

3rd Expert Meeting on Women & Justice

**January 12-14, 2003
Penang, Malaysia**

Asian Women's Fund

All rights reserved.

Asian Women's Fund (AWF)

March 2003

4F, Sougo Kudan Minami Bldg., 2-7-6 Kudan Minami , Chiyoda-ku, Tokyo 102-0074

TEL. +(81-3) 3514-4071 FAX. +(81-3) 3514-4072

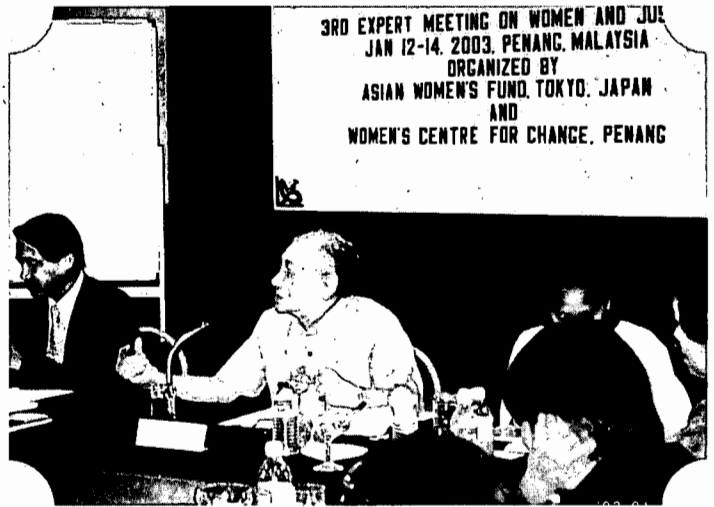
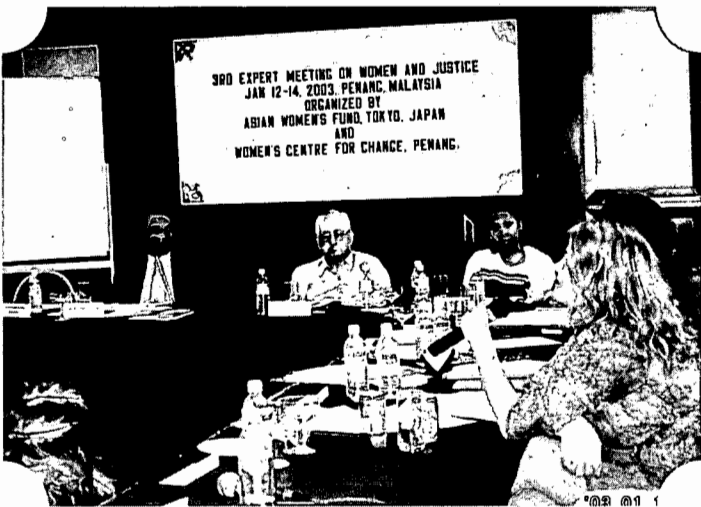
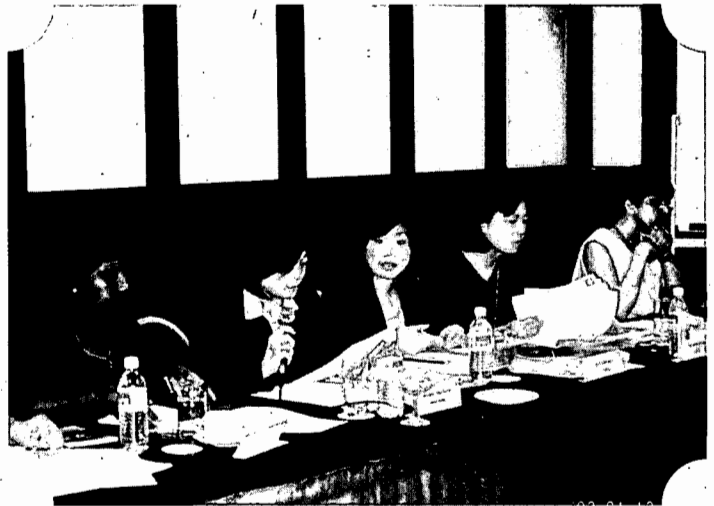
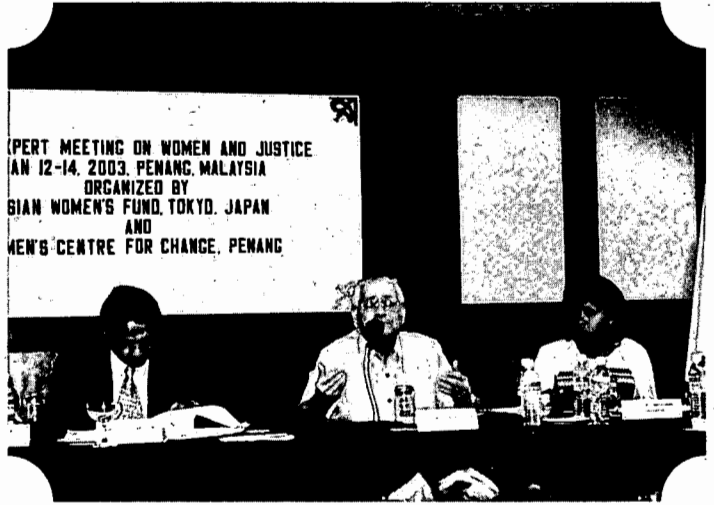
e-mail: dignity@awf.or.jp

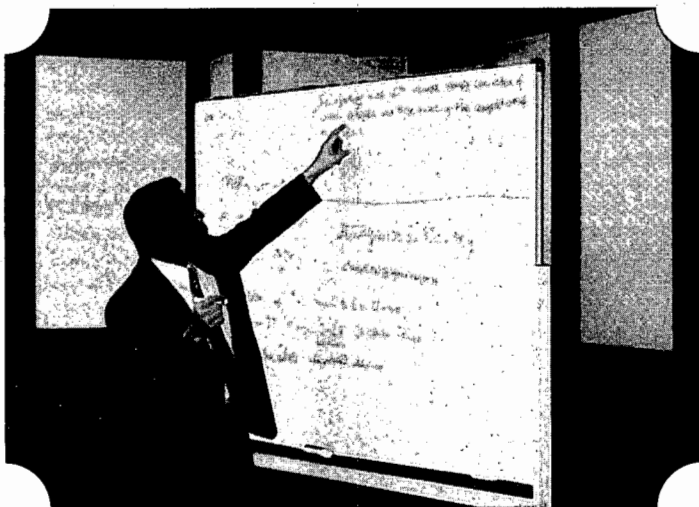
website: <http://www.awf.or.jp>

TABLE OF CONTENTS

The Third Expert Meeting on Women and Justice

Summary of the Discussion	1
Session 1	1
Session 2	4
Session 3	7
Session 4	9
Session 5	10
Penang Statement on Women in Detention	11
National Reports	15
Algeria <i>Leila Zerrougui</i>	15
Australia <i>Elizabeth Biok</i>	24
Hong Kong <i>Hing Chun Wong</i>	39
India <i>Nirmala Pandit</i>	51
India <i>Soli J. Sorabjee</i>	63
Indonesia <i>Pasti Serefina Sinaga</i>	71
Japan <i>Emi Omura</i>	81
Malaysia <i>Stephanie Bastian</i>	92
Malaysia <i>Zarizana Abdul Aziz</i>	99
Madagascar <i>Lalaina Rakotoarisoa</i>	108
Philippines <i>Dina Joy C. Tenala</i>	121
USA <i>Barbara A. Frey</i>	126
List of Participants	136





SUMMARY REPORT OF THE 3RD EXPERT MEETING ON WOMEN AND JUSTICEWOMEN IN DETENTION

January 12-14, 2003, Penang, Malaysia

Prof Yokota welcomed the participants for the third meeting of experts who had gathered to discuss the topic of 'Women in Detention'. The participants introduced themselves. Prof Yokota explained the background of the meeting and the important relevance of the topic. He suggested that the topic of 'Women in Detention' might be divided under two broad categories, i.e. the actual situation of women in detention institutions and the position of legal provisions. It was agreed that the discussions would focus on the broad themes and the country experts would supplement further information. He wished success and fruitful discussions in the following sessions.

Session 1 Violation of Women's Dignity and Human Rights in Detention Facilities and Prisons

Session 2 Input from Malaysia on the Issue

Session 3 Laws and Procedures to Protect Women's Dignity and Human Rights in Detention

Session 4 Laws and Procedures to Redress Damages Suffered by the Victims

Session 5 Penang Statement

Session One

Ms. Leila Zerrougui, Algeria

Women in Detention are not a very important issue in Algeria. Very few women are found in detention facilities. Little over 700 women are kept in prisons as against the total population of 23,000 inmates of prisons. Generally women are not kept in institutions. The judges too are not eager to do that. However when women are kept in prisons, they are housed in the same prisons as that of men but in separate quarters. This unfortunately hampers any possibility of rehabilitation women prisoners.

This paper focussed on the general issue of women in detention. It pointed out the difficulties that most of the developing countries may face in providing separate institutions for women in detention. In fact, lots of times all women are put together whether they are

detained as under trials, for protective reasons, as convicts or till they are set free (after completing the sentence) in the custody of a male relative. It also addressed the issue of vulnerability of women detainees, both as delinquents and as victims. Many women who have been detained carry a social stigma. Further the women staffs in the prison were seen perpetuating the same societal stereotypes within the prisons.

The author felt that the attitude of the judiciary and the media towards the issue of women in detention is very important from the point of possibility of bringing about any change in the situation. The media should ideally bring this issue to the notice of the public. But the judiciary has reflected a traditional and paternalistic attitude of the male judges. The women judges are not quite sensitive towards this issue either. Many times the testimony by a woman is not accepted unless the evidence produced by another eyewitness supports it.

The following are the highlights of the discussion:

1. This presentation has also highlighted the lack of sensitivity of women towards women's issues. In many countries even when there are many women in the judiciary, yet they are not seen very sensitive towards the issue and sufferings of women in detention.
2. Since there is a stigma against crime and people are very angry towards criminals, it may be difficult to expect that there would be any support or sympathy towards the prisoners or the rights of prisoners. However, there is greater more sympathy towards women prisoners than towards the men prisoners.
3. Many times the judges do not realise the gravity and sufferings of women in detention including the issue of consent and the prevailing power equation when abuse or rape is committed on women while in detention.
4. In India the media has taken initiatives in bringing the abuses to the notice of the public and since then, there has been a change in the attitude of the judges. Presently there is a move to change the laws, particularly those affecting the abuse while women are in detention.
5. It is very important that the efforts must be directed towards the sensitisation of the judiciary. The elected representatives are not interested in this issue and hence change in the law would come very slowly.
6. The discrimination against the vulnerable people is further reflected in their treatment while in prisons.
7. In Australia, women who are trafficked are in fact kept in *incommunicada*. They are further discriminated. There is urgent need for the sensitisation towards these issues.

Ms Lalaina Rakotoarisoa, Madagascar

Ms Lalaina Rakotoarisoa presented a paper addressing the situation of women in detention in Madagascar. In cases of women, the delay in trials leaves them in detention for longer periods than the legally prescribed limit. The institutions are overpopulated, thus resulting in deteriorating of services. Further the institutions are not equipped to take care of children who continue to live with their mothers. In Madagascar, there are more women judges who are assigned to address issues of women and that leads to some improvement of the women's situation in prisons. Women prisoners can have the custody of their children till the age of 2 years. Many times when both the parents are in prisons, the relatives are not informed of the birth of these children. Many times such children are seen roaming on the streets. The children, who grow in prisons with their mothers, suffer from fear and isolation from men whom they have not seen at all.

The main discussion points:

1. The general experience is that women suffer from depression more frequently than the men. This situation is further aggravated among women in detention.
2. Isolation of women and their children from men is a different and important topic that needs to be addressed. The International criminal observatory has indicated that men are provided with intimate conjugal visits, but that is yet not provided for the women under detention.

Ms. Elizabeth Biok, Australia

Indigenous women in detention suffer doubly. The general tendency among the indigenous lawyers is to represent a man and not woman. This in fact reflects the general tendency of discrimination. The aboriginal legal assistance cell may also continue to perpetuate this tendency. Ordinarily, one who is charged for trafficking including drug trafficking may not get bail. Legal aid services are available to certain categories of people but women are not necessarily benefited under this scheme. In cases of immigration or illegal entrants to Australia, they are first detained and not released except under the *habeas corpus* provisions. Any refugee entering Australia is taken in detention and is kept away and in isolation without any representation till the status is determined. No legal aid or assistance is provided to the detainees under refugee status. A person in immigration detention is most vulnerable. They are uncertain in approaching the judiciary even if their other rights are violated.

Conditions under which women live in detention are appalling. Further, the detention administration is entrusted in the hands of an American company under a contractual arrangement. This further hampers the rights of detainees including access to lawyers and legal services. Many of the officials who receive the immigration applications are people who are not lawyers. They are the people who are appointed by the private companies. The basic amenities like providing sanitary napkins are not provided to women in detention. However the church groups are helping in addressing this shortfall. At times the situation in immigration detention is found to be worse than that in the jails. There is no judicial review in the immigration cases. However there are administrative tribunals, which are to review decisions taken by the immigration officials.

There is a tendency of criminalisation of the asylum seekers. Currently each country over emphasises the importance of domestic laws over the international laws. But there is still a need to recognise that the international law must prevail over the domestic laws. The question is, whether can the mechanisms under the international laws like ICCPR and other international treaties can be used to protect situations and conditions of women in detention.

Session Two

Ms. Barbara Frey, USA

Many human rights are guaranteed in the USA. However the situation of women in the prisons and detention centres is something to be concerned about. Many of the women in detention are chained to the bed no matter what their health condition is. At some places the prison officials serve as Para-medics. This often conflicts with their role as a guard. Many women prisoners are sexually abused while in detention by the prison officials or by other men detainees. Various international standards are violated by the US detention services. Any redress that an inmate may have, is available only after all the possible remedies within the detention services are exhausted, no matter how dilatory those processes may be.

The issue of race discrimination and its impact on the prison discrimination is an important point of concern. The judges in the court may not be racist but the impact of their decisions may result in discriminatory action. Many of the federal judges are conservative judges. Similarly, laws may have discriminatory impact on the people, e.g. the punishment for carrying crack cocaine is harsher than on carrying other forms of cocaine. With the result, the African Americans who are mostly engaged in using crack cocaine are harshly punished than the white Americans, who are engaged in using other forms of cocaine.

The ageing population among the women prisoners is on the increase and has its own health impact on the prison population.

The Prison Litigation Act of 1995 has not necessarily helped the prison inmates. There are however some creative ways in which situations of women in prisons have been addressed. Not many states/counties have separate detention facilities for women. Sometimes the detention authorities rent out premises from the prison authority.

What does one need to focus on the priorities as a nation?

No one speaks out for the persons in detention including women. They are bad people and no one apparently has any interest or sympathy for these people. The more troubling question is what is the situation of international law and international practices?

Ms. Emi Omura, Japan

The law in Japan requires that the women and men be housed in different institutions. However there is always overcrowding of inmates in all the institutions. Women prisoners in spite of the legal provisions face serious concerns before, during and after childbirth. The child is left in the nursing home when the mother has to work in the prison. In such a situation the mother cannot visit the child until her term of punishment is over. Nor can the child meet with the parents in the prison till it completes the age of 14 years. It is believed that this arrangement is to protect the emotional well being of the child. Further the child is not even informed of the whereabouts of the parents. This evolves from the Japanese culture and the stigma that is associated with the prison.

In cases of trafficked women, most of the women are detained in the immigration detention centres. The situation in detention centres is worse than the prisons. However prison inmates must work while in prisons and those housed in the detention centres do not work. Pre-trial detainees are kept in detention centres before they are tried and sentenced.

Ms. Stephanie Bastian, Ms. Zarizana Abdul Aziz, Malaysia

Under the Internal Security Act, a person may be arrested and kept in *incommunicado*. The illegal immigrants experience a very harsh treatment. 4.65 % of the prison population consists of women prisoners. Before the trials, the individuals are kept in the lock up. The prisoners are ill treated while they are detained in the detention centres. They are taken in

hand cuffs when taken to court for trial, even if the detainee is cooperative. The cautions' statement is not explained to the detainee.

Situations within the custody are not made public and hence little information is available about the situation in the prisons and in detention centres. All kinds of persons are detained in the detention centres including hard core criminals, mental patients and some times even juveniles are kept with adults. Men and women are however segregated. But over crowding of the detention centres is so grave that not all inmates can sleep at the same time for the insufficient space that may be available to each inmate. The living conditions in the lockups are worse than those in the prisons.

The National Human Rights Commission has been taking initiatives in improving the situation in detention centres including lockups and prisons. There is a need for education and sensitisation of police officials on human rights and the rights of the prisoners. There is a wide scope for improvement in the police administration.

Protection of Women and Girls' Act has been enacted for protecting young girls from moral dangers. However, many times this Act is used to harass the girls rather than to protect them. The experience is that many of these girls come from economically poor families.

The lockups are used for detaining illegal immigrants. This is most inconvenient in cases of foreign wives of Malaysian men. A foreign wife is allowed to live in Malaysia on a licence, which is applied for by the husband. But if there is some discrepancy in the marriage relationship, then the husband would generally not renew her licence and the wife then becomes an illegal immigrant and may be subjected to detention followed by deportation.

In cases of custodial rape, the concept of consent was not clear. When there were no marks of bruises on their body, they removed their own clothes and did not oppose the policeman, the magistrates found it difficult to regard that case as a case of custodial rape.

In cases of religious detention centres, the authorities are expected to ensure proper Islamic behaviour from people. The government does not have a specific policy in addressing the racial issue. The government opposes any action that apposes their policy. In such a situation they make no distinction among the different races. In cases of *Sharia* courts there is a hierarchy of courts under this system. However, they are usually headed by religious leaders and may not have trained lawyers at the lower level. Sometimes the *sharia* courts would borrow civil judges who belong to the Muslim religion. The civil law recognises the freedom of religion and every one other than Muslim can renounce his religion but the Muslim does not have the right to renounce the religion. In two states where the Islamic party is in power, the *hudud* is being introduced but not yet implemented on the grounds of

'time is not yet ready for such change'. There is nothing like a mixed marriage, since that is not permitted. They must convert to Islam before they can marry. But this act amounts to violation of human rights where a forced conversion is expected.

The following points came up for discussion;

1. Similar protection homes are provided in Hong Kong, to house girls who are found in vices homes, brothels, bars, etc.
2. In Australia young children, are rounded up in order to protect them at a certain time of the night and kept in protective homes. Unfortunately they round up more indigenous children than the white Australians and thus the discrimination against the indigenous people is on the rise.
3. How does Malaysia address the race relationship between the different communities?

Session Three

Ms. Pasti Sinaga, Indonesia

The law respects equality among women and men and hence has no special laws addressing the situation of women in detention. However there are rules that address the situation women in such institutions, e.g. minimum provisions to ensure health and hygiene of the inmates. There are also correctional institutions, which house women prisoners. These do not look like prisons. But at most places women are housed in separate wings in the prisons that houses men prisoners.

If there are complaints by the inmates of the institutions, such are to be addressed by the warden of that institution. But there is no other authority that engages in the redressal procedure. However law and the reality are different and not all provisions are implemented.

Ms. Dina Joy Canencia Tenala, Philippines

This paper addresses women's correctional institutions where women are housed for less than three years. Any woman who is kept in detention for a period longer than the three years is kept in a prison. Those who are housed in the correctional institutions can be visited for five days a week. Any one can visit these institutions whether a visitor is a relative or not. Men inmates are allowed to have conjugal visits by their spouses but the contrary is

not true in cases of women inmates. The reason being, there is burden on the state resource if women get pregnant. The women are housed in dormitories. The women inmates are not further segregated on the basis of hard-core convicts, first time offenders, etc. But the women undergoing death penalty are housed in a separate dormitory.

A nursing child is brought to the mother for nursing and is left with the relatives and in the absence of relatives the child is kept in an institution.

What is the length of time that elapses before the case comes for hearing? It can range from anytime depending on the severity of the offence. When a person is convicted the time of detention prior to the trial is deducted from the total sentenced period. Detainees can complain to the ombudsman and not to the officials of the detention house.

Ms. Hing Chun Wong, Hong Kong

There are five institutions for women detainees, including prisons training centre, drug addiction treatment centres and rehabilitation centre. The women officials manage these institutions. Mentally disturbed detainees are kept in psychiatric centres and are released on review of their mental health.

A young child of a prisoner stays with the mother. The child born in the prison stays with the mother for the first 9 months. While in the correctional institution the child stays with the mother till the age of 3 years. During this time the child is allowed to play in the open areas. The child can later stay with the relatives or in the institutions and visit the mother once in a week.

Women detainees are provided with vocational and educational training facilities. Some work is also provided for the women prisoners, e.g. dress making, embroidery, etc. The first time and young offenders are kept in the rehabilitation institutions with minimum security and here they also receive vocational training and follow a strict disciplinary routine. Many young girls are covered in this facility.

