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BANGLADESH RULE OF LAW ASSESSMENT

April 6, 2011

This publication was produced for review by the United States Agency for International Development Mission in Dhaka, Bangladesh. It was prepared by Millennium Partners under its Building Recovery and Reform Through Democratic Governance Contract DFD-I-00-06-0028-00 Task Order AID-388-TO-11-00006

BANGLADESH RULE OF LAW ASSESSMENT

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USAID/Bangladesh

April 6, 2011

Task Order No. AID-388-TO-11-00006

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ACRONYMS

ACC	Anti-Corruption Commission
ADB	Asian Development Bank
ADR	Alternative dispute resolution
BLAST	Bangladesh Legal Aid and Services Trust
BRAC	Bangladesh Rehabilitation Assistance Committee (original name, now BRAC)
CPF	Community Policing Forum
DANIDA	Danish International Development Agency, Ministry of Foreign Affairs, Denmark
DC	Deputy Commissioner (senior administrative officer at the district level)
DCHA	Democracy, Conflict, and Humanitarian Assistance Bureau, USAID
DFID	Department for International Development, United Kingdom
DGFI	Directorate General of Forces Intelligence (military intelligence unit)
EU	European Union
GIZ	Deutsche Gesellschaft für internationale Zusammenarbeit (German International Cooperation Agency)
GOB	Government of the People's Republic of Bangladesh
ICITAP	International Criminal Investigative Training Assistance Program, US Department of Justice
INL	International Narcotics and Law Enforcement Bureau, US Department of State
JATI	Judicial Administration Training Institute
JSSD	Justice Sector Strategy Development Project
KOICA	Korean International Cooperation Agency
LL.B	Bachelor of Laws degree
LL.M	Master of Laws (advanced degree)
MLAA	Madaripur Legal Aid Association
MLJPA	Ministry of Law, Justice and Parliamentary Affairs
MWCA	Ministry of Women and Children Affairs
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
OPDAT	Office of Overseas Prosecutor Development and Training, US Department of Justice
RAB	Rapid Action Battalion
SIDA	Swedish International Development Agency
TAF	The Asia Foundation
UNDP	United Nations Development Program
UP	Union Parishad (local council)
USG	United States Government
USAID	United States Agency for International Development
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

Bangladesh's path to sovereignty was marked by political struggle and violence. The new nation of Bangladesh emerged from conflict in 1971 with many challenges and few resources. The country has experienced impressive development progress, especially over the past two decades. However, advances in economic and social conditions have taken place despite persistent low rankings on indicators of good governance. There is broad agreement that sustained development progress will require that Bangladesh improve the quality of governance.

Bangladesh's legal system largely derives from 200 years of British rule. The colonial authorities established a structure of laws and judicial institutions that continue to shape the present day administration of justice. Upon independence, the new government provided in its constitution for the preservation of previously existing laws.

The environment for rule of law development in Bangladesh reflects the attitudes, interests, and expectations of those who operate and use the justice system and those who are affected by it. Principal stakeholder groups, with varying interests and incentives, include the government, the judiciary, and civil society.

While the justice system is based on a normative framework derived primarily from English common law, it also recognizes customary law, as applied through the *shalish* system of informal resolution of disputes in villages. A hierarchy of courts modeled after British practice hears civil and criminal cases. Under the Constitution, the Supreme Court has the authority of judicial review of laws and the power to declare them unconstitutional.

A significant issue for the courts in Bangladesh is the substantial backlog of pending cases. This backlog is necessarily a serious impediment to timely access to justice and a burden on the economy and society. Especially poignant, the long delays in deciding pending criminal cases are cited as a principal cause why the majority of those incarcerated in Bangladesh's overcrowded prisons are awaiting trial rather than serving sentences.

Alternative dispute resolution is gaining ground in Bangladesh. In addition to the traditional *shalish* mediation process in villages and expanded community mediation efforts by several non-governmental organizations (NGOs), the Civil Procedure Code encourages court-annexed mediation of civil disputes. Also, the business community is making increased use of arbitration under Bangladesh's modern arbitration law.

The justice system also includes the legal profession, legal agencies of the government, independent commission, and the institutions of civil society involved in legal services for the poor, anticorruption, human rights, and related research and educational activities.

The fundamental challenge for development of the rule of law in Bangladesh is the polarizing competition between the two major political parties. This polarization has a corrupting influence on the courts, as on other public institutions. The challenge of unrestrained political confrontation manifests itself in erosion of judicial independence and accountability, a lack of efficiency and integrity in the justice system, widespread impunity and violations of human rights, and inadequate access to justice and unequal protection of the law:

- History has witnessed a pattern of actions by the executive to weaken the safeguards of judicial independence set forth in the 1972 constitution. The Supreme Court has vigorously defended fundamental constitutional principles in landmark decisions. However, the Court has not developed needed institutional capacity to manage the Judiciary and the executive continues to exercise inordinate influence.
- Recent laudable efforts by the Chief Justice have addressed the efficiency of judicial case management. However, opinions differ widely on how to address issues of complex procedures, lax case management, deficient information management systems, insufficient personnel, and inadequate physical infrastructure. Efficiency issues are also evident beyond the courts in the investigation and prosecution of criminal offenses.
- International monitors have reported numerous instances of extrajudicial executions by the Bangladesh security forces. Prosecutions are rare in these cases and, despite a government “zero tolerance” policy, law enforcement and military officers have virtually complete discretion. The National Human Rights Commission has not undertaken either investigations or prosecutions.
- Deficiencies in the justice system have become a source of general public dissatisfaction. But the limitations are especially injurious to the poor. A broad effort to overcome inequality could begin with reinvigoration of the government’s legal aid fund as a foundation on which to build trust and cooperation.

Current programs of international cooperation recognize a history of previous efforts that have not succeeded in helping Bangladesh to achieve sustainable reforms. Over the years, there has been a mounting appreciation of the need for effective policy leadership, good governance and institutional capacity, and public demand for and expectation of improved performance. Newer development cooperation programs are designed with increased attention to aid effectiveness principles of local ownership, alignment, harmonization, managing for results, and mutual accountability.

The World Bank is no longer active in the justice sector after having completed a major project that produced no significant positive results. Principal donors include the Asian Development Bank, the Danish International Development Agency (DANIDA), the United Kingdom’s Department for International Development (DFID), European Union (EU), Germany’s Deutsche Gesellschaft für international Zusammenarbeit (German International Cooperation Agency; GIZ), and the United Nations Development Program (UNDP). UNDP plays a lead role in coordination and policy dialogue, managing a diverse array of five justice sector programs.

The United States has been engaged in the justice sector with a primary emphasis on law enforcement issues, including issues of counterterrorism, trafficking in persons, and human rights.

The United States Agency for International Development’s (USAID’s) response to the primary challenges described above might best be directed toward enhanced judicial self-governance and independence as well as support for expanded access to justice, especially for the poor. These two potential areas for cooperation should be explored with guiding principles in mind that will help assure that any USAID investment in this high-risk area has a reasonable prospect for achieving worthwhile and sustainable results.

Support for judicial self governance should encourage self-examination by the Judiciary of its performance, priority needs, and aspirations. Such self-examination can provide the basis for a strategic approach to achieving institutional excellence and adherence to core values.

Support for improved access to justice should begin with support for the Bangladesh government's legal aid program, with engagement of interested think tanks, NGOs, and universities in a broad coalition. The new USAID community-based policing program can be a valuable complement in legal empowerment of the poor and disadvantaged. For the longer term, additional measures should be explored, such as institutional strengthening of civil society organizations and support for improved legal education.

Both these potential areas for achieving sustainable impact in the context of good governance and democratic consolidation need to be approached cautiously, with recognition of the risk of failure. They must be informed by experience. The assessment team has identified a number of questions that USAID will need to address in broad consultations with stakeholders before proceeding. The USAID dialogue should be complemented with diplomatic engagement and coordination with the international community.

BANGLADESH RULE OF LAW ASSESSMENT

I. INTRODUCTION

This report contains a targeted analysis of the current status of the rule of law in Bangladesh and an assessment of the primary opportunities and constraints affecting the development of the rule of law. USAID Bangladesh requested this assessment to support informed decisions on the development of a strategy and to identify priority areas that could benefit from USAID assistance within the framework of US Government priorities in its relations with Bangladesh.

The report describes the background context and the purpose and methodology of the assessment. Following the guidance set out in the USAID Guide to Rule of Law Country Analysis,¹ it then examines the Bangladesh justice system, principal challenges, current programs of international support, and recommendations for consideration by USAID.

The evaluation took place in January-March 2011. The statement of work is included in Annex 1. The evaluation team consisted of Natalija Stamenkovic (team leader), Gary Collins, and Cynthia Farid, accompanied by Keith Crawford, from the Democracy, Conflict, and Humanitarian Assistance (DCHA) Bureau of USAID Washington. Biographical summaries of the team members are found in Annex 2. A bibliography of principal sources for the team's research is in Annex 3. Annex 4 includes a list of persons interviewed in the course of the evaluation.

A. The Country and Its People



Bangladesh is located in the northeast of the Indian subcontinent, at the northern edge of the Bay of Bengal. Its land boundaries are with India to the west, north and east, and with Burma to the southeast. The national territory of about 144,000 square kilometers (about the size of the state of Iowa or of England and Wales) is mostly a flat, alluvial plain. The land is traversed by the confluence of the Ganges, Brahmaputra, and Meghna rivers and is subject to extensive flooding during annual monsoons.

Bangladesh is the world's most densely populated country (leaving aside the urban enclaves of Malta, Monaco, and Singapore), with a population exceeding 160 million.² It has the seventh largest population of all countries and the fourth largest Muslim population (after Indonesia, Pakistan, and India).

¹ "Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework: A Guide for USAID Democracy and Government Officers," January 2010, http://pdf.usaid.gov/pdf_docs/PNADT593.pdf.

² With a population of 160 million, Bangladesh has a population density of 2,878 persons per square mile (i.e., 144,000 sq. kms. = 55,598 sq. miles).

While Bangladesh is experiencing urban migration, about 70 percent of the people still live in rural areas. The population is predominantly of Bengali ethnicity; almost 90 percent of this population state they are Muslims, while an estimated nine percent declare themselves Hindus and the remaining one percent Buddhist, Christian or members of other religions. Life expectancy in Bangladesh is about 68 years, with approximately 80 percent of the nation's population under the age of 40. Current per capita income is about \$US 750. Life for the average Bangladeshi is a continuous struggle to overcome economic hardship, with about 40 percent of the population living in poverty. Adult literacy is estimated to be approximately 60 percent. Although male literacy is slightly higher, Bangladesh has now achieved gender parity in school enrollment, which is diminishing the gender-based discrepancy in literacy.³

Bangladesh's path to sovereignty was marked by political struggle and periods of intense violence—especially at the time of partition and independence from British rule in 1947 and again in the 1971 conflict for independence from Pakistani sovereignty. The new nation of Bangladesh emerged in December 1971 with many challenges and few resources. Its initial 20 years were characterized by recurrent political upheavals and instability. However, especially over the past two decades, the country has experienced impressive development progress. GDP has tripled, with a doubling of per capita income and dramatic gains in life expectancy, poverty reduction, literacy, and child survival. Bangladesh is among the top performers in human development and is on track to meet several of the Millennium Development Goals.⁴ The economy continues to grow at a rate of close to six percent and is rapidly evolving as the rate of growth in the industrial sector (primarily in apparel assembly) is more than twice that of agriculture.

B. Improving Governance

Advances in economic and social conditions have taken place despite persistent low rankings on indicators of good governance. For example, the World Bank Governance Index places Bangladesh in the bottom 25 percent of countries for political stability, government effectiveness, regulatory quality, and control of corruption, with deterioration in all these categories from its rankings in 1998. The World Bank score for rule of law is only slightly better, at the 27th percentile.⁵ A comparison of Bangladesh's performance with neighboring countries and others on the World Bank Index is summarized below in Table 1.

³ There is some variance among national and international sources of economic and social data about Bangladesh. See the website of the Bangladesh Bureau of Statistics, <http://www.bbs.gov.bd>; World Bank Country Data for Bangladesh, <http://data.worldbank.org/country/bangladesh>; World Fact Book, 2011, <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>.

⁴ See "MDGs and Bangladesh," UNDP, <http://www.undp.org.bd/mdgs.php>. A recent study estimates that more than 40 million people in Bangladesh will escape from extreme poverty in the period 2005-2015. Chandry, Laurence, and Geoffrey Gertz, "Poverty in Numbers: The Changing State of Global Poverty from 2005 to 2015," Brookings Institution, January 2011, http://www.brookings.edu/papers/2011/01_global_poverty_chandy.aspx.

⁵ See "Country Data Report for Bangladesh: 1996-2009," in *Worldwide Governance Indicators*, 2010, World Bank, <http://info.worldbank.org/governance/wgi/pdf/c20.pdf>. See also the Millennium Challenge Corporation's Bangladesh Scorecard for 2011, which compares Bangladesh with other low-income countries, <http://www.mcc.gov/documents/scorecards/score-fy11-bangladesh.pdf>.

Table 1: State of Governance Comparisons

Country	Government Effectiveness	Rule of Law	Corruption Perception	Doing Business	GNI Per Capita PPP
Bangladesh	22.7	27.3	22.8	35.0	1,440
India	53.6	16.7	53.3	27.3	2,960
Pakistan	25.6	19.1	22.8	53.6	2,700
Nepal	24.2	24.9	20.6	32.8	1,120
Indonesia	47.4	28.7	43.9	33.3	3,830
Vietnam	45.5	41.6	33.3	49.2	2,700
Nigeria	13.3	11.5	27.8	31.7	1,940
Kenya	32.2	17.7	18.9	48.1	1,570

Source: World Bank Country Assistance Strategy, 2011-2014

This divergence between economic and social progress, on the one hand, and continued political polarization and weak governance, on the other, has been described as Bangladesh’s development paradox.⁶ There is broad agreement that Bangladesh needs to continue, and even accelerate, its economic and social progress over the next decade if it is to realize the aspiration of becoming a well governed, democratic, middle-income country of opportunity by 2021, the 50th anniversary of its independence. There is also broad agreement that sustained economic and social progress will require that Bangladesh respond effectively to the challenge of improving the quality of governance.

Highly credible elections in December 2008 have provided a broad base of support for an ongoing transition to renewed democratic governance and, with it, an opportunity for Bangladesh to reform political practices and institutions of governance. Promoting good governance, including a strengthened rule of law, features prominently in the country’s development planning.⁷ The international community strongly supports this objective. In particular, support for pluralistic and responsive governance is a top priority for the United States in its relations with Bangladesh. That priority is reflected in USAID’s request for this assessment of the rule of law.

⁶ See, e.g., Mahmud, Wahiduddin, Sadiq Ahmed, Sandeep Mahain, “Economic Growth and Governance: The Political Economy Aspects of Bangladesh’s Development Surprise,” Commission on Economic Growth and Governance Working Paper 22, 2008, <http://www.growthcommission.org/storage/cgdev/documents/gcwp022web.pdf>; World Bank, “Governance and Growth: The Bangladesh Conundrum,” in *Bangladesh: Strategy for Sustained Growth*, July 2007, pages 125-136, <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/Publications/44813-1185396961095/4030558-1185396985915/fullreport.pdf>.

⁷ See “Strategy II: Promoting Good Governance,” in *Steps Towards Change: National Strategy for Accelerated Poverty Reduction II (Revised) FY 2009-2011*, pages 71-77, Government of the People’s Republic of Bangladesh, December 2009; “Economic Growth and Corruption Free Good Governance,” in *Outline Perspective Plan of Bangladesh 2010-2021: Making Vision 2021 a Reality*, pages 12-16, Government of the People’s Republic of Bangladesh, June 2010 (DRAFT).

