - they are called anti terrorism laws. Terrorists adopt ideologies and call them beliefs, and we combat them with further statutes and enactments and call them national security laws. And the game between the state and the society goes on and on. I for one do not know who has failed whom.

But this I do know: If I were as miserable, impoverished and destitute as the millions we all see around I cannot vouch for what I might do to sustain at least my spirit. We are waging a massive war against terrorism with vehemence and single-mindedness. We are fighting fundamentalisms because we believe they are destroying the fabric of society. Which is true.

But what about the war we need to wage on poverty and degradation? Is the stark poverty that goes on and on and on, not destroying the fabric of our society. How come we wage only half-hearted wars on poverty? Is it because our (the privileged people's) way of life remains unaffected? Why are we not as enraged about the sheer degradation around us as we all were when 11 September happened?

Ironically many of us who have been trying to better the formal institutions of justice and ensure equal justice through those institutions have realized what a sham that effort can become. It can turn into a sham because we can get away with tinkering exercises and call them reforms; we can get acclaim and awards but we know that there is no change for those who haven't budged an inch from where they were fifty years ago!! I for one am totally ashamed of that grim reality.

And this connects in very real terms with our present penal reform agenda. Penal reform (which is the reform of all the institutions that deliver justice) can really occur best when the public gives it support. As things stand the general public is only selectively interested in the reform of criminal justice

institutions: and least of all in prisons. They know that prisons are places where there is a concentration of the marginalized (scum) of our society. The better off don't go to prison (by and large). They *do* go to the Court so there is a clamour for the reform of the Court machinery: The welloff do also sometimes have brushes with the police, so police reform is also advocated. But prison – you and I are unlikely to go to jail for criminal behaviour. Prisons are places where all the people that were on the margins *outside*, are now *inside.*

I am trying hard to advocate that the face of justice has to start being seen on our streets. We have had some illuminating thoughts from penal reformers about the vital and essential relationship between poverty reduction and crime prevention and we need to work that through in our programmes of penal reform NOW. Baroness Vivien Stern has provided a valuable approach to this issue in her paper on the theme of crime prevention and poverty reduction. And the Department for International Development (UK) has taken stock of these views in their strategies for access to justice for developing countries.

The present attitude of most people appears to be that they don't want to know the reasons why large chunks of our population are the scum of the earth, and nor do we want to know the reasons for their offending: that they are scum and ostracized by society is reason enough to further ostracize them; and prisons seem a great way to do that. It is a little like nineteenth century England where the kind of people you did not want to see on your streets were put in warehouses.

But who should take responsibility for the children on the garbage dumps, and the women who are battered and for the young who have nothing to do because they were never educated. I think some of this would need to be reflected in our deliberations if by access to justice we mean real access and real justice. We need to take responsibility here and I believe we are here to commit ourselves in some way to initiatives. Some of the initiatives undertaken by PRI might be briefly recounted here as PRI and its regional partners in Bangladesh, India, Nepal, Pakistan and Sri Lanka all make their contributions to what can be done**:**

- There has been (as there needs to be) a *strengthening* of cooperation and coordination. That I think is extremely crucial—that we interact healthily and intensively with each other.

- PRI has sought to develop an exchange of good practices on alternatives to imprisonment or non-formal justice across the whole region and I think we need to spread this. There have been exchanges between countries that have been put into practice in the past two years. For instance, delegations from Nepal went to Bangladesh to learn about *mediation*. The Nepalese practitioners went to India to learn about the *open camps* in Rajasthan or India's version of open prisons and they went to Sri Lanka to learn about open prisons and *community service*. A delegation from the African countries of Kenya and Malawi came to India during the course

of this year to again learn about how open prisons in Rajasthan function. This was all enabled and put into place at the behest of PRI.

- PRI has worked and is working towards exchanges of skills and knowledge across the whole region and this is a very important facet that needs to be expanded during our deliberations. Our Nepali NGO partners have carried out training for prison staff for instance in Russia and Kazakhastan. Indian and Nepalese trainers are here in Dhaka to facilitate the regional training of trainers programme that will be carried out immediately after this Conference.