Generally the detention institutions for women are overcrowded. This is also due to the influx of women from the Mainland China who are convicted on the grounds of 'breach of condition of stay'. The record on these women is kept alive and they may also have difficulty in entering Hong Kong at some later date.

Session Four

Mr. Soli Sorabjee, Dr. Nirmala Pandit, India

The Prison Act of 1894 governs the situation of prisoners in India. But the judiciary has been very active and the judges have been humanising the Act while interpreting its scope. There is overcrowding of the jails and the Supreme Court has directed that no person should be detained for a period longer than the term of sentence if she/he was to be convicted.

The reform committees have suggested both urgent needs of segregation of men and women in detention, as well as management of detention institutions, be managed by women officials. Further administrative rules have been formulated to address the interactions of women with the detention centres. Mentally ill women are placed in detention centres and they languish in such institutions without any treatment or trial.

India has a strong and vigilant media, which has brought to the notice of the public, the excesses committed against women detainees. There is an urgent need to get information about the detainees so that improvements in the prison situations can be brought about. There is also the need for establishment of an independent body like ombudsmen, to address the grievances of detainees. The important reasons for non-implementation of the rules/laws need to be addressed. And a sense of responsibility is to be incorporated in the administration of detention facilities.

After a person is charged and goes to the custody, the delay is caused in bringing the case for hearing. In such a situation a person may remain in the custody for a longer period than the time of his sentence if he was to be convicted.

Far less number of women is seen in the detention institutions. The reason may be attributed to the psyche of a traditional society where it is believed that women do not commit serious crimes.

In addressing complaints of the detainees, there is need for establishing some institutions. Such authority should ideally be independent from the prison authority. In the Romano-Germanic system a judge is appointed in the institution that takes upon the cause on his own and who may be accessible and an inmate may approach such an authority in complete anonymity and confidence.

Ms. Iulia Antonella Motoc, European Situation

In spite of consisting of many countries, the European regional institutions have played a very important and unifying role. The European Union and the Council of Europe have taken lead in addressing the situations of women in the detention institutions. The tendency is to reduce the penalty for women detainees so that few women are in the prisons and continue to live with their children outside the prison authorities.

While Europe faces a severe situation of asylum seekers, a uniform system is being worked out but not much progress is being made. The situation of prisoners in Western and Eastern Europe is quite different. In Central and Eastern Europe, the communist regimes did not treat prisoners any better than the free citizens outside the prisons. There is a cultural diversity that exists between the Eastern and Western Europe in all aspects. Now the trend is to replace community work for jail imprisonment.

The time has come to address the situation of women in detention in an innovative way. For example putting a woman in jail affects her children in a very adverse manner and hence it is essential that we address this question in a different light. Further, one also has to take into consideration the ground realities in each of the States. The corruption, diversity in social context, etc. has to be taken into consideration. In Australia, an alternative is introduced, which provides for a weekend detention. This is provided to young first time offenders and is proving to be effective. If one commits the same offence again then he is denied of bail provisions.

In India, some times the fine proceeds are used for helping the family of victims rather than putting a person in jail and satisfying the family of victim of the revenge of the wrong done to them.

Session Five

Preparation of the Statement

A framework for the statement was worked out and the main concerns were shared.

PENANG STATEMENT ON WOMEN IN DETENTION

January 14, 2003

Preamble

At the third meeting of experts on 'Women and Justice' convened by Asian Women's Fund in Penang in January 2003, the participants discussed issues relating to women in detention and agreed on the following:

Recalling that the Universal Declaration of Human Rights and the UN Standard Minimum Rules for the Treatment of Prisoners proclaim the dignity and worth of every human person including women in detention;

Recognising that women in detention include women convicted of crimes, those awaiting the completion of their trials, asylum seekers, and those who are being held for protective or immigration reasons;

Concerned that women in detention are subject to grave violations of their human rights;

Determined that these violations must be eliminated irrespective of different jurisdictions, cultures and religions;

Convinced that greater transparency in the situation of women in detention will ensure protection of, encourage research on and introduce reforms to promote human rights;

Noting that women make great contribution to the welfare of the family and to the development of society and that women in detention face multiple discrimination of varying degrees and therefore are vulnerable to human rights abuses.

A. Pre-Trial Detention Rights

1. All women in detention are to be presumed innocent until proven guilty and must be given access to gender sensitive legal assistance. At the time of their detention they must be notified of the reasons for their detention. They must be informed about their legal rights and given access to gender sensitive legal assistance. Their whereabouts must be communicated to their next of kin and they must be permitted to communicate with their next of kin and legal adviser.

2. Interrogation and medical examination of women in detention must be carried out by competent and gender-sensitive women officers. Officers must bear identification at all times.
3. Pre-trial detention must be closely monitored by the judiciary. It must be as short a period as possible. In no situation should it exceed the period of sentence for the offence charged.

B Detention Conditions

4. All detention centres must maintain a register which identifies the names, purpose of detention and day and hour of admission and release of all persons in detentions.
5. States should make every effort to locate detention sites in proximity to the women detainee's places of residence so as to encourage visits by family and friends and avoid isolation of detainees. Special needs of women with children to be addressed by providing regular child visits and counselling of family members.
6. There should be segregation of pre-trial detainees, non-penal detainees and convicts in detention centres. There should be segregation also on account of sex and age of persons in detention.
7. Accommodation must be provided for women in detention, which meet requirements of basic human dignity including decent standard of health, adequate nutrition, sanitation, space, lighting, and ventilation. Women in detention must have access to physical exercise and recreation. Detention centres must provide facilities to enable women in detention to practice their religions.
8. Access to education, vocational training, and counselling services must be made available so that women in detention are empowered to become integrated in the society after they are released.
9. Women in detention must be protected from all violence, including sexual violence. States must establish and enforce policies that secure women's physical safety and protect them from degrading treatment including verbal insults.
10. Women in detention must have access to adequate medical care that is appropriate to their gender-specific needs. Special accommodation must be made for necessary pre-natal and post-natal medical care including mental health and treatment.

11. Provisions must be made for women who give birth or have infant children to care for their children in suitable accommodation while in detention.
12. In addition to the aforementioned minimum standards, women in detention, for reasons other than penal convictions including for immigration considerations, must be provided with conditions that recognise their non-criminal status and respect family unity.
13. States must not take recourse to detention of women on the ground of protective custody unless there is no alternative mechanism for women who voluntarily make a specific request for protection.
14. Women detainees must be unconditionally released after having served their sentences.

C. Grievance Redress

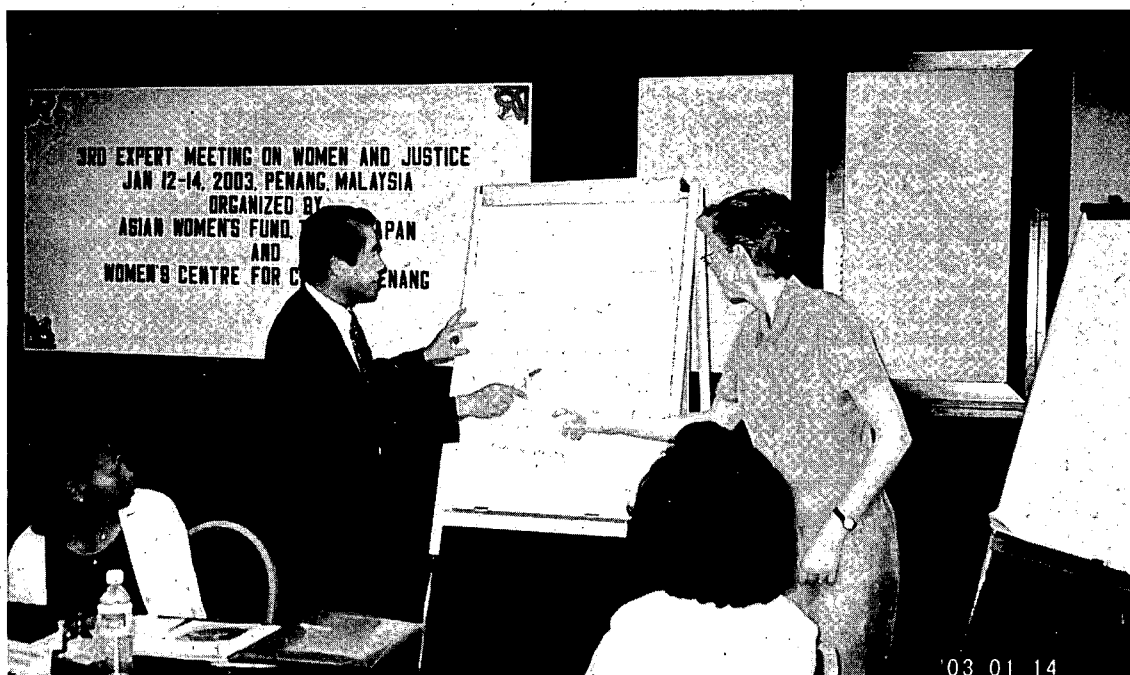
15. Independent and transparent grievance redressal mechanism be made available to address complaints lodged by detainees. Redressal procedures must ensure fair, timely and expeditious disposal of grievances.
16. Monitoring committees be constituted and empowered to visit detention centres and make periodic public reports to be placed before the legislature concerning the compliance by detention centres with basic human rights standards.
17. There must be mechanisms for compensation to women in detention for harm or injury due to criminal or negligent acts of detention authorities.

D. General Recommendations

18. The State should promote and support education regarding the human rights of women in detention, including public education about the conditions faced by them in detention and gender sensitive training for lawyers, judges, law enforcement officers and personnel in detention centres.
19. There is a need for collaboration and co-operation among States including sharing of resources and experiences in the training and sensitisation of the prison officials, law enforcing agents and the judiciary. Aid agencies should be encouraged to

support programmes addressing situation of women in detention in developing countries.

20. States must investigate and prosecute person's accused of violating the human rights of women in detention.
21. Rights of ex-detainees must be restored as far as possible to ensure their full integration in society.
22. The States must make available to the public all the relevant information regarding prisons, detention centres and conditions women face in detention, while maintaining women's right to confidentiality.
23. The media must be encouraged to investigate and disclose information concerning human rights violations of women in detention.
24. The legal profession and the judiciary must be actively engaged in monitoring and providing effective protection and remedies for women in detention.
25. Rehabilitation of women must also be emphasised. Alternative detention models encouraging rehabilitation and permitting women to maintain family responsibilities be promoted.



Leila Zerrougui

Magistrate, Member of the UN Sub-commission
Vice-president of the Working Group on Arbitrary Detention

Introduction

Detained women have always been considered as a particularly vulnerable group, which requires a special protection, even if we are tempted, as the deprivation of liberty weakens and always poses the risk of having harmful effects on human rights, to include in the category of vulnerable detainees, any person subject to any form of deprivation of liberty. Indeed, considering the detention conditions and the state of prisoners' rights today, significant progress can be noticed with regard to the cruelty and utter misery of the past. However, such progress is increasingly questioned and gives way to a speech, which constantly calls up the crisis shaking the penitentiary system almost everywhere in the world.

Actually, in the context of globalization, the number of exclusions and failures from economic, social and cultural integration increases daily. In parallel, the recourse to confinement grows, and the prison intended to dissuade, improve and reintegrate into society is becoming a large dump rather aimed at locking up and excluding unwanted people and not only those who are punished by the law for their crimes and offences. As a result, more and more children, mentally deficient persons, foreigners - especially those in illegal situation- victims of criminality and drug consumers are detained nowadays, often in very poor conditions and in violation of the most relevant norms of the international law of both human and humanitarian rights.

Thus, the excessive recourse to detention comes first and entails overcrowded prisons, which leads to an increase in the number of infringements of the prisoners' rights, and the deterioration of detention conditions which inevitably affect the most vulnerable groups and individuals.

It is in this context, that women are increasingly confronted to confinement, while only twenty (20) years ago, they were rarely put in jail. Indeed, the rate of female delinquency remains low and the detention rate of accused and/or convicted women rarely exceeds five

(5) per cent in most countries¹, but delinquent women are not the only ones to be put behind bars.

Women are also detained because they are illegal immigrants, refugees or asylum seekers; because they are the victims of organized transnational criminal networks or because they are threatened in their physical integrity, often by their next of kin, in a society that refuses or is unable to ensure their protection. Therefore, besides the inherent problems of detention, they undergo discriminations, constraints and sometime abuse targeting them as women, and reproducing their ancestral marginalization and their entrenched discrimination, whether concerning their position in society or their status in the legal systems.

The purpose of this communication is to highlight women vulnerability in detention, as well as the unsuitability of detention conditions with regard to their specific needs, as practiced in the majority of countries. It will especially address the issue of detention conditions of female prisoners, gender-based discriminations, the abuses they undergo in the detention premises and the attacks on their physical integrity, their dignity and their rights. But it will also deal with the issue of detention used "as a means of protection" of women victims of criminality, and the administrative or judiciary detention of illegal immigrant women, refugees or asylum seekers.

To apprehend efficiently the specific nature of women detention, we will tackle the subject as follows:

In the first part, we will address the unsuitability of detention facilities to women's specific needs;

In the second part, we will focus on the vulnerability of detained women, the discriminations and abuses they undergo as well as the risks they are exposed to in the detention premises;

We will conclude by proposing some recommendations of concrete measures to improve women detention conditions by adapting them to their needs, and to ensure them an effective protection against gender-based violence and infringements of their rights.

¹ The rate of 4 to 5% is mentioned in Penal Reform International' annual report of 1999; it is also mentioned in the special issue of the French magazine "Regard sur l'Actualité" entitled "l'Univers Pénitentiaire" (Penitentiary Universe) page 31. In Algeria, the rate of women incarceration rarely exceeds 3%.

1. The unsuitability of detention conditions to women's specific needs

In society, women are often marginalized and seen as inferior. When they are detained, whether under police custody, immigration control services or the authority of the penitentiary administration, their stigmatization is worsened and their rights precariousness emphasized.

Indeed, there is a set of protecting rules enacted at both the international and national levels, which recognize to women subject to any form of deprivation of liberty, a protection and specific rights in consideration with their sexospecificity, their physical conditions and /or the mothering status. These rules broadly involve, the separation of detention facilities, supervision of detention by female staff, special equipment needed for pregnant women, women recovering from labour or convalescents, as well as the fitting of a special structure for mothers accompanied by infants. As abuse of women in detention is a common occurrence, these rules involve also specific measures required to ensure the protection of detained women against gender-based violence, notably rape and sexual abuses, which target them particularly².

However, for objective or subjective reasons, these norms are rarely entirely applied, and a gap often exists between the prescriptions of the whole general or specific, international or national norms and the reality experienced by detained women. It is true that prison is a particularly constraining institution and has a deterrent effect upon the lives of all prisoners. Insofar as the act of incarceration itself is expected to serve as a punishment, life in prison does not only imply loss of liberty, it also imposes other restrictions and deprivations, in particular, the loss of both autonomy and privacy. Yet, for women, the prison is more constraining, precisely because penitentiary systems are focused on men and dominated by men, and generally disregard the sexospecificities.

As pointed out before, women's involvement in reprehensible behaviours is up to now not very important, and female population in prison represents in most of countries only about 4 to 5 per cent of the whole prisoners population. However, it must be underlined that with the process of globalization, the liberalization of exchanges and the spreading of transnational, organized crime, we notice a larger involvement of women in punishable behaviours justifying their upholding in custody, their pre-trial detention and/or their sentencing to

² The norms governing the specific protection of women in detention are contained in the minima standards for the treatment of detained women approved by the Economic and Social Council in 31 July 1957 in its Resolution 663 (XXIV) CI, on the Recommendation of the First United Nations Congress on Crime Prevention and Treatment of Offenders.

imprisonment. As a result, a growing incarceration rate among women in some countries is noticed³.

Although such a change requires the adoption of a sexospecific approach and the implementation of affirmative actions in order to meet the specific needs of the female prisoners population, penitentiary systems continue to be designed, organized and administered mainly by men and essentially for men. Actually and under the pretext that incarcerated women are a minority, very few countries set out more than one prison exclusively reserved to women, and even in the detention facilities reserved to them inside the prisons for men, their particular needs are not always taken into consideration. In police stations, the detention premises are not only inadequate to women needs, but even worse, in the hands of the law enforcement personnel, women arrested for questioning are often interrogated, searched and kept in custody by policemen. Indeed, if in penitentiary centres, women's facilities are generally staffed by female prison officers, this rule is not always respected when it deals with law enforcement custody.

In the prisons I have visited either as a judge in my own country or as a member of the Working Group on Arbitrary Detention⁴, women are generally detained in buildings or distinct quarters from those occupied, to a great extent by men; they are often kept in detention during long periods in provisional detention centres even after their sentencing and without any prospect of rehabilitation.

In the facilities reserved to them, the female prisoners are gathered higgledy-piggledy, mixing recidivists -some for serious offences, others for less serious infringements-, with occasional delinquents representing all forms of intra-family crimes (murders on spouse, ill-treatment, assaults and batteries on children, infanticide, and incest⁵). Infants and under-aged can also be sharing the same premises with adults, and an increasing number of women are incarcerated for drug-and-sex-related offences.

This dangerous promiscuity seriously penalizes children and doesn't help the use of efficient means which guarantee the implementation of the minima standards adopted by

³ In 1997 annual report of the "Observatoire international des prisons", it is reported that in the United States, for instance, in 1996, the rate of female incarceration has reached 7,7% of the total prisoners population. According to the same report, the rate has tripled within 15 years, and a third of women in detention are detained for an offence related to drugs. See page 144.

⁴ The mandate of the Working Group on Arbitrary Detention, -a non-conventional mechanism of the United Nations-, enables its members to visit the detention premises in the countries, which agreed to receive them. Since its establishment in 1991 by the Commission on Human Rights, the Group has visited more than fifty (50) prisons and administrative retention centres in eleven (11) countries: China, Vietnam, Nepal, Bhutan, Indonesia, Rumania, The United Kingdom, Peru, Bahrain, Australia, and Mexico.

⁵ The promiscuity between accused and convicted, adults, minors and infants is current. See the report of the International Observatory of Prisons for 1998, devoted to detention conditions in 55 countries.

the United Nations for the treatment of different categories of offenders and more particularly those applicable to women and minors; it breaks the separation principle of the detainees according to the criteria of modern penology and waives the norms of classification of penitentiary centres according to reinsertion objectives and/or of rehabilitation of offenders. Added to these problems, the unsuitability or the insufficiency of Health Services and qualified staff, in particular, concerning motherhood and the seriously sick.

The family moving away and the separation of children are other major problems which the female prisoners have to face, since in general, women are either gathered in a prison for women, often away from their usual place of residence, or are transferred in centres having reserved facilities and of a female supervision staff at their disposal. These transferring are made to the detriment of family reconciliation and emphasize the stigmas associated to female delinquency.

In these detention premises, the possibilities of work and training are rare for women, since generally the programs are planned in order to respond to the male inmates needs. As regards women, the sentencing to imprisonment is in fact, often reduced to a temporary deprivation of liberty, the other functions of penalty such as rehabilitation, reinsertion and reintegration, are put off indefinitely.

To conclude this first part, it comes to my mind the observation by a psychiatrist working in prison, who in order to illustrate the specific dimension of female incarceration, mentioned the case of some women sentenced to a long period of imprisonment: In addition to the deprivation of liberty, these women were confronted to a "suppressive penalty of childbirth", as heterosexual relations are forbidden in prison and "intimate conjugal visits" are not authorized for women⁶.

2. The vulnerability of women in detention

In detention premises, women are not confronted only to problems related to the unsuitability of the detention facilities to their specific needs. Imprisoned women are particularly vulnerable because the stigmas of the involvement in criminal behaviours are harder for women than for men and because at all events and even if they are confined for other reasons; (non-citizens in illegal situation, victims of criminality or threatened in their bodily and human integrity), the deprivation of liberty stigmatizes them much more than men.

⁶ "L'Observatoire International des Prisons" underlines the discrimination undergone by female prisoners. In its report for 1998, it is mentioned that even in the systems where «intimate conjugal visits » are allowed for the male inmates, they are forbidden for women prisoners.

Dealing with delinquents' women, national practices even in the most developed countries reveal blatant disparities between the situation of male and female delinquents⁷. In patriarchal societies, when a man is detained and whatever the gravity of the facts he is blamed for, he is rarely abandoned by his family, except for the fringes or the multi-recidivists. Often, the family shows solidarity with the detainee, supports him morally, visits him regularly in prison and assigns him a counsel for his defence. It is true that in most cases, women are those who assume this responsibility, (his wife, his companion, his mother, his daughter or his sister).