II. THE CONTEXT FOR RULE OF LAW DEVELOPMENT IN BANGLADESH

A. The History of Legal System Development

While the nation state of Bangladesh is only 40 years old, the people of Bangladesh have inhabited this land for thousands of years. The area that came to be known as Bangladesh was ruled by Buddhist kings for 400 years until it was conquered by Turkic tribes in about 1200 A.D. In the 16th century it was absorbed into the Moghul Empire, which introduced elements of *sharia* into the legal system. European powers arrived in the 17th century and their influence, especially the British, had a determinative influence on the law and the administration of justice throughout the Indian subcontinent.

Bangladesh's present legal system largely derives from two hundred years of British rule. The British East India Company, which had a presence in India dating to the early 17th century, consolidated its control over Bengal in 1757 at the Battle of Plassey. The British East India Company ruled British India under the authority of the British Government for the next century. The 1857 mutiny and ensuing widespread revolt prompted the British Parliament to end that mandate and assume responsibility for the governance of all of India as a Crown Colony.

The Government of India Act of 1858 transferred power and responsibility for Indian affairs to the crown, represented by a cabinet minister, the Secretary of State for India, in London and a Governor-General, or viceroy, in Calcutta. Bengal, including present-day Bangladesh, was governed by a Lieutenant Governor. The British authorities established a structure of laws and judicial institutions that continues to shape the present-day legal system of Bangladesh. Law Commissions developed laws on succession, contracts, negotiable instruments, evidence, transfer of property, and civil and criminal procedure, all modeled on English common law. A series of organic acts established high courts (including one in Calcutta) as well as a hierarchy of district courts, session courts, and magistrates to hear civil and criminal cases.

Within British India, Hindus made up a majority of the population. The idea of a separate Muslim state emerged in the 1930s and gained popularity among Indian Muslims, especially after 1936, when the Muslim League suffered a decisive electoral defeat in the first elections under the 1935 constitution. On March 23, 1940, Muhammad Ali Jinnah, the leader of the Muslim League, publicly endorsed a "Pakistan Resolution" that called for the creation of an independent state in regions where Muslims were in the majority.

At the end of World War II, the United Kingdom moved quickly to grant India independence. The Congress Party and the Muslim League could not, however, agree on the terms for drafting a constitution or establishing an interim government. In June 1947, London declared it would grant full dominion status to two successor states, India and Pakistan. Pakistan would consist of the contiguous Muslim-majority districts of western British India, plus parts of Bengal. These arrangements resulted in a non-contiguous Muslim nation separated by more than 1,000 miles of Indian territory. West Pakistan comprised four provinces and the capital, Lahore (later Islamabad); East Pakistan was formed of a single province.

Both India and Pakistan retained their own Federal Courts after 1947 to function until new constitutions were framed. The India Independence Act of 1947 also provided for a separate High Court for East Pakistan, with its seat at Dhaka. In 1950, Pakistan adopted legislation that

abolished appeal to the Privy Council from the Federal Court of Pakistan. The Federal Court thus became the highest court in Pakistan until 1956, when the High Courts in the provinces and the Supreme Court of Pakistan in the capital were established under a new Constitution. The Pakistani Constitution of 1956 was replaced in 1962, but the judicial structure remained unchanged.

Pakistan's history over the next decade was marked by political instability and economic difficulties. Attempts at civilian political rule failed, and martial law prevailed between 1969 and 1972. Significant revenues were invested in developing West Pakistan and the peoples of East Pakistan began to feel increasingly dominated and exploited by their western compatriots.

Friction between West and East Pakistan culminated in a 1971 army crackdown against the East Pakistan dissident movement led by Sheikh Mujibur Rahman, whose Awami League Party had won 167 seats out of 313 National Assembly seats on a platform of greater autonomy for the eastern province. Resistance to the Pakistani military erupted into a bloody conflict that ended with the entry of Indian troops, the surrender of Pakistani forces, and a declaration of Bangladeshi independence in 1971.

Following independence, the new Bangladeshi government declared that “all laws that were in force in Bangladesh on 25 March 1971...shall continue to be so in force,” thus preserving colonial-era legislation as well as the applicable post-1947 Pakistani laws as the basis of Bangladeshi law. This preservation of existing law at the time of independence was later confirmed by Article 152 of the Constitution, which defined “existing law” as “any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not is has been brought into operation.” Bangladesh adopted its Constitution in 1972, which provides for an independent Judiciary organized along the lines of the pre-existing judicial system of superior and subordinate courts.⁸

B. Roles and Interests of Major Stakeholders

The environment for rule of law development in Bangladesh reflects the attitudes, interests, and expectations of those who operate and use the justice system and those who are affected by it. An awareness of those attitudes, interests, and expectations is important for the consideration of what opportunities may exist for international cooperation to support local efforts to strengthen the rule of law as a governing principle of Bangladeshi democracy and to improve the efficiency and effectiveness of the administration of justice. The following summarizes the impressions of the assessment team with respect to the principal institutions most directly concerned: the government, the Judiciary, and civil society.

1. The Government

Under the Constitution, the President is head of state. However, the Prime Minister, as head of government, holds the dominant political power. The President is elected by the Parliament every five years and the Prime Minister is named by the President from among members of

⁸ A detailed account of the history of legal development in Bangladesh – including the Hindu, Muslim, British, and Pakistani periods – can be found in Ahamduzzaman, *Legal History & Legal System of Bangladesh*, Shams Publications, 2d Edition, 2010, Chapter III, Historical Background of the Judicial System of Bangladesh,” pages 38-128.

Parliament. The Prime Minister selects the members of the Council of Ministers, or Cabinet, who are then appointed by the President. Recent electoral history has been characterized by a “winner-take-all” approach in which the two principal parties, the Awami League and the Bangladesh Nationalist Party have alternated in victory and the victor has ruled unilaterally to the exclusion of the loser while the loser has sought to undermine the governing party’s program. Power is concentrated in the party leader who serves as Prime Minister after winning the election.

The Ministry with the greatest responsibility within the government for issues concerning the rule of law is the Ministry of Law, Justice and Parliamentary Affairs (MLJPA). The Law Ministry’s responsibilities include the development of legislation, certain aspects of court administration (especially for the subordinate courts), legal policy, and supervision of civil litigation, administrative adjudications, criminal prosecution, and public financing of legal services for the poor. Other significant stakeholders in government include the Office of the Attorney General, which represents the government in the Supreme Court, and the Bangladesh Police, the primary law enforcement agency, which constitutes a force of about 124,000 reporting to the Ministry of Home Affairs.

Within the government, administrative continuity is provided by the secretariats of the ministries, which are staffed by senior members of the civil service. Ministerial secretaries often wield a great deal of power because of their “insider” knowledge, experience, and subject-matter expertise. The importance of senior members of Bangladesh’s civil service cannot be overemphasized.

The legislative branch of the government is a unicameral Parliament, or *Jatiyo Sangsad* (House of the People). The Parliament has 300 members who are elected by popular vote from single territorial constituencies for five-year terms of office. The remaining 45 seats are reserved for women, and allocated among the political parties according to their representation of elected members. Parliament sits for a maximum of five years and must meet at least twice a year, including within 30 days after election results are declared. Party discipline is strictly applied in the Parliament. Members who vote in opposition to the party that nominated them vacate their seats according to Article 70 of the Constitution.

In a political environment of partisan confrontation, there are disincentives to reforms that would increase accountability, diminish impunity for partisan militants, and reduce opportunities for patronage in judicial or other appointments. At present, most observers perceive a trend toward diminished judicial independence and efficiency. On the other hand, political leaders in both major parties share the aspiration of “Bangladesh 2021” in which the country would achieve middle income status and consolidate democratic stability by its 50th anniversary.⁹ Both parties have demonstrated their readiness to put in place policies that have fostered economic and social progress. The police have distinct organizational incentives affecting their receptivity to reform. On the one hand, there is a desire to improve the professionalism and effectiveness of law enforcement, as evidenced by an ongoing police reform initiative. On the other hand, the police

⁹ See Centre for Policy Dialogue, “Bangladesh Vision 2021,” 2007, http://www.cpd.org.bd/html/Policy%20Brief/sub%20folders/downloads/Vision_2021_English.pdf; Government of Bangladesh Planning Commission, “Outline Perspective Plan of Bangladesh 2010-2021: Making Vision 2021 a Reality,” DRAFT, June 2010.

face little risk at present of being held accountable in the face of persistent accusations of human rights violations and corruption. The challenge for Bangladeshi reformers is to enhance the incentives for placing the rule of law and the administration of justice into the framework of policies that will be seen by national leaders and other stakeholders in government as necessary to achieve desired policy objectives.

2. The Judiciary

The Constitution provides for a Supreme Court, with an Appellate Division and a High Court Division, as well as an array of subordinate courts. District Courts adjudicate civil suits and Courts of Sessions and Magistrates' Courts hear criminal cases. In addition there are a large number of specialized courts and tribunals with specialized jurisdiction, such as labor courts, an administrative tribunal, an environmental court, and a family court.

The President appoints the Chief Justice and other Supreme Court justices based on prior consultation with the Prime Minister. Justices are nominated from judicial service or from among members of the Supreme Court Bar. Candidates must have 10 years of experience on the bench or at the bar. Once appointed justices hold office until age 67. Subordinate court judges are also appointed by the President (through the Judicial Service Commission).

The 1972 Constitution originally required consultation with the Chief Justice on judicial appointments and vested in the Supreme Court the authority for control and discipline of judicial officers in the subordinate courts (including their assignment and promotion). Subsequent constitutional amendments repealed the consultation requirement and transferred from the Supreme Court to the President (acting in consultation with the Supreme Court) the control and discipline of judicial officers in the subordinate courts. These changes demonstrate a continuing pattern of executive branch efforts to gain increased influence over the Judiciary.¹⁰

The Supreme Court has been persistent in its desire to preserve its autonomy and to gain management control over the entire Judiciary. This is manifest in the landmark ruling in 1999 in *Ministry of Finance v. Masdar Hossain*, in which the Supreme Court ordered the establishment of measures to end the control and discipline of the subordinate judicial personnel by the Ministry of Law, Justice and Parliamentary Affairs and rejected the application of civil service rules and procedures to judicial personnel. After delays over several years, the basic steps to implement this decision have been taken and the Supreme Court now has an opportunity to achieve new institutional independence. In addition, a 2009 Appellate Division decision has questioned the legitimacy of the repeal of the original constitutional requirement for consultation with the Chief Justice on judicial appointments.¹¹

The Court's interest in judicial independence will require that it develop autonomous management capacity to achieve a true separation of powers. In addition, the Court has been embarrassed by a recent survey that found the Judiciary to be the most corrupt of public

¹⁰ See Articles 95, 115, and 116 of the Bangladesh Constitution.

¹¹ As reported in the IGS report, *The State of Governance in Bangladesh 2008*, note 13, *infra.*, page 126, the Chief Justice indicated in that decision that "the convention of consultation has matured into constitutional convention and is now a constitutional imperative." See Nazrul, Asif, "Confusion and Controversy over Reinstitution of the '1972' Constitution," in *Forum*, The Daily Star, November 2010, <http://www.thedailystar.net/forum/2010/November/confusion.htm>.

institutions.¹² These issues would appear to provide strong institutional incentives for the Judiciary to be interested in reforms to strengthen the rule of law. Of course, there will be resistance on the part of some individuals within the Judiciary. However, that could surely be overcome by committed leadership from the Supreme Court.

3. Civil Society

There is a broad range of civil society organizations and subject-matter experts in Bangladesh with an interest in strengthening the rule of law. These include research institutions such as the Institute for Governance Studies at BRAC University and individual scholars who have produced impressive analytical studies and recommendations.¹³ They also include national and international nongovernmental organizations that advocate for respect for human rights, accountability and transparency in public administration, access to justice for the poor, and other causes that depend upon adherence to the rule of law for their realization. In Bangladesh, as elsewhere, experience has shown that reform requires not only political commitment and public sector capacity, but also public demand for and expectation of improved performance and service to the public. In addition, consideration must be given to the interests of the organized bar and to the business community. Attention to the interests and concerns of a broad range of civil society organizations will be essential to any effort to strengthen the rule of law.

¹² Transparency International-Bangladesh, “2010 Household Survey,” January 2011, <http://www.ti-bangladesh.org/research/HHSC%20Final%20Short%20Report31%20Jan.pdf>.

¹³ See, e.g., Institute of Governance Studies, “Judicial Oversight,” in *State of Governance in Bangladesh: Confrontation, Competition, Accountability*, BRAC University, August 2009, http://dspace.bracu.ac.bd/bitstream/10361/582/1/SOG_2008.pdf; Jahan, Ferdous, “From Rule of Law to Legal Empowerment of the Poor in Bangladesh: Towards an Agenda for Change, National Consultation on Legal Empowerment of the Poor, 2007, UNDP, http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/4_Bangladesh/4_3_Access_to_Justice.pdf; Institute of Governance Studies, “The Judiciary: Policy Note,” Institutions of Accountability Series, BRAC University, May 2010, http://igs-bracu.ac.bd/UserFiles/File/archive_file/Judiciary_Policy_Note.pdf; Hossein, Sara and Tanjib-ul Alam, “Confronting Constitutional Curtailments: Attempts to Rebuild Independence of the Judiciary in Bangladesh,” in Brass, Paul R., editor, *Routledge Handbook of South Asian Politics*, Routledge, 2010.

III. THE JUSTICE SYSTEM

Bangladesh's justice system involves a normative framework that draws upon distinct traditions of Bengali customary law, and religious traditions (Islamic, Hindu, Buddhist and Christian). However, the principal influence is the English common law. A judicial system of courts and related institutions applies that normative framework in a manner that is modeled after British judicial practice. These formal institutions are complemented by traditional informal dispute resolution practices (*shalish*) and by increased use of mediation and other alternative dispute resolution procedures.

A. The Normative Framework

Bangladeshi law is derived primarily from English common law. Family or personal law matters are resolved according to one's religion, thereby incorporating Muslim, Hindu, Christian and Buddhist legal traditions into the country's legal system. The fundamental law, of course, is the Constitution, adopted in 1972 and amended many times. A large body of statutes, many of them dating to the colonial era, is codified and maintained up to date by the MLJPA.¹⁴ In addition, under the Constitution, law declared by the Appellate Division of the Supreme Court is binding on the High Court Division and law declared by both division of the Supreme Court is binding on the subordinate courts.

Also, Bangladesh's legal system recognizes customary law from the villages, or *shalish*. *Shalish* is a social system for informal adjudication of petty disputes, both civil and criminal, by local notables, such as *matbars* (leaders) or *shalishkars* (adjudicators). This informal justice system, which seeks to mediate disputes to the extent possible, has been in place in rural Bangladesh for millennia.

B. The Institutional Framework

1. The Courts

The formal court structure is presided over by a Supreme Court with an Appellate Division and a High Court Division. The Appellate Division consists of eight justices, sits at Dhaka, and only hears appeals from rulings of the High Court Division and, upon request from the President, may offer advisory opinions on questions of law of high public importance. The High Court Division, with 90 justices, sits at various sites throughout the country. It exercises original jurisdiction in a limited range of cases (e.g., under the Admiralty Act), but mainly hears appeals from rulings of the subordinate courts and petitions for writs for the enforcement of fundamental constitutional rights.¹⁵ Importantly, the Appellate Division (under the Chief Justice) exercises supervisory power over the High Court Division and the High Court Division exercises supervisory power over the subordinate courts. Under the Constitution, the Supreme Court has the authority of judicial review of laws and can declare them to be null and void as contrary to the Constitution. It also has rulemaking power to regulate the practice of the Supreme Court and the subordinate courts.