- The strengthening of international standards, prevention of violations of human rights and the spread of good prison practices has and is being constantly promoted: through training for prison staff from superintendent to warders (carried out in India and Bangladesh and in Pakistan through mobile teams of trainers), in prison-based training workshops and the regional training of trainers, and also through amendments in legislation.

- PRI has laid particular emphasis on the improvement of prison conditions in keeping with international standards. Provisions of legal aid for instance in Nepal and in Pakistan, the provision of mental health and care for women, the care of juveniles - all these are programmes that are being sought to be expanded towards this end.

I think PRI is struggling hard to highlight the fact that criminal justice systems all over the world are in crisis and that jails are usually used as dumping grounds for all those who are in conflict with the law (barring the rich and the powerful. In almost all the countries of the world prisons are over-crowded (with under-trial prisoners) and the judicial process is enormously slow. We all know that, and the practitioners give us several reasons including that of scarce resources. We also concede the high percentage of small-time offenders. Here is where the PRI agenda on initiatives to work for alternatives comes in--that these small-time offenders do not need to be in prison at all. There are other ways of dealing with these offenders such as Community Service.

So what are the future programmes that we should like to see? Prison and penal reform today has two interrelated priorities: (i) reducing prison populations and (ii) promoting alternatives. These are the two themes that should underlie most of the discussions even as they relate to under-trials, women and juveniles.

A vital feature of PRI's work needs to be underlined at this point: the intention to interact as closely as possible with the government agencies that are responsible for the provision of justice. We are also keen to establish that there are non-formal mechanisms and alternative dispute resolution mechanisms for which

Bangladesh in particular has given us very worthy replicable models that should be given a closer look and elaborated upon for spreading in the region. These would be addressing the problems of overcrowding and under-trials in our system.

PRI's future work and reform agenda on these categories is aimed at being better informed, with a realistic perspective and better knowledges and understandings of the context.

I think the basic thing that we want to remind ourselves before we proceed further is that PRI and its reform schemes are founded on the right to human dignity and equitable justice for the offender *and* the victim. Often programmes can run into trouble if it is believed that the victim has been forgotten. It should be our effort each time we put in place a programme for reform to remind ourselves about the reaction of the victim, because how we handle those who violate the laws needs to be addressed to restore balance in society. It has the potential to be done justly, or unjustly. It can be done with bias, with discrimination and prejudice. And in particular when we talk about women, under-trials and juveniles it may be that we want to do it justly, but we need to be very cautious that we do not end up doing it unjustly. This can happen because our societies in this region are very hierarchical and very unequal and we have to make doubly sure that when we talk of *equality before the law* we do not almost imperceptibly allow all the inequalities of society to get woven into the formal system either in the promulgation of laws or in the handing out of justice. I am sorry I am being presumptuous that I am talking about all this in the presence of such eminent members of the judiciary but it does happen-- that we do take all the inequalities that exist outside in society on board in the institutions that deliver justice.

At no point does Penal Reform International or any of its regional partners believe that they are the instruments through which all of these reforms will be implemented. That is not what it's about. It is eventually the responsibility of the state. The society handed over, mandated the state to perform all of those functions that relate to the delivery of justice. It is not our endeavour to replace the state. It would be presumptuous for any group within society to think that would be possible.

I think there is a basic argument at the heart of all the work that we assembled here have committed ourselves to do and that is that basically *Penal Reform International* is an international NGO. All its partners in the region (BLAST, ASK, MLAA, PRAJA, CVICT, Advocacy Forum, HRCP, AGHS, CHA) are all NGOs—non-government organizations. And we can and do intend to assist and cooperate with the state and we do intend to tell the state when it goes wrong that there *might be another way*. And, therefore, this is really also a reminder to the state agencies that we are there to help, we are there to be called upon whenever required and that there are things happening all over the world in the area of penal reform and access to justice that need to be taken cognizance of especially in the societies in developing countries that cannot neglect the relationship between access to justice in institutions and in society. Therefore, I beseech, more than the

NGOs who in any case we take as given as committed to the cause, that the State agencies should call upon our help, should seek our cooperation and enable us also to cooperate with them whenever and however possible. That is what Penal Reform International is about, that is what this Conference is about and that is what all the partners that are helping Penal Reform International in every region of the world are seeking to do - work within the state parameters with a full commitment to human rights initiatives.