The reality is quite different when a woman is involved in a criminal proceeding. The community condemns her before the verdict of justice, and the family reaction is often negative. She is, then, rejected and left to herself; the shame felt by the family is expressed by their absence in the hearing and during the detention period. A woman is rightly or wrongly accused of breaking the law is less easily absolved, especially when the rules are rooted in religious or cultural guidelines. This situation jeopardizes the right to a fair trial⁸, worsens the detention stigmas and complicates the preparation to prison exit.

The vulnerability of these women is all the more considerable that the reasons for their imprisonment are linked to the infringements of discriminatory criminal norms or social rules which regulate their sexuality or their relationships with men, notably male relatives. This situation is expressed in the detention premises by the reproduction of violence undergone by women in the community, with the absence of guilt, since the victims are perceived as not deserving respect and protection, and in any cases will not be believed, and because at all events the aggressors, under their functions cover, are insured of impunity⁹.

From this situation, it results that detained women are routinely abused by those who are responsible for their detention; the abuses vary from sexual harassment and verbal aggressions to rapes, ill treatments and torture. Indeed, the situation of detained women is

⁷ In the 1340 Recommendation (1997) related to the detention effects on the familial and social levels, the Parliament of the Council of Europe draws attention on the specific social problems that incarcerated women meet, owing to the stereotypes they suffer from, of the little chance they have as opposed to men to meet again their spouse at the prison exit and to find a job, and the harmful consequences of the loss of their parental rights though incarcerated women have often young children; they were responsible for.

⁸ In most countries, legal aid is mandatory only in criminal matters; women prosecuted for misdemeanours often appear before the court without the assistance of a barrister. According to an inquiry made in Nepal in 1997 by Penal Reform International, more than 50% of incarcerated women were waiting for their trial without a barrister. 61,4% were arbitrary detained and 51,8% ignored totally the progress of their judicial proceeding.

⁹ In a report published by 'Amnesty International' in March 2001 on the violence stigmatizing women in detention in the Philippines, it is mentioned that "very often policemen and prison officers abuse of their authority in order to indulge in sexual abuses notably rapes against women who were entrusted to them... Those who commit these acts operate with impunity, and are rarely prosecuted." The European Court on human rights has considered on 25 September 1997, in a case brought against Turkey (the Ayden's case) that: "The rape of a detainee by a state officer must be considered as a particularly serious and odious form of ill treatments, taking into consideration the easiness of which the aggressor can abuse his victims' vulnerability and fragility".

more sensitive when they are under police custody, since the most serious and frequent abuses generally occur during this period; but the risks of violence faced by women are not limited to these premises, they are produced in the penitentiary centres and even when the supervision of detention is entrusted to female staff¹⁰.

The female staffs often reproduce the stigmas and stereotypes of society, towards potential victims of discrimination. This situation is more prejudicial as the percentage of members of ethnic and racial minorities, within the incarcerated women population, is in many countries disproportionately of higher rate, and women victims of rape or other sexual abuses, in detention, are among these marginalized groups.

However, if it is true that delinquent women are stigmatized, marginalized and their needs neglected within the detention premises, those who are deprived of liberty because of other reasons, asylum seekers, illegal immigrants, victims of criminality or those threatened in their physical integrity by relatives, are not better treated. Added to the deprivation of liberty, in the conditions pointed to so far, women undergo injustices and discriminations, motivated by racial, xenophobic or sexist attitudes.

The recourse to detention of illegal immigrants and asylum seekers is in some countries systematic and mandatory. This increases the rate of foreign women in detention. These particularly vulnerable women are sometimes detained with their children in centres, which are adapted neither to their needs nor to their children's. They are submitted to linguistic and cultural isolation, separation from their relatives and are even exposed to sexual attacks and xenophobic violence.

Among these persons, foreign women, victims of trafficking are the most deeply wronged and stigmatized. They undergo a triple discrimination: as women, they are discriminated against within their proper groups; as victims trafficked for sexual exploitation purposes, they are discriminated against within society and by courts. They are often perceived and treated as offenders rather than victims and retained systematically in detention pending their expulsion. These women often report that they have been victims of ill treatment, brutalities and/or sexual abuses.

¹⁰ In the report 1995-1996 of the "Union inter-africaine des droits de l'homme" : intitled "Les droits de l'homme en Afrique histoire, réalités et perspectives" we can read in page 236: 'In Somalia, for instance, the former detainees of Hargisa, a central prison, have confided to Amnesty International that the female guardians often allowed the soldiers in duty, at the prison entrance, to 'make a visit' to the female prisoners in order to make advances to them. The female prisoners who do not accept the soldiers' advances were severely punished; their leg was put in a kind of a metallic jaw and was tightly maintained. This could crash the leg and leads to an irreversible mutilation.'

Such practices are frequent in many other African countries and are still unpunished because the responsible always act under the cover of their functions. Amnesty International and Penal Reform International describe parallel situations and sometimes more violent and more humiliating: See notably the report 2001 of Amnesty International entitled 'Rapes and other sexual abuses in detention' in the Philippines.

In other countries, it happens that women convicted for infringements considered by the society as a breach of 'honour and virtue' be detained beyond the end of their sentences either to forewarn them against prostitution or to protect them against the risks of physical violence they may undergo. It happens also that detention is used as a means of protection of victimized women because the society cannot guarantee their security against threats uttered from their relatives. This form of detention, often implemented without the consent of the victims, establishes a gender-based discrimination, which is obviously inequitable, and violates the victims' fundamental human rights such as the right to freedom, to privacy and to security.¹¹

Conclusions and Recommendations

From what preceded, it appears that women in detention, whatever the grounds of their detention, are often ill-treated, discriminated and stigmatized. Nevertheless, the international instruments, whether dealing with general norms or specific rules, insist on their vulnerability and ask constantly the States to integrate the gender dimension and a sexospecific perspective, in their legislation and policy, and to adopt affirmative actions to tackle violations targeting women in detention. States are also invited to envisage mechanisms that ensure protection, redress and remedies against gender discrimination, and which assure to detained women an effective undertaking of their specific needs and rights.

Most of the States have ratified the most pertinent international instruments related to both human and humanitarian rights. Most of the countries, if not all, provide in their legislations for some provisions that clearly prohibit any form of violence in prison, threats and all forms of ill treatments. But, the ratification of international instruments and the simple determination or articulation of formal rules, which give priority to human rights, protection against violence and equality of treatment are no sufficient. The implementation of these principles requires the establishment of efficient mechanisms and procedures, and the adoption of positive actions, in consideration of vulnerable and disadvantaged groups, especially, those who, like women, undergo a structural and deep-rooted discrimination.

The improvement of detention conditions, the adaptation of premises detention and reinsertion programs to women's specific needs require funding and further human and material resources which are not always available, notably, in developing countries. The

¹¹ See L.Zerrougui: 'Discrimination in the criminal justice system' the final working paper prepared in application of the decision 2001/104 of the sub-commission on the promotion and protection of human rights, page 13 (E/CN.4/Sub.2/2002/5.)

international cooperation and the technical assistance made available by United Nations specialized agencies can help these countries reducing the recourse to confinement by developing alternatives to imprisonment or at least assuring to the female prisoners an efficient undertaking of their specific needs.

In order to be effective, international cooperation should have among other objectives the adoption of measures corresponding to the needs of the targeted detained population, in a way to suggest satisfactory solutions, proper to particular circumstances of each country, and which are accepted by public authorities and the personnel in charge of prisons and detention centres.

As far as violence in prisons is concerned, it is the States' duty to submit the detention premises to external controls, take protection measures in all situations where there is deprivation of liberty, incriminate all forms of violence inflicted to women in detention, prosecute and bring the alleged perpetrators before the court, and set accessible complaint mechanisms and effective remedies. To eliminate the gender-based violence in prisons and put an end to the widespread impunity, judges, law enforcement officers and the penitentiary staff must be trained, educated and sensitized to the victimisation and vulnerability of detained women.

These measures can only be adopted if there is a real political will to eliminate all forms of discrimination against women, to reinforce their rights and assure their protection within society and in detention facilities. A will, which goes through the reform of inappropriate legal systems and the abrogation of discriminatory laws.



Elizabeth Biok
Solicitor

1. INTRODUCTION

Gaols are the last resort of the justice system. They should be the 'ambulance at the foot of the cliff. What we need is a fence at the top of the cliff.'¹

International law as established in international conventions provides human rights protections and standards of treatment for women in detention through creating the normative framework for the rights of detained persons. The Universal Declaration of Human Rights establishes that a person's liberty is not to be restricted arbitrarily, that all persons have the equality before the law to challenge any imprisonment, and special protections are owed to families and mothers:

Article 9 – No-one shall be subjected to arbitrary arrest, detention or exile.

Article 12 – No one shall be subjected to arbitrary interference with his privacy, family, home....

Article 25 (2) Motherhood and childhood are entitled to special care and assistance.

The International Convention on Civil and Political Rights expands protection for persons in detention stressing that trials and possible terms of imprisonment are to be conducted under due process of law and with respect for the individual's human rights:

Article 9 (1) – Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention....

Article 10 (1)- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 (3)- The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

These protections are complemented in the Australian criminal justice system by common law and statutory protections and remedies as well as policy directives to ensure that the dignity and human rights of women in custody are upheld.

¹ Trevor Nyman, (Professor of Law, University of Technology Sydney) 'Repeat Offenders: New bail law will fuel growth in gaols', (2002) 40 *Law Society Journal* (No 8) 50, at page 51.

However there are a significant number of women and their children who are held in administrative detention under provisions of Australian immigration law. They have few (if any) legal rights and are unable to access the court system to question their detention or the conditions under which they are held.

At present there are approximately 610 women in criminal detention in New South Wales (NSW) prisons². Of these almost one third (198 women) are on remand, which means they are awaiting their trial or sentencing, and have not been released on bail. While the Aboriginal population is less than 5% of the total Australian population, Aboriginal women are over-represented in NSW prisons, making up 17 % of women serving full-time prison sentences.

The numbers of women in immigration detention are smaller, reflecting the inability of women refugees to flee to Australia because of cultural barriers, family commitments and lack of money to pay people smugglers. There were 162 female detainees in six immigration detention centres, along with 119 children. Women constitute approximately 22% of immigration detainees, and mainly come from Iraq, Iran, Afghanistan, Peoples Republic of China and Indonesia.

In this paper I aim to explore the current paradox in Australia whereby women in criminal detention are protected by established legal rights and structures, mirroring their rights under international law. Yet no such safeguards are provided to women who attempt to enter Australia without visas to seek asylum and are imprisoned in immigration detention centres.

2. CRIMINAL JUSTICE DETENTION

A. Pre-Sentence Detention

I consider that the essential legal protections for women charged with criminal offences are the provisions to be granted bail, and the right to independent legal advice and representation.

Release on Bail

² These statistics have been gathered from the 2001 Annual Report of the NSW Department of Corrective Services, Appendix 48, Persons under detention in each correctional centre, 24 June 2001. The Annual Report for 2002 has not been published, but there appears to be little variation in female prison populations.

Bail is an agreement between the defendant (person accused of a criminal offence) and the court, which allows the defendant to be released from detention while waiting for the case to come to trial or for final sentencing³. Such release permits the defendant to more easily prepare her defense, and to continue her normal life pattern, including working. As there can be lengthy delays of one to two years before criminal matters proceed to trial in NSW courts, release on bail is important for women with family responsibilities as it allows them to maintain their family relationships during an emotionally stressful period.

The requirements for bail are set out in the *NSW Bail Act 1978*. As soon as a person is charged by the police, she must be given a written explanation of bail rights and be allowed to contact a lawyer for assistance in obtaining bail⁴. If she is not granted bail by the senior police officer, she must be brought before the court as soon as possible for a decision on bail. If a person is held in police detention for more than four hours she must be given facilities for washing and changing clothes before appearing in court⁵. If the defendant is detained in prison, the prison governor must send the application for bail to the court without delay.

For minor offences which do not result in a sentence of imprisonment, the police officer must grant bail unless the defendant has previously defaulted on a bail agreement, is under the influence of alcohol or drugs, requires protection, or is at risk of injury.⁶ In relation to serious offences, there is a presumption that a person should be granted bail⁷, unless the police can convince the court that

- the defendant is unlikely to re-appear in court for the trial,
- the defendant may harm people in the community (such as the victim),
- the defendant may attempt to influence the witnesses,
- the crime was so serious as to require that the defendant be detained for the community's protection.

Yet, recent amendments to the Bail Act reflect concern with major drug offences and restrict the right to bail for persons charged with supplying, growing, manufacturing or importing commercial quantities of drugs⁸. Unfortunately the same amendments also limit the bail

³ *Bail Act* s. 7 (1).

⁴ *Bail Act* s.18(1) (d)

⁵ If a person is arrested after 3.00pm, she will not be taken to court for the bail hearing until the next morning.

⁶ *Bail Act* s. 8 (2)

⁷ *Bail Act* s.9

⁸ *Bail Act* s. 8A, which came into effect on 1 July 2002.

rights for defendants who are on parole, on a good behavior bond, or serving periodic detention. This could mean that a woman who is serving week-end detention because her crime was non-violent and because she has sole care of children, would be denied bail if she is charged for a second non-violent offence.⁹

For serious offences, bail is usually granted on conditions decided by the judge in the bail agreement. Such conditions can include:

- living at a fixed address,
- reporting to the police,
- surrendering a passport,
- attending a drug or alcohol rehabilitation centre,
- having a person agree to ensure the defendant will appear at court, and
- paying a cash bond, which is lost if the defendant fails to appear at court.

The fact that there are 198 women currently on remand in NSW prisons indicates that it can be difficult for women to meet such bail conditions; rural Aboriginal women are disadvantaged if the conditions require a cash bond or a reputable person to go as surety.

Legal Representation

Many female defendants lack the information, education or money to engage a lawyer to assist with getting bail or preparing their criminal defence. International law provides that a criminal defendant has the right to legal assistance without payment "where the interests of justice so require"¹⁰. Similarly the High Court of Australia has stated

That the accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that the accused is unable to receive, or did not receive a fair trial..... the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only.¹¹

⁹ These amendments reflect the importance of "law and order" issues in Australian politics, especially in the year preceding the NSW elections to be held in March 2003.

¹⁰ International Covenant on Civil and Political Rights, Art. 3 (d)

¹¹ *Dietrich v The Queen*, (1992) 177CLR 292, at para 30

It is NSW government policy that all defendants, at risk of long-term imprisonment, are entitled to legal representation through the Legal Aid Commission. Legal Aid lawyers are available to assist in bail hearings, trials and appeals. There is a Legal Aid lawyer available in every court in NSW to assist with preparing bail applications. Defendants must meet the Legal Aid means test, indicating that they can not pay for their legal costs, and do not have other persons who can help them with such legal fees.

Independent legal assistance is often very important for females defendants, especially those from disadvantaged, and non-English speaking backgrounds. They are often unaware of the law and receive poor or incorrect legal advice from male family members. They can be pressured to plead guilty in order to benefit a male co-accused.

B. Women serving prison sentences.

Treatment of women prisoners reflects varying government and community responses to the rationale for imprisonment:

Are women imprisoned as a severe punishment for past deviant behavior?

Are women imprisoned as a deterrent to other women, or repeat offences?

Are women imprisoned as a punishment but with the aim of rehabilitating offenders to avoid criminal recidivism?

I consider that it is only the last view, which permits prison systems to treat women with dignity and respect for their human rights. In NSW, there are a number of alternatives to detention in prison, all of which are based on the view that less-serious and younger offenders should be separated from long-term criminal populations in gaols.

Periodic detention allows the prisoner to live at home for part of the week, caring for her family, and working, while reporting to prison on specified days, often Friday to Sunday¹².

Home detention is based on the use of electronic tracking devices, and does not allow the prisoner to leave a limited area. Constant supervision by parole officers is required¹³.

Work release programmes are established at many minimum security prisons allowing women at the end of their sentences to be released daily to go to work and education. They receive normal wages, received as a lump sum on release.

¹² *Crimes (Administration of Sentences) Act 1999*, Part 3 ss. 80 -101

¹³ *Crimes (Administration of Sentences) Act* Part 4, ss 102 -106

Release on parole permits offenders who have demonstrated good behavior while in prison to be released under supervision before their sentence has been completed.

For full-time prisoners, it is essential that the prison conditions meet all their needs and their personal security and dignity are maintained while in detention. Medical care is provided in NSW prisons at goal clinics or by visiting doctors. No hospital treatment is given in prison and women prisoners are taken to local public hospitals for surgery or to give birth. There is very limited care for pregnant and post-natal women, but women prisoners can keep their babies in some goals. A female prisoner with young children can apply for a "local leave permit" allowing her to serve her sentence with her children in a community residence programme¹⁴.

Visiting rights for friends and relatives of prisoners allow a woman to maintain social contact with her family and community while in detention. Generally one to three visits are permitted a week, with up to four persons at one time.

Many women in detention suffer from mental illness or intellectual disability¹⁵. They are often imprisoned because there is a lack of supervised treatment in the community and their actions are interpreted as resulting from criminal intentions, not mental illness or substance abuse. But there is little assistance in prison; counseling is rare with treatment generally consisting of medication, especially sedatives.

Women prisoners often lack educational qualifications and many are illiterate. Therefore to assist them to avoid future criminal behavior, prisons provide some education in basic skills and job-training. They are permitted to enroll in correspondence courses with Technical and Further Education colleges, and some can be granted leave to complete university courses by correspondence and short-term attendance.

Many women prisoners have legal problems which arise when they are in jail, including divorce or child custody applications started by their close family members, offences committed in jail, assault by prison staff or other prisoners, and applications for early release on parole. The Legal Aid Commission has a special unit, Prisoners Legal Service, which provides legal assistance in such cases. Courts can be set up in prisons under a visiting judge to hear matters arising in goal.

If a prisoner wants to complain about her treatment, there are a number of organizations, which supervise conditions in goals. Prisoners can raise issues with the visiting judge or write to the Ombudsman. The Anti-Discrimination Board may investigate any claims of

¹⁴ *Crimes (Administration of Sentences) Act* s. 26 (2) (I). Two such centres have been established in Sydney allowing women to live in houses with their children under 5 years of age, but still under prison supervision.

¹⁵ Approximately 70% of female prisoners have been admitted to mental health hospitals. Ravens T, 'The reality of women in prison', *Reportage*, 22 December 2002.

discriminatory treatment by prison staff or police officers. There are also official visitors who attend the prison once a month to listen to complaints and attempt to resolve it. The aim of these supervisory bodies is to ensure that prisoners are treated fairly and without violence.

I consider that in the last two decades there have been significant advances to making prisons places of rehabilitation, not just punishment in NSW. Initiatives such as home detention and the "Drug Court"¹⁶ have attempted to lower the rate of re-offending by creating a higher fence at the top of the cliff. However such programmes are costly and not very popular with the general public. They are always at risk of funding cuts, especially when politicians want to be seen as "tough on criminals". It is essential therefore that the human rights safeguards are codified in legislation such as the *Bail Act* and the *Crimes (Administration of Sentences) Act*.

3. WOMEN IN IMMIGRATION DETENTION

A. Restricted rights of release

While the criminal justice system provides protection for women detainees in the right to release on bail, or supervised conditions in prisons, no such protections apply to women and children who are kept in immigration detention centres. Apart from the centres in Sydney, Melbourne and Perth, the three other detention centres are in remote locations in desert-like environments. The distance from towns and public transport makes visiting very difficult, costly, and almost impossible for volunteer lawyers and refugee community groups to support and assist women detainees.

The *Migration Act* specifies that an "unlawful non-citizen" must be detained¹⁷; this covers people who have arrived by boat or plane without a visa, who have entered on a false passport (usually to seek asylum in Australia), or whose visa is cancelled before or after entry. It is in direct contravention of international law which provides that

Everyone has the right to seek ... asylum from persecution¹⁸, and

The Contracting states shall not impose penalties on account of their illegal entry or presence on refugees.....¹⁹

¹⁶ A special division of the NSW District Court which permits offenders to undertake drug rehabilitation and employment training as part of their sentence.

¹⁷ *Migration Act* 1958, s 14, s. 189 and s. 190

¹⁸ Universal Declaration of Human Rights Art 14 (1)

In contrast to the *Bail Act* provisions discussed above, courts are not permitted to review immigration detention and order a person's release²⁰. People who are been illegally in Australia for many years or who have lost their residence rights because of criminal activity are placed in detention centres, just prior to deportation. Therefore detention centres may house both asylum seekers and hardened criminals at one time.

There is no right to legal advice for asylum seekers when they first arrive, and many are held without access to lawyers for months. There is a provision for release from detention for children under 18 and for persons who have been victims of torture or trauma, but has been used very rarely. A trial project is underway in Port Augusta and Woomera for women and children to live in houses near the detention centre, however women appear reluctant to leave their husbands in the detention centre and live in a town where local people can be hostile, where there are no refugee communities and where they must still move around under the supervision of detention centre staff. Women who have Australian-citizen children are not permitted to keep their children in the detention centre, so the children are often put in foster care.