¹⁴ See <http://bdlaws.minlaw.gov.bd>.

¹⁵ The writs contemplated are the traditional remedies of *habeas corpus*, *mandamus*, *prohibition*, *certiorari*, and *quo warranto*. See Ahamduzzaman, *Legal History and Legal System of Bangladesh*, 2nd edition, Shams Publications, 2010, pages 135-136.

As noted above, the Chief Justice of Bangladesh and other justices of the Supreme Court are appointed by the President of Bangladesh after consultation with the Prime Minister. Candidates must have 10 years of judicial service or 10 years of experience as a member of the Supreme Court Bar. A justice of the Bangladesh Supreme Court holds office until he/she attains the age of 67 years. A retired justice is prevented from pleading or acting before any court or authority or holding any office for profit in the service of the republic. A retired justice may, however, serve in another judicial or quasi-judicial office or the Office of the Chief Adviser during a caretaker government. A Supreme Court justice may only be removed from office for misconduct or incapacity under the provisions of Article 96 of the Constitution, which provides that the Supreme Judicial Council convene to hear the allegations against the justice and provide the justice with an opportunity to be heard. The Supreme Judicial Council is constituted by the Chief Justice and next two senior justices of the Appellate Division.

The subordinate courts include several classes of District Courts that hear civil cases and Sessions Courts and Magistrates' Courts that hear criminal proceedings. In addition, Parliament has created more than 20 special courts and tribunals to hear cases involving specialized subject matter.¹⁶ Approximately 1,200 judges preside over the subordinate courts. Judges within the subordinate courts are appointed by the President through an examination administered by the Judicial Service Commission and, upon appointment, become members of the Judicial Service. The Judicial Services Commission, created in 2007 as a key element in the separation of the subordinate courts from executive branch control, is chaired by the Chief Justice.

In rural communities, access to the formal justice system most often begins with village courts. An aggrieved party may make an official petition to the chairman of the union council (the administrative division above the village, also known as Union Parishad), who may call a session of the village court with himself as chairman and two other persons nominated by each of the parties to the dispute. The parties may question the impartiality of the chairman and have him replaced. The village courts are inexpensive and hand down judgments quickly that usually reflect local opinion and power alignments. Their decisions are only rarely appealed. There are occasions, however, when the union council chairman may reject an official petition to constitute a village court or when one party desires a higher opinion. In these cases, the dispute goes to an Upazilla court at the sub-district level. Cases may wind their way up from district courts to permanent benches of the High Court Division. Once cases leave the village courts, they become expensive affairs that may last for years. The village courts handle many of the same kinds of disputes that are addressed by the traditional—and more popular—*shalish* system.¹⁷

¹⁶ The special courts and tribunals include the following: Administrative Tribunal, Administrative Appellate Tribunal, customs appellate tribunal, tax appellate tribunal, labor appellate tribunal, special tribunal for firearms and explosives cases, family courts, small causes courts, artha rin adalat (recovery on loan defaults), bankruptcy court, acid violation prevention tribunal, women and child repression tribunal, money laundering court, juvenile court, speedy trial tribunal, public safety tribunal, settlement court for abandoned properties, environment court, environment appellate tribunal, electricity court, mobile court, cyber tribunal, cyber appellate tribunal, Ahamduzzaman, note 8, *supra*, pages 143-160.

¹⁷ For a comparison of village court and *shalish* models, see “Informal Systems and Village Courts: Poor People’s Preference,” in *Human Security in Bangladesh: In Search of Justice and Dignity*, UNDP, 2002, pages 91-100, <http://www.undp.org.bd/info/hsr/Chapter%206.pdf>.

Low salaries are considered to be an impediment to recruitment and retention of highly qualified judges. An entry level judge receives the equivalent of approximately \$US 150 per month; in the Supreme Court, a High Court Division justice receives about \$US 675, and an Appellate Division justice about \$US 730.¹⁸

Leaving aside judicial salaries, which are paid from a separate budget, the budget for the Judiciary is surprisingly low. For 2010, our research indicates that the total amount allocated for other personnel services (including pensions), maintenance, and capital investment was only the equivalent of about \$US 53 million.

Although there have been a substantial number of vacancies in the subordinate courts in recent years, the Judicial Service Commission has been making progress in overcoming that problem since its creation in 2007.¹⁹ The distribution of judges among the several categories of courts and the number of judicial vacancies in those courts are summarized below in Table 2.

Table 2: Judicial Personnel and Vacancies, 2011

Court	Number of Judges	Number of Vacancies
Supreme Court Appellate Division	8	0
Supreme Court High Court Division	90	0
District Court and Special Courts of Equal Status	155	30
Add'l District Judge and Chief Jud. Magistrate	167	42
Joint District Judge and Add'l. Chief Jud. Magistrate	100	78
Senior Assistant Judge and Assistant Judge	360	10
Senior Jud. Magistrate and Judicial Magistrate	387	138
Courts of Metropolitan Magistrates	37	8
TOTALS	1,304	306

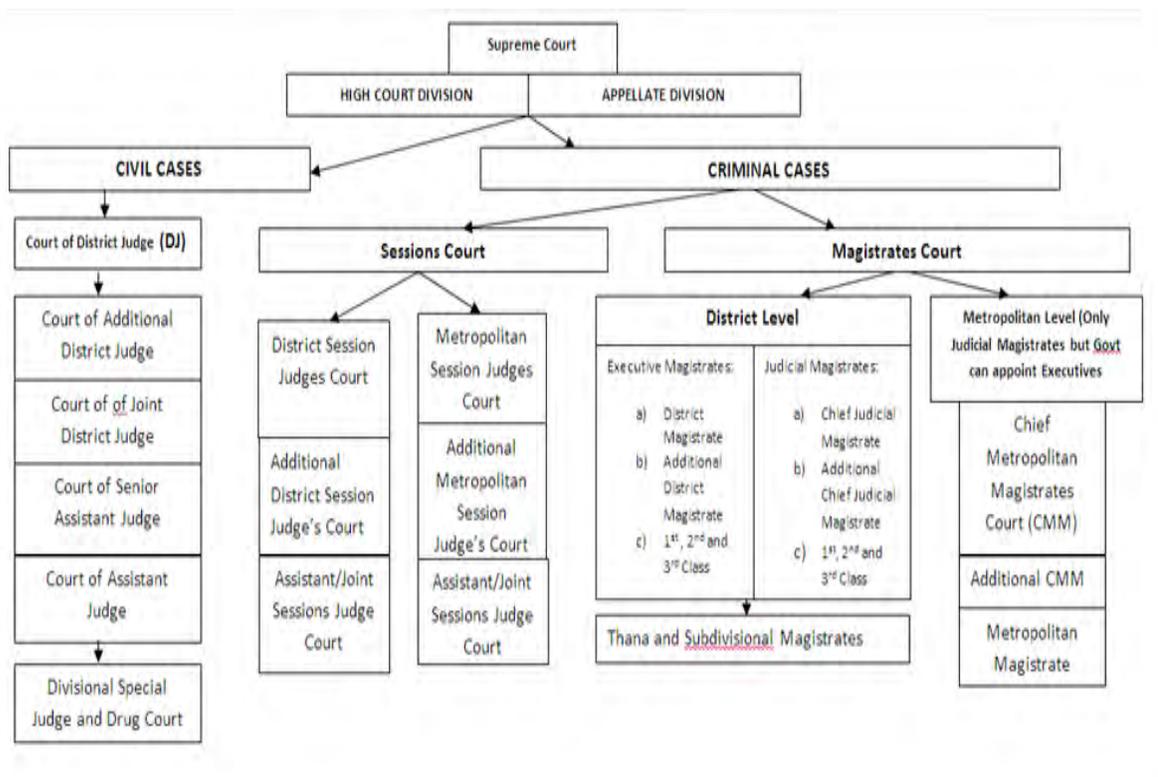
Source: Ministry of Law, Justice and Parliamentary Affairs, Supreme Court, and Ministry of Establishment.

The structure of superior and subordinate courts is illustrated below in Figure 1.

¹⁸ Salary data is derived from the Institute of Governance Studies Policy Note on the Judiciary dated May 2010, note 13, *supra*, which cites the Bangladesh 2009 Judicial Pay Scale. The Policy Note also provides for comparison data on the higher Supreme Court salaries paid in India and Pakistan.

¹⁹ The Bangladesh government news service reported that the Commission had appointed some 815 assistant judges and judicial magistrates since 2007, according to the Chief Justice at a meeting with the President of Bangladesh on March 23, 2011. <http://bssnews.net/newsDetails.php?cat=0&ie=168401&date=2011-03-23>.

Figure 1: Structure of the Bangladesh Courts



A significant issue for the courts in Bangladesh is the substantial backlogs of cases. While complete statistical records are not readily available, research suggests that at the end of 2010 the Appellate Division of the Supreme Court had 9,141 pending cases. This is an extraordinary number for a court of eight judges. The High Court Division of the Supreme Court left 313,735 cases pending and the subordinate courts backlog of pending cases was 1,619,287 at the end of 2010. Backlogs of this magnitude are necessarily a serious impediment to timely access to justice and a burden on the economy and society. The distribution of caseloads, dispositions, and clearance rates of the various courts is set out below in Table 3.

Table 3: Caseloads, Dispositions, and Clearance Rates, 2010

Court	Pending on January 1	Received	Total	Disposed of	Transferred	Pending on December 31
Supreme Court Appellate Division	5,260	5,464	10,724	1,583	0	9,141
Supreme Court High Court Division	325,571	57,470	383,041	69,306	0	313,735
District Courts (Civil Cases)	488,760	166,945	655,705	131,323	4,797	519,585
Sessions Courts (Criminal Cases)	286,305	195,618	481,923	149,928	3,158	328,837
Magistrates' Courts (Criminal Cases)	793,053	741,838	1,534,891	709,112	54,914	770,865
Total	1,898,949	1,167,335	3,066,284	1,061,252	62,869	1,942,163

Source: Bangladesh Supreme Court.

It is noteworthy that the majority of cases before the High Court involve criminal prosecutions, with 199,000 criminal cases pending at the end of 2009, and that more than one million criminal cases were then pending in the subordinate courts. Delay in disposing of criminal cases is cited by prison authorities as the principal reason why more than 70 percent of those incarcerated in the overcrowded prisons are awaiting trial.²⁰

The Chief Justice has made a concerted effort to reduce the Supreme Court's backlog of pending cases. In March 2011 he reported that the number of cases pending in the High Court Division had been reduced by 60,000 in the previous six months.²¹

2. The Legal Profession

Bangladesh has a history of a vibrant and politically active legal profession. There are two kinds of legal degrees in Bangladesh. These are the college-oriented two-year bachelor of laws (LL.B pass) degree and the University-based four-year LL.B (honors) degree. The latter is more academically rigorous. Over 70 part-time, evening colleges now offer the LL.B (pass) course established by the National University. These evening colleges generally do not offer a quality of instruction comparable to that of the more established law faculties.

The most prestigious law faculties in Bangladesh include Dhaka University, which has been offering legal education since 1921, Rajshahi University, which established a law faculty in 1950, Chittagong University, which established its law faculty in 1992, and Kushtia Islamic University, which commenced teaching law in 1980. Students who have completed a two-year pre-university study in college (higher secondary course) are eligible to be admitted to the four-year LL.B (honors) degree program offered by these four government universities. Alternatively, one can seek a two-year LL.B (pass) degree after obtaining a basic university degree. LL.B graduates can apply for a one-year master of laws (LL.M) degree. Instruction is offered either in the department of law or in one of the university's affiliated colleges. There have long been concerns about the limitations of legal education in Bangladesh and important curriculum and other reform initiatives have been taken by leading universities, including the introduction of clinical education. However, these reforms have not been widely adopted.²²

Law graduates sit for the bar exam and, upon passing the exam, are enrolled as members of their district bar associations. The Bangladesh Bar Association, comprising members of all the district bar associations, has approximately 44,000 members and its members are entitled to practice law in subordinate courts, tribunals and revenue authorities.

Advocates on the Bar Association's roll elect from amongst themselves fourteen persons to serve as Members of the Bar Council for a three-year term. The Bar Council represents the members of

²⁰ The Odhikar Human Rights Report for 2010 reports (on page 86) that the 67 prisons in Bangladesh, with a capacity for 29,240 prisoners, had 69,052 inmates as of December 29, 2010. Of these, 48,968 were awaiting judicial determination of their guilt or innocence. The report is available at http://www.odhikar.org/documents/2010/English_Reports/Annual_Human_Rights_Report_2010_Odhikar.pdf.

²¹ See Government of Bangladesh news release, note 19, *supra*.

²² See Menon, N.R. Madhava, "Legal Education and Training in Bangladesh," in *Strengthening the Criminal Justice System*, Asian Development Bank, 2006, pages 75-87, <http://www.adb.org/Documents/Books/Strengthening-Criminal-Justice-system/strengthening-criminal-justice-system.pdf>.

the Bar and fulfills various executive duties relating to continuing legal education, law reform and finance. The elections run along party lines with the Awami League advocates running against the Bangladesh Nationalist Party advocates.

Members of the Supreme Court Bar Association are divided into various categories based on their seniority. Advocates may apply to practice before the High Court Division of the Supreme Court after they have practiced for a minimum of two years before subordinate courts in Bangladesh. Currently, there are 4,236 members of the Supreme Court Bar Association.

3. Alternative Dispute Resolution

The most widely used form of alternative dispute resolution (ADR) is the *shalish* informal community mediation process. *Shalish* remains the most important method of dispute resolution in villages and amongst the poor. Normally, the process starts with interrogating the disputants to ascertain the facts. Ideally, *shalish* should lead to reconciliation between the parties. However, in the context of Bangladesh's rural social structure, *shalish* has sometimes been criticized as being vulnerable to the biases of the existing rural power structure and local religious orientations. It is generally believed that the vast majority of disputes at the village level are resolved through this accessible, inexpensive, and quick procedure.

In urban centers the traditional *shalish* is not an available alternative to the formal system. However, there is some use of community mediation. Several NGOs are working with both urban and rural communities to help them introduce best practices in mediation of disputes, increase awareness of and sensitivity to the need to respect gender equality and the fundamental rights of all under the Constitution, and improve the professionalism and objectivity of *shalish*.²³

The Civil Procedure Code was amended in 2002 to introduce ADR as a means to speedily and economically dispose of civil suits. Under the amendment, judges should ascertain whether it would be beneficial for parties to seek to settle pending lawsuits through mediation. The Ministry of Law, Justice and Parliamentary Affairs, has undertaken various measures to motivate and sensitize judges, lawyers and litigants about the advantages of ADR. Workshops, seminars, and training programs have been organized for judges, lawyers and court support staff in Dhaka and selected districts. Working with the Judicial Administration Training Institute (JATI), the Law Ministry sponsored a documentary film titled "Settlement of Disputes through Mediation" that is shown in JATI's judicial training seminars.

Due to lengthy delays in civil suits, businesses, especially foreign investors, are increasingly turning to arbitration as a means of avoiding the uncertainties and delay inherent in Bangladesh's formal legal system. Arbitration is increasingly seen by large businesses as a viable means of resolving commercial disputes. Bangladesh has a modern arbitration law based on the United Nations Commission on International Trade Law (UNCITRAL) model arbitration law.