****

Regional Cooperation in South Asia for ensuring human rights in penal reform

****

Justice J.S. Verma,
Chairperson, National Human Rights Commission
of India and Former Chief Justice, India

It has been a privilege to have been at PRI's first Regional Conference on Penal Reform in South Asia in Kathmandu in 1999, and to be here at the second Regional Conference in Dhaka where we are assembled to take stock of the work done and to set ourselves further goals for accomplishing tasks that badly need doing in the realm of penal reform.

I would like to come straight to a few things which I think need to be underscored at the inaugural session. While there is a need to be more focused while we discuss our programmes for better access to justice, the focus having been set out to be under-trials, women and children, yet at the same time I would like to observe that unless we take a holistic view of the entire situation it may not be possible to do justice to a particular area alone. The areas of under-trials, women and juveniles are closely related to the whole which means that we have to go into what really are the causes that have led to the present problems and what is it that prevents us from carrying out the solutions that we agree on again and again.

We need to remind ourselves of two maxims. The first is related to what the United Nations Charter tells us of the aims that were envisaged for its role when that august body was first formed: the United Nations Charter aimed at saving succeeding generations from the scourge of war and the ugly human rights violations that had occurred as a result of the madness of many, and the aim was world peace given the devastation and horrors of the Second World War. That was uppermost in the minds of everyone who was working towards a better world.

The second maxim comes also from the same period when Mahatma Gandhi said that peace never comes out of a clash of arms: It comes out of justice lived and done. I am trying here to establish a connection between justice and peace, a connection that was being emphasized at that critical moment of the history of all of us. I seek to reiterate this connection because when we talk of access to justice, the word justice must be understood in its widest and most wholesome form to encompass as much as possible. If justice exists in each dimension of our lives the causes of conflict and the causes of the humiliation of people would be reduced considerably. Another facet of this was also emphasized by Mahatma Gandhi when he said that it was always a mystery to him how anyone could actually feel a sense of achievement in the humiliation of his fellow beings.

Now, if we remember these two maxims all the time during our deliberations we may be closer to the solutions we seek for our problems, within the nation and also outside it.

I feel particularly pleased about the joint and cooperative effort that is being made by so many organizations of the South Asian region under the help and guidance of Penal Reform International. They have been involved for quite some

time in this cooperative effort and the reason is very obvious: we need to address these problems immediately and we need to address them collectively. The justice that we seek is an urgent need and cannot be postponed. Our problems in the region are linked to it and we cannot run away from that linkage.

Fifty-five per cent of the world's poor live in this region and as Dr. Shankardass has reminded us most of them survive on less than one dollar a day! Out of a world population of 6 million 2.8 million survive on two dollars a day of whom 1.2 million live on less than 1 dollar a day! This is the magnitude of poverty. Prof. Amartya Sen has spoken of *the three unfreedoms—poverty, illiteracy and malnutrition*.

Poverty is the cause of all kinds of deprivations and when there is deprivation all around then naturally the marginalised get more marginalised and the disadvantaged get more disadvantaged. Under-trials in prisons, women and children naturally become greater victims of the deprivation which is in a large measure being faced by everyone because of their greater vulnerability due to certain economic, social and cultural factors.

If the concept of justice is properly understood and addressed and we are able to synchronise the heart with the mind and our psyche removes the causes for inflicting humiliation on someone else and not respecting the human rights of others we might at least be a little nearer the justice we so desperately need.

The Vice Chairperson of PRI mentioned the event of September 11. It is perfectly true that since that event it has not only become unfashionable to talk of human rights, it is regarded as risky. One is likely to get labeled and categorised. And yet we know that it is precisely in these difficult times that the need to remember human rights and respect them is greatest because the danger to human rights is more when people seem to think that the respect for human rights is not consistent with national security or the security of everyone.