Detainees are liable for the costs of their detention²¹; the current charge is approximately AUS \$75 per day. This is a debt to the Australian government, which the detainee must pay if she leaves Australia and applies for another visa overseas. For a person who has been in detention for 6 months, this would result in an oppressive debt of AUS \$13,500.

B. Conditions in Immigration Detention

While prisons are managed by a government department and staffed by public officials, immigration detention centres are managed by a private French/USA company under a contract with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Detention centres are built on Commonwealth property so the normal State law standards of health and safety do not apply. Legal advice and representation in applying for refugee status is provided by private contractors to DIMIA, fee-charging private lawyers or by volunteer lawyers. There is no requirement for female asylum seekers to be assigned to a female lawyer, so disregarding the reality that many women have refugee claims relating to sexual assault or domestic violence.

¹⁹ Convention relating to the Status of Refugees Art 31 (1)

²⁰ *Migration Act* s.183.

²¹ *Migration Act* s. 209.

Because services are provided under commercial contracts and not under legislation or public policy, centre management is chiefly concerned with cost and efficiency, not the welfare of detainees. Unlike prisons, there is no expectation that detainees will become members of the Australian community, so need to gain skills in education, employment and language. The regime in detention centres is punitive, yet these women have not committed any criminal offences.

Minimal medical assistance is provided, especially for women (most medical staff are male). The high security environment with razor wire, electric fences and constant supervision adds to the mental and physical trauma which many asylum seekers suffered in their flight from their home countries. Many women have been victims of sexual assault yet there is no provision for appropriate health care or counseling. There is a culture of self-harm and extreme depression in the detention centres, but very little psychiatric help is provided²².

Detainees are required to work: cooking, gardening, cleaning or maintaining building; they are not paid wages, but are given phone cards or cigarettes. Most of their personal goods, clothing and additional food are given by refugee support groups. Because of the remote location for detention centres, it is difficult for visitors from their national or religious communities to gain access. The appendix to this paper provides insight into one family's experiences in immigration detention.

4. CONCLUSION

During the 2002 Christmas holidays, there was large-scale violence in four immigration detention centres, resulting in fires and major damage. It appears that the disturbances may have been instigated not by asylum seekers but by repeat criminal offenders who were facing criminal deportation²³. Psychiatrists are concerned by the impact of the violence on asylum seekers who are already disturbed by the harsh detention centre conditions, especially for women and children who are cut off from community support.

Some detainees have been charged with criminal offences resulting from the violence and have been transferred to state prisons²⁴. Strangely, they will have access to better

²² Sev Ozdowski, the Australian Human Rights Commissioner has stated that the detention centres were "like mental hospitals, only without proper staff ... and proper facilities". *Sydney Morning Herald*, 20 August 2002, page 2

²³ Scotsman with record on Villawood violence charges, *Sydney Morning Herald*, 4-5 January 2003, page 7

²⁴ Detention turns to jail for 35 detainees, *Sydney Morning Herald*, 3 January 2003, page 6

conditions and increased human rights protections in prison than under immigration detention.

Acceptable minimum standards for the treatment of women in criminal detention have adopted in most state prisons; the Australian community has become aware that these standards are essential to enable women offenders to resume normal lives after imprisonment. It is now the challenge for refugee advocates and human rights lawyers to educate the public that the same standards should be upheld in immigration detention. Women and children should not be punished because they have tried to flee persecution and find protection in Australia.

Appendix – Case Study on Immigration Detention

This case study, prepared for an investigation by the Human Rights and Equal Opportunity Commission of Australia by one of the Legal Aid Commission's Social Workers, highlights the negative impact of detention on a family with a disabled child.

Introduction

The family concerned comprises the father and mother, their primary school age daughter and a son and another daughter who are both toddlers. The family, who are from a religious minority, fled from a Middle Eastern country early in 2001, having experienced torture, persecution and marginalization over a prolonged period. They traveled by boat from Indonesia to Australia and on arrival were sent to Woomera Immigration Detention Centre (IDC). After several weeks the family was transferred to the Villawood IDC. DIMIA eventually accepted their claims to refugee status and the family was granted a Temporary Protection Visa later in 2001.

Whilst the family was detained at Villawood IDC, a legal officer from the Legal Aid Commission of NSW assisted the family with their application for a Protection Visa. The legal officer had grave concerns about the health and welfare of this family, in particular the younger daughter who had serious and undiagnosed disabilities. The social worker accompanied the legal officer on a visit to the Villawood IDC in mid 2001, and interviewed the father via an interpreter. The social worker subsequently had extensive telephone

contact with the family, linking them to a range of support services after their release to the community.

During the interview at the Villawood IDC, the father spoke at length about the family's ordeal in transit to Australia and whilst in detention. He presented as suffering from a high level of trauma and emotional stress. His distress about his own experiences was compounded by his fears and sense of powerlessness concerning the health and welfare of his children, especially his younger daughter. During the follow-up interview, it was apparent that the family members were still suffering the after effects of their experience in detention and at times found it very difficult to talk about particular aspects of it.

The father explained that during the six-day sea voyage from Indonesia to Australia, the family was confined in a small area in the boat's hold, adjacent to the engine room. Thick diesel fumes affected all the passengers and exacerbated the younger daughter's breathing disorder, which did not improve after they landed in Australia. For many months her parents had to take it in turns to stay awake at night to check on her breathing and reposition her when it slowed significantly or almost stopped. Many times her lips turned blue and they feared she would die in her sleep. Consequently, both parents suffered from sleep deprivation over a prolonged period.

Conditions at Woomera Immigration Detention Centre

The five family members were allocated a small cubicle about the size of a railway compartment, with bunk beds. Instead of a door there was a curtain that did not reach the ground and would cover an adult of average height from about the neck to the knees. There was therefore very little privacy or soundproofing. There were six such compartments in a small, enclosed area. Being winter, it was very cold. The building was poorly insulated and there was only one small heater between the six families. There were constant fights over who would have the heater near their compartment. To keep warm, families huddled together on their beds wrapped in blankets.

The father told the social worker that a member of staff at the IDC had told detainees that if they needed medical assistance, they should come and ask for it at the medical office. At about 2am one very cold, wet night, the younger daughter's breathing became almost imperceptible. Her lips turned blue and she became limp and cold. Her father said he wrapped her in some bedding and carried her across an open area to the building where the medical office was located. Despite the father's protestations, the guard on duty at the building's reception area refused the father entry for half an hour. The father stood outside, trying to shield his daughter from the rain. He commented that this was one of the most

cruel and demeaning experiences of his life. *"My child and I were treated like stray dogs, left out in the cold. Can you imagine how hopeless I felt for my family, standing there shivering and wondering if my daughter would die in my arms?"*

Whilst at Woomera, the daughter's condition became serious enough to warrant hospitalisation three times. Her mother, who was still breastfeeding her, was allowed to accompany her to the hospital where they stayed for several days. The mother said there was a guard on duty outside their hospital room 24 hours a day, and the door was left open at all times. She had no privacy. The mother commented *"do these people think I am a criminal, that I would run away with a sick child and leave the rest of my family behind in detention?"* She and her daughter returned to the IDC in Woomera and the medical officers there gave the child medication for asthma. This apparently provided relief for a few minutes at a time but did very little to improve her condition.

The parents described the toilet facilities at the Woomera IDC as putrid. For more than two hundred people, there were five toilets for the males and five for the females. The ground outside was muddy, and with people of many cultures using the western style toilets, the toilets were never clean. They said facilities for washing were too awful to describe.

The parents said the diet was monotonous, with the same type of food served up day after day. It consisted of rice, some sort of meat, lettuce, tomato and bread. Most days they could not tell what meat was being served up and they avoided eating it as they do not eat red meat, so they had no regular source of protein. They lost interest in their food and lost weight. In other circumstances, a meal might be something to look forward to, but they just went through the motions of eating before returning to their compartment.

Conditions at Villawood Immigration Detention Centre

When the family was transferred to Villawood IDC, their accommodation was larger, more private and food was better. However, the younger daughter's health still did not improve and she was admitted to the local hospital, accompanied by her mother, with security guards on a 24 hour roster outside the hospital room door. At the IDC, the family said they had problems finding food suitable for the younger daughter to eat. She had reflux and needed pureed food. The parents said that for some time they were not aware that they could ask for tins or jars of baby food. When it was available, the jars were large and as there were no facilities in their room to keep food cold, they ended up wasting part of each jar. They were worried that they would be punished for this.

The social worker phoned the health worker at the IDC and asked for information about the younger daughter's diagnosis, whether the family could be provided with more support in managing their daughter's health, and if baby food could be made available. The health worker indicated that there were too many detainees for the health staff to go around asking if they needed help. She said the family just had to come to the medical centre and ask for assistance. When the social worker relayed this to the father, he said that when he had asked at Woomera IDC for assistance, he had been ignored and humiliated, and he was afraid to keep asking for help at this IDC. His family's lack of English language skills and lack of entitlement to any medical services in their home country added to their reticence to "just go and ask".

Whilst in detention, the father said he was suffering from a degree of memory impairment. He explained that he had been a craftsman in his home country, carrying out delicate work with jewellery that required steady hands. The social worker observed during both visits that the father's hands had a constant tremor.

The older daughter outlined the activities at Woomera IDC. There was a small room for about 30 children to play in. There were some pencils and paper, and on three days a week between 10 and 11.30am a female teacher would come and provide some supervised play activities. It was not really school, but it gave them something to do, even though many of the children could not understand what the woman said. Adults in detention had one hour of English language tuition a week.

According to the older daughter, there was a bit more for children to do at the Villawood IDC. Each weekday morning and afternoon, two hours of a form of schooling was provided, but again, many children did not know enough English to understand the teacher and there was insufficient individual attention. The older daughter said the classes were boring and not very useful as it was hard for the teacher to pitch at the right level for everyone. The older daughter befriended two other girls who spoke her own language. The play area was poorly equipped – there was a net and some sort of racket and ball, but the equipment was often broken. The person supervising was rarely available so the children could not use the area very often.

Psychological and Social Well-being

The older daughter described how frightened she was whilst at the Woomera IDC. There were many single men there, and frequently there were raised voices and fights. She was afraid to go anywhere unaccompanied by one of her parents and there was little opportunity

to play with other children. She said *"it was so cold. Most of the time I stayed on the bed with a blanket over me, crying and talking to God"*.

The mother said that for more than 40 days at Woomera they had no contact with the outside world and had no opportunity to phone anyone in Australia or their home country to inform them that they were still alive. They were separated from the people they had travelled with on the boat. There was no TV, radio, printed material, or telephone in the family accommodation section. Everyone was suspicious of everyone else and kept to themselves. This added to their sense of alienation.

The father said that to take his mind off his fears, he asked time and again at the Woomera IDC if he could do some voluntary chores, but his requests were ignored. He said that worse than the physical conditions in detention were the boredom, the depression and the inability to relax. *"Every waking minute you are anxious, you fear that you will be rejected, that you and your family will be deported, that you have been through all of this hell for nothing. How can you be a good, responsive parent when you are in such a state? You want your children to have a good future, but how can you reassure them that it will be all right, when you do not believe it yourself? And you have no idea how long you must suffer in this state. The authorities make you feel you are a terrible criminal and trouble-maker, that you must be isolated from Australians so you don't taint anyone. You feel so small and powerless"*.

It transpired that the family's refugee application was processed reasonably quickly. The father said *"we did not know at any stage how long it would take. We'd hear of some families being released and that gave us a glimmer of hope, but mostly we heard bad stories about deportations and it filled us with dread. We met some Australian staff who seemed humane but some others were very cruel. We did not understand what sort of country we had come to and why we were so hated."*

The mother told the social worker *"If we were not in fear for our lives we would not have risked all this. On the one hand if we stayed in our home country we faced the certainty of more persecution, torture and possibly even death. On the other hand there was perhaps a 50% chance that if we took this path we would survive and our children would have a future, so we took that risk."*

The older daughter said that while she was in detention she could not understand why no-one came to visit, and said this was very demoralising. Every weekend she felt more depressed thinking about other children outside the IDC playing and going about their normal life. It was as if they were in a bubble and no-one wanted to come near them. She explained that now she is in the community she *"cannot bear to go back to that place (the*

IDC), to see those big wire fences and to go through all that security. I'm too scared to visit my friends who are still there and I feel really bad about that as I miss them. They have been there for such a long time, they must be so lonely. I wish they would be released".

The parents and older daughter stated that they are far more relaxed living in the community than when they were in detention, but their experience there will always be on their minds. "We are scarred by that experience. Even now, we cannot really relax and throw our energy into building our future. We have temporary status. We want to settle down here and make a contribution, to learn English and to work hard. We want our children to feel safe and happy and have a good education. But we are still worrying about the possibility that we will be sent back. This is another form of cruelty", and hang onto hope and faith, but it is so hard. They don't treat you as human, it gets hard to remember that you still are human in spite of that."

The father said "I can't understand why your government allows people to suffer in detention for so long. By the time they are released into the community they are often so damaged, so emotionally and mentally sick, that they will be a huge burden to your community. Why does your government want this. This is so unnecessary, why not let the people live in the community while they are waiting?"

On the issue of allowing women and children out of detention whilst the men remain in detention, both parents were of the view that "this is absolute cruelty. It is not a concession. We know one family where the mother and children are out and the father is detained. They are all ill with worry; they cannot function as a family. It is terrible for the mother and children trying to cope without the father and worrying about what is happening to him in detention. He is so lonely and hopeless and feels he has even less power to be a good parent than when they were all together. Families should be released together, not locked up like criminals. If you push people hard enough of course they snap. It is so distressing to hear of people harming themselves. When you are at the IDC, you try to shut out all the talk and rumours and hang onto hope and faith, but it is so hard. They don't treat you as human, it gets hard to remember that you still are human in spite of that."

Law and Procedures to Protect Women's Dignity and Human Rights in Detention Facilities and Prisons

Hing Chun Wong
Judge

Introduction

1. This paper is written based on research on the current Hong Kong legislation such as the Prison Ordinance Cap. 234 and related legislation and statistics published by the Correctional Services Department (CSD) and my understanding of the current conditions of penal institutions in Hong Kong.

Hong Kong Penal Institutions

2. There are 13 male prisons and a psychiatric centre for male prisoners and 5 institutions for women. The total number of prison inmates at the end of 2001 is 12,054 of which 9,818 are male and 2,236 are female. Roughly 18.5% of the total population of the penal institution in Hong Kong is women.
3. The 5 penal establishments for women include two Prisons, a Training Centre, a Drug Addiction Treatment Centre and a Rehabilitation Centre.

Existing Legislation for the Protection of Female Prisoners and Detainees

4. Under the Hong Kong legislation, male and female prisoners and detainees are usually housed in separate prisons, and in cases where they are detained at the same location there are separate buildings devoted to the different gender. Under section 8 of the Prison Ordinance cap. 234, it is stipulated that:

"In a prison used for both men and women separate buildings or parts of building shall be used for the men and the women respectively so as to prevent the one from seeing or communicating with the other."

Further, Rule 6 of the Prison Rules of the Ordinance provides that:

"(1) In a prison for both men and women the whole of the premises allocated to women shall be entirely separate."

(2) The keys of the premises allocated to women shall be under the control of female officers. "

5. Male prisoner officers are not allowed to visit a female prison unaccompanied by a female officer. Rule 5A of the Prison Rules of the Ordinance states that:

"No officer of the Correctional Services Department or other person employed in a prison shall enter a cell or dormitory allocated to a prisoner of the opposite sex unless accompanied by another officer or other person employed in the prison who is of the same sex as the prisoner to whom the cell or dormitory is allocated."

Further, Rule 7 states that:

"Female prisoners shall in all cases be attended by female officers. A male officer shall not enter a prison or part of a prison appropriated for the use of female prisoners except on duty and in the company of a female officer."

6. Other than the separation of male and female inmates, further protection of female prisoners is provided in the form that physical search of female inmates are to be conducted only by female officers. Rule 10 of the Prison Rules:

"No prisoner shall be searched other than by an officer of the same sex. In other respects the same course shall be pursued in reference to the admission or discharge of a female prisoner as in the case of a male prisoner."

7. Rule 21 of the Ordinance also provides for children of female prisoners who are of tender age or who are born in prison:

"(1) The child of a female prisoner may be received into prison with its mother and kept during the normal period of location and any child so admitted shall not be taken from its mother until the Medical Officer certifies that its is in a fit condition to be removed.

(2) When any child received into prison under paragraph (1) is over the age of 9 months or attains that age while in prison the Medical Officer shall report to the commissioner whether, in his opinion, it is necessary or desirable that such child should be retained in prison. The Commissioner may commit such child to the care of such relative of the child as may be willing and able to undertake such care and who may, in his opinion, be a fit and proper person to undertake such care. If the

Commissioner is unable to find any relative of the child to whose care such child maybe entrusted, then he may commit such child to the care of any person or institution approved by the Chief Executive.

(3) Notwithstanding the provisions of paragraphs (1) and (2) the Commissioner may permit any child to remain in the prison until the mother has completed her sentence or such child has attained the age of 3 years whichever is the earlier.

(4) Any child retained in prison may be supplied with clothing at the public expense."

Types of Detention Facility for Female Prisoners/Detainees

8. Hong Kong has five separate penal institutions for female offenders. These are: the Tai Tam Centre for Women (TLCW); the Tai Tam Gap Correctional Institution (TGCI); the Chi Ma Wan Correctional Institution (CMWCI), the Chi Ma Wan Drug Addiction Treatment Centre (CTC) and the Rehabilitation Centre established in August 2002.
9. The Tai Lam Centre (TLCW) is a maximum-security prison; it also serves as a remand centre for adult women. The Tai Tam Gap Correctional Institution (TGCI) is a minimum to medium security establishment completed in March 1999 with facilities for a prison for young offenders under 21, a training centre for women aged 14-21 and it also houses a reception centre for women in remand aged 14-21. The Chi Ma Wan Correctional Institution (CMWCI) is a medium security institution mainly for the holding of Chinese illegal immigrant prisoners subject to deportation, while the Chi Ma Wan Drug Addiction Treatment Centre (CTC) is a drug rehabilitation facility for female adult drug dependants.
10. Other facilities include the Siu Lam Psychiatric Centre (SLPC), a maximum-security facility for the criminally insane under the Mental Health Ordinance for both male and female inmates. Female inmates are kept in separate wards. The SLPC provides psychiatric treatments and assessment for the mentally ill.
11. There is further accommodation for detainees pending deportation or transit to the immigration centre for Chinese illegal immigrants and other nationals at the Victoria Prison (VP). The Bauhinia House is a half way house for females newly released from the training centre or the drug addiction treatment centre where they are prepared for reintegration.
12. The newly established Chi Lan Rehabilitation Centre and Wai Lan Rehabilitation Centre are for young female offenders between 14 and 21 years who have

committed light offences who serve their term in two phases. The former is a minimum-security facility for phase 1 inmates where young females receive disciplinary training for a period of 2-5 months. Phase 2 inmates are housed in the latter facility. It is a community-based facility aimed to prepare the inmates for reintegration and inmates* either attend regular schools or seek open employment. Furthermore, they are encouraged to take part in voluntary community services.

Types of Programme, Treatment and Services available to Women in Penal institutions

13. Female inmates who are physically fit are required to work. Such work includes sewing, printing and laundry. They are paid a salary that may be used to buy personal items inside the system; the balance will be saved and paid to them upon discharge. Various types of educational classes in different areas of interest are conducted inside the penal institutions. Groups and individual counselling are available to those in need. They are also given vocational training such as the use of computer and office management skills.
14. Young offenders between 14 and 21 in youth penal institutions are given half day schooling and half day in vocational training, couple with social skills training and counselling to help them develop character and to build a sense of responsibility. After discharge, they are required to undergo aftercare supervision for 3 years.
15. For those who are confirmed drug dependants at the Drug Addiction Treatment Centre, they are required to undergo a course of compulsory residential treatment for detoxification and rehabilitation and are offered courses for the development of socially acceptable behaviour and interpersonal skills. Upon discharge, they are put under 1 year supervision during which aftercare support and counselling will be given for their reintegration.

Treatment for women with special needs

Pregnant women and women with young children

16. As mentioned above, children of incarcerated mothers are allowed to stay with their mothers until the age of 9 months. This may be extended to 3 years. Mothers with young children are housed in a special ward where a medical doctor visits daily and the children are allowed to play in an open space. The doctor will prescribe for the

infant an appropriate diet as required. Mothers with young infants are not required to work.

17. Pregnant offenders at penal institutions are sent to public hospitals and looked after by obstetricians. Deliveries take place at public hospitals and the mothers are put in an open ward after delivery.
18. NGOs have been invited to work with inmates in penal institutions. One example is the Save the Children Fund (Hong Kong). Since 1998, it has been offering counselling to imprisoned mothers and their children to reduce the traumatic effects of the separation of mothers with their children and helping families to overcome problems faced by such families. Escorted visits are offered to young children of 6 years and under with mothers in prison. They are allowed a half-day visit each week in a special day room assigned for such purposes. This facility is available at the Inmate-Parent Centre at the Tai Tam Gap Correctional Institution.