²³ See "Alternative Dispute Resolution: Community-based mediation as an auxiliary to formal justice in Bangladesh: the Madaripur Model of Mediation (MMM)," Penal Reform International, 2003, <http://www.blast.org.bd/content/publications/ADR-Mediation.pdf>. The principal NGOs in Bangladesh working in communities to advance mediation are the Bangladesh Legal Aid and Services Trust (BLAST) and the Madaripur Legal Aid Association (MLAA).

4. Legal Agencies of the Government and Autonomous Commissions

The Ministry of Law, Justice and Parliamentary Affairs (MLJPA) is the principal government agency for all matters dealing with the law and the administration of justice. Its broad mandate involves responsibilities for legislation, representation of the government in civil and criminal cases, and other legal matters. It prepares the budget for the Judiciary and still performs residual functions with respect to the operation of the subordinate courts. The Ministry is also the administrative body for a number of public offices, such as the Bar Council, Law Commission, and Judicial Administration Training Institute.

Under the leadership of a Minister and a State Minister for Law, the Ministry is composed of two divisions (also known as wings): the Legislative and Parliamentary Affairs Division and the Law and Justice Division. The former prepares and reviews draft bills and ordinances on behalf of the government. It also reviews government regulations, contracts, and other legal instruments. The latter works on matters relating to the administration of justice and provides for the government's representation in legal proceedings.

In particular, the Solicitor's Office monitors litigation by and against the government, provides legal representation in administrative tribunals, and oversees the appointment and performance of government pleaders for civil cases and public prosecutors for criminal proceedings. In matters before the Supreme Court the Ministry shares responsibility with the Attorney General.

The Attorney General is the principal law officer of the Government. He is a constitutional officer and, as such, is entitled to have the right of audience in all courts of Bangladesh. He is also, *ex-officio*, Chairman of the Bangladesh Bar Council. He is assisted by a professional staff of about 150 who represent the Government in the High Court and Appellate Divisions of the Supreme Court.

The Police constitute the principal law enforcement agency. It has a complement of about 124,000, headed by an Inspector General and reporting to the Ministry of Home Affairs. It is organized in seven geographic ranges and five municipal departments. The ranges are subdivided into 64 districts, each headed by a Superintendent of Police who is answerable to the Deputy Commissioner (DC), the highest ranking administrative officer at the district level. Within the Police there are a number of specialized units, including a special branch, criminal investigation department, traffic, armed police, and the rapid action battalion made up of civilian police as well as members of the armed forces. In addition, police prosecutors typically present the government's case in criminal cases in the Magistrates' Courts. The annual budget is about \$US 420 million, an amount the International Crisis Group has described as "simply insufficient to meet the policing needs of the country and undermines the force's ability to perform effectively."²⁴

The Police are undergoing a far-reaching reform. At present, the organization operates under a legislative charter dating to 1861, which reflects colonial administration emphasis on controlling the population and serving higher authority, rather than seeing law enforcement as a public service for the benefit of the people. The Police describes itself as a "service" rather than a

²⁴ International Crisis Group, "Bangladesh: Getting Police Reform on Track," December 2009, <http://www.crisisgroup.org/en/regions/asia/south-asia/bangladesh/182-bangladesh-getting-police-reform-on-track.aspx>.

“force” and its vision and mission statement is a commitment to provide service to all citizens and to uphold the rule of law.²⁵ However, it is hampered by an inadequate legal framework that inhibits civilian oversight and accountability to the public and by a lack of resources that results in inadequate training and equipment.

In particular, by centralizing authority and management, the 1861 Police Act impedes the implementation of community policing. Because authority is not devolved to constables as well as other key decision makers, they are unable to make the independent decisions that would allow them to fashion effective community police programs and forge enduring partnerships between police and the communities in which they work.

The low budget of the Police is reflected in very low salaries, with senior officers receiving about \$US 300 and the lowest ranks only about \$US 80 per month. Those figures go a long way to explaining the difficulties in improving performance, eliminating corruption and human rights violations, and avoiding political influence in the work of the Police.

The Anti-Corruption Commission (ACC) was set up in November 2004 and it took over the duties of the Bureau of Anti-Corruption. The impetus for the Government to pass the Anti-Corruption Commission Act was primarily international concern about corruption within the Government of Bangladesh (GOB), including Transparency International’s identification of Bangladesh as the most corrupt country in the world for five consecutive years, starting in 2001. The Government’s unwillingness to let the Commission function independently was evident when the Government declared that the ACC was a part of the executive branch and should work within the framework of the Government hierarchy. The ACC was further impeded by a legislative requirement that the Prime Minister consent to any ACC investigation of a Member of Parliament or government minister.

The reconstitution of the Commission by the recent Caretaker Government in February 2007 and related amendments to the Anti-Corruption Act provided the ACC with some degree of renewed independence and dynamism, resulting in several high profile investigations of senior Government officials. Unfortunately, the ACC has again experienced a loss of power. The Supreme Court recently dismissed several high profile cases initiated by the ACC and the current government has set up a controversial anti-corruption task force that works parallel to the ACC with overlapping authorities. Moreover, new legislation to further constrain the independence of the ACC was under consideration at the time of the writing of this report.

The Human Rights Commission was established by Bangladesh’s Caretaker Government in 2008. The Commission has a mandate to hear complaints of human rights violations throughout Bangladesh, investigate allegations of human rights abuse and make recommendations to government and/or judicial authorities on human rights abuses. The commission was granted a broad range of powers which include entry to any facility, including prisons, access to government documents and reports, and authority to initiate prosecutions of persons it has reason to believe guilty of human rights violations.

Despite these broad powers, the Human Rights Commission has not officially acted upon any complaint that has been lodged with it since its inception. The Chairman has directed some

²⁵ See the full statement on the Police website, <http://www.police.gov.bd/index5.php?category=2>.

critical statements at the government, particularly in regard to “crossfire killings.” However, the Commission has not initiated or recommended any prosecution. Observers and stakeholders have commented on the limited resources and capacity that are available to the Commission to carry out its duties.

5. Access by the Poor to Legal Information and Services

The poor in Bangladesh have limited access to legal information. Most indigent and disadvantaged citizens view the formal justice system as inefficient, expensive and distant. In addition, studies have confirmed that many are uncomfortable with the formal system’s adversarial approach to determine winners and losers as compared to the more conciliatory and restorative forms of justice which have their roots in Bangladeshi rural history and culture.²⁶

Legal aid is provided largely through NGOs, largely financed by international partners. The Law Ministry administers a legal aid fund that is distributed to each of the sixty-four district and sessions court judges. Allocations are estimated to be the equivalent of about \$US 110,000 per district. However, by all accounts, the funds are often not disbursed. Reportedly, much of the money is sent back to the central government at the end of the fiscal year, with only eight of 64 districts reporting a utilization rate above 90 percent. Our interviews suggest that (1) many indigent persons are unaware of the existence of the fund; (2) some district and sessions court judges are reluctant to disburse funds, thinking that returning them to the central government demonstrates prudent management; and (3) the procedures for requesting the funds are opaque and overly complex. There would appear to be considerable scope for improving access to justice for the poor by improved management of this legal assistance fund, with the support of the Law Minister and the Chief Justice.²⁷

²⁶ Jahan, Ferdous, “From Rule of Law to Legal Empowerment of the Poor in Bangladesh, Towards an Agenda for Change,” note 13, *supra*.

²⁷ See the report by the Manusher Jonno Foundation on its June 2010 seminar on the Legal Aid and Services Act, http://www.manusherjonno.org/index.php?option=com_content&view=article&id=43%3Aseminar-on-legal-aid-and-services-act&catid=34%3Aevents&Itemid=1, and related press coverage in the Daily Star, June 24, 2010, <http://www.thedailystar.net/newDesign/news-details.php?nid=143964>.

IV. PRINCIPAL CHALLENGES FOR RULE OF LAW DEVELOPMENT

The fundamental challenge for development of the rule of law in Bangladesh is the polarizing competition between the two major political parties, the Bangladesh Nationalist Party and the Awami League.²⁸ This polarization has had a corrupting impact on the courts, as on other organizations of democratic governance.²⁹ Unrestrained political confrontation thus constitutes a significant challenge to an independent and impartial judicial system that gives practical effect to the rule of law. The principal manifestations of this challenge are described below.

A. Erosion of Judicial Independence and Accountability

The Supreme Court of Bangladesh was once widely respected as one of the more progressive voices in protecting the fundamental rights of citizens. However, a process of erosion of the Court's independence and accountability has diminished that positive image.

History has witnessed a pattern of actions by the executive, in both elected and unelected governments, to weaken the safeguards of judicial independence that were built into the 1972 Constitution. The repeal of the requirement for consultation with the Chief Justice on judicial appointments and the transfer from the Supreme Court to the executive of control and discipline of judicial officers in the subordinate courts are discussed above in sections II and III of this report. In addition, there has been manipulation of the retirement age of the Chief Justice (to limit or extend the term of a sitting Chief Justice), an unsuccessful effort to reorganize the High Court under Presidential control, the appointment of "additional" judges to the Supreme Court, and the "deputation" (assignment) by the executive of judicial officers to serve as legal officers—or in other capacities—in government ministries.³⁰

The Supreme Court has responded in a somewhat inconsistent manner to this pattern of interference. On the one hand, it has vigorously defended fundamental constitutional principles

²⁸ Extreme partisan competition and conflict in Bangladesh has been described and lamented by many observers. One recent article includes a succinct statement of the author's understanding, based on many years of experience, of the "rules of the game" as it is played in Bangladesh:

- Elections are more or less free and fair
- Winners take all political power and enjoy a mandate to do whatever they want, leaving nothing to the opposition
- The opposition launches a five-year campaign of disruption
- Both parties develop extensive networks of thugs
- Both parties endeavor to commandeer organized life, politicizing professional associations, trade unions, and universities
- Press freedom exists
- An independent higher court system gives some protection to political rights and civil liberties of those who can afford it, but this protection does not extend to the lower court system
- A new cycle begins with each successor election.

Blair, Harry, "Party overinstitutionalization, contestation, and democratic degradation in Bangladesh," in Brass, Paul R., editor, *Handbook of South Asian Politics*, Routledge, 2010, pages 98-117.

²⁹ For example, politicization has also had implications for the customary dispute resolution mechanism, *shalish*. Traditional village elders in some communities have been replaced by partisan loyalists, resulting in decisions that often appear to be politically aligned. Jahan, note 13, *supra*.

³⁰ The pattern of executive encroachment summarized here is set out in detail in Hossain, "Confronting Constitutional Curtailment," note 13, *supra*.

in landmark decisions of the Appellate Division.³¹ On the other hand, the Court has not been able to date to develop the institutional expertise and capacity to give practical effect to the management and oversight of the Judiciary in the manner it has asserted to be a judicial rather than an executive responsibility. As a result, the executive continues to exercise inordinate influence over the Judiciary.

In particular, in the important *Masdar Hossain* case, the Appellate Division set out a 12-point declaration on requirements for separating the subordinate courts from the executive. These included the establishment of the Judicial Service Commission as well as measures to enhance financial independence and to diminish the role of the executive with respect to the assignment, promotion, and discipline of judges and magistrates performing judicial functions.³² However, despite the eventual creation of the two commissions in 2007, the Judiciary still has little capacity for planning, budgeting, human resource management, or property management. The Law Ministry retains a primary role in personnel matters (including the deputation of judges to serve in nonjudicial capacities in executive departments) and the Ministry of Finance plays a lead role in determining the allocation of non-salary resources for the courts.³³ Our research shows a maintenance budget for the Supreme Court and the subordinate courts of less than \$US 4 million. The inadequacy of this funding level is evident from the poor physical condition of the subordinate courts and their lack of basic supplies and equipment.

The continuing lack of enthusiasm by the executive for an independent Judiciary is illustrated by the fate of the Supreme Judicial Commission. The Commission was created by ordinance of the Caretaker Government in 2008 to respond to concerns about politicized appointment to the Supreme Court. After a legal challenge to the original proposal, the Commission was designed to include the Chief Justice as chair, with a majority of its nine members from the Judiciary. The Commission operated from January 2008 until February 2009, selecting candidates for appointment to the Supreme Court. However, in the absence of support from the elected government, the initial ordinance lapsed for lack of parliamentary action. While the temporary commission has been criticized as being too weak, its demise leaves the executive with virtually unlimited discretion in the appointment of justices to the High Court and the Appellate Division.

A related factor in the diminished prestige of the Judiciary is the lack of accountability for what is widely perceived as increased corruption. In the Transparency International 2010 Household Survey,³⁴ an extraordinary 88 percent of those who had dealings with the judicial process reported experiencing some form of corruption. In those cases, 60 percent reported a demand to pay a bribe. This recent report is consistent with earlier research suggesting that the Judiciary has a considerable number of judges of ability and integrity, but there has been “a fall in quality and

³¹ Notably, these include the 1989 *Anwar Hossain* case, rejecting the executive restructuring (and domination) of the High Court, and the 1999 *Masdar Hossain* case, which required the establishment of a separate judicial service free of executive control.

³² The 12 points are quoted in full on the Supreme Court website in an article by Justice S.K Sinha entitled “Judicial Development in Bangladesh,” dated September 12, 2010, http://www.supremecourt.gov.bd/article_file/Judicial%20Development%20Programe%20in%20Bangladesh.pdf.

³³ Judicial salaries are protected by Article 88 of the Constitution.

³⁴ TI-Bangladesh 2010 Household Survey, note 12, *supra*.

consistency amongst judges” and that “this acts as a further deterrent for those of integrity and ability joining the bench.”³⁵

The Code of Conduct adopted by the Supreme Court in 2000 provides guidance on how justices should conduct themselves. Article 96 of the Constitution states that a judge can be removed if he is found to be guilty of gross misconduct through an inquiry to be conducted by the Supreme Judicial Council.³⁶ Subordinate court judges continue to be governed by rules and regulations formulated for civil service personnel and are subject to discipline by the Law Ministry. These rules were specifically designed for those officers in administrative services and thus define misconduct under the civil service.³⁷ (So far, these rules have not been adapted for judicial officers, despite the formal separation of the Judiciary from the executive.) There have been few reported cases of judicial discipline in the last decade despite widespread reports of judicial corruption and misconduct.

B. Lack of Efficiency and Integrity in the Justice System

A politicized environment, a pattern of executive interference, and repeated challenges to judicial independence—all have contributed to impair the capacity of the Judiciary to perform its functions in an efficient manner. As noted above, much of the capacity for court management has gravitated to the executive. While the measures taken to implement the separation of the Judiciary have created an opportunity, the Judiciary has not demonstrated a present ability to manage efficiently the challenges of timely disposition of cases, assuring ethical behavior in judicial and support personnel, managing human resources, property and equipment, planning and execution of budgets, and all the other aspects of self-governance. This tends to perpetuate dependence on the executive, especially the Law Ministry and the Finance Ministry.

Recent efforts by the Chief Justice to encourage more disciplined case management to attack the backlog of cases are laudable. However, they appear unlikely to mature into a systematic, institutional process to achieve continuously improved performance. Such a process would require caseload analysis, rules, training, monitoring, timely statistical reports, and incentives. At present, the existence of a severe backlog of pending cases is evident. But there is no coordinated analysis of the reasons for the backlog or a plan to address it. In our interviews we found that opinions differed widely as to the nature and size of the problem and what to do about it. Some point to rigid and complex procedures; others cite lax case management practices that tolerate excessive adjournments and continuances; still others suggested lack of management information systems, insufficient personnel and excessive absences and vacancies, and inadequate courtrooms and other infrastructure.

It is understandable that the Judiciary, lacking in resources (including control over its own budget), would face a challenge of efficient and effective performance. These circumstances call

³⁵ Institute of Governance Studies, *The State of Governance in Bangladesh 2008*, note 13, *supra*, at page 63.