The event has assumed importance in the fight for human rights because a tussle seems to have emerged between human rights for people, and the integrity, unity and security of nations. I should like to illustrate through an example that there really is no tussle if the two goals are properly pursued. The Preamble to the Constitution of India underscores that human rights (defined as the dignity of the individual) and the unity and integrity of the nation are not incompatible concepts. These are concepts which not merely tend to exist they must co-exist. The preamble of the Indian Constitution holds out the promise of justice, equality, fraternity and the dignity of the individual while assuring the unity and integrity of the nation – they have been put together because they are considered as complementary. The reason that is spelt out in subsequent articles is the obvious one that a nation is a sum of its individuals. An individual too is something only within the collectivities of which he/she is a part and the nation is one such collectivity.

Accepting this as a basic fact, and a basic philosophy, and synchronizing it

with the will to ensure that this should be pursued as a goal can bring one nearer to some of the aims that elude us. The concepts of punishing, and of the reasons for punishing including the deprivation of liberty that that punishment entails, would all be understood better: that being deprived of that valuable constituent of living - *liberty* – is the big punishment that has been agreed by the law and the Constitution. Documents like constitutions that are used for supporting our claims to freedoms when these are violated, are the very documents that suggest how important freedoms and liberties really are. If offenders are deprived of even some of these liberties and freedoms it is punishment enough. Punishment does not require the violations of human rights and dignities of offenders.

Prison reform within a penal reform agenda requires a close look at what (in terms of rights) an imprisoned person is permitted and allowed (rather than simply what he is NOT permitted or allowed). All this needs to be worked through and none of it really need clash with the rights of the victims. To say 'what about the rights of victims' is therefore a wrong question to pose. The rights of the victim are the reason why the prisoner has been incarcerated in the first place: that is the punishment on the books and that is what he is given. That is the reason why he faces a trial and if convicted is found guilty.

It is not accidental that one of the prime focuses of this Conference is **under-trials**. An under-trial is a person in whose case guilt has not yet been proven. All of us know that the percentage of under-trials in India is on an average 75 per cent—three-fourths of most prison's population. They are the reason that prisons are overcrowded and overcrowding is one of the reasons (among others) why facilities are inadequate and poor. Poor inadequate facilities means violations of human rights of people who may not even need to be in prison. Would it be justice if they were not guilty and were kept incarcerated for the kinds of periods that we have them in there? Is it in line with the justice that we are talking of?

New reasons are created each day for incarcerating people: the latest as we have been reminded is security and integrity of the State threatened by terrorism. Human rights activists are ridiculed for not realising that with terrorism around they are actually concerned about the human rights of imprisoned 'criminals'! The fact is, and we know this, that no human rights activist ever supports terrorists. Terrorism is regarded by one and all as the greatest human rights violation and every human right activist abhors and fights against terrorism. The question that arises at ALL times is are we not governed by the rule of law? If the rule of law prescribes a certain manner and method in which an accused person has to be dealt with then are we to read into that rule of law something more and deprive the accused person of that which he or she need not be deprived of under the rule of law?

What we eventually have to address is a very fundamental right here: the right to life – the most sacrosanct and basic of all human rights, not derived from any thing else, but a right all on its own. In the International Covenant of Civil and Political Rights Article 4 paragraph 2 the

non-derivable right to life is the very first and receives emphasis throughout the document. Such is the case also with the comments of the Human Rights Committee on Article 4. It is said that whatever you do even to a man who is deprived of his liberty must be consistent with his dignity. This is the basic requirement of the International Standards of the Humanitarian Law. Even security comes under Resolution 1373 of 28 September 2001 after the 11 September attacks on the U.S.A. and it specifically mentions the combating of terrorism in accordance with the rule of law and the International Standards of Humanitarian Law respecting human rights.