Special Medical Treatments

19. Female penal establishments are staffed with a medical doctor, a clinical psychologist, a women psychological assistant, a welfare officer and full time nurses. Inmates are physically examined upon entry to the penal institution. Female inmates with a history of drug addiction or STD and those showing such symptoms are encouraged to take blood tests. Positive cases are referred to government clinics or hospitals for consultation and treatment.
20. The Training Centre assigns a 'personal officer' to each of its inmates who offers counselling and psychological support. The Drug Addiction Treatment Centre is staffed with full time aftercare officers to handle in house counselling and aftercare supervision.
21. Psychological services are offered to female inmates in the form of group discussion adjustment programmes for new entrants and counselling sessions on emotion and stress management for those in need. Special counselling groups dealing with substance abuse and recidivism are also on offer. How often these courses are run is not known.
22. NGOs are invited to conduct workshops with female inmates on issues such as marriage, parenting, family planning, childcare, child abuse, handling of domestic violence and other social skills. Other workshops include pre-release and

reintegration orientation courses. The initiatives seemed to have come from the NGOs.

23. Each penal establishment is visited by two justices of the peace once a month, some institutions are visited fortnightly. They will investigate complaints lodged by inmates, inspect diets and examine the accommodation at the institution. These visits are conducted without prior notice.

The Problem of Overcrowding in Female Penal Institutions

24. In recent year, we witnessed a surge of the number of female inmates in the Hong Kong penal system (table I). Local women account for 28% of the female prison population. The majority of female inmates are illegal immigrants who will be deported upon discharge. At the end of 2001, the overall occupancy rate stood at 111%, but the number of women sent to prison increased by 61% during 2001. The 2000 figures of women in penal institution in Hong Kong as at 1 September 2000 can be seen in table II. As a result of the recent upsurge of the number of women imprisoned, the CSD had to convert male facilities for the use of female inmates as a temporary measure. The female prison population surged from 1,458 in October 2000 to a record high of 2,825 in May 2002. This increase was due to the large number of mainland legal entrants convicted of "breach of condition of stay".
25. An analysis of the 2001 penal institution population in Hong Kong (table I) shows that, local women (331) consisted of less than 6% of the total local Chinese prison population (5,545). Compared to the total number of Mainland Chinese in prison (2,966), mainland women (1,272) amounted to 42.88%. The number of women of other nationalities (167) in detention is 27% of the total number of inmates of non-Chinese nationalities (616) in detention. While the number of women sent to Drug Addiction Treatment Centre (173) is 23.47% of the whole DATC population.
26. Examining table III on the type of offences committed by women in detention, it is evident that of the 7,955 offences committed by women convicted and sent to prison, an overwhelming majority of female offenders committed the offence of "breach of condition of stay" (4,589), and 666 committed the offence of remaining in Hong Kong unlawfully, while 601 offences of "possession of forged ID". These three offences were usually committed by Mainland Chinese women entering Hong Kong whether legally or illegally seeking to settle and obtain employment in Hong Kong. Together, they formed 73.6% of all offences committed by women in penal institutions in Hong Kong in 2001.

27. It is an offence for visitors to Hong Kong to seek employment without permission. Consequently, in order to escape detection, women from Mainland China arriving in Hong Kong by lawful means or otherwise often obtained forged identity documents or used stolen documents in order to seek employment.
28. Comparing with the statistics released by the Hong Kong Police on the number of illegal immigrants arrested (table IV), the number of illegal immigrants from Mainland China has been decreasing and the numbers were the lowest in 17 years. In 2001, a total of 8,322 illegal immigrants have been arrested, a decrease of 1.8%. As a result of active enforcement action against illegal vice activities by the Hong Kong police in 2001, 1,357 female illegal immigrants from the mainland for vice activities have been arrested. Compared to the figure of 279 in 2000, there was an increase of 486%.
29. A large majority of these women were brought in to work at vice establishments as prostitutes. They are often found to have been controlled by gang or triad members and some were badly treated and abused. Some were detained against their wish and forced to work to pay for inflated expenses for their illegal immigration.
30. A small number were pregnant women who obtained two-way permits to visit Hong Kong for a short period, they over stayed in order to give birth to their babies in Hong Kong thus gaining rights of abode in Hong Kong for these children. Others detained include those who overstayed to look after their children born in Hong Kong of a Hong Kong father. It normally takes these women a number of years before they are allowed to legally settle in Hong Kong permanently. These two categories of women sometimes are given temporary permit to stay for a limited period of time after which they will be required to return to mainland China pending legal immigration to Hong Kong.
31. It is the Hong Kong Department of Justice's policy not to prosecute women from Mainland China who have not committed other criminal offences and found to have entered or overstayed in Hong Kong for the first time. They are usually deported immediately back to Mainland China. This policy used to include those women found in vice establishments. In recent years, in an attempt to deter mainland women who came to Hong Kong to work at vice establishments, these women are now charged and imprisoned for the offence of "breach of condition of stay" if they came to Hong Kong on a tourist/visitor permit. This probably explains the recent upsurge of the number of women detained in prison.
32. To accommodate the increasing prison population there are plans to build a 'super jail' at an outlying island. The recent proposal is an institution housing 7,220

inmates at a construction cost of HK \$16 billion. If approved by the legislative funding committee, this institution will be in operation in 12 years' time. It is anticipated that women inmates will be detained in the same institution with separate buildings devoted to female prisoners.

33. Rather than imprisoning the women who repeatedly overstayed in Hong Kong and who have not committed other criminal offences, it would be both expedient and humane to deport them back to Mainland China immediately. It is understood that the mainland government has a policy of sending these illegal immigrants to rehabilitation and re-education camps upon their return. It is obvious that by immediately sending these women back to mainland China, a great deal of resources would be saved.
34. Whatever the means, it is against international human rights norms to detain women in over crowded prisons when their only crime is the wish to settle and work in Hong Kong. It is also a phenomenon peculiar to Hong Kong that migration from one part of the country to another part is restricted and families sometimes waited for as long as one or in some cases a couple of decades before they are united.

Table I

(as at end of year)

Prisoner

	<u>2000</u>	<u>2001</u>
Local Chinese	5,594	5,545
Male	5,293	5,214
Female	301	331
Mainland Chinese*	2,605	2,966
Male	1,723	1,694
Female	882	1,272
VR/VM/VII	377	229
Male	342	206
Female	35	23
Other Nations/Territories	561	616
Male	438	449
Female	123	167
Sub-total	9,137	9,356
Male	7,796	7,563
Female	1,341	1,793
DATC Inmate	869	737
Male	726	564
Female	143	173
TC Inmate	411	391
Male	371	351
Female	40	40
DC Inmate	167	167
YO	138	132
YA	29	35
Remand	1,252	1,169
Male	1,068	1,023
Female	184	146
Detainee		
VM/VII #	16	16
Male	11	12
Female	5	4
Other detainees	165	218
Male	109	138
Female	56	80
Total in Penal Institutions	12,017	12,054
Male	10,248	9,818
Female	1,769	2,236
Resident	63	64
Male	61	57
Female	2	7

* Comprising Mainland Chinese IIs and 2-way permit/passport holders.

After the closure of HIDC in Jun 98, all VM/VII are detained in penal institutions.

Note : Prisoner figures include civil prisoners.

Table II**Major female correctional institutions in Hong Kong as at 1.9.2000**

Name of Institution	Security Level	Functions	Capacity/ Certified Accommodation	Current Population (as at 1.9.2000)
Tai Lam Centre for Women (TLCW)	Maximum	Prison for Adult Prisoners aged 21 and above. Also a Reception Centre for Adult Remands.	278	370
Tai Tam Gap Correctional Institution (TGCI)	Minimum to Medium	Training Centre Inmates aged 14-21. Prison for Young Offenders under 21. Also Reception Centre for remands aged 14-21.	160	236
Chi Ma Wan Correctional Institution (CMWCI)	Medium	Adult Prison to hold mainly Chinese Illegal Immigrants prisoners subject to deportation	338	423
Chi Ma Wan Drug Addiction Treatment Centre (CTC)	Minimum to Medium	DATC for both adult and young convicted addicts. Also house local prisoners to ease the congestion of TLCW.	250	189

Table III

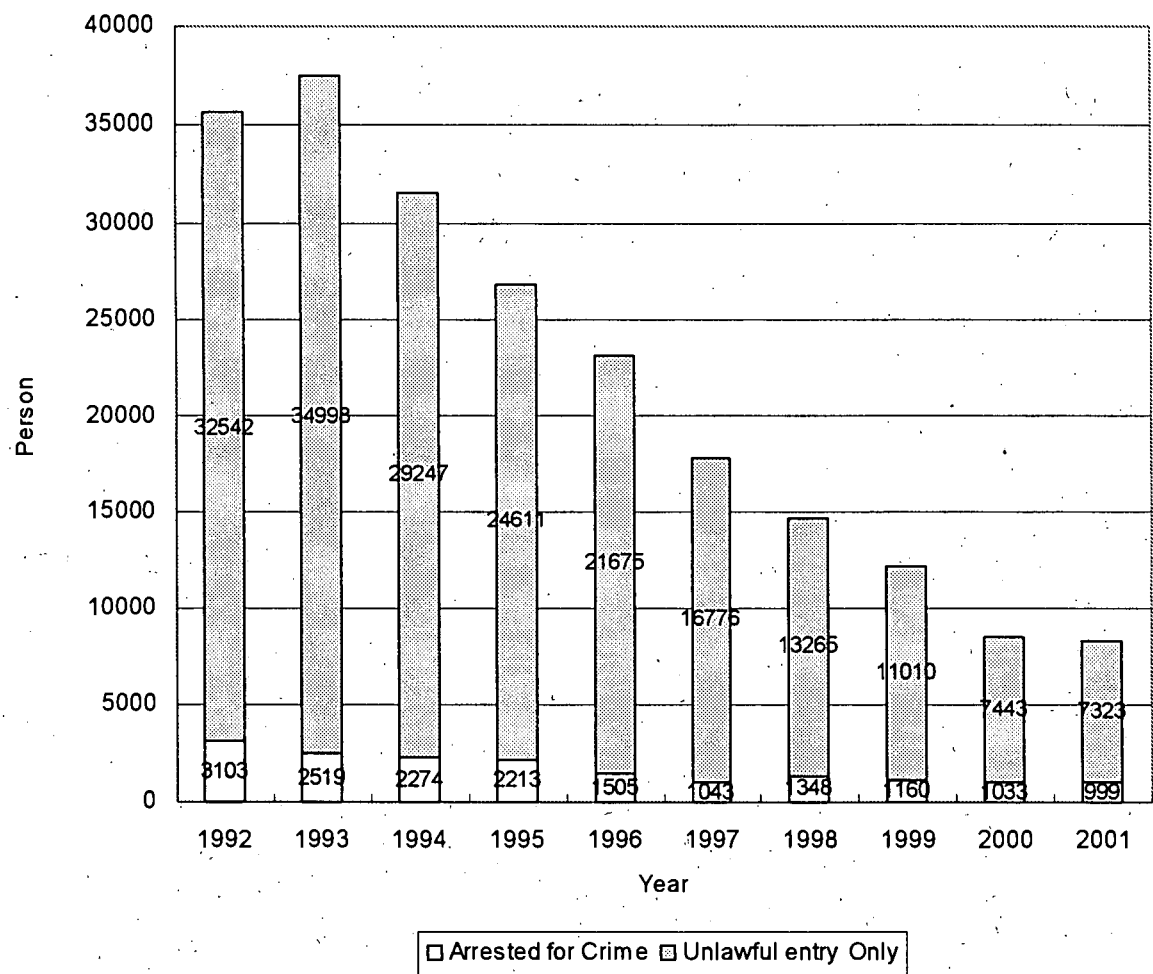
Admission of Sentenced Persons by Sex by Type of Offence

(Female)

<u>Type of Offence</u>	<u>2000</u>	<u>2001</u>
Against Lawful Authority		
a. Unlawful Society	1	1
b. Possession of Offensive weapons	1	3
c. Perjury	275	305
d. Others	11	7
Sub-total	288	316
Against Public Morality		
a. Rape	0	0
b. Indecent assault	0	1
c. Keeping a vice establishment	9	23
d. Others	8	10
Sub-total	17	34
Against the Person		
a. Murder	0	2
b. Manslaughter/Attempted murder	2	3
c. Wounding/Serious assault	14	22
d. Others	7	5
Sub-total	23	32
Against Property		
a. Robbery	9	6
b. Burglary	8	7
c. Theft	307	397
d. Others	36	42
Sub-total	360	452
Against the Penal Code		
a. Possession of a forged ID	480	601
b. Forgery/Counterfeiting	25	77
c. Others	18	50
Sub-total	523	728
Against Local Laws		
a. Remaining in HK unlawfully	398	666
b. Breach of condition of stay	2,654	4,589
c. Publishing of obscene articles	1	5
d. Others	426	831
Sub-total	3,479	6,091
Narcotics Offences		
a. Trafficking in D.D.	73	72
b. Simple Possession of D.D.	187	218
c. Others	19	12
Sub-total	279	302
Total (Female)	4,969	7,955

Table IV

MAINLAND ILLEGAL IMMGRANTS ARRESTED 1992-2001



Nirmala Pandit

Director, Managing Trustee Centre for Empowerment

1. Introduction

Women under detention are not a new phenomenon but today it has now assumed startling dimensions. Women are kept under detention in jails, prisons, remand homes, women's institutions, or other places of custody where they are kept as prisoners, or otherwise. Women all over the world experience marginalised status. While under detention, her status and dignity gets further deteriorated due to the inhuman treatment and conditions she faces in custody. The treatment has taken various forms such as torture in custody, rape, custodial death, brutal and inhuman treatment of prisoners, whether undertrials or convicts. Unfortunately, this brutality, when perpetrated on helpless and defenceless women, amounts to the most severe affront to human dignity. The media has tried to bring such cases of custodial crime to light through investigative journalism and tried to awaken the conscience of mankind and judiciary and has come heavily on those who are perpetrators of custodial crime. Over the last few years we have seen an increasing sensitivity on the part of the judges to the sufferings of victims of custodial crime, particularly women in detention.

2. Situation of Women Prisoners in India

- 2.1 Women prisoners constitute a very small proportion of the total prison population. Various factors attribute for this situation. They are the innate nature of a woman, her domestic status, putative weakness and ambiguity regarding her legal and social responsibilities. Unfortunately, the minority status of women in prison tends to reinforce the lost status of women otherwise seen in the society. Against 2,75,605 total prison inmates as of 1998, the women prisoners were 8,822, which constitute 3.2 percent of the total prison population.
- 2.2 In most of the jails large number of prisoners are detained in miserable conditions extending much beyond their liveable capacity.
- 2.3 At the end of 1998

State	Available Capacity	Inmates Population
Bihar	692	1053
Haryana	81	358
Maharashtra	590	784
Uttar Pradesh	824	1071
Delhi	120	373

Source: Women in Detention, Third Report, Committee of Empowerment of Women (2001-2002), August 2001.

- 2.4 Many of the women have been in the custody for a period longer than the full sentence if they were to be convicted for the offence had they been tried. The majority of women prisoners belong to poor, disadvantaged and vulnerable sections of the society. The facilities of legal aid and assistance are often dependent on the will of the prison officials. There are very few voluntary organisations that are seen working for women detained in prisons and other custodial institutions. Most of the prisons are overcrowded. This results in deteriorating physical conditions, sanitation and other facilities for the inmates. That also has an adverse impact on the staff supervision and the delivery of health care services. The Justice Krishna Iyer Committee (1987) has well phrased the situation of women prisoners. The Committee noted that 'the prison institutions suffer from the pathology of misinformation or ignorance about rights and limitations. Lack of legal help, apathy or lack of sensitivity by the jail officials and lack of awareness about the judicial process and law are the major reasons behind a large number of women languishing in prisons.'
- 2.5 There are very few prison institutions that exclusively house women prisoners. Often, they have to be accommodated in the same prisons that are used for men. According to the prison statistics (1998) there are total 1133 prisons in India, which include 16 prisons exclusively used for women. In most of the jails, central, district or sub-jails, the women imprisoned have to walk through men's section and suffer humiliation and harassment.
- 2.6 One important factor responsible for not having adequate and separate prisons for women is the relatively small numbers of women prisoners in the total prison population. The choice is really difficult between the few exclusive prisons for women where they would be lodged far away from their home and may face isolation from family and friends. Or the non-exclusive prisons located nearby may ensure more visits by the family but the women may face humiliation. They

invariably face injustice and discrimination due to their subordination in the society in general. The psychological stress caused by separation from family and particularly from children, the unhelpful attitude of close relations and uncertainty of the future makes the life for women in prisons very pitiable.

- 2.7 In addition to womanhood related abuse and discrimination, the women prisoners are the last to receive rehabilitative and reformatory measures undertaken in the prison. According to the National Human Rights Commission, most of the jails in the country, have no schemes for gainful vocational training nor have facilities for elementary education for women prisoners.

So far sporadic efforts have been made towards improving the status and living conditions of women prisoners (both convicts and undertrials) in prison and even after their release. There are very select voluntary organisations working for the betterment of this disadvantaged group.

3. Legal Position

- 3.1 The Constitution of India, the Prison Acts and Jail Manuals recognise the following rights for the people under detention. They are equally applicable to men and women;

Right to human dignity

Right to Minimum needs

Right to Communication

Right to Access to Law

Right against arbitrary prison punishments

Right to meaningful and gainful employment

Right to be released on the due date

- 3.2 Every State in India has to ensure that living conditions in every prison and allied institutions are compatible with the concept of human dignity in all aspects such as accommodation, hygiene, sanitation, food, clothing, medical facilities, etc.

- 3.3 The situation of women in custody is not uniform throughout the country. This is due to the fact that the matters relating to prisons, reformatories, borstal schools, etc. and the persons detained therein are the State subjects under the Constitution of India (Entry 4 of List II in the Seventh Schedule), while the prison administration is governed by the State administration under the provisions of the Indian Prisons Act 1894 and the jail manuals of the respective State Governments. However the major

laws regulating the criminal justice system in the country are the Indian Penal Code, the Indian Evidence Act and the Criminal Procedure Code which are uniform throughout the country and have also incorporated provisions protecting the dignity and rights of women in custody from arrest to sentencing in prison.

4. Constitutional provisions

- 4.1 The Preamble of the Constitution is evident of this inspiration. It assures "dignity of the individual", and goes further in assuring justice, liberty and equality to all its citizens, both men and women equally.
- 4.2 Human rights in its conception are a fall-out from the notion of human dignity. The Constitution of India has in its various provisions protected this human dignity and human rights of individuals. Right to life, which is a Fundamental Right under Article 21 states that, No person shall be deprived of his life or personal liberty except according to the procedure established by law." This right to life includes right to live with dignity, not just to ordinary law-abiding individuals, but is also to those deprived of their personal liberty for various reasons. Men, women, children, inmates of mental asylum/hospital, protective homes, remand homes, police custody and prison – all have right to live with dignity. With the application of the activist mind, the Supreme Court of India has expanded this right to include –right to privacy, right to healthy living conditions, freedom from unreasonable constraints like fetters or bars, right to publish a book from prison, right to shelter, right to compensation and so on. Today, the Right to Life means the Right to live with human dignity and freedom from all kinds of exploitation.
- 4.3 Non-discrimination is the core value of human rights and internationally it is a non-derogable right. Right to human dignity is inadequate without right to equality before law and equal protection of law. The Constitution of India has guaranteed the values of Justice and Equality that flows through all human rights. Article 14 of the Constitution provides for equality before law and prohibits discrimination among citizens on the ground of religion, race, caste, sex or place of birth (Art. 15) and assured equality of opportunity (Article 16) for all.

5. The Indian Penal Code 1860

- 5.1 Several provisions are incorporated to address the situation of women under detention. It addresses situations of abuse and torture faced by women in jail,

hospitals, protective custodies, etc. Severe punishments are prescribed for such offences. Provisions regarding custodial rape address situations when it is committed by a police officer within the limits of the police station or in the police custody; by a public servant or by a person belonging to the management and is being committed on the staff of a jail, remand home or other place of custody (Sec. 376 (2)). The law on custodial rape has undergone a major change after the Mathura case (*Tukaram v State of Maharashtra AIR 1979 SC 185*) where a tribal girl was raped by a police constable in the police station, but was acquitted for want of sufficient evidence. This followed a nation-wide movement by women's organisations to amend the rape laws. Similarly a sexual Intercourse by a public servant with a woman in his custody shall be punished with imprisonment of either description for a term, which may extend to five years and shall also be liable to fine. (Sec. 376B of IPC). This provision is extended to institutions run by voluntary organisations (Sec. 376C) and to the hospitals (Sec. 376D) and to any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

6. Criminal Procedure Code, 1973

In order to avoid excesses by the custodial authorities, the Criminal Procedure code requires such officials to follow certain rules in all cases of arrest or detention (Articles 21 and 22 (1) of the Constitution and (*D.K. Basu v State of W.B. AIR 1997 SC 610*))

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.
5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.
8. A trained doctor should subject the arrestee to the medical examination, every 48 hours during his detention in custody by the doctor on the panel of approved doctors appointed by the Director, Health services of the concerned State or Union Territory. The Director Health Services should prepare such a panel for all tehsils and districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
11. A police control room should be provided at all districts and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.
12. In order to ensure decency to women, whenever it is necessary to search a woman, the search shall be made by another woman with strict regard to decency (Sec. 51(2)).