³⁶ For a summary of the main provisions of the judicial code of conduct and a critical analysis of the disciplinary system for judges see Ar Rashid, Harun, and Arafat Sufian, “Discipline of the Supreme Court Judges of Bangladesh: A Critical Review,” *Bangladesh Research Publications Journal*, Volume 3, Issue 4, March-April 2010, pages 1159-1170, <http://www.bdresearchpublications.com/admin/journal/upload/09137/09137.pdf>.

³⁷ 1985 Government Service and Discipline Rules.

for, in the words of one observer, “the cultivation of independence of mind and spirit.”³⁸ That is, the Judiciary needs to strengthen its resolve to improve its performance, and thereby enhance not only its efficiency but also its independence and integrity.

Of course, the justice system is far more than the Judiciary. It involves interaction among related institutions, a number of which are described in section III of this report. Ideally, if circumstances permitted, it would be desirable to address these related institutions in the justice sector in a comprehensive way, as has been suggested in a 2007 study commissioned by the Local Consultative Group of Development Partners in Bangladesh.³⁹ A broad multi-institutional effort might be overly ambitious at this time. Nevertheless, Bangladesh has identified priorities that are directly related to the challenge of achieving efficiency and integrity in the administration of justice. In particular, two challenges of efficiency and integrity in the criminal justice field need to be considered simultaneously with a focus on improved judicial performance.

The first of these challenges is the lack of an organized and integrated career prosecutorial service. Administratively, the Ministry of Law, Justice and Parliamentary Affairs manages the prosecutorial function. The Ministry appoints prosecutors from among practicing attorneys on a short-term basis, usually for the duration of one case, but sometimes for the term for which the appointing government is in office. Most prosecutors are affiliated with the party of the government that appointed them. It is estimated that typical caseloads exceed 1,000 cases per prosecutor and that 90 percent of the criminal cases in Bangladesh that proceed to decision result in acquittal, although no accurate statistics are available. Reports of unprofessional conduct by prosecutors are common, including reports of failure to appear at scheduled proceedings or of appearing in court unprepared. There are also frequent complaints of prosecutors who have won a hearing in the lower court, where they represented the state, reappearing in the appellate court representing the other party as a private lawyer.⁴⁰ These conditions have given rise to calls for a “prosecutorial service...under an independent and permanent institution, with competent, committed and experienced professionals who can act without fear or favor.”⁴¹

The second challenge relates to the Bangladesh Police. The institutional challenges faced by the Police are numerous and substantial. They operate under an outdated legal framework; they are underpaid, undertrained and underequipped; they are vulnerable to political direction and

³⁸ Hossain, note 13, *supra*, page 200.

³⁹ Stapleton, Adam, Greg Moran, and Sara Hossain, “Joint Assessment of Prospects for Harmonization within the Justice Sector in Bangladesh,” June 2007,

⁴⁰ Md. Afrashuzaman, “The Disposable Prosecutors of Bangladesh,” Vol. 07 Prosecutors in Asia, March 2008, <http://www.article2.org/mainfile.php/0701/309>.

⁴¹ See the press release by the Asian Human Rights Commission, “Bangladesh: End the politically chosen ‘disposable’ attorney and prosecutorial system,” January 2009, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-016-2009>. See also Rahman, Shafiur, “Strengthening the Public Prosecution Service in Bangladesh,” in *Strengthening the Criminal Justice System*, note 22, *supra*, pages 20-23.

corruption⁴²; and they are subject to serious allegations of extrajudicial killings and other human rights violations.⁴³

An ongoing police reform is underway with international technical and financial support. Improving the ability of the police to prevent crime, investigate allegations, and produce reliable evidence that can be presented to the courts by competent prosecutors and evaluated by capable and impartial judges is essential to achieving a credible criminal justice system. In addition, the Government of Bangladesh has been especially concerned about the threat of international crime, including terrorism, trafficking in persons, and related financing. Bangladeshi efforts to address this complex and sophisticated threat will require that the police develop a sustainable capacity to respond.

C. Widespread Impunity and Violations of Human Rights

The joint military-police Rapid Action Battalion (RAB), an elite crime-fighting force, has been alleged to be responsible for well over 1,000 killings over the past five years.⁴⁴ International monitors have contended that many of these deaths, often described as “crossfire killings” or “shootouts,” were actually extrajudicial executions of people in custody. Bodies of the victims often had wounds that suggested that they had been tortured. (Newspaper reports routinely put the words “crossfire” and “shootout” in quotation marks to indicate skepticism about official explanations.)

While there have been fewer extrajudicial killings since the elected government took office in January 2009, some new cases are being reported and no one has been held accountable for past abuses. “The very forces tasked with upholding the law and providing security to the public have become well known for breaking the law in the gravest manner without ever facing any consequences. ... Forces such as RAB and the military intelligence agency DGFI have become symbols of abuse and impunity.”⁴⁵

The GOB has historically been reluctant to prosecute state officers accused of human rights violations. This attitude has been attributed, in part, to an outdated legal framework under which law enforcement officers and members of the armed forces are shielded from prosecution. Article 46 of Bangladesh's Constitution empowers Parliament to pass laws that provide immunity from prosecution to any state officer for any act done to maintain or restore order, and to lift any penalty, sentence, or punishment imposed. Military personnel (including those in the RAB) are also protected from the civilian criminal justice system under rules that ensure that they can only be prosecuted in internal courts by their peers. While the civilian courts have jurisdiction over cases involving police officers suspected of involvement in criminal activities, the Criminal Procedure Code requires explicit government approval to prosecute an officer purporting to act in an official capacity.

⁴² The Transparency International 2010 Household Survey ranks the Police as the second-most corrupt public entity, after the judiciary, with about 80 percent of those who had dealings with the police reporting that they experienced corruption or harassment. TI-Bangladesh, note 12, *supra*.

⁴³ Human Rights Watch, “Ignoring Executions and Torture: Impunity for Bangladesh’s Security Forces,” May 2009, <http://www.hrw.org/en/reports/2009/05/18/ignoring-executions-and-torture-0>.

⁴⁴ *Ibid.*

⁴⁵ *Id* at page 10.

For all of these reasons, senior law enforcement and military officers have virtually complete discretion in carrying out their mandate, even if it includes the use of unlawful violence. The persistence of this pattern of human rights violations and impunity suggests some measure of public tolerance.⁴⁶ The Government of Bangladesh has repeatedly declared a “zero-tolerance” policy for extrajudicial executions and stated that state officials who engage in such acts will be punished. There are, however, few reported instances of investigations into current or past abuses.⁴⁷

In July of 2009 the Parliament reinstated the Bangladesh National Human Rights Commission (NHRC) that had been initially been created during the second Caretaker Government. The Prime Minister appointed a highly respected law professor, Mizanur Rahman, as its Chairman in 2010. The NHRC has broad powers to investigate human rights violations and initiate independent prosecutions. It is also vested with judicial powers to award damages. NHRC can also request reports from the government regarding the activities of the Bangladeshi security forces. In practice, however, this level of scrutiny has not been exercised. There have been several instances where the NHRC has publicly criticized the government regarding human rights violations. However, this has not resulted in either investigations or prosecutions. Most observers interviewed expressed the view that the NHRC is being constrained by political considerations.⁴⁸

D. Inadequate Access to Justice and Unequal Protection of the Law

The foregoing challenges relate to institutional weaknesses in the performance of organizations responsible for the administration of justice. The cumulative effect of those weaknesses is a lack of adequate access to justice for the people of Bangladesh and unequal protection of the law.

The deficiencies of the formal justice system, especially the extensive delays and the reports of corruption, have become a source of general public dissatisfaction. But the limitations are especially injurious for the poor. As noted above in section III of this report, the poor have limited access to legal information and many are uncomfortable with the formal system’s overall approach. This is part of the reason for the popularity of the informal *shalish* system in places where it is available, even though that system is also the subject of criticism on several grounds. A poor person is especially frustrated when opposed by a litigant who can afford to engage in dilatory tactics to delay a decision.

The Law Ministry’s limited legal aid fund takes on increased importance in an environment of inadequate access to justice for the poor and vulnerable. The fund is intended to be available for legal representation in both criminal and civil cases. The challenge is to make its existence known, to overcome the reluctance of some judges to fully use this resource, to simplify the procedure for requesting assistance under this program, and to consider whether it might be put to broader use beyond providing payment to experienced attorneys. Improving this instrument for expanded access to justice for the poor and disadvantaged would require a collaborative

⁴⁶ See Odhikar, and International Federation for Human Rights, Mid-term Assessment and Report on the Universal Periodic Review: Bangladesh,” February 2011, http://www.odhikar.org/UPR/Mid_term_review_UPR.pdf.

⁴⁷ See Odhikar, Human Rights Report 2010, note 20, *supra*, which recounts extensive reports of extrajudicial killings and minimal action to hold police accountable.

⁴⁸ Assessment interviews.

effort by the Law Ministry, the Supreme Court, and the nongovernmental organizations that work to provide legal assistance and awareness of rights to the needy.

The legal aid fund is only a part of the effort that will be needed to overcome inequality before the law. However, it is the first government program in this field and it offers a foundation on which to build an atmosphere of trust and cooperation and a structure of mechanisms for expanding access to justice in Bangladesh.

V. CURRENT PROGRAMS OF INTERNATIONAL COOPERATION

Bangladesh has been a recipient of considerable international assistance since its inception. In recent years several programs have addressed rule of law development. International partners have, for the most part, focused their interventions on justice sector institutions, the legal framework, and access to justice. Many of these activities are integrated and span more than one component of the justice sector.

On the whole, these programs have not succeeded in helping Bangladesh achieve the substantial and sustainable reforms that were hoped for. The lack of success to date surely reflects the complexity and challenge of working in the Bangladesh political and institutional environment as well as inadequate attention to effective aid principles in program design and implementation.

Over the years there has been a mounting appreciation of the need for effective policy leadership, good governance and institutional capacity building, and public demand for and expectation of improved performance. Many new development cooperation programs are designed with increased attention to internationally accepted aid effectiveness principles.⁴⁹ There is more consultation with government counterparts and more mutually deliberated results-oriented strategy development. The continued donor support for upholding the rule of law and security sector reform is a striking acknowledgement that the rule of law and the fair and efficient administration of justice are important to the overall development of Bangladesh.

A. Relevant Areas of Support

1. The World Bank

In 2001, the World Bank initiated a \$US 30.6 million legal and judicial capacity building project. Its goals were to improve the efficiency, effectiveness, and accountability of the civil justice delivery system; increase access to justice, particularly for women and the poor; and provide a foundation for protecting against corruption. The project had five components: (1) Judicial Capacity Building (to reduce delays in concluding cases); (2) Improving Access to Justice and Legal Literacy and Public Awareness; (3) Legal Reform Capacity Building; (4) Preparation of Future Reforms; and (5) Project Implementation and Related Services.

Five pilot courts were set up to begin backlog reduction programs and for a limited time some of them achieved significant progress. However, the improvements were not sustained due to lack of leadership upon the departure of the international contractors. IT systems were put in place but the Government did not provide adequately for maintenance and training. JATI was considered to be a notable advance in judicial training, but the program implementers did not consult the users of the premises about the building's design, and construction was left incomplete. The singular notable achievement was said to be the strengthening of the drafting wing of the Ministry of Law.

⁴⁹ The 2005 Paris Declaration's call for local ownership, alignment of international programs with local strategies, harmonization among international actors, managing for results, and mutual accountability has gained considerable traction.

Implementation was slow and during the course of the project the focus shifted from capacity building to rehabilitation of court infrastructure. Ultimately, the project was rated unsatisfactory and the World Bank abandoned further programming in the justice sector.⁵⁰

2. Asian Development Bank

The Asian Development Bank (ADB) has focused primarily on institutional capacity building within the government rather than on the demand for justice and for related governance services. It just entered its last phase of a \$US 65 million project, involving the supply of equipment. Members of the Judiciary interviewed by the team expressed concern about the level of consultation in the implementation and sustainability of the project.

3. DANIDA

DANIDA implements a \$US 6 million dollar program which focuses on both the demand side and supply side, working with state and non- state actors. The program addresses access to justice by implementing over 230 projects and workshops to improve community mediation, including under the traditional *shalish* system. Bangladesh Legal Aid and Services Trust (BLAST), Madaripur Legal Aid Association (MLAA), and other NGOs that seek to expand access to justice through alternative dispute resolution have received support from DANIDA. The program also provides support to JATI and to the NHRC.

4. United Kingdom Department for International Development

DFID supports a broad array of governance activities. It primarily operates, as do donors such as DANIDA and the Swedish International Development Agency (SIDA) through collaboration with other international partners. It also funds NGOs such as Manusher Jonno to disburse funds and build capacity of smaller civil society organizations, and to promote access to justice and advocacy work.

5. European Union

The EU supports a broad spectrum of individual projects in the areas of human rights, local governance, and capacity building of NGOs. In regard to justice sector reform, its biggest contribution is approximately \$US 14 Million for the Activating Village Courts Project. This project is managed through UNDP.

6. United Nations Development Program

UNDP focuses primarily on institutional capacity. Its projects in the justice sector are partially financed by bilateral donors and its efforts appear to be centered more on supporting public institutions than on civil society organizations. Current UNDP interventions include:

The Access to Justice Project, implemented through MLJPA, has the broad objective of promoting access to justice and human rights in Bangladesh through institutional and technical support to judicial sector reform. Since 2007 the project has been working to ensure justice for

⁵⁰ See World Bank Implementation and Completion and Results Report, May 2010, http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000333037_20100714004114.

all, particularly disadvantaged and vulnerable groups. The project is expected to run until 2012 with an overall budget of \$US 3 million. The broad objectives are:

- **Enhanced access to justice (both formal and informal) to the poor, vulnerable and marginalized:** The project focuses on service delivery of formal and informal legal services, better utilization of the national legal aid budget, and bridging gaps in services to vulnerable groups. It seeks to build capacity of the National Legal Aid Fund and to establish functional networks and partnerships between district bar associations, NGOs, community legal service providers, client interest groups including law clinics within university law faculties, the village courts and the National Legal Aid Services Organization with the aim of improving coordination among legal awareness programs.
- **Strengthened institutional capacity and management:** The project seeks to strengthen institutional capacity of the Law Ministry by improving its business processes and communication through effective measures including ICT as a means for better case-management, professional learning and facilitation of access to information. The project is also supporting the translation of 50 most referred to and most relevant laws from an access to justice and human rights perspective. Websites containing the texts of laws are also being updated as a measure to enhance access to legal information.
- **Support administration of justice:** The project is supporting law and policy reform through the Law Commission. Current focus is on key issues such as legal aid, ADR, the Evidence Act, etc.

The Village Courts Project is a five-year project that commenced in 2009 and is expected to run until 2013. It is administered through the Ministry of Local Governance and supported by the EU. The overall budget is approximately \$US 15 million. The project seeks to strengthen local justice systems in 500 Union Parishads (UPs) through the establishment and activation of village courts and improving access to justice and strengthening local government. Currently 236 out of the 500 village courts have been set up.