So it is not that the rules of the game have altered, or may be altered, because of a certain event. What has changed really is the mind-set, and that is what needs to be taken care of. It has to be constantly remembered that the human dignity of any person in any situation, in any circumstances, is not negotiable. Incarceration places SOME restrictions on those sent 'inside' and NO MORE. These and these alone are what a person in prison can be deprived of. One of the prime principles of the penal system is that ***offenders are sent to prison as punishment and not for punishment.***

I would like to read out to you a passage from a speech of Winston Churchill not known to be very liberal to demonstrate that even he thought on the above lines as Home Secretary more than a hundred years ago. He said and I quote, "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of a country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminals against the state, a constant heart-searching of all charged with the deed of punishment, tireless efforts towards the discovery of regenerative processes, unfailing faith that there is treasure if you can find it in the heart of every man, these are the symbols which in the treatment of crime and criminals make and measure the stored up strength of a nation and are a sign and proof of the living virtue". He may not have been a liberal but he did recognise the principles of a true democracy. In a democratic polity the rule of law is the bedrock of democracy.

Civilised society has always proclaimed that there must be a presumption of innocence in civilised society until a person is found guilty. How then can we decide to deal with an under-trial as if he were guilty and convicted; or hold anything against him except the fact that there is reasonable suspicion of an accusation made against him which may require him to be in custody till the trial is over and it is decided whether he is guilty or not. And this part of the exercise is a part of the administration of criminal justice and if the word justice is associated with it anything that is not fair and reasonable cannot be allowed because it is not just.

In 1952 one of our great judges Justice Vivien Bose laid down the test for justice by using the three simple words—fair, just and reasonable in a case where the question of the interpretation of Article 14 in the Indian Constitution concerning the right to equality was involved. It was at a time when we had cases like *Gopalan* v *State of Madras* around (where the Supreme Court at the time was narrowly

construing liberty in the Fundamental Rights) and Article 14 was being interpreted as requiring only reasonable clarification. At that time in a judgement the *State of Bengal vs. Anwar Ali*, Justice Vivien Bose in a separate concurring judgement said that Article 14 requires every action to be fair, just and reasonable. It was not in Menaka Gandhi's case in 1977 as it is often believed, that these words were used. The concept of justice must include that which is fair and reasonable And this needs to be asked at each stage of the justice process: Put in the context of the penal system too we need to ask the same question: do we find fairness and reasonableness in the penal process. Most of us will answer in the negative.

An argument is often made about why prisoners of all people should be given such attention at the expense of the State. A further one is also made that most of these people are used to such poor conditions outside where they live why should we be so concerned about their well-being. That is lob-sided logic and not the kind that educated enlightened persons should even be tempted to use. The State decides to put people in prison; therefore the State is bound to provide basic amenities commensurate with a human being's dignity and with human decency.

The subject of **women** – the other category that is the special focus of this Conference – is an area that we do not even know enough about. We have little idea about what is really happening to them inside but one thing we DO have to bear in mind is that in incarcerating women one is not punishing just the one woman but an entire family that depends on her, particularly her children. If we say women are the pivots of families our attitude to them when they appear as alleged offenders is certainly not consistent with this approach.

In our capacities as Chief Justices both Justice Anand and I visited some jails: we would like to believe that these visits made some difference. But one experience that I would like to recount is that of a woman from Tihar jail who wanted to know how the judicial system works that she can be in prison for four years and still wait for a verdict. Above all she said how was the system ensuring that the children were not being punished alongside. When she came to the jail she left behind children (a minor girl and a boy) and she had no hesitation in stating that her reports were that the children were already going astray and being neglected. Her husband was busy elsewhere and clearly the family was a broken family.

It is out of such situations too that juvenile delinquency is born: **Juveniles** are another special focus of this Conference and it is a delicate and very sensitive subject. This is an area that needs to be studied with some seriousness and to be tackled with some expertise. Apart from the separate (and special) handling of juveniles at the hands of the justice machinery there is a lot that needs doing about the problem of neglected children. I hope that the futures of children will be debated with the same concern about the futures of our upcoming generations as we have suggested for our women.

The rhetoric of the Right to Life that Article 21 of the Indian Constitution has to be translated into action. **1** This right is about decent dignified living and

about ensuring that the kind of life we are building for people is the kind that ensures decency for families and their futures. We therefore need to keep in mind not only humane treatment of prisoners and protecting their basic fundamental rights we have also to bear in mind what impact the prisoners have on society when they are released. That is in society's interest.