All the Committees who had examined the problem of protection of dignity and human rights of women in detention viewed that there is an urgent need for reforms in these laws. Barring the CrPc, all other laws governing substantive provisions related to women in detention were enacted during the British Rule. These laws are outdated and not suitable to address the nuances of the present day criminal justice.

7. Specific Laws Regulating The Detention Institutions.

- 7.1 Each State has its own Prison Manual to govern the state of affairs in the prison within its territory. Despite the facilities to be provided as per these Manuals, the situation of women prisoners and their exploitation within the four walls of the prison is on the increase. The agony of women prisoners serving longer periods of imprisonment has been further aggravated by their separation from family, children, friends and relatives.
- 7.2 While taking into consideration, the status of women in family and society, their special needs and their vulnerability, the Prison manuals have provided for segregation, protection, care, treatment, training and rehabilitation of women prisoners. Generally, the classification of prisoners is done on the basis of various categories like convicts, under-trials, habitual offenders, etc.
- 7.3 It is terrifying for any prisoner to live within the four walls of the prison without any contact with the outside world. It is also very important to preserve the mental health of all prisoners. Some level of facilities for recreation and relaxation are to be made available for them. These include television, cassette recorder, radio, etc.
- 7.4 Special care of the physical and mental health of women has to be taken in custodial institutions. Immediately after her admission to prison, a woman prisoner has to undergo a thorough medical check-up. Pregnant women or women who require special medical care are provided with the necessary facilities. The pregnant and nursing women prisoners are provided a prescribed special diet and exempted from work, which is not suitable to their physical conditions. Medical check-up of women prisoners is generally done by women medical officers.
- 7.5 Irrespective of all cultures and societies, being in prison always accompanies a blemish and often women prisoners are prominent victims of this social stigmatisation. Women prisoners with small children suffer the most. Hence, when it is found at the time of admission, that the woman prisoner is pregnant, the prison administration is ordered to take such a woman to the nearest maternity hospital.
- 7.6 All women prisoners are provided with suitable clothing including sanitary pads along with adequate quantity of washing and toilet soaps in order to maintain proper cleanliness and hygiene. The food provided is as per the scales mentioned in the respective prison manuals.

- 7.7 While in prison, special efforts are made towards rehabilitation of the prisoners. Vocational training courses like sewing, knitting, embroidery, paper bags, garment making, etc are conducted by the prison administration. Arrangements are made at many jails to provide primary and adult education with trained teachers. Legal aid is provided to the needy women prisoners.
- 7.8 Children up to the age of 4 to 6 years are allowed to stay with their mothers in prison. In such cases crèches are organised in many prison. Prison manuals also provide for special diet for children living inside prisons with their mothers.
- 7.9 The provisions relating to custodial justice to women are found not only in legislations enacted by the States or the Centre, but they are also to be found in various subordinate legislation, executive instructions, circulars, memoranda, etc. which are compiled and consolidated in various manuals. There are a number of judicial decisions of the Supreme Court and High Courts, which have given a humane approach with human rights perspective to the custodial justice to women.

8. The Prisons Act, 1894

- 8.1 This Act governs the daily routine issues relating to the custodial justice throughout India. It defines the duties of prison officers including medical officers; admission; removal and discharge of prisoners; discipline of prisoners; food, clothing and bedding and different categories of prisoners as well as issues relating to their health and employment. The Prison Act is, therefore, the significant piece of legislation that regulates the situation in custody as well as treatment of jail inmates.

9. Some Judicial Efforts In Improving The Situation Of Women Under Detention

1. The right to life with human dignity is a Fundamental Right of every citizen. So in discharge of its responsibilities, the State must provide the minimum conditions ensuring human dignity. In *Bhuvan v. Mohan* (AIR 1974 SC 2092), it was observed that 'we cannot do better than say that the Directive Principles contained in Article 42 of the Constitution requiring that the State shall make provision for securing just and human conditions of work, may benevolently be extended to living conditions in jails. However, the reality is different.
2. The Supreme Court of India has delivered a series of favourable decisions protecting human rights of the prisoners. In *Javed Ahmed v State of Maharashtra*

(AIR 1985 SC 231) the Court observed that, Articles 14, 19 and 21 of the Constitution are available to prisoners as well as free men. Prison walls do not keep out the fundamental rights. In *Bhuvan's* case the Court opined that right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, to exercise and recreation, to meditate and chant, to creative comforts like protection from extreme cold and heat, to freedom from indignities like compulsory nudity, forced sodomy and other unbearable vulgarity, to movement within the prison campus, to minimal joys of self expression, to acquire skills and techniques and all other fundamental rights tailored to the limitation of improvement'.

3. Although the system of Bail envisioned in the Criminal Procedure Code aims towards helping the poor and vulnerable, in reality it operates very harshly against them. The poor are priced out of their liberty in the justice market. In *Hussainara Khatoon* case (1979 3 SCR 177), it was observed that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of the Constitution. There is a wide gap between the high principles of the Constitution and the practical reality.
4. In *Kadra Pehadhyā v State of Bihar* (AIR 1983 SC 1086) the Supreme Court observed that it is a crying shame upon our adjudicating system, which keeps men in jails for years on end without a trial. It is obvious that after so many incarcerations awaiting trial either the spirit must be totally broken or they must be seething with anger and resentment against the society.
5. Free labour by the prisoners is contrary to the Art. 23 (1) of the Constitution of India, which guarantees right against exploitation and prohibits forced and free labour. That is why, all convicts who are given work in prisons are paid for what they work. Free labour from prisoners amounts to violation of Art. 21 of the Constitution, since it is not in accordance with the procedure established by law.
6. The prison laws have laid down the guidelines regarding patterns and manners of use of instruments and circumstances in which restraints like handcuff, chains, iron fetters, bars and straitjackets may/may not be used. In *Prem Shanker Shukla v Delhi Administration* (1980 3 SCC 526/AIR 1980 SC 1535) the Court held that handcuffs should be used in the rarest of rare cases and they were to be used only when the person was desperate, rowdy or the one who was involved in a non-bailable offence. The handcuffs or other fetters shall not be

forced on a prisoner convicted or those undertrials who are irregularly lodged in jails anywhere in the country or while transporting or in transit from one jail to another or from jail to a court and back. It is mandatory for the jail authorities to obtain prior permission from the Magistrate.

7. The most significant ruling of the Supreme Court on prisoners' rights were in the case of *Sheela Barse v. State of Maharashtra* (AIR 1983 SC 378). The Court gave seven guidelines to improve the situation of women in custody. These are: exclusive police lock-ups for female suspects, interrogation of women prisoners in the presence of a female police officer, arrestee being informed of the grounds of arrest immediately, provision for legal aid, surprise visits to police lock-ups, communication to the nearest relatives or friends, immediate inquiry by the Magistrate about any torture meted out to the woman and her right to medical examination.

10. Penal reforms for effective custodial justice to women

- 10.1 The question of ensuring custodial justice to women and protecting their dignity and rights within such institutions has been studied by a number of Committees. The Indian Jail Committee constituted during British rule in 1919-20 recommended that each province should have separate institutions for women prisoners.
- 10.2 The All India Jail Manual Committee of 1957-59 voted in favour of a specialised approach towards care, treatment and rehabilitation of women offenders. It was also emphasised that vocational training for women while in custody is essential.
- 10.3 Another Committee constituted under the chairmanship of Justice Mulla studied the status of women prisoners during 1980-83. The Committee gave recommendations on the unhealthy living conditions, exploitation, and unnecessary prolonged severance from families and lack of gainful and purposeful employment. It laid emphasis on training of custodial staff in prisons to handle women prisoners with a reformative attitude.
- 10.4 Finally, the Government of India constituted an Expert Committee on Women Prisoners chaired by Justice Krishna Iyer in 1986-87. This Committee gave a number of useful suggestions to improve the status of women prisoners in jails.
- 10.5 There is no pre-release planning and well-laid policy for rehabilitation of women prisoners after their release. The women prisoners suffer from peculiar problems

after their release. They are stigmatised for having been in prison. They are more vulnerable to the suspicion and rejection by the family as well the society. The Committee suggested a National Policy for Custodial Justice for Women. It also stressed the adoption of a specialised approach towards handling, treatment and rehabilitation of women prisoners

10.6 In the light of the inadequacy of existing Prison Manual to address several issues affecting prisoners' rights and in particular those of women prisoners, the NHRC prepared Model Prison Bill has recommended an appointment of a woman officer at the headquarters to look exclusively into the problems of women prisoners. The Commission further suggested the following steps to improve the condition of women prisoners.

- ❖ Complete segregation from men prisoners and men's prisons
- ❖ Differential management of women prisoners under the supervision of female staff
- ❖ State governments to formulate a comprehensive scheme for care, protection, treatment, education and development of women prisoners in keeping with their personal characteristics and rehabilitation needs.

11. Recommendations and Conclusion

11.1 It is now universally recognised that every person deprived of his liberty whether an accused or a convict should be treated with humanity. It is true that the position of such persons is not the same as that of any law abiding free citizen and in exceptional cases, they might be subjected to a certain degree of restraint and coercion, but they cannot be regarded as unworthy for the enjoyment of human rights for the simple reason that they are outlaws.

11.2 It is important that the category of women in detention and custody be given special attention within the criminal justice system. The provisions related to bail, parole, probation and other innovative sentencing should be liberally used in case of women criminals. There should be less formal and speedy procedures applied in criminal cases and especially in the cases involving women. The recommendation to set up courts exclusively for women and having female judicial officers made by various Committees reviewing the situation of women in detention and custody need to be tried out.

- 11.3 As there are no separate institutions for the undertrials, they are kept in jails and prisons along with those serving their punishment, but in separate enclosures or wards. In the case of *Common Cause v Union of India* ((1996) 4 SCC 33), the Supreme Court held that right to speedy trial is a part and parcel of the right to life guaranteed by Art. 21 of the Constitution, and ordered the release of certain categories of undertrial prisoners on bail. Unfortunately, the situation has not improved.
- 11.4 Another aspect that hampers the rights of women in detention and custody is that of lack of rehabilitation after their release from the institutions. It is largely these seen that women possess no formal skill or education. The training given to women prisoners is inadequate for them to get any gainful employment after the release. The situation is further aggravated by the lack of pre-release planning and post-release rehabilitation. The women prisoners face peculiar problems once they are out of jails/protective homes. These problems are not just economical but social too. Women prisoners become vulnerable to suspicion and rejection once they are out in the society. Often they are stigmatised for having been in prison. Imprisonment has more adverse impact on women than on men. Even the close family relations including husband and children shun these women. Moreover, a number of women prisoners suffer from mental depression and other forms of psychosomatic illnesses.
- 11.5 Women's human rights are constantly denied through specific forms of violence and deprivation. There is a visible gap between the law that stands in the statute books and the law that is followed by the 'custodians of the law' i.e. police, courts and prison institutions. The problems of women prisoners can only be appreciated keeping in mind that the women prisoners have an entirely different criminal profile and social reality than that of men.

12. Important References

1. Report on the Custodial Justice for Women, The National Commission for Women.
2. Indian Jail Committee recommendations
3. The Empowerment Committee Report
4. The Mulla Committee Report
5. National Standards on the Conditions of Detention
6. The Krishna Iyer Committee Report

Soli J Sorabjee

Attorney General, Member of the UN Sub-commission

The Supreme Court of India has ruled that prisoners are not denuded of their basic human rights upon incarceration. The Supreme Court has frowned upon undue harshness and excessive restrictions placed on prisoners. In the leading case in *Sunil Batra (II) v. Delhi Administration* [1980 (3) SCC 488] the Supreme Court laid down certain guidelines with respect to prison justice. These included:

- The fact of incarceration could not deprive prisoners of other freedoms such as the freedom to read and right; to exercise and recreation; to meditation and chant; protection from extreme cold and heat; freedom from indignities such as compulsory nudity and forced sodomy.
- The court proscribed what it described as inflictions apart from physical assaults. These included solitary confinement; denial of necessary amenities; transfer to distant prisons, which resulted in snapping visits from relatives and friends and so on.
- Finding that adolescents are often subject to sex excesses and exploitative labour, the Court directed that young inmates be separated from adults.
- Prisoners had the right to confidential conferences with their lawyers.

In its decision in *Sheila Barse v. State of Maharashtra* [1983 (2) SCC 96], the Supreme Court expounded on the rights available to women in police custody. Certain guidelines for their treatment which were laid down included the following:

- Female suspects should not be kept in a police lock-up in which male suspects are detained.
- Lock-ups for women should be in good localities and should be guarded by female constables.
- Interrogation of females should be carried out only in the presence of female police officers/constables.

Despite the pronouncements of the Supreme Court in reality the condition of women detainees and prisoners in jail is far from satisfactory. The National Commission for Women

in its report found that that amongst the under-trial prisoners languishing in jail, 50 per cent are female prisoners. The Commission found under-trial women languishing for 4 or 5 years in jails for offences for which the sentence would have been much less if they were convicted.

Another problem noticed was that the proportion of female prisoners suffering from mental depression was high compared to male prisoners. Yet there were hardly any arrangements for psychiatric treatment and counselling.

The Commission observed that by and large the women prisoners continue to live a life of insecurity, suffering and deprivation in various jails scattered all over the country. The Commission has recommended exclusive jails for women prisoners wholly managed by women staff which can bring succour to them and provide custodial justice by way of healthy environment, greater freedom of movement and a sense of security.

In a mixed jail in a State which had 49 women prisoners, 39 of whom were convicts, it was noted that remissions were mostly ordered in cases of male convicts while female convicts were ignored or overlooked. The majority of women staff sanctioned for this women's wing was not in position. In some jails, women warders on daily wages were engaged which is not a good practice.

At a seminar held in Delhi in 1993 by the National Commission for Women some of the suggestions formulated were as follows:

- In making arrests the police officer should not actually touch the person of the woman.
- The medical examination of a female should be conducted only under the supervision of a female registered medical practitioner with strict regard to decency.
- A female prisoner should not be handcuffed or made to wear fetter cross-bar during transit from one jail to another or to the court or for investigation. Besides, she should be escorted by the Matron or Female Warden if she is required to leave the female enclosure, wherever available.
- There should be separate prisons for the undertrial women prisoners.
- There should be one Central Jail for women in each State and Union Territory.

In two studies undertaken by the Regional Institute of Correctional Administration [RICA] Vellore, on contemporary and correctional issues, the findings were:

- women prisoners needed legal advice/awareness and counselling;
- most women were worried about the custody and care of adolescent daughters who live away from them;
- vocational training given to them is not of any rehabilitative value;
- there is a need for a clinical psychologist, welfare officer and social workers in women's prisons.

Women in jails are treated as marginalized sub-standard human beings. Women's jails to a large extent ignore the special requirements of women, some of whom live with little children in prisons. Most offenders are known to suffer from various ailments such as skin diseases, respiratory diseases such as tuberculosis and other sexually transmitted diseases. A majority of them are mentally ill and are simply put away in prisons because there is nowhere else to go. Regrettably institutionalisation as a means of corrective justice makes no distinction between the convict, the under-trial, the mentally disabled, the vagrant, the destitute, the runaway or abandoned girl and the prostitute. This subjects them equally to the physical and mental trauma of closed confinement and the neglect and abuses (sexual and other) that go with it. The inter-changeability of punitive and protective or curative institutions has led to prison cells being regarded as places of 'safe custody'.

What is urgently needed is sophisticated gender sensitive training in human rights and 'human handling' skills need to be imparted to jail officials continuously. There is also need for psychiatric counselling for women who live away from children and other dependants and suffer poor mental health.

Right to life is a guaranteed fundamental right under the Indian Constitution [Article 21]. The Supreme Court has ruled that the right to life means the right to live with human dignity. Regrettably human dignity of women prisoners and detainees is not respected in practice. The recommendations and suggestions referred to above are not implemented in earnest.

There is not sufficient consciousness and sensitivity to right of women prisoners. They are not a vote bank for politicians. Violation of their rights is 'invisible' and on a massive scale.

Violation of Women's Dignity and Human Rights in Detention Facilities and Prisons

The *National Expert Committee on Women Prisoners* has outlined the conditions to which women in prison are subject. (1987 report):

- The physical state of women's prisons is "despairing". There are no separate entrances for women, and male staff often has access to female sections. Further, there is inadequate space per prisoner. Further, women's prisons are frequently misused as general prisons.
- It is found that often, women do not have separate prisons for the simple reason that there are not enough women prisoners to justify the required budgetary allocation. For that reason, some states resort to congregating women from various prisons in one custodial venue.
- Prisoners' classification is non-existent and often, "mental cases" and women under "protective custody" are indiscriminately mixed with other categories-thereby causing victims to risk "further contamination".
- Rudimentary facilities such as basic clothing; basic toiletries; hygienic toilets; and satisfactory sleeping arrangements, are often found missing in women's prisons.
- Medical care and child care (for children of women prisoners) were also found to be issues of concern.

Conclusions and Recommendations

In the light of the discussion made in the report, the commission is of the opinion that it is essential to make appropriate provisions in order to foreclose harassment of women in custody and in order to protect such women in the extent possible. It is felt that amendment of each individual provision, as existing in the Code of Criminal Procedure, may not sufficiently serve the purpose. The provisions which call for amendment in the light of the discussion made hereinbefore are scattered in different chapters of the Code of Criminal Procedure. Under the circumstances, the amendments made especially with an eye on protecting the women in custody from harassment and avoidable hardship will not come into focus if effected in each individual provision and the officials concerned may not become fully aware of such provisions without making a special effort in this behalf. So also, the women's organisations and the relatives of the concerned women in custody may experience the same difficulty in informing themselves about the rights of such women. In the Commission's opinion, it is, therefore, desirable that, as far as possible, the provisions

especially made in this behalf may be incorporated in a separate Chapter of the Code of Criminal Procedure so that the concerned officials, as also the women's organizations and the women in custody and their relatives, can, without much effort, apprise themselves of the rights of such women and the obligations of the concerned officials.

For the sake of convenience, a draft of the proposed chapter relating to arrest, interrogation and custody of women (and, incidentally, of children) and the proposed provisions embodying the conclusions of the Commission is being set out hereinafter. But before doing so, the conclusions and recommendations may be broadly indicated:

Substance of Recommendations in a nutshell

- 1) In the event of a woman being required to be arrested, the police officer concerned shall not actually touch the person of the woman and may presume her submission to custody. This recommendation is being made in order that the dignity of the concerned woman is maintained. (Paragraph 2.2)
- 2) Ordinarily, no woman shall be arrested after sunset and before sunrise. In exceptional cases calling for arrest during these hours: (i) the prior permission of the immediate superior officer shall be obtained, or (ii) if the case is of extreme urgency, then after arrest a report with reasons shall be made to the immediate superior officer and to the Magistrate. (Paragraph 2.3)
- 3) Whenever a woman is medically examined, the examination shall be conducted only under the supervision of a female registered medical practitioner, with strict regard to decency. (Paragraph 2.6)
- 4) The concerned woman shall be informed about her right to be medically examined, in order to bring on record any facts which may show that an offence against her has been committed after her arrest. (Paragraph 2.8)
- 5) A copy of the report of the medical examination shall be furnished to the woman. (Paragraph 2.7)
- 6) A woman shall not, under section 160, Criminal Penal Code, be required to attend for interrogation at any place other than her dwelling house, and section 160 of the Code should be amended for the purpose. (Paragraph 2.10)
- 7) When the statement of a woman is recorded during investigation, a relative or friend of the woman or an authorised representative of an organisation interested in the welfare of women shall be allowed to remain present. (Paragraph 2.11)

- 8) Where a woman is convicted of an offence to which section 360, Criminal Penal Code applies, whilst exercising the power of the court to release the offender on probation or on due admonition, etc., as exercisable under that section, due regard should be paid to the fact that the offender is a woman. (Paragraph 5.10)
- 9) The prohibition imposed by section 433A, Criminal Penal Code on the reduction (by the Government) of the period of imprisonment (of offenders sentenced to imprisonment for life) below a minimum period of 14 years should not apply to a woman. (Paragraph 2.19)
- 10) Where a pregnant woman is sentenced to imprisonment (whether for life or for a specified term), the court should have power to direct that execution of the sentence be suspended till termination of the pregnancy and a specified period thereafter, subject to certain conditions. (Paragraph 2.24)
- 11) The High Court on its administrative side should have power to direct the District and Sessions Judges to satisfy themselves that female prisoners are protected and properly looked after, in accordance with the provisions that we are recommending in this regards.