The National Human Rights Commission Project is a multi-donor effort that began in 2009. The other development partners include DANIDA, SIDA, SDC, and Korean International Cooperation Agency (KOICA) with an overall budget of \$US 6.9 million. The NHRC serves as the major national human rights watchdog and is mandated to address specific human rights complaints through investigation and where necessary take action through public interest litigation. The project's objectives are:

- To build the institutional capacity of the NHRC to foster its independence and help it to promote and protect human rights
- Build greater legal awareness amongst the citizens of Bangladesh at the grassroots levels, regarding their human rights
- Ensure consistency of the laws of Bangladesh with international obligations

The Police Reform Project began in 2005 and is scheduled to run through 2014. The project is co-funded by DFID and implemented by the Ministry of Home Affairs and the Bangladesh Police, with an overall budget of \$US 29 million. It has promoted national ownership and supported community policing nationally. The project currently focuses on:

- Strategic direction and organizational reform supported by planning and budgeting, enhanced accountability and oversight, and a modernized legislative framework
- Human Resource Management systems and structures put in place to build capacity of the police force
- Improved police operations, investigations and prosecutions
- Improvement in public perception of the police by strengthening its ties with the community by improving access to justice, human rights and reduced fear of crime
- Promoting and upholding the rights of women and children and the provision effective policing and victim support services.

The ***Justice Sector Strategy Development Project*** (JSSD) is a short-term project over a 12-month period that initiates a process for national dialogue on the formation of a national strategy for the justice sector. The process intends to adopt an inclusive approach to justice sector reform by combining national dialogue, supporting empirical research, and building critical partnerships between various government and civil society counterparts. It is intended that this process would develop a comprehensive national strategy with the ultimate goal of a larger initiative for Justice Sector reform. The project is expected to run until October 2011 with the prospect of scaling up to a larger intervention.

7. GIZ

GIZ's program consists of three components: (1) gender responsive community-based policing; (2) promotion of legal empowerment of women; and (3) improving overcrowding in prisons.

In ***gender responsive community-based policing***, GIZ is working in four pilot districts to build trust and strengthen relationships between police and the local communities, especially women. In recent years, Bangladesh has established community policing forums that include representatives of the local (sub-district and district) police forces, political parties and interest groups, as well as Ansars (village guards), teachers, businesspeople, shopkeepers and farmers. Together, they address local security concerns and develop monthly action plans. These forums provide a unique opportunity to raise awareness of violence against women, women's legal and human rights, and improve women's access to justice. The national Ministry of Women and Children Affairs (MWCA) has therefore collaborated with the Bangladesh Police in selecting 160 such forums to serve as many as 600,000 people, for a gender-responsive community-policing project. This will complement the national Police Reform Program at the local level.

In ***legal empowerment of women***, GIZ partners with decision makers in communities, villages, police, and local NGOs and media, in order to build trust between civil society and the legal authorities. It provides gender training for *salish* and supports alternative dispute resolution committees which, helped by local NGOs, build on the *salish* tradition. Members of the local government also receive training to implement arbitration processes in accordance with the Muslim Family Law Ordinance and other laws. In cooperation with the Royal Netherlands Embassy, the project is promoting gender-responsive, community-based police interventions as well as legal advisory services and assistance for women. Together with other development partners and national stakeholders, it is encouraging a stronger normative framework and better legislation related to women's rights and empowerment.

In *improving overcrowding in Prisons*, GIZ supports a coordinated process established by the Bangladesh Ministry of Home Affairs and the Prison Directorate, the police, the courts, the prisons and social services. Through better coordination they have identified a number of practical, low-cost interventions that can quickly and permanently reduce the prison population.

B. US Government Contribution

1. Bangladesh Law Enforcement Development Program

As a result of a close partnership between the State Department Bureau of International Narcotics and Law Enforcement Affairs (INL) and USAID, the Justice Department's International Criminal Investigative Training Assistance Program (ICITAP) received \$US 1.5 million Department of Defense 1207 program funds in July 2010 to provide technical assistance to the Bangladesh Police.

Among other things, the program supports the development of a positive police community relationship and partnership and provides training and limited equipment donations. The program, which ends in 2013, is implemented in North West Bangladesh in the Rajshai District. This district has experienced problems with extremism in recent years. The program's base of operations is the police college, where ICITAP is providing trainers and equipment to integrate into the training curricula principles of community policing, human rights and dignity, criminal investigations, and supervisory and management skills. The UNDP community police program is not implemented in this region of Bangladesh but the region is seen as vital by the GOB in its effort to deny space to extremists.

As discussed above, the Bangladesh Police suffer from capacity problems such as lack of training on how to carry out proper investigations, and poor coordination with prosecutors. Additionally, police receive little understanding of how respect for human rights relates to their duties as police officers. The current program focuses on long term cultivation of knowledge and teaching of human rights and dignity.

2. Counterterrorism and Prosecutorial Development

Since 2005 the US Department of Justice Office of Overseas Prosecutorial Development and Training (OPDAT) has been supporting efforts to by the Government of Bangladesh to strengthen its anti-money laundering/terrorist financing regime and improve the capability of Bangladeshi law enforcement to investigate and prosecute complex financial and organized crimes. The Resident Legal Adviser assigned by the Department of Justice works primarily with the Bangladesh Bank (where the Financial Intelligence Unit is located) the Attorney General's Office, and the Law Ministry.

Key components of technical assistance provided under the OPDAT program include:

- Support for the development of a comprehensive counterterrorism regime, with attendant strengthening of legislation
- Refinement and practical implementation of anti-money laundering legislation
- Review of existing criminal laws and procedures with an eye on reform to facilitate investigation and prosecution of complex cases

- Support for the establishment of a career prosecution unit and prosecutorial and judicial skills development
- Support for increased anticorruption efforts
- Assurance that programs designed to strengthen counterterrorism capacity also incorporate human rights protections.

OPDAT has implemented training programs for Bangladeshi prosecutors and investigators. In addition, the RLA provides technical assistance and training on trafficking in persons issues, working with the Home Ministry. OPDAT efforts contributed to Bangladesh's signing of all twelve of the UN counterterrorism instruments, including the Convention for the Suppression of Terrorist Financing.

3. Community-Based Policing Project

This is a new USAID community police program that will be implemented by the Asia Foundation (TAF). At the time of this assessment the activity was preparing to begin implementation. The funding amount is \$US 2,500,000 with a period of performance from December 22, 2010 through December 22, 2013. It features integrated activities that engage police, local communities, and policy makers to: (1) increase collaboration and positive relations between police and communities through joint community-police activities for increased public security; and (2) enhance citizen effectiveness and accountability in community policing through training, facilitation, and technical support. Both of these goals will be further supported through district, divisional, and national-level dialogues on policing and communities with the participation of opinion leaders and policy makers from civil society and government.

Community Policing Forums (CPF) are a key instrument for trust building under this program. TAF CPFs have been well received by local communities and police. They have resulted in reductions in drug, gambling, sexual harassment, petty extortion and similar crimes as reported by community members. And they have proven to be self-sustaining without outside assistance given sufficient training and facilitation support. The program builds on this experience base and integrates in new technical assistance on gender-based violence and disaster preparedness, as well as increased emphases on local government, media and civil society linkages. USAID will coordinate closely with ICITAP and the program will consult closely with the Home Ministry, Bangladesh Police National Headquarters, the Ansar (Village Defense Party), and all the organizations participating in the existing UNDP-supported Police Reform Program. USAID intends to form a task force to communicate with the wider international community interested in work with the police, including the British High Commission, Japanese Embassy, UNICEF, and the International Organization for Migration.

VI. PROPOSED USAID RESPONSE TO OPPORTUNITIES

A. Program Objectives

The present assessment has analyzed weaknesses in the rule of law and the administration of justice in Bangladesh and identified what the assessment team considers to be the four major challenges. It has described efforts to address those challenges through local initiatives and international cooperation. Our conclusion is that there are realistic program objectives that are worth pursuing and that can attract support from within the Bangladesh Judiciary and government and from broad segments of civil society.

The experience of previous efforts shows that the challenging environment of Bangladesh is no place for a donor-driven, stand-alone program to provide technical expertise or equip the courts with computers. Nor does the early initiation of a broadly based comprehensive reform of the justice system, with or without international support, seem feasible in the present state of rule of law development in Bangladesh. Rather, the assessment team strongly believes that international efforts, and especially any USAID program, should be focused at this time on the four principal challenges identified above. That is, program objectives should be carefully developed and refined to advance the four essential elements of the rule of law corresponding to the principal challenges:

- Independence and accountability of the Judiciary
- Efficiency and integrity of the justice system
- Protection of human rights and denial of impunity
- Access to justice and equal protection of the law.

Two programmatic areas appear promising in this regard: judicial self-governance and improved legal assistance for the poor and disadvantaged.

Judicial self-governance offers a path to increased efficiency and integrity within the Judiciary through improved management. Improved management and increased efficiency and integrity, in turn, should greatly strengthen the ability of the Judiciary to reduce its dependence on the executive, control corruption, and increase the quality of its service to the public. The outcome would be enhanced judicial independence and accountability.

Improved legal assistance for the poor and disadvantaged offers a way to expand access to justice and also to empower citizens to challenge unlawful actions by powerful interests that have historically enjoyed impunity.

These two areas are also promising because they are responsive to current priorities of local stakeholders and their international partners. Judicial self-governance is directly relevant to the interest within the Judiciary in preserving independence and improving court administration. Legal assistance through the presently underutilized fund established by the government and administered by the courts is a priority of the Law Ministry. Both these themes are of keen interest to the academic and NGO communities and both are being addressed in current programs of international cooperation being coordinated by UNDP and supported by several donors. Moreover, progress by the courts on judicial self-governance will be affected by the degree of

support provided by the Law Ministry, and efforts by the Law Ministry to improve legal assistance will be affected by the degree of support from the Judiciary.

B. Guiding Principles

Specific approaches for USAID in addressing the themes of judicial self-governance and legal assistance need to be carefully tested with stakeholders. As recently observed by Nancy Birdsall and Francis Fukuyama, “effective institutions have to evolve indigenously, reflecting a country’s own political, social, and cultural realities. ... Institutions such as the rule of law will rarely work if they are simply copied from abroad; societies must buy into their content.”⁵¹

In this spirit, there are several principles that USAID should consider in developing a rule of law program in Bangladesh and in how it designs its implementation approach:

1. Local ownership should be the starting point. Initial efforts should be to undertake broad consultation and informational exchanges to facilitate informed judgments by local stakeholders about their objectives, what they need to do in order to achieve them, and what support they need from international partners in general and from USAID in particular.
2. USAID should focus on issues that are priorities of the Bangladesh government and Judiciary and that also correspond to United States Government (USG) interests and the above-listed proposed USAID program objectives. Programming in strengthening judicial self-governance and expanding legal aid appears to meet this test.
3. Program design should employ a phased and iterative approach utilizing clear benchmarks that should be reviewed frequently to ensure that intended results are being achieved. Initial investments in this project should be modest and targeted towards ensuring that local partners will undertake and sustain the activities and reforms to which they commit themselves. Funds should be increased only as the benchmarks are met.
4. USAID should integrate rule of law efforts with the other activities in its portfolio within the country development cooperation strategy. In addition, USAID should seek to assure complementarity among USG rule-of-law-related programs, in particular to encourage their mutual reinforcement in responding to the above-enumerated program objectives.
5. USAID should also be prepared to dedicate technical staff to conduct a continuing dialogue and coordination within the US Mission, with local stakeholders, and with the international partners, including monitoring and evaluation to ensure that benchmarks are being met.
6. USAID efforts should be reinforced by ongoing diplomatic interventions to elevate the place of the rule of law on the bilateral agenda and to seek diplomatic engagement by other members of the international community.

The foregoing principles illustrate the point that a rule of law program in Bangladesh is a difficult and high-risk task not to be undertaken lightly. Success will involve assisting diverse Bangladeshi stakeholders to work through the issues and develop and carry out their own

⁵¹ Birdsall, Nancy, and Francis Fukuyama, “The Post-Washington Consensus,” *Foreign Affairs*, Volume 90, Number 2, March-April 2011, pages 45-53.

focused efforts to strengthen the rule of law while simultaneously assuring that the process retains sufficient congruence of interests with the USG and other members of the international community so as to merit continued support.

It is important to recognize that the extensive multidimensional and multi-institutional dialogue we are proposing—among stakeholders and by them with regional counterparts, international organizations, and international development cooperation partners—should serve two related purposes. First, it will help to define and build momentum for a locally owned strategy and program of action to strengthen the judiciary and expand access to justice. Second, and perhaps even more important, it will help to build a social consensus on the values of judicial independence, efficiency, integrity, and service to the public. Experience worldwide demonstrates that it is societal commitment to those values—far more than specific rules, plans, or organizational arrangements—that guarantee the rule of law.⁵²

C. Illustrative Program Activities

With these program objectives and guiding principles in mind, the assessment team offers the following ideas for USAID’s consideration in designing a rule of law program for Bangladesh. These ideas were inspired and informed over the course of our research, and especially our extensive dialogue with stakeholders in Bangladesh. However, converting these recommendations into specific program activities with identified actors, quantitative targets, and agreed timeframes will require additional consultations with those who will have the greatest stakes in program results and the greatest knowledge of the practical issues involved in achieving those results. In a sense, the following recommendations, in accordance with the guiding principles suggested above, are more a suggested agenda for in-depth stakeholder dialogue than a confident prescription by the assessment team of the precise measures needed to achieve the stated program objectives.

Additionally, the team is aware that the principal challenges we have identified embrace many important obstacles to advancing rule of law in Bangladesh. In suggesting that USAID focus on just two themes we have deliberately not recommended other activities that seem less appropriate for USAID, especially in the early phase. For example, in our description of principal challenges, we identified above as serious issues the absence of a career prosecution service as well as the impunity with which the police operate. The team has not recommended that USAID respond to these challenges because, in our view, they would strain available resources, create demands for specialized expertise, and dilute attention from the difficult work of addressing the difficult issues of judicial self-governance and legal aid. Also, other USG agencies and other donors are already addressing these issues. Continued efforts by OPDAT and ICITAP should be coordinated with USAID’s program so as to be mutually reinforcing and all USG efforts to advance the rule of law need to be included in the coordination with other international actors (such as the broad international support for the Police Reform Program).

⁵² See USAID, “Guidance for Promoting Judicial Independence and Impartiality,” revised January 2002, http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf. A new analysis of the development of judicial independence in comparative perspectives, including numerous country studies, will soon be available. Shetreet, Shimon, and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Framework and Practical Challenges*, Martinus Nijhoff Publishers, 2011.

USAID should be a major player in interagency and international coordination, but a lead actor only in selected activities.

1. Judicial Self Governance

Effective separation of the Judiciary from the Executive branch will require that the Judiciary develop the capacity to perform a broad range of management functions for which it has previously been dependent on the Law Ministry and other executive agencies. At the same time, enhanced management capacity will enable the Judiciary to deal more effectively with the chronic issues of case backlog and corruption that have become matters of broad public interest and the source of diminished public confidence in the courts.

Reform in this area will necessarily threaten many vested interests that benefit from the present system and will also be opposed by those who tend to be instinctively resistant to change. USAID will need to identify and engage those proponents of reform who may take a leadership role in efforts to strengthen judicial independence, accountability, efficiency, and integrity. A principal theme for initial discussion will be how to build a broad coalition of support and how to engage reluctant stakeholders. Leadership from the Supreme Court will be essential. Other likely champions might be found in the broader Judiciary (perhaps through the Judicial Services Association and the Women Judges' Association) as well as in the private bar, the media, universities and think tanks, and legal-services-oriented NGOs. Necessary participants in the process will certainly include staff personnel from the courts, who would take on new responsibilities, and from the government ministries, who would be expected to relinquish some responsibilities. In addition, it will be necessary to engage members of the bar on how the economics of law practice can be positively affected by greater efficiency in the courts.

An effort to engage a broad and diverse group of stakeholders can be aided by a fact-based examination of the issues, including exposure to international standards and best practice on themes such as judicial ethics, discipline, budgeting delay reduction, case management, human resources, and operational effectiveness. There are existing systems that might be helpful in structuring such an examination and disseminating information about the underlying conditions and the costs and benefits of alternative approaches.