It is also in society's interest to ensure that in combating the crime or violence problem we identify some causes. We need to tackle or combat terrorism, the phenomenon, not individual terrorists. Why is there terrorism? At the moment in trying to eradicate terrorists we are only adding more to the numbers.

I am trying to emphasise through all these examples and illustrations that we need to look at the problems from a different perspective. Incarceration is a delicate issue. So is terrorism - ugly as its repercussions are. To look for boundaries and persons is not enough: we need joint understandings and clearer perceptions of causes. I commend the efforts towards this regional collaboration because notions of sovereignty in many respects have undergone a paradigm shift. We talk of globalisation in areas where it is extreme and not always of much use, like the debt trap in which many countries are caught and international terrorism that is prevalent in so many nations. What we need is globalisation in the rule of law, and in the approach to human rights. We declare that human rights are universal but the fact is that they are not universally respected. Human rights cannot bear the slightest strain. Whenever there is even a minor situation of violation we find the respect for human rights going awry.

As a member of the judiciary and also of the Human rights Commission of India I think I am engaged in complementary roles. The Vice Chairperson of PRI talked of the role of governments and of non-government organisations, and how the two really need to be perceived. In a democracy the people have a participatory role. The role of the people is not merely a sporadic exercise of voting in periodic elections. That certainly is a very important role but the people's role does not end with the announcement of electoral results. It continues throughout, because in a democratic set-up the people have a participatory role of also monitoring the functioning of the institutions of governance and of ensuring that these institutions not only perform as they are required to but are strengthened and are saved from all external pulls and pressures so that they are accountable. This is the participatory role of the people, not merely the majority because today democracy does not mean merely rule of the majority as a result of the electoral mandate. Democracy means a fair representation of all sections of society in policy-making, decision-making, etc. It is this participatory role of the people that has to be there at all times and has to be effective.

Non-government organisations play a very important role in mobilising public opinion and informing the people. Media too is a very important representative of public opinion-- moving public opinion in the right direction and making its presence felt, and enabling the public to play its participatory role in a democracy. NGOs must be perceived as

representative bodies and not as busybodies, interfering everywhere and being viewed as interlopers. Both NGOs and media as collectivities must function with responsibility and spread information and not misinformation. They are arms of the civil society that must behave responsibly to have credibility.

Such bodies, once their bona fides have been established, should be constructively involved in such responsible tasks as visiting prisons and other institutions of society to keep the general public informed abut their functioning. All this falls within the ambit of the discharge of the civil society's participatory role in a democracy and unless we take care of the proper functioning of institutions in a democracy it is not possible to achieve the kind of positive results that we are talking about. I therefore laud the partnerships that are being forged here towards these ends.

In the quest for ensuring human rights whereas it is the State that is primarily responsible for the protection of these rights and accountable for the violation that takes place within its jurisdiction, non-State players can also ensure that there are no violations of people's human rights. This is the emerging principle of human rights jurisprudence. And the judiciary has to be complemented or aided by the civil society and by institutions like the one which I am happy to be heading in India at present—the National Human Rights Commission.

People ask me how do you feel being the Chairperson of the National Human Rights Commission after being the Chief Justice of India and what do you think you can do here. I say that I think I can assist the judiciary to perform its task better and the judiciary can rely on me to report on human rights which in the Court it is not possible for them to do. That was my experience when I was a member of the judiciary. In Court we needed the NHRC to monitor and give reports on the status of human rights so that we felt safe and we could give orders on the basis of the reports. Prison reforms are to a great extent possible through such collaboration.

One could call this way of working "load –sharing". Cases of the mentally ill, of child labour, of bonded labour, of starvation deaths and so many other areas, where action is needed to improve the situation the NHRC is able to assist the Supreme Court which in turn is then able to pass orders and the protection of human rights is sought through this process of complimentarity. I was happy that when I was in Nepal in 1999 there was talk of a National Human Rights Commission being set up there and I was asked of its value and achievements and could assure the government functionaries there that it was the most worthwhile thing we could do. Nepal set up its Human Rights Commission. We read in the Dhaka newspaper that the Chief Justice of Bangladesh had laid due emphasis on human rights and had expressed some thoughts about a Human Rights Commission. I can give some assurance that the work of Courts is facilitated and the work is shared when there is a responsible Commission to look into human rights in a democracy. With NGO participation as mobilisers of civil society the institutions of the State can deliver better. We have found this to be the case in India. Accountability is

ensured when we make room for civil society's participation and recognise it. Laws are made more effective and we do not need new laws but the effective responsible use of the existing ones that are perfectly capable of handling more situations than we imagine, including terrorism.