For ensuring compliance therewith, the High Court should have power to take appropriate measures to move the State Government. (Paragraph 2.26)

The following concrete protective measures are recommended as regards female prisoners:

- (a) On admission to jail, a female prisoner should be medically examined. If medically necessary, she should be kept, separately in a female enclosure. On each occasion of readmission to jail after temporary release, the same course should be adopted. (Paragraph 2.27)
- (b) Where a female prisoner is suspected of pregnancy whilst in custody, she shall be sent to the District Government Hospital. In case of advanced pregnancy, she shall be shifted to female ward of the Government hospital. (Paragraph 2.27)
- (c) A female prisoner shall not be handcuffed or made to wear fetter cross-bars during transit from one jail to another or to the court or for investigation. (Paragraph 2.28) Besides this, she shall be escorted by the Matron or female Warden, if she is required to leave the female enclosure. During transit, a female relative shall be allowed to accompany her. (Paragraph 2.28)
- (d) Where there are no suitable arrangements or housing women prisoner, they should be sent to a suitable institution wherever practicable. (Paragraph 2.29)
- (e) At places other than Sessions headquarters, a judicial officer (preferably a lady judicial officer) shall make an inspection of the jail where the women in custody are detained. Such inspection shall be made at least once in every two months and the District and

Sessions Judge may make appropriate recommendations in the light of the inspection report. (Paragraph 2.30)

At the Sessions headquarters, the Sessions Judge shall carry out such measures for the protection of women as recommended in this report are implemented. Copies of these inspection Reports shall be forwarded to the concerned officers. (Paragraph 2.30)

(f) Apart from surprise visits as above, jails where there are women prisoners shall be visited by visitors appointed by the Government of these jail visitors, one should be a medical officer and two should be social workers (of whom, wherever practicable, one shall be a woman). Two visitors should visit the jail at least once in six months and make a report to the Sessions Judge. (Para 2.31)

(g) These provisions should apply, not only to women prisoners, but also to women in custody in police lockups or as detenus under a law providing for preventive detention, irrespective of whether the woman is kept in custody during investigation, inquiry or trial or after conviction etc. (Para 2.32)

(12) As a consequence of our comprehensive recommendation relating to medical examination of women involved in the criminal process, consequential amendment maybe made in section 53 of the Code of Criminal Procedure, 1973. (Paragraph 2.6)

(13) In section 160 (1), Criminal Penal Code, 1973 (which prohibits the summoning of women, etc., during investigation by the police), certain verbal changes should be made. (Paragraph 2.10)

(14) Section 416, Criminal Penal Code should be amended to make the commutation of death sentence passed on a pregnant woman mandatory. (Paragraph 2.13)

(15) At present, by section 437 (1), Criminal Penal Code, a restriction is imposed on the release on bail, of a person accused of an offence punishable with death or imprisonment for life, but the first proviso to that sub-section rests in the court a discretion to release on bail certain categories of persons (persons below the age of 16 years, women, and sick and infirm persons).

The recommendation is that in such cases, the court shall direct that such persons shall be released on bail, unless the court for reasons to be recorded, considered it proper not to release such person on bail. (Paragraph 2.23)

(16) For violation of the mandate contained in section 160 (1), Criminal Penal Code (which provides that a person below 15 years or a woman shall be examined only at his or her

residence), a specific penal provision should be inserted in the Indian Penal Code, as section 166A. (Paragraph 2.12)

- (17) In deciding about release on admonition of an offender under section 3 of the Probation of Offenders Act, 1958, the court should have regard also to the fact that the offenders is a woman. (where the person convicted is a woman). (Paragraph 5.8)
- (18) Section 4 (1) of the Probation of Offenders Act, 1958, which empowers the court to release offenders convicted of certain offences on probation of good conduct, should be amended to provide that in deciding about such release, the court shall have regard also to the fact that the offender is a women (where the person convicted is a woman). (Paragraph 5.9)
- (19) Section 37(1), Mental Health Act, 1987 should be amended so as to provide that among the five visitors to the institutions falling within the section, at least one shall be a woman, wherever practicable. (Paragraph 6.6)
- (20) For punishing the offence under section 81, Mental Health Act, 1987 (Indignity, etc., on a mentally ill person in custody), a new section 84A should be inserted, prescribing, for the above offence, a punishment of imprisonment up to 2 years or fine up to Rs. 5000 or both. (Paragraphs 6.9 and 6.10)

Set out in the Appendix I to this Report are our recommendations in the form of draft amendments in the relevant enactments, that is to say,

- (a) the Code of Criminal Procedure, 1973;
- (b) the Indian Penal code,
- (c) the Probation of Offenders Act, 1958; and
- (d) the Mental Health Act, 1987.

We hope that these recommendations, if implemented, will alleviate the hardship of women in custody to a great extent. We conclude this report on this optimistic note.

(M.P. THAKKAR)

CHAIRMAN

(Y.V. ANJANEYULU)

(P.M.BAKISI)

MEMBER

MEMBER

(C.V.C KRISHNAMURTY)

(Delhi, 14 December 1989)

Laws and Procedures to Protect Women's Dignity and Human Rights at Detention Facilities and Prisons

Pasti Serefina Sinaga
Judge

Introduction

In the context of implementing criminal imprisonment in Indonesia, the system of achieving the objective of punishment (imprisonment) is popularly known under the term "Correctional System" (Sistem Pemasyarakatan). This indicates moving from the previous penal system of imprisonment that tends to be deterrence oriented to a new pattern more characterized by the treatment orientation.

In the perspective of recognizing and respecting/ protecting human rights, which has become a global demand particularly in the last several decades, it should be natural if the idea of correction as a system of treating prisoners who are undergoing prison sentences obtains particular (positive) attention, as a system that is accommodative and responsive to the current social development and changes. For the system of correction emphasizes the belief that the treatment of prisoners must heed their rights as human beings.

In Indonesia there are no regulations and procedures yet which specifically govern protections for women's dignity and human rights in the duration of their undergoing the criminal punishment process. The placement of prisoners in the correctional institution is part of a crime-handling process set off with the processes of investigation, prosecution and trial of cases in the court as well as the implementation of verdict in a Correctional Institution. The crime handling process is conducted in an integrated way under an Integrated Criminal Justice System (Police, Public Prosecutor, Judge/Court).

Criminal Justice System in Indonesia

Indonesia adopts the Legal System/Civil Code of Continental Europe under which a suspected criminal will be processed through the criminal code procedure. As a reference in the process of handling crimes, Indonesia has codified a Criminal Code Procedure (Kitab Undang-undang Hukum Acara Pidana--KUHAP) that now has been stipulated under Law No. 8 of 1981. As to its contents, the KUHAP governs all matters concerning the procedures for judicature within the overall system of justice at all levels of judicature. Thus all parties relating to the process (lawyer, police, public prosecutor, judge) will refer to the KUHAP.

The due process of law which constitutes a constitutional guarantee for the protection of individuals against arbitrary power, which guarantees that no one shall be robbed of life, freedom and property other than under decision of the court. Three points forming the foundations and assumptions are:

- (1) rule of law;
- (2) equality before the law; and
- (3) presumption of innocence.

KUHAP has met the requirements to be the legal basis for conducting the due process of law.

The basic principles are:

- the principle of equality in the presence of law,
 - the right to obtain legal advisor for each suspect/accused which in certain cases is obligatory,
 - the right to be informed by law enforcer regarding the suspicion to be charged against him,
 - the right to immediately obtain examination, with any violation of human right which is personal in nature both regarding the enforcement of freedom to move or over property shall be based on the provisions of the law,
- the right of the suspect to attend the trial,
- presumption of innocence, etc.

Detention is the placement of the suspect or accused at a certain place by the investigator or the public prosecutor or the judge with stipulation in the matter of method as well as under a manner as governed by the law. The detention of the criminal is basically a seizure of the right to live in freedom belonging to someone. The detention is to be conducted on the basis of presumption of innocence, as clearly stated in Law No. 8 of 1981 on KUHAP.

The order for detention given by the investigator is only valid for a maximum of 20 days and can be extended by the public prosecutor for a maximum of 40 days. After the period of 60 days has elapsed, the investigator must have released the suspect from the detention for the sake of law. The prosecution period totaling 20 days is extendable by the Chairman of District court for 30 days. After 50 days have elapsed, the public prosecutor must release the suspect from the detention for the sake of law.

After level of examination in the trial, the maximum period of detention is 30 days and can be extended by the Chairman of District Court for a maximum 60 days. After 90 days have elapsed, the accused must have been released from the detention for the sake of law, although the case of the accused has not been decided yet.

System of Development in Correctional Institution

In Indonesia the orientation of punishment (with the concept of treating prisoners) and its practice can be seen in Law No. 12 of 1995 on Correction.

There are several matters which can show the position, relationship and at the same time the urgency of correction as a system of treating prisoners to achieve the objective of punishment (imprisonment), even for the success of law enforcement as a whole. Those matters include the application of concept for the treating of prisoners both during in the correctional institution and after the release from the Correctional Institution. Viewed from the aspect of time, the whole process of correction of a prisoner during the treatment in the Correctional Institution is divided into several phases (stages), namely:¹

- (1) stage of admission-orientation (0-1/3 of the imprisonment period);
- (2) stage of assimilation (1/3-1/2 of the imprisonment period);
- (3) stage of conditional release (2/3-the end of imprisonment period).

The placement and change of a prisoner in the treatment phases are very much affected by the fact that how far he can respond to the treatment programs given by the correctional institution officers and at the same time he shows the increasingly positive development and progress in his behavior.

This means that the period of a prisoner to be transferred from the phase of admission orientation to the phase of assimilation and so on until the phase of release is heavily dependent on the manner the prisoner undergoes the process of treatment, because the correctional system as a way to treat prisoners adopts this progressive model/standard, in which a prisoner on the basis of his or her awareness, is really demanded to continuously and optimally behave in accordance with the programs of treatment directing him to the efforts to achieve the objectives of rehabilitation, reintegration and resocialization.

In addition, the efforts to achieve the objective of imprisonment through the correctional system is also supported by the inclusion of the concept of correction outside the walls of the Correctional Institution as well as further correction after the prisoner has completed his or her sentence in the Correctional Institution. The handling of treatment outside and after the Correctional Institution is conducted by an institution called BAPAS (Correctional Center) which in practice usually cooperates with community leaders. (both formal and informal), where the former prisoner resides.

Conceptually, such a pattern of treatment considerably supports the success of achieving

¹ See the Decree of the Minister of Justice of the Republic of Indonesia Number: M.02-PK-04.10 of 1990 dated April 10, 1990 on Pattern for Treatment of Prisoners

the objectives of reintegration and resocialization of the relevant former prisoner and in the long run he or she is expected to be able to restore his balance and sense of peace in the social life because the former prisoner has united with the community.

Protection for Women's Dignity and Human Rights

Internationally there is a regulation on minimum standard for treatment against prisoners. Accepted by the first United Nations Congress on Prevention of Crimes and Treatment against offenders, held in Geneva in 1955. By referring to the above-mentioned Convention, Indonesia adopts the substance of the United Nations Convention into Law No. 12 of 1995 as well as the Government Regulations No. 32 of 1999 on Requirements and Procedures for Implementation of the rights of those offenders undergoing treatment, and in the forms of other ministerial regulations.

The United Nations Convention on minimum standard for Treatment against the following prisoners is not intended to describe in details a system of correctional institution model. The regulation only seeks, on the basis of general consensus regarding the present premise and main element of the systems which are adequate at present to start with what are generally accepted as the good principles and practices in treating prisoners and managing correctional institution.

The basic principles of Human Rights of Prisoners clearly state that:²

- (1) There shall be no discrimination based on race, color of skin, sex, language, religion, political stance or others, origin of nationality or social origin, wealth, birth or other status.
- (2) On the other hand, it is necessary to respect the religious belief or moral level from the group, in which the prison is included. Prisoners from different categories must be placed in correctional institutions or parts of the institutions which are separated, considering the sex, age, record on criminal act, legal reason for their detention as well as the need for their medical treatment, so that:
 - (a) Men and women must be as far as possible detained in separate correctional institutions; in institutions which accepts both men and women, all buildings designed for women must be completely separated.
 - (b) Prisoners who have not been tried must be separated from the prisoners who have been sentenced.
 - (c) Prisoners who are sentenced due to debt and prisoners sentenced due to other

² Peter Baer, Pieter Van Dijk, Adnan Buyung Nasution, Leo Zwaak: Main International Instrument of Human Rights, Jakarta: Obor Indonesia Foundation, 1997, page: 671

- civil cases, must be separated from the prisoners jailed due to criminal acts.
- (d) Young people jailed must be separated from adults.

Right and Obligation of Detainee

In KUHAP (Criminal Code Procedure) there is a principle which states that each person, both a man and woman has the equal right before the law, so that until now there are no regulations or laws which are enacted specifically for female detainees. It cannot be denied as a fact in human life that women are also likely to commit crimes. It is necessary to remember that female prisoners are not very much different from other woman, who also still have the status as wife, mother, lover, sister or younger sister of community member; that they also have needs as ordinary human being, which must be met. As humans, their rights are indeed limited, because they do not have the power to do them at the time and in the form of activity they want to do, for instance. However, apart from many restriction, the existence as a human being must always be respected.

The rights and obligations of detainees are:

- a. Detainees still have rights as already governed in Law No.8 of 1981 on KUHAP and political rights as well as civil rights already governed in the laws.
- b. The rights of detainees are emphasized on the rights given by God possessed by each person and the implementation is conducted by observing the status as detainees and the only right which is deprived of the detainees is the right to live freely. The obligation of detainee to attend the program for care is facultative, not obligatory. That obligation only gives benefits which are advantageous for themselves by carrying out various activities so that the stress, boredom, and despair can be properly coped with.

The care program for a detainee ends, if the relevant detainee has received a decision from the court, which has permanent standing. Moreover, the Government Regulations of the Republic of Indonesia No. 32 of 1999 on Requirements and Procedures for Implementation of Rights of those undergoing treatment in Correction Institution states among others:

- The Correctional System emphasizes on the following efforts: care, treatment, education and guidance for those offenders undergoing treatment, which are aimed at restoring relationship between those offenders undergoing treatment and the community.
- The implementation of correction and treatment is based on the principles of the Correctional System to care, treat, educate and guide prisoners with the objective that they become good and useful people.
- Prisoners in the Correctional System have the right to obtain spiritual guidance and

physical treatment and their rights are guaranteed to perform their religious duties, communicating with external parties, both their family and other parties.

- Obtaining information both through printed media and electronic media, obtaining reasonable education and so on.

- Those rights may not be automatically obtained, but with certain conditions or criteria, like obtaining reduction of prison sentence (remission), assimilation, must meet the requirements established.

- Rights of Prisoners (Article 14 of Law No. 12 on Correction):

- a. performing religious duties in accordance with their religion or belief;
- b. obtaining care, both spiritual and physical;
- c. obtaining education and teaching;
- d. obtaining reasonable health services and food;
- e. conveying complaints;
- f. obtaining reading materials and following the releases of other mass media which are not banned;
- g. obtaining the wage or premium for the work performed;
- h. receiving the visits of family, legal advisor or other certain people;
- i. obtaining reduction of prison sentence (remission);
- j. obtaining an opportunity for assimilation, including leave to visit family;
- k. obtaining conditional release;
- l. obtaining leave toward release; and
- m. obtaining other rights in accordance with the existing laws and regulations.

Facilities in Female Correctional Institution

(Case Study on Female Correctional Institution in Tangerang)

As a pilot program of correctional institution, the Female Correctional Institution in Tangerang is constructed on the basis of the design which is very much different from the previous "prison", because it does not consist anymore of a building, which gives an impression of "prison", but it consists of cottages which is occupied by a group of female prisoners and Warden of Correctional Institution.

a. Buildings in Female Correctional Institution

The buildings occupied by detainees is in the form of cottage permanently constructed in the circle/round form with the roof in the form of high dome in order that the air can properly circulate. The Female Correctional Institution in Tangerang consists of 7 (seven) cottages, which are divided into 6 (six) permanent occupation and 1 (one) cottage for temporary

occupation. Each cottage has 14 rooms, in which each room is occupied by one or three persons. The temporary one cottage consists of 6 (six) rooms only and each room can accommodate up to 5 people. This design is made in such a way in which rooms are in the opposite, because they are in the form of circle. The central room in the cottage is used as a place for the assembling, in order that prisoners can still feel the family atmosphere, although it is pseudo-familial in nature, with certain duties and responsibilities.

In addition to the Cottage as a place for occupation, the Correctional Institution also provides the following rooms:

- BINAPI Room (room to give treatment guidance for prisoners).
- GIATJA Room (room for carrying out activities of prisoners, such as handicraft and activities to produce other goods).
- BIMASWAT Room (room for social guidance and care, covering the areas of education, care and bibliography)
- Worship Room: mosque is provided for Moslems and Chapel room is provided for Christians.
- Sports Room, in the forms of table tennis field and badminton field.
- Public Kitchen Room, the place to take the food provided.
- Canteen Room, which is provided to serve the needs of officers, detainees and visitors.

b. Personal Facilities

Each room has a bathroom/toilette, makeup mirror, mattress and cupboard. As entertainment, each cottage is provided with one unit of TV. The auditorium of BINAPI Room is also provided with traditional arts equipment such as Kulintan and sound system for Karaoke and Kasidah. The occupants are also permitted to bring small radios into the room in order that they also follow the development of information outside their detention. A library is also provided to enrich the insight and knowledge of occupants as well as bibles for religious activities. The sports equipment and equipment supporting the handicraft (such as sewing machine, embroidery equipment) are also provided. Under certain circumstances, detainees can receive incoming calls depending on its urgency.

c. Treatment Program

- The existence of this Correctional Institution is also supported by skill counseling programs for prisoners, such as arranging dry flowers beauty, embroidery, sewing, cooking and gardening.
- In the area of education, "Kejar Paket" program is implemented to eradicate the illiteracy for detainees who cannot read, write and a plan is worked out for the advanced

education program for detainees who have attended the Senior High School.

- In the area of religion, a cooperation is also established with external institution, such as Moslem boarding school, churches, Department of Religious Affairs to give lecture/spiritual sermon and religious activities.

- In the area of manpower, the detainees who are undergoing the stage of assimilation are enabled for employment with the wage outside the Correctional Institution with the companies determined (in cooperation with the Correctional Institution) or Balai Latihan Kerja Industri. (Industrial Skill-Training Center--BLKI).

d. Other Rights and Upholding Disciplines

Each female detainee who has just been admitted/ imprisoned is obliged to undergo pregnancy test, to see whether the relevant detainee is in the stage of pregnancy or not. Women who are pregnant and give birth in a Correctional Institution are given an opportunity for breast-feeding for 2 years and thereafter the child must be separated from the mother, based on the psychological development of the child. It is intended to obtain psychological care and to conduct consultations with psychologist provided by the Correctional Institution at certain time.

In addition to providing the above-mentioned rights, rules/disciplines are upheld by detainees such as obeying the daily schedule prepared, being polite and friendly to other detainees and officers, keeping the cottage environment clean, etc., all of which are aimed at making the cottage discipline and creating peace and togetherness within the Correctional Institution.

e. Work Program of Correctional Institution for 2003

The work program worked out by the Directorate General of Correction, the Department of Justice and Human Rights which must be implemented in every Correctional Institution in the framework of meeting the minimal humans' needs is:

1. Meeting the needs for clothes, sleeping, footwear, underwear BH, food/drink, in accordance with humans minimal needs.
2. Meeting the need for occupation room equipment.
3. Meeting the need for kitchen utensils.
4. Model of clothes for prisoners and children undergoing correctional education in accordance with the general model (having collar and front button).
5. Meeting the need for extra fooding for patients in accordance with doctor's provisions.

6. Meeting the need for extra food to break the fast in accordance with the reasonable humans minimal need.
7. Meeting the need for minimal food for prisoners who work hard, youths and children in accordance with the standard.
8. Cost of extra food for patients, extra food to break the fast and extra food for religious holidays.
9. Storage, processing and serving the food must meet the minimal standard (hygiene).
10. Providing full-time medical personnel and para-medics for each every Correctional Institution, Detention Center, Branch of Detention Center.
11. Providing hospital with adequate medicines in every Correctional Institution.
12. Providing clinic with medical equipment (general and dental) as well as adequate medicines in every Correctional Institution.
13. All prisoners suffering from mental disorders are placed in mental disorder hospital.
14. Providing bathroom/toilette which meets the requirements for air circulation and sun light for all occupation rooms.

f. Problems

The problems to be faced is funds to meet the needs for facilities, the implementation of development, education and training facilities. For instance in the area of education, it must certainly be considered that the skill education cannot be offered for all occupants because the following factors must also be considered: the needs, capacity and duration of prisoners in a Correctional Institution. Burdening the government with all needs mentioned above is certainly not an appropriate solution. Therefore, it is necessary to establish cooperation with various parties, such as NGO, private and state enterprises which have high level of social concern.