*The International Framework for Court Excellence*⁵³ envisages a court-driven participatory process that is designed to assist the judges themselves to set priorities, identify problems, and resolve them. The framework calls for a self-assessment of how the courts are performing and uses a questionnaire designed to help judges identify problems and bottlenecks. The self-assessment results are used to inform the setting of priorities and the formulation of a strategic plan.

The *Framework* is built on a foundation of seven areas for court excellence and ten court values that support excellence in those areas:

⁵³ See the website at <http://www.courtexcellence.com>.

Areas for Excellence

1. Court Management and Leadership
2. Court Policies
3. Human, Material, and Financial Resources
4. Court Proceedings
5. Client Needs and Satisfaction
6. Affordable and Accessible Court Services
7. Public Trust and Confidence

Court Values

1. Equality Before the Law
2. Fairness
3. Impartiality
4. Independence of Decision-Making
5. Competence
6. Integrity
7. Transparency
8. Accessibility
9. Timeliness
10. Certainty

The Judicial Reform Index,⁵⁴ developed by the American Bar Association Rule of Law Initiative, offers a somewhat broader analytical model based on international standards. The JRI involves an international team working with a group of local experts to assess 30 indicators of judicial performance relating to qualifications of judges, judicial powers, financial resources, structural safeguards, and transparency and judicial efficiency. This model may be useful in strategic planning, but does not incorporate that step in its internal design.

The Rule of Law Index,⁵⁵ developed by the World Justice Project, is the broadest framework of all. It involves a participatory analysis of ten factors and 49 sub-factors that incorporate essential elements of the rule of law, including those beyond judicial performance. About 70 countries have participated in this process. While it appears too sweeping for consideration by USAID in Bangladesh at this time, it might not be too early to encourage participation by Bangladeshi leaders in World Justice Project forums and regional outreach meetings in order to learn about the concept, gain awareness of the experiences of others, and familiarize themselves with additional opportunities. (For example, one or more Bangladeshi leaders could be nominated to attend the World Justice Forum in June 2011 in Barcelona.⁵⁶)

Exposure to other international organizations, such as the International Association of Judges, and regional organizations, such as the Asia-Pacific Judicial Reform Forum, could also be helpful to stimulate analysis and planning within Bangladesh. The local effort could also benefit from exchanges with neighboring countries that have introduced measures to improve the performance of their judiciaries. Possibilities might include Singapore (a sponsor of the International Framework for Court Excellence); India, (a recent participant in a Rule of Law Index assessment that has also made impressive reforms in case management and backlog reduction); and the Philippines (which has made strides in improving judicial education and accountability as well as case management).

The JATI could be an excellent forum for hosting a continuing dialogue on issues of judicial self-governance. It would be worthwhile for USAID to explore the possibility of JATI playing this role, perhaps in collaboration with other sponsors from within the legal community. The assessment team also ascertained that JATI is interested in providing follow-on training for the

⁵⁴ http://apps.americanbar.org/rol/publications/judicial_reform_index.shtml.

⁵⁵ http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2_0.pdf.

⁵⁶ <http://www.wjp-forum.org/2011>.

Judiciary on court administration issues. However, any role for JATI would be subject to the Supreme Court's approval.

A thorough exploration of the issues by USAID with local stakeholders will be an important starting point. Questions to be examined include the following:

- How important is judicial self-governance to issues of judicial independence, accountability, efficiency, and integrity? What are the principal issues?
- What roles can judicial leaders (especially in the Supreme Court) play in encouraging judicial self governance?
- What is the likelihood that professional organizations, such as Judicial Services Administration, the Bangladeshi Bar Association and its constituent bodies, and the Women Judges' Association, can play a leadership role in promoting judicial self-governance?
- Who are the most likely champions within the Judiciary? The media? The business community? The government of Bangladesh? The private bar?
- How would international support best be provided? Which international partners would be most helpful?
- Which civil society organizations would be most effective at analyzing and advocating for judicial self governance?
- What would be the most effective method to improve the Judiciary's capacity to provide administrative management of the courts? What are the obstacles?
- Would there be value in a self-examination and analysis by the Judiciary to help identify priorities and facilitate planning?
- How can information best be disseminated and concerns of reluctant stakeholders be accommodated so as to expand the constituency for reform?
- What kinds of strategies could overcome entrenched opposition?

2. Improved Legal Assistance

As noted above, several programs of international cooperation are supporting efforts to improve the delivery of legal information and services to the poor and disadvantaged. Most of these efforts work with local NGOs to provide externally funded alternatives to an improved institutionalized system. While the assessment team identified access to justice and more equal application of the law as a major challenge to the rule of law in Bangladesh, we do not recommend that USAID replicate existing programs that neither seek to strengthen institutional arrangements nor make them sustainable. Rather, we recommend that USAID add its effort to ongoing work to improve the institutional basis for sustainable legal aid. In particular, we recommend an initial focus on increasing the effectiveness of the government legal aid fund managed by the Law Ministry and distributed to individual indigent litigants by the district and sessions courts. For the longer term, we recommend that USAID explore additional ways to achieve sustainable institutional arrangements for legal services.

USAID has a substantial history in legal empowerment of the poor. The programs that have been the most successful in developing countries have had vertical and horizontal reach, simultaneously incorporating bottom-up and top-down approaches and including a wide array of actors from civil society, local and national governments, the indigent society, and the courts. Successful programs have provided assistance on themes such as:

- **Reforming Law and Giving the Poor Voice:** Ensuring that the poor are able to influence the development of policy and law and enhance their rights through democratic and transparent political processes—rights enhancement
- **Providing Knowledge as a Means for Empowerment:** Making sure that the poor understand their rights and the processes by which they can be exercised and enforced—rights awareness
- **Leveling the Playing Field:** Ensuring that the poor are able to overcome bureaucratic and cost barriers that broadly affect their access to economic opportunity and wealth generation—rights enablement
- **Providing Access to Enforcement:** Making sure that the poor can protect their rights in and access to opportunities and assets through affordable and fair mechanisms for enforcement of rights and contracts and dispute resolution.⁵⁷

USAID should build on the decades of successful experience that it has had in this area.

The starting point should be a focus on the legal aid fund created by the government to pay the legal fees of indigent litigants. As described above, the Law Ministry makes a modest amount of funds available in each district and sessions court for this purpose. The National Legal Aid Cell within the Ministry is tasked with operationalizing the government's efforts to help the poor gain access to justice. However, at present the legal aid fund is not being well utilized:

- The legal aid law permits only attorneys with five or more years of experience to be paid from the fund. However, experienced attorneys tend not to be eager to devote much time and effort for the very low fees payable from the fund. At the same time, some valuable services that could be provided by less qualified professionals, such as paralegals, cannot be paid from the fund.
- The process for filing a request for legal aid is cumbersome and complicated. There is a lack of understanding by court staff on how they should be filled out and this inhibits communication with potential beneficiaries.
- Most indigent people apparently are unaware of the fund's existence.

In partnership with the Ministry, efforts should focus on reducing the barriers that discourage people from using the formal court system. Expert technical assistance should be utilized to assess the legal aid barriers in the country and to provide draft codes to simplify the procedures

⁵⁷ Bruce, John W., Omar Garcia-Bolivar, Tim Hanstad, Michael Roth, Robin Nielsen, Anna Knox, and Jon Schmidt, "Legal Empowerment of the Poor, From Concepts to Assessment," USAID, March 2007, http://pdf.usaid.gov/pdf_docs/PNADM500.pdf.

and applications in the legal aid law. The courts, which also have a role in the disbursement of the fund, would necessarily be a part of this effort.

Civil society can be an especially effective instrument in improving the use of the government fund. Experienced NGOs could provide information to local populations about the availability of the legal aid fund and how to access it. Organizations such as ASK, MLAA, BLAST, and BRAC also have deep ties to the communities in which they operate, and would have the skill and know-how necessary to design community literacy campaigns that resonate with each community. NGOs are also in an ideal position to engage in advocacy campaigns aimed at redrafting the legal aid law, increase the resources available in the legal aid fund, and to reform the procedures for applying for legal aid in the courts.⁵⁸ NGOs could also train court personnel on filing out legal aid forms. A grants program could be designed to target these activities.

In addition to support for reinvigorating the government's legal aid fund, USAID's new community-based policing program can be an early valuable complement in legal empowerment of the poor and disadvantaged. This program should be expected to give voice to citizens and to modify the historic relationship, dating back to the colonial era, between police and the community.

For the longer term, many useful activities could reduce the barriers that impede access to justice for the poor and disadvantaged. Potential programming could involve a wide array of actors, including not only the Law Ministry but also NGO's and universities providing clinical legal education. The strategy should mix top-down approaches that focus on improving the government's ability to increase legal aid, with bottom-up approaches of working with civil society and universities to enhance understanding of the issues, involve supportive stakeholders, and increase public awareness and demand.

In its longer term strategy, USAID should explore the benefit of providing technical assistance to NGOs to institutionalize their organizational development processes. The assistance should be designed to impart critical management skills such as strategic planning, project design, networking, public advocacy, fundraising, and oversight of lawyers and others who act on behalf of the NGOs. The results of this program could have a significant impact in their ability to manage their caseload and attract new pro-bono volunteers. This type of intervention may also be useful for the Bar Association.

For the longer term we believe that investing in legal education could have a significant impact on legal aid and have an overall benefit to the rule of law in Bangladesh. Evaluations of USAID legal education programs elsewhere have illustrated how clinical legal education programs have fostered participation of young attorneys in public interest law, strengthened the culture of volunteerism, and improved critical legal thinking skills of future practicing attorneys.⁵⁹ USAID should further explore the possibility of a program in partnership with one or more universities that would foster legal assistance to the poor. Suggested activities could include support for

⁵⁸ One solution would be to advocate for a reform to the Legal Aid Law that would allow the NGO (vs. the attorney) to access the legal aid fund as payment for representing the indigent client.

⁵⁹ Dietrich, Mark, and Nicolas Mansfield, "Lessons Spurned, Legal Education in the Age of Democracy Promotion," East-West Management Institute, 2006, <http://ewmi.org/Pubs/EWMILegalEducationReform.pdf>. See also, Menon, N.R. Madhava, "Legal Education and Training in Bangladesh," note 22, *supra*.

clinical legal education focused on providing legal aid to the poor. At the same time, a course in public interest law could have the added benefit of stimulating interest in and creating opportunities for young people to pursue a career that aids the poor.

As in the case of judicial self-governance, USAID support for improved legal aid should begin with a lengthy consultation with stakeholders to investigate and analyze local priorities and identify the best programming options. Initially, this consultative process should focus on ways to improve the effectiveness of the government's legal aid fund. However, it should also address the broader term issues that might be included in future programming, such as those raised in the following questions:

- What legal aid options are available to the indigent in the formal legal system?
- What are the main impediments to the poor's use of the justice system? What are the opportunities to partner with the government and the courts to reduce the barriers?
- What is the practice of attorneys providing assistance to the poor without compensation? What are the incentives for providing pro-bono service and what are the opportunities for enhancing them?
- What assistance would enhance a sustainable role for legal aid NGO's?
- What role does the Bar Association play in providing pro-bono service? How could that role be enhanced?
- Are there any opportunities for expanding clinical education in universities, such as student volunteers in legal clinics that would promote a culture of pro-bono service? Are there opportunities to encourage greater emphasis on public interest law and legal services at the university?

VII. CONCLUSION

This assessment has demonstrated the centrality of the rule of law for the future of democracy in Bangladesh. It has also demonstrated the vulnerability of the rule of law to the strains of partisan strife in a highly charged political environment. The assessment has identified four particular challenges: (1) threats to judicial independence and accountability; (2) threats to the efficiency and integrity of the justice system; (3) widespread impunity and violations of human rights; and (4) inadequate access to justice and unequal protection of the law.

The situation is one of high risk for USAID programming, and of high stakes for Bangladesh's economic, social, and political development. The assessment team concluded that there are worthwhile actions USAID can take to help Bangladesh respond to these challenges, while recognizing that ultimately the outcome will be determined by the commitment of national leaders, the strength of local institutions, and the demands and expectations of civil society. Therefore, the assessment's recommendations for program objectives, guiding principles, and illustrative program activities are all premised on a strategy of encouraging and supporting Bangladeshi stakeholders to take the lead in analyzing the issues, establishing priorities, and formulating strategic plans. The assessment recommends that implementation be carefully coordinated and rigorously monitored to assure that it remains on track and consistent with shared interests.

The assessment team believes that a focused USAID program along these lines will be a worthwhile undertaking and will have a reasonable likelihood of success in strengthening the rule of law in Bangladesh and thereby advancing USG priorities in its relations with Bangladesh.

ANNEX 1. STATEMENT OF WORK

C. 1 BACKGROUND

As the seventh most populous country in the world and the fourth largest Muslim-majority country, Bangladesh is of significant strategic interest to the United States. Bangladesh is poor, vulnerable to natural disasters, and susceptible to social upheaval and political conflict. Since independence, it has held democratic elections sporadically, including three successive peaceful transfers of power from 1991 to 2006. Yet, Bangladesh's development as a democracy has been interlaced with military rule, debilitating political polarization, ineffective institutions of governance, and endemic corruption. The triumphant free and fair parliamentary elections organized by the military-backed caretaker government on December 29, 2008 led to Bangladesh's successful transition to democratic rule and opened a new chapter in the country's history. This transition comes in the wake of a history of political acrimony, Parliament boycotts, bitter recriminations over electoral manipulations and a tradition of street violence. The difficult but successful transition back to elected government has brought about new opportunities for democratic development and a new sense of urgency exists among Bangladeshi stakeholders to reform political practices and institutions of governance. This new chapter also presents the United States with an historic opportunity to help Bangladesh improve the country's governance including the rule of law.

C.2 OBJECTIVES

USAID/Bangladesh seeks to purchase two project evaluations and a rule of law assessment for Democracy and Governance programs. The project evaluations will gauge the impact and lessons learned from two programs that will end in 2011 and, if appropriate, provide USAID/Bangladesh with recommendations for follow-on programming. The rule of law assessment will provide a targeted analysis of the status of rule of law development in Bangladesh, and an assessment of the primary opportunities and constraints to the development of the rule of law in Bangladesh. The assessment will lead directly into a strategy and potential activity design for rule of law assistance in Bangladesh to include the identification of priority areas that could benefit from USAID interventions and prioritized recommendations for future programming.

C.3 SCOPE OF WORK

TASK THREE

Assessment: Rule of Law in Bangladesh

The purpose of this assessment is to provide the US Mission with an analysis of the primary challenges in advancing the rule of law in order to develop a strategy for programming. It includes two main tasks:

- 1) An analysis of the primary challenges and opportunities in advancing the rule of law, including an assessment of political will for judicial reform
- 2) A proposed strategy for programming, including prioritized areas of intervention where

USAID has a comparative advantage and program recommendations. The assessment team shall conduct a background review of key documents, as well as on-site research and interviews to develop a report that addresses these areas. The assessment will be consistent with the Rule of Law Strategic Framework, which is designed to synchronize with the Mission's broader country, and democracy and governance strategy. The Assessment Report will consist of two major components:

Analysis of primary challenges and opportunities in advancing the rule of law: This section of the report will analyze the current state of the justice sector in order to develop and present strategic recommendations. Consistent with the draft Rule of Law Strategic Framework, the analysis will include the following steps:

The assessment will take into account the political and historic context, including current events. In addition, the assessment will briefly outline the political and governance structure of the country as it relates to the current state of the legal framework and justice sector institutions, and identify recent changes that help frame the rule of law problems that need to be addressed. This section is intended to succinctly articulate the rule of law sector in the broader political context of the country. In particular, the assessment will include an analysis of the impact on women of the rule of law and barriers to their effective participation.