Let me end by reminding you of just one sentence from the United Nations Secretary General, Kofi Annan's recent human rights message.

'We must be guided by one clear principle beyond any other and that is respect for the International Rule of Law'.

Once this is achieved everything will fall in place. Without going into the United Nation's instruments on the subjects under discussion which I am sure you will be discussing I decided to suggest some areas of deliberation that I felt should agitate your minds: I am very sure this is going to be a meaningful Conference and each one of us who has come here to participate in it will go back better educated at the end of this exercise. I am quite sure that I am going to learn more before I leave.

****

Our major concerns

****

Justice Mainur Reza Chowdhury
Chief Justice, Bangladesh

I am honoured to be here at the Inaugural Session of the Second South Asia Regional Conference on **'Access to Justice and Penal Reform'** organised jointly by Penal Reform International and Bangladesh Legal Aid and Services Trust.

The administration of justice is perhaps one of the most credible reflections of good or bad governance. Ensuring dispensation of justice by State mechanisms is a mark of the State's accountability. It is, therefore, fundamentally crucial for those involved in the field to discharge their function to the best of their ability and sincerity.

Penal reform is one important component of administration of justice. It calls for the elimination of unfair and unethical treatment in all penal measures. The first Conference on Penal Reform in South Asia took place in November 1999 in Kathmandu against the backdrop of a widespread concern that the agencies of the criminal justice in the entire region were not meeting their specific objectives and the objectives of justice generally. Police, courts and prisons were all seen as needing both reform and better coordination to meet the needs of social order and justice.

The legal basis for penal reform is enshrined, like in some other countries of the South Asia Region, in the Constitution of Bangladesh. Article32, 33(1) and in particular Article 27 speak about fair trial and dispensation of justice. Article 27 declares that every citizen is equal before the law. The major problem in the realisation of this fundamental right of citizens lies in the high illiteracy rate and lack of legal access. Particularly the financial inability of a big section of citizens to avail themselves of legal services circumscribes their chances to be equally treated before the law. The legal aid programme in Bangladesh started in the 1970s, and in turn led to the promulgation of a Legal Aid Law in 2000. Under this law, the National Legal Aid Organisation and its District Committees started extending legal aid to the poor and backward sections of the society. A number of NGOs including BLAST have been involved for many years in these efforts.

The volume of backlog of cases, the loopholes and complexity in the procedural laws and case management system and wide-spread corruption and malpractices are among a number of factors which delay and deny access to justice for many. The court machinery is overloaded, slow and not readily accessible to all.

The consequences are alarming. The majority of the prison population in this country is being held as pre-trial prisoners. Many of these pre-trial prisoners may have been the victims of fictitious and false cases; many may be imprisoned for a period more than the length of punishment of their yet-to-be proved crimes.

Another concern in penal reform is the prisoners' treatment during the period of their confinement. The Law Minister of

Bangladesh has just related the horrific situation that exists in our prisons. We all know that one fundamental principle of justice and good governance is to recognise that a person is sent to prison **as** punishment and not **for** punishment as Justice J. S. Verma has pointed out. But, unfortunately, our jail systems are being used for inflicting more punishment by denying the minimum standard of living and by treating the prisoners in a manner devoid of human dignity.

For example, nearly 11,000 prisoners are imprisoned in the Dhaka Central Jail that has a capacity of accommodating only 2,632 prisoners. The same situation is known to be prevailing in the Gazipur jail. In many respects including food, shelter and other basic needs of life this prison population is not treated in a manner that conforms to the 1955 United Nation's Standard Minimum Rules on the treatment of prisoners.