The assessment team will evaluate the roles and interests of the major political actors, and assess the political will for judicial reform. The purpose of this part of the analysis will be to identify who is likely to "win" and "lose" from the enactment of reforms to the rule of law system. Identifying the winners and losers in light of their potential power will be instructive in terms of assessing the level of political will for various types of interventions.

The assessment team will examine program options beyond the justice sector that might have a bearing on the rule of law. Such considerations will include issues such as lack of consensus over governance, lack of competition in political processes, inadequate inclusion of members of society, and inability to govern effectively. The purpose of this section will be to identify other corollary impediments to democratic transition outside the justice sector that condition potential progress in the justice sector.

The assessment team will assess the justice sector itself. This analysis will include examination of the five key elements that comprise the rule of law, namely: 1) order and security; 2) legitimacy; 3) checks and balances; 4) fairness; and 5) effective application. Each of these five elements must be present for rule of law to prevail. This section will focus on how these elements are embodied and enacted within the legal framework and justice sector institutions and actors. This section should outline the key features of the justice system, extent of its independence from the executive branch of the government and the framework of laws and the justice sector institutions. The analysis should also address key challenges and opportunities for promoting the essential elements of the rule of law within the legal framework and justice sector institutions. The purpose of this section will be to identify potential points of intervention within the justice system itself that are in need of reform and amenable to change.

In addition, the assessment will review existing USG and other donor programs in the justice sector, to determine what progress has been made so far, and where opportunities and entry points might exist for programming. The assessment will identify lessons learned and areas of programming that are both strategic for the USG and complementary to existing donor programs.

2. Programming Strategy:

The assessment will be used to inform the development of a strategy and programmatic options for rule of law interventions. This strategy will be based on the findings from the preceding sections as well as additional considerations such as Mission priorities, USG policy, availability of resources, and activities of other donors. The strategy should be designed to focus rule of law activities around the primary challenges in promoting the rule of law in light of the current state of political will, opportunities and constraints for reform, and past successes.

The strategy should include the following components:

- Primary problem(s) framed in terms of the essential element(s) of the rule of law that are most critical to establishing the rule of law in Bangladesh including effective protection for women.
- Opportunities for interventions, including the specific institutions and laws where opportunities exist for realistic and long-lasting reform.
- Program recommendations including intended results that could be achieved through both programs to address the primary rule of law problem and the rights of women.

Recommendations should be prioritized both in order of importance and USAID's comparative advantage.

D. Proposed Methodology

The contractor shall provide a team to work directly with USAID staff to conduct the work in three stages.

Preparation phase: The first phase of the assessment and evaluations will involve reviewing background materials and key documents; developing an assessment and evaluation methodology that includes primary research questions and interview protocols; and preparing a schedule of interviews for the subsequent field work stage. A pre-trip meeting with relevant USAID staff is required during the preparation phase to review documents, discuss background reviews and agree on the primary research questions, interview protocols and assessment schedule. This meeting will take place preferably at the USAID offices in Washington, D.C., but may be conducted via teleconference if necessary.

Literature Review and Evaluation/Assessment Methodology: Prior to beginning the interview process, the contractor shall prepare for the assessment by reviewing key documents on the justice sector; background material on the political situation; and applicable sections of USAID and project documentation. The contractor will also prepare a methodology plan including primary research questions, interview protocols to structure the interviews, and a list of proposed individuals to be interviewed. The methodology plan, interview schedules and interview protocol will be presented to USAID/Bangladesh COTR for approval prior to departure for the field-research phase.

Field-work phase: The team will conduct field research, including gathering and reviewing documents, and conducting structured interviews with key informants (and focus groups, if appropriate) and beneficiaries, including Judiciary, Government personnel, international and donor personnel, USAID partners, members of Parliament, lawyers, judges, court administrators,

mediators, civil society organizations, citizens groups, and other relevant stakeholders. The team will present a list of interviewees to the USAID COTR for approval prior to conducting interviews. The contractor will be responsible for developing the list of interviewees and arranging meetings, as well as transportation to the meetings.

ANNEX 2. TEAM BIOGRAPHICAL SUMMARIES

NATALIJA STAMENKOVIC — TEAM LEADER

Natalija Stamenkovic is a seasoned development professional who has served in many senior roles for large international donors and implementers. In 1994, Ms. Stamenkovic worked for the US State Department Office of Counsel to the Inspector General. In 1996, she joined the Office of the Public Defender for the State of Maryland and later started her own private practice. She entered the development field in 2000 with UNHCR, where she served as a Senior Legal Advisor to the UNHCR mission in Bosnia-Herzegovina. She assisted in the return and reintegration of over 15,000 refugees during the three years of her service. In 2004, Ms. Stamenkovic was Lord Paddy Ashdown's Senior Prosecutorial Reform Advisor for the Office of the High Representative in Bosnia-Herzegovina. Later in 2005-2007, Ms. Stamenkovic joined the United States Agency for International Development where she served as a Senior Rule of Law Advisor to the Europe and Eurasia Bureau. During her tenure at USAID she provided extensive guidance to the USAID missions in Kosovo, Serbia, Georgia and Azerbaijan to design new rule of law strategies, monitor and evaluate existing projects and develop RFP's for new rule of law programs. From 2008-2010, Ms. Stamenkovic was the Director of Democracy, Governance and Community Development at International Relief and Development. She managed large donor programs that were promoting democracy and governance in Cuba, Indonesia, and Sudan. Ms. Stamenkovic is currently the president of Development Professionals Inc, a small woman owned company that specializes in rule of law programming and monitoring and evaluations of democracy programs. She is managing programs in Congo and South Africa. Recently she completed an assessment for the USAID mission in Albania and an evaluation of the USAID ROL program in Lebanon. She holds a Juris Doctor degree from the American University School of Law. Ms. Stamenkovic specializes in criminal institutional reform and access to justice particularly for vulnerable populations. She speaks Russian and Serbo-Croatian fluently.

GARY COLLINS — TEAM MEMBER

Mr. Collins is a legal expert with over 18 years experience working in rule of law and human rights projects in Bangladesh, the Middle East and the Balkans. A member of the Maryland State Bar Association, he is fluent in four languages and speaks some Bangla. After leaving active duty with the US Army's JAG Corps in 1991, he was a Legal Adviser with the United Nations Relief and Works Agency in Jerusalem and then with the United Nations' peacekeeping operations in the former Yugoslavia. He was the Senior Legal Adviser to the Head of Mission of OSCE's, Kosovo Verification Mission in 1999 and then worked on property law issues related to refugee and IDP returns, including restitution, for Bosnia's Office of the High Representative in Sarajevo. From 2001 to 2002, he was the Head of the Rule of Law & Human Rights Department for OSCE's Mission to the Federal Republic of Yugoslavia. He then took up the position as Chief of Party of USAID's Economic Policy for Economic Efficiency Project in Belgrade, Serbia. He provided USAID with an assessment of the state of Macedonia's ability to investigate and prosecute government officials for corrupt practices and an analysis of the overall capacity of the government to police corruption in procurement with recommendations on future capacity building assistance. Mr. Collins was the first international consultant hired by the Asian Development Bank to assist Bangladesh's Anti-Corruption Commission in 2004. He then

became a Senior Adviser with Danida's judicial capacity building project with Bangladesh's Judicial Administrative Training Institute (JATI) in Dhaka. At JATI, Mr. Collins worked on a daily basis with senior members of the Judiciary and Ministry of Justice. Afterwards, he served as the Deputy Chief of Party on a USAID judicial reform project in Beirut which included assessment of the capacity to conduct training for judges, along with recommendations on ways of strengthening teaching methods, curricula, research facilities and partner institutions, e.g., other judicial training centers in Europe. Currently, Mr. Collins is working in Palestine providing the Najah University's Law Faculty advice and assessment for establishing legal clinics specializing in property law related to the Israeli occupation. Mr. Collins has extensive experience teaching human rights law, gender issues and international humanitarian law as a member of the adjunct faculty Canada's Pearson Peacekeeping Centre in Nova Scotia. He holds a Juris Doctor degree from the University of Baltimore School of Law. He has provided numerous assessments and evaluations for rule of law projects and is familiar with the Bangladesh legal and political environment where he has established excellent relations with his legal counterparts.

CYNTHIA FARID — TEAM MEMBER

Ms. Farid is a development and rule of law professional who for two years served as the national advisor and program manager to the American Bar Association Rule of Law Initiative in Dhaka, for its women's rights protection program which involved community legal services and access to justice components. In that position, Ms Farid both designed and managed all aspects of the program, including the development of the program objectives and activities, its monitoring and evaluation plan; implementation of the activities such as overseeing travelling lawyers, drafting the training manual, outreach and coordination with the local NGOs and community-based organizations partnering with ABA ROLI; and coordinating financial management and reporting; among other activities.

Currently she is working with the UNDP and is actively involved in Tobacco Control Activities with CTFK-Bloomberg Initiative. She also has experience in a range of rule of law programs with other donor organizations, grassroots NGOs, community service providers, think tanks, and legal rights organizations in Bangladesh. She has specific expertise in women's rights issues, has a strong understanding of international legal covenants such as the Convention on the Elimination of All Forms of Discrimination Against Women and has is committed to leveraging these laws to protect women's rights and to strengthen the capacity of women's rights and legal aid organizations. Ms. Farid is excellent at facilitating dialogue to promote a reform-conducive environment, and moves easily among local community groups and government institutions, legal organizations and donor organizations. She has excellent (English) writing and legal skills having also worked in law firms in London and Manchester, England as well as Dhaka, Bangladesh. She is fluent in Bengali, Hindi and English.

KEITH CRAWFORD — TEAM MEMBER

Mr. Crawford is a democracy specialist for the USAID Office of Democracy and Governance with over 20 years of experience in international development. He currently serves as an expert advisor and technical authority on complex policy and program issues, develops policies, strategies, and plans for democracy and rule of law development programs. He also serves as a technical expert in developing and maintaining relationships with other Government departments

and agencies that provide rule of law assistance (State Department, Justice). Additionally, he provides leadership in designing and implementing USAID rule of law training programs to help assure that the Agency's democratic cadre is current on best practices in rule of law programming. He has on-site rule of law experience implementing, designing and managing rule of law programs in Africa, Asia, the former Soviet Union, North Africa, the Middle East and Africa. Prior to joining USAID he served as an Assistant District Attorney in Brooklyn, New York. He holds a B.A. from Old Dominion University and a J.D. from Howard University School of Law.

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ANNEX 4. INTERVIEW LIST

Bangladesh Government, Judiciary, and Political Leaders

Shafique Ahmed, Minister of Law, Justice and Parliamentary Affairs
Mahbubey Alam, Attorney General
Imman Ali, Justice, Appellate Division of the Supreme Court
Dr. Shirin Sharmin Chowdhury, Minister of Women's and Children's Affairs
Mirza Hussain Haider, Justice, High Court Division of the Supreme Court
Khairul Haque, Chief Justice of Bangladesh
Ashraful Islam, Registrar, Supreme Court
Mizanur Rahman, Chairman, National Human Rights Commission
Hamid ul Haque, Director-General, Judicial Administration Training Institute

United States Government

Shelia Ahluwalia, State, Office to Monitor and Combat Trafficking, Department of State
Habiba Akter, Justice and Human Rights Advisor, USAID Bangladesh
Feleke Assefa, Office to Monitor and Combat Trafficking, Department of State
Gary Barr, International Criminal Investigative Training Assistance Program, US Department of Justice
Melissa Bentley, Office of the Coordinator for Reconstruction and Stabilization, Department of State
Karl Clark, Senior Law Enforcement Advisor, US Embassy Dhaka
Kathleen Crowley, Democracy, Human Rights and Labor Bureau, Department of State
Dianne Cullinane Democracy and Governance Adviser, USAID Bangladesh
Jon Danilowicz, Counselor for Political and Economic Affairs, US Embassy Dhaka
Nicholas J. Dean, Deputy Chief of Mission, United States Embassy, Dhaka
J.P. Feldmayer, Diplomatic Security Special Agent, US Embassy Dhaka
Robert Gerardi, Resident Legal Advisor, United States Embassy Dhaka
Bruce Hemmer, Office of the Coordinator for Reconstruction and Stabilization, Department of State
Najrana Imaan, Assistant Legal Advisor, United States Embassy Dhaka
Shirley Ives, Mission Strategic Planning Advisor, USAID
Bryan Koontz, State, Office of the Coordinator for Counterterrorism, Department of State
Sherri Kraham, Managing Director, Millennium Challenge Corporation
Christopher Lehmann, Senior Regional Director for Counter-Terrorism and Asia/Pacific, Office of Overseas Prosecutor Development and Training, US Department of Justice
Khadija Mojidi, Director, Office of Population, Health and Nutrition, USAID Bangladesh
James Moriarty, US Ambassador to Bangladesh
Denise Rollins, Director, USAID Bangladesh
Vivita Rozenbergs, Bureau of Narcotics and Law Enforcement, Department of State
Dennis Sharma, Deputy Mission Director, USAID Bangladesh
Kevin Sturr, Director Democracy and Governance, USAID Bangladesh
Sherina Tabassum, Democracy and Governance Advisor, USAID Bangladesh
Hoa Tran, Bureau of Population, Refugees and Migration, Department of State
Anthony Tranchina, Department of State Desk Officer
Shawna Wilson, Senior Rule of Law Advisor, Bureau of International Narcotics and Law Enforcement, Department of State

International Partners

Mahal Aminuzzaman, Governance Advisor, Danish International Development Agency Bangladesh
Sarder M. Asaduzzaman, Project Manager, Activating Village Courts Project, United Nations
Development Program Bangladesh
Warren Cahill, Project Manager, Improving Parliamentary Democracy Project, United Nations
Development Program Bangladesh
Michael Kramer, Investigator, World Bank
Priyani Malik, Governance Officer, World Bank Bangladesh
Tam Pham, Desk Officer, United Nations Development Program
Promita Sengupta, Program Coordinator, GIZ Bangladesh
Bhavna Sharma, Governance Advisor, Department for International Development Bangladesh
Henk Van Zyl, Project Manager Police Reform Project, United Nations Development Program
Bangladesh
Won Young Hong, Assistant Country Director, Democracy and Governance Cluster, United Nations
Development Program Bangladesh

Implementing Organizations

Jumana Dalal, Senior Program Manager, Asia Division, American Bar Association Rule of Law Initiative
Hasan Mazumdar, Country Representative, The Asia Foundation
Jennifer Rasmussen, Asia Division Director, American Bar Association Rule of Law Initiative
Nancy Yuan, Vice President, The Asia Foundation

Civil Society

Selima Ahmed Chair, Bangladesh Women Chamber of Commerce and Industry
Shaheen Anam, Executive Director, Manusher Jonno Foundation
Aroma Dutta, Private Rural Initiative Programs Trust
Sara Hossain, Supreme Court Advocate, Bangladesh Legal Aid and Services Trust
Ferdous Jahan, BRAC Development Institute
Sumaiya Khair, Dean of the Law Faculty Dhaka University
Adilur Rahman Khan, Executive Director, Odhikar
Z.I. Khan, President of Human Rights and Legal Aid Committee, Bangladesh Bar Council
Shahdeen Malik, Attorney and Law Professor
Abdul Awal Mintoo, Former President of Federation of Bangladesh Chambers of Commerce and Industry
Mizanur Rehman, Empowerment through Law of the Common People