This matter was taken up in Bangladesh only in 1978 when the government formed a Jail Commission to suggest measures for reforming and modifying the prison system. The nine-member committee chaired by a senior judge (Justice Munim) of the Supreme Court in 1980 presented a report comprising 181 recommendations. Only a very few of them have been implemented in the last 2 years.

I do not think I need to emphasise the need for penal reform in Bangladesh, which is not much different from the need in other countries in the South Asia region. Delay and distortion at the pre-trial stage, backlogging of cases, limited access to justice, and poor conditions in the prison system are I believe more or less the same in all countries of South Asia. Considering their geographical proximity and common legal system, political background and culture the countries of the South Asian Region could well share a common approach to take steps and measures for penal reform. This was also recognised at various forums including the First Conference on Penal Reform in South Asia in 1999.

I would like to pinpoint here some important issues of penal reform that I think need urgent attention.

The proper functioning of the police department is instrumental in ensuring quick disposal of cases and also fair trial. In order to create a congenial atmosphere for the police department to work effectively, various steps may be taken including insulation of the police from the executive, separating the investigating and prosecution functions of the police, reviewing and modifying the powers of the police to arrest and detain, training and motivational programmes, improving the pay structure and service conditions. An independent and separate body for monitoring and assessing the performance of police may be installed as a watchdog body.

The coordination of criminal justice system comprising the police magistrate and support staff can help reduce denial and delay in justice at pre-trial stage. To that end necessary laws and regulations need to be simplified, amended and modified. Following the 'presumption of innocence' principle special regimes needs to be instituted for pre-trial prisoners, such as family and other visits and constructive voluntary activities.

Watchdog institutions like the Ombudsman and Human Rights Commission, established with sufficient autonomy and authority, are likely to ensure access to justice and reduce the backlog of cases. These, I believe, are under consideration of the Bangladesh government. Persons who are detained in prisons for long years without specific allegations should not continue to be detained. In collaboration with the Home and Law Ministries, a system of paralegal workers may be created to inspect and help the prisoners.

In view of the principle that justice delayed is justice denied, measures like the establishment of more Courts, training and motivation of judges, lawyers and support staff, and improving the case management system through computerisation need to be taken.

Where appropriate, as in the cases of first time offences of petty crimes, community service orders and paroles can be built into sentencing options. To assist in this process the working of this alternative in other areas can be observed and a scheme suitable to the particular region in question formulated and tried.

Prison rules and regimes should aim at helping prisoners to resettle and integrate in the community after the completion of their prison sentences. Prison rules and regimes should not limit prisoners' freedom, external social contacts and opportunities for personal development. In order to improve the condition of prisoners, the District Judge, District Magistrate or a suitable government nominated representative must regularly inspect prisons and it may be even better to follow the example set by Justices Verma and Anand for Chief Justices to visit the prison occasionally. Training and sensitisation of prison staff needs to be carried out regularly. Civil society groups may be included in prison reform works.

Special treatment is necessary for special groups of prisoners such as juveniles, women, foreigners, mentally disturbed and addicted persons. Female medical staff and prison officials should be inducted for female prisoners. The conditions of so-called 'safe custody' have to be improved. Instead of putting them in safe custody located at the prisons, arrangement should be made to put them in shelter homes under the supervision of the Social Welfare Ministry.

Considering the susceptibilities of juvenile delinquents to the influence of ordinary criminals with whom they are compelled to stay under the present prison system, measures should be taken to ensure that they are offered a separate corrective and congenial atmosphere so that they can come back to normal life in the society.

Alternatives such as non-formal justice through mediation and conciliation between conflicting parties should be extended to ensure inexpensive and generally reconciliatory and restorative justice. Offences like assault and battery, neighbourhood disputes, offences relating to movable property, family disputes, dowry demands need to be resolved through mediation and conciliation.

These reforms are long overdue. The enormity of the sufferings of the poor

and the helpless prison population in our societies makes reforms imperative. We need to ensure that justice is accessible to all in society, irrespective of class, creed and sex, by establishing and maintaining an efficient, transparent and accountable penal system.

With so many eminent persons from South Asia I am sure that this Conference will give guidance and prove more than fruitful. I appreciate the efforts of all those who have come from other countries and wish them a pleasant stay in Bangladesh.