A halfway house is need to be established by the government. The reason being is to prepare the detainees mentally, spiritually before they are going back to the community.

Conclusion

Indonesia has not yet specifically made regulations and procedures for protecting the women's dignity and human rights in detention place and prison, so that the provisions on the process of punishment are valid for men and women. That female and male prisoners

have equal rights in Indonesia as stated in article 27 paragraph (1) which does not discriminate men and women in the presence of law must also be applied in a Correctional Institution by observing their status as prisoner.

The upholding of female prisoners rights in the framework of promoting dignity and human rights in Female Correctional Institution, especially Female Correctional Institution in Tangerang, Semarang, Malang and Medan, for most of them have been accommodated, this can be seen from the physical form of the building as well as facilities inside. However, from the aspect of physical quality, a number of facilities must be renewed and the quantity must be added. The programs of treatment, training and education have been implemented, but it is still necessary to increase the funds in order that the programs can be properly implemented.

Similarly with the work program for 2003-2005, which is planned by the Directorate General of Correction, the Department of Justice and Human Rights which has been directed to the guarantee for the protection of women's dignity and human rights who became inmate in a Correctional Institution. But this matter also needs political will of the government and the personnel of the correctional institution to properly implement the work program.

Emi Omura
Attorney-at-Law

1. Introduction

Recently in Japan, the problem about human rights of detained person was highlighted because prison officer assaulted the prisoner, using leather handcuffs. But the treatment necessary to protect detained women's dignity is not studied thoroughly, and even the condition of detained women is not known widely.

There are all sorts of detained people, and there are all kinds of problems according to the circumstances. For example, in a police detention room (known as Daiyo-Kangoku¹), there are many problems of sexual violence from detained men or from policemen, which occur inevitably due to the construction of the detention house. The same problem occurs in the refugee camp. But in this report, I handle the problems of convicted prisoners and their dignity and human rights.

At first, I make a general survey of the actual condition of detained women in Japan, and the laws and regulations which protect the dignity and human rights of detained women, and secondly, I investigate whether these laws and regulations work adequately, analyzing judicial precedent.

Seeing Japanese laws and regulations related to detained person, there are few provisions which protects rights specifically except article 18(which prohibits holding person in bondage) and article 36 (which prohibits torture or cruel punishment) in Constitution, and there are only few provisions in Code of Criminal Procedure or in Prison Law either. For the purpose of viewing the actual condition in Japan, I would investigate international covenant on human rights (especially International Covenant on Civil and Political Rights (ICCPR) article 7,² which was adopted in 1966 by the UN General Assembly and ratified in 1979 by Japanese Government, the Standard Minimum Rules For the Treatment of the Prisoners which was adopted in 1988 by the UN, the Body of Principles for the Protection

¹ Daiyo-Kangoku The Prison Law states in its Article 1(3) that a police cell may substitute for a prison when there is no room in detention centers. Suspects have been routinely held in police custody throughout the pre-indictment period.

² article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 10 paragraph 1 All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

of All Persons Under Any Form of Detention or Imprisonment(Body of Principles), and the Basic Principles for the Treatment of Prisoners(Basic Principles) in 1990.

2. Outline of the Women's Prison in Japan

1 *The number of prisoners*

According to the statistical table about correction in 2001, the total number of inmate is 17,895,467 including 963,282 women. The average number of inmate per day is 63,415 including 3,488 women. The new comer is 28,469 including 1,562 women.

2 *The number of Women Prison*

There are 59 prisons in all over Japan, and 6 of them are for women (in Sapporo, Tochigi, Kasamatsu, Wakayama, Iwakuni, Fumoto).

In Japan, Prison Law³ prescribes that "men and women should be imprisoned separately ", so, the facilities are separated as a general rule. But the problem is that all of the prison is overcrowded and many prisoners are waiting in the prison for man to be accommodated. Some of them are waiting for nearly 2 months.

In view of the Minimum Rules⁴, the number of women's prison should be increased and the separation should be observed strictly in waiting facilities.

3 *The basic system of Treatment*

(1) The imprisonment classification and the treatment classification

Detained men are classified according to the progress of criminal trend, the length of punishment, age, foreigner, physically/mental handicapped and they are imprisoned in different prisons or different sections according to those classification.

On the other hand, detained women are not classified as such, because "Woman" itself is viewed as one classification. As a result, first offender and repeated offender or Japanese and foreigners are mixed in one prison. (Workshops and living quarters are separated, though).

³ Prison Law was enacted in 1908.

⁴ Article 8 The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, (a)Men and women shall so far as possible be detained in separate institutions: in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.

The system of treatment classification, which classifies people according to the needs of vocational training or education, is also taken and this system is applied to both men and women.

(2) The progressive treatment system

The progressive treatment system is also applied to both men and women, so when they progress one rank, the prison softens the restriction of visiting and communication, possession of goods, taking free action etc.

(3) The Problems

The Minimum Rules require taking the system of imprisonment classification (see article 8), but Japanese women prison doesn't.

First, even though workshops and living quarters are separated, first offender and repeated offender can come into contact with each other. For example, in Tochigi Prison, all prisoners (except very few parts of them) get together in one place for eating, while most detained men eat in living quarters. In Tochigi, only 12 prison officers watch 700 prisoners while breakfast, so the prison is thinking of improvement as it is so hard to watch around.

Secondly, most of female mental patient is imprisoned in ordinary prison, while most of male patient can be admitted to be in medical prison.⁵ For example, in Tochigi Prison, there are prisoners suffering from aftereffect of stimulants (6% of all the prisoners), mental disease (2%), depression (2%), but they are treated simply with medicine.

This is because medical prison has fixed capacity, and often, person with physical disease takes priority over the mental patient. So that if some mental patient goes out of her mind and scream, her action might violate the discipline, but she wouldn't be charged, properly speaking. But other prisoners complain that it is unequal, so they have to punish the mental patient inevitably. It results in insufficient treatment for mental patient.

Thirdly, the same problems above take place in case of foreigners. We must cope with the situation that foreigners are increasing (in Tochigi, 22% of all prisoners are foreigners. Chinese, Philippine, Korean in order of amounts.)

⁵ SMR 82(1) Persons found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.

(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

4 *The composition of Prison Officers*

(1) How the male officer takes part

The Minimum Rules require that the officers in Women Prison should be women as a general rule,⁶ so I will investigate the composition of prison officers in Japan. The staff in prison consists of prison officer, technician, teacher, nurse and 80% of those are women. Most of the staff in safety section, education section, and classification section is female because they keep in touch with prisoners directly. Male staff often deals with office work such as general affairs, accounting, office supplies, etc. For example, in Tochigi prison, male staff is 16% of all the members but there are only 3 men in 88 prison officers. But in Japan, male officers are not obliged to accompany with female officers even when they enter into the living quarters (except the solitary cell). So it is hard to say that the Minimum Rules are thoroughgoing.

(2) Consistency of woman officers' treatment

In the Minimum Rules, article 53, it requires treating and monitoring by female staff, and it comes out one of the biggest problem in case of security check, so I take up this matter here. About security check, Prison Law (article 14) prescribes that "prisoner should take security check when he is imprisoned or when the officer find it necessary to take it". In accordance with this provision, detained man takes security check when he is imprisoned and every time he changes his clothes to working ones, that is, every day. On the other hand, detained woman takes security check only twice, when coming in and going out of the prison. One reason is the kind of factory is different from that of man, so it's hard to be in danger situation, and the other reason is officers count tool such as scissors when work finish, so the problem hardly occurs. Prison Law Enforcement Regulation prescribes that "detained woman should be examined by female officer" and actually they keep this rule, so this custom should be continued even if the number of detained women increase.

(3) The staff of the Correction Bureau in the Ministry of Justice

In this connection, most of the planners of treatment for detained women in the Ministry of Justice are male, so some may think it undesirable because male lacks the viewpoint of woman.

⁶ SMR 53 (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution. (2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer. (3) Women prisoners shall be attended and supervised only by women officers. This doesn't however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women.

3. Purpose of treatment in women's prison

1 The purpose of treatment

Talking about what is stressed on treating woman, Rules of Prisoners' Classification (the official directives of the Ministry of Justice) in 1972 is still the guideline and it says as is shown below.

- to develop stability of emotion
- to acquire the knowledge and technique of making a home
- to acquire cultures and hobbies
- to pay attention to maintaining her health
- to keep good relationship between guarantor and herself

2 The contents of working and education

As for education, detained man and recently woman also can learn Japanese or math/he/she doesn't finish his/her compulsory education, or he/she can take the national college qualifying examination. But the work and the training woman does is a little different from that of man.

The work woman does is assembling metals, dressmaking, embroidering, cooking, washing, cleaning and the vocational education program is improving techniques to be a hairdresser, operating forklift, caring elderly person.

3 The problem

Comparing the contents of work and the vocational education to that of man, it can be said that woman is expected to correct herself as a housekeeper. **However, the life of woman has widely changed in these 30 years since the Rules of classification had published.**

In spite of that, the detained woman is still treated at the basis of "the image of woman" which is considered to be ideal in the past. Somebody describe it as "reproduction of the gender bias".

Of course, some people involving correction maintain that it is necessary to change the purpose of education, that is, from the education to become a good house keeper to the education to become a good worker at the same time, and to carry out the individual treatment which can meet the needs of women's various way of life. But this opinion doesn't become the majority and it hasn't changed the present condition.

4. Matter peculiar to women

1. *Woman needs* to be paid special attention about pregnancy, giving birth to a child etc. The Minimum Rules require various kinds of consideration. ⁷Body of Principles which prohibits any kind of discrimination, also prescribes in article 5 that "we don't regard special consideration to woman (especially pregnant woman or mother feeding her baby) as a discrimination if such kind of attention is paid for the purpose of protecting rights and special status".

2. *Pregnancy*

(1) Consideration to a pregnant woman

As is the case of Tochigi prison, detained woman is paid such careful attention as follows.

- She can use individual room after her pregnancy turns out.
- She is given special foods (example; foods containing a lot of calcium)
- An obstetrician comes to see her (twice a month), and she can go to a hospital out side of the prison, if she is in bad condition (once a month).

(2) The problems

The prisoner is not exempted from working unless the doctor alarms the prisoner's miscarriage or pregnancy induced hypertension. This may be criticized at the viewpoint of protecting of mother. If this is the case of a normal labor, she is guaranteed maternity leave (6 weeks before and 8 weeks after the childbirth) by Labor Standard Law, although woman doesn't take such long leave in practice. Working in prison is held compulsory and it is thought to be not a labor, so it is not admitted to apply Labor Laws to these works directly. The precedents said "working in prison is just an execution of sentence". So it is difficult to apply this law but we have to prescribe that pregnant prisoner should be exempted from labor.

3. *Childbirth*

(1) Consideration to Childbirth

In women's prison in Japan, the detained woman is transferred to the hospital outside

⁷ SMR 23 (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for the children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate. (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

of the prison, when labor pains start. The grounds for transfer are in Prison Law⁸. The hospital to which prisoner is transferred is decided in advance. One reason is to get through the procedure smoothly. Another reason is that they should avoid refusal from the hospital, because some hospital refuses to accept prisoner, on the grounds that it hurts its honor.

(2) Early transfer

Transfer before labor pain starts is limited to the case when the prisoner is in need of being examined by the external doctor, and it is very rare that the prisoner is recognized to be in need. If we think a mother's safety as important, we should put earlier transfer to practical use.

4 *Suspension of execution*

I'll refer to the relation between pregnancy, childbirth and the suspension of execution. Code of Criminal Procedure prescribes in article 482 as shown below.

About the prisoner sentenced to imprisonment with/without labor, prosecutor may command to suspend the execution if the prisoner is in danger of hurting his/her health remarkably:

- over 70
- 150 days after pregnancy
- until 60 days passes after childbirth
- in danger of taking disadvantage which can't be restored
- the only person who can take care of his/her parents who are seriously ill
- the only person who can take care of his/her little child
- in other important and difficult problems

But these provisions are prescribed to satisfy the purpose of imprisonment, that is, to deprive liberty and to get rid of other elements which weaken this purpose. In addition, this is only a discretionary provision.

The prosecutor has to contact with the chief of police station to monitor the prisoner or to require protective measures to probation officer. There must be a guarantor also, so execution is hardly suspended as a result.

⁸ Prison Law 43 A sick person shall be transferred to the hospital temporary considering circumstances if he is hardly treated in the prison.

44 The provision above is also applied to a pregnant woman or a childbearing woman--

5 Child Care

(1) In prison law (article 12), there is a provision about "carrying baby". It says that " (1) when woman who comes in prison wants to 'carry' her baby, it can be permitted when it's in need. (2) It's the same as clause 1 if detained woman give birth to a child in prison."

(2) The life after childbirth

In order to be apart from others, the prisoner can use nursery room individually which has toilet and bath room, for 1 month after giving birth to a baby.

After one month, she returns to a normal life and she also has to work. There is no nurse in the prison, and nobody can care her child during she goes to work, so she has to leave her child in the nursing home outside of prison until she is released. So, actually, nobody spends one year with her child in the prison.

(3) The problem of this provision

I take up this problem as "The problem peculiar to woman ", because it seems to be a provision in case of feeding, so I think it goes well if I deal together with the matter of pregnancy and childbirth. When thinking that this provision is related to a childcare in general, it is not a problem peculiar to woman, it could be a problem of man also. On this point, the provision, which permits only woman to "carry ""her" baby, is criticized.

5. The Relief Measures for the Detained Women

1 I check the present condition in Japan against the Minimum Rules adopted as an international standard. We can see that the measures for protecting the women's dignity and human rights haven't been taken enough due to the equipment, system, and the treatment policy and we can also see that we haven't realized the necessity of protection well.

In the next paragraph, I examine the domestic and international measures when the detained woman wants to be relieved from the violation of dignity and human rights. And I examine whether such measures are useful, that is, whether the Minimum Rules are functioning fully in Japanese precedents.

2 The kinds of relief measures

The first relief measure is to release from the detention. She could be released based on

Habeas Corpus Law.

Secondly, the woman can demand compensation for the violation based on State Redress Law.

Thirdly, she can plead with the appropriate organizations.

In Prison Law and Prison Law Enforcement Regulation, the system of "pleading" and the chief prison officer's interview is prescribed, so she can complain of violation to the Minister or the chief prison officer. But the Minister or the chief prison officer is not obliged to improve the condition.

The prisoner can also plead with the Civil Liberties Bureau in the Ministry of Justice or the Japan Federation of Bar Associations, and if the statement is received, recommendation for correcting is given sometimes. But this is "recommendation" after all, so it often resulted in just appealing the problem to the people.

I take up the relief measures by Habeas Corpus Law and State Redress Law.

3 The relief by Habeas Corpus Law

- (1) The law is established to recover the liberty of Humans promptly and easily if the liberty is deprived illegally. And it prescribes the relief procedure for the person whose liberty is restricted without the legally justified procedure (according to Habeas Corpus Rule). But someone can demand relief measures only when the restriction is remarkably illegal. When the person insists the illegality, they often stand on the international standards such as the Minimum Rules. That may be because it is hard to stand on the domestic standard, as it is insufficient.
- (2) But the biggest problem is if the court judges "the illegality of restriction" on the basis of the international standard such as the Minimum Rules. I can't find the precedent which judges on the basis of the provision of the Minimum Rules I take up above, but there are some precedents shown below. The precedent (1998.7.21 in Tokushima District Court) is about the requirement for transferring from the prison to the hospital or Medical Prison on the basis of Habeas Corpus Law. The court denied the illegality of the restriction. The plaintiff claimed that when interpreting the ICCPR, Vienna Convention on the Law of Treaties is applied and that according to the provision of Vienna Convention (article 31, clause 3 b⁹), the general comment of the Committee should be valued, so according to

⁹ Vienna Covenant 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

General Comments issued by the Human Rights Committee under the ICCPR about article 7, 10 of the ICCPR, they should respect and apply the Minimum Rules and the Body of Principles.

On the other hand, the court judged as follows.

- Vienna Covenant came into effect in 1981 in Japan, and as it doesn't have the retroactivity, ICCPR isn't applied because it was adopted and is in valid since 1979. And it is the Nation who has the right to interpret ICCPR first of all.
- However, according to the article 98 clause 2 in Japanese Constitution,¹⁰ which states the spirit of international cooperation, it is better if the government respects the article 31 in Vienna Covenant and interprets ICCPR according to the General Comment or the Minimum Rules.

- (3) The Court didn't admit to use the Minimum Rules as the grounds of judging the illegality of restriction as a result. According to this judgment, we can't apply these international standards directly in any case. But it is important that the Court said that the government should respect these rules. On the other hand, some precedents denied the legal binding clearly.

4 State Redress Law

- (1) To demand compensation, "illegality" is the requirement¹¹ so the same problem as above occurs, which is whether international rules are referred to in the judgment.
- (2) For example, there is a precedent in which the prisoner sentenced to life imprisonment claimed that it is illegal that the chief prison officer put him on long solitary confinement (Asahikawa District Court, 1999.4.13). The plaintiff claims that the detention is illegal because it violates the Constitution (article 18, 36), ICCPR (article 7, 10) and the Minimum Rules (article 57, 21). The court said that "the Minimum Rules doesn't have legal binding in Japan, so we can't judge illegality on these provisions; so what plaintiff says about these rules are off the point". The higher court judges in the case of visiting and communications, (Sendai Higher Court, 1993.4.14) like this; the Minimum rules and the Body of Principles do not oblige the government to obey them and they are mere guidelines. They don't establish standard rules in Japan nor function as international custom laws.
- (3) These precedents clarifies that the Minimum Rules etc. don't have legal bindings and

¹⁰ Constitution 98 clause2 The treaties concluded by Japan and established laws of nations shall be faithfully observed.

¹¹ State Redress Law 1 If a public official illegally causes damage intentionally or by his negligence as a matter of duty, State or public organization redresses the damage.

that the court doesn't admit the claim based on these standards. These precedents didn't deny that ICCPR is self-executing, but ICCPR is abstract, so it is more difficult to insist the facts which lead to the recognition of illegality, compared to insisting on the basis of the Minimum Rules, which prescribes human rights concrete. As a result, to demand relief from the present condition on the basis of international standards becomes nearly impossible.

6. Conclusion

In Japan, it is no exaggeration to say that the problems of detained women's dignity and human rights are left behind. The deficiencies of the domestic laws and the system is one reason and the another reason is that the courts make light of international standards.

Some system is held under the "custom", but we have to maintain domestic laws quickly to satisfy the demand of international standards which clarify these customs.

In addition, the court should recognize the problems of detained person, especially those of detained women which weren't taken up until recently and the court shouldn't hesitate to relieve women's dignity as the "last fort for human rights"

Finally, we have to make every effort to appeal to the Government, to the Diet and to the Court, on the purpose of establishing detained women's dignity and human rights.



Violation of Women's Dignity and Human Rights in Detention Facilities and Prisons

Stephanie Bastian
Attorney-at-Law

Introduction

There are several types of detention in Malaysia, under various legislations, using different legal procedures. These laws and procedures are applied on Malaysians and foreigners, men and women, allowing for the regulated exceptions. Some of the types of detention are:

1. Lock-up- A person arrested for a criminal offence under the penal code or other acts can be detained in police lock-up for 24 hours, or when remand is extended by a magistrate (maximum 14 days), until he is released or charged in court, for investigative purposes
2. Juvenile Detention
3. Drug addicts rehabilitation center
4. Rehabilitation of young girls
5. Religious rehabilitation
6. Detention without trial – Under the Internal Security Act (ISA), Emergency (Public Order and Prevention of Crime) Ordinance (POPO), Special (Preventive Dugs Measures) Act. 60 days in an undisclosed location followed by the serving of a detention order.
7. Illegal immigrants – holding centers of camps
8. Prison – remand and convicted criminals

The main authority responsible for national security and detention in the country is the Ministry of Home Affairs, which houses the Police department, the Prisons department and the Immigration department. Other related bodies are the internal Police Disciplinary department, the Public Complaints Bureau under PM's department, AG's chambers, the Bar Council, the Malaysian Human Rights Commission (SUHAKAM) and human rights and women's NGOs.

Over the last few years, many issues have been highlighted in our local media with regard to regulations, procedures and the conditions under detention and police custody. Much of this has been due to the numerous arrests and detentions of NGO activists and reformasi protestors, in recent times, who have exposed the manner of arrests and the plight of detainees. This paper limits itself to comments on the lock up conditions and refers mainly to the Penal code and Police act offences and the procedures as laid out in the Criminal Procedure Code (CPC).

Detention in Lock-Ups

Hundreds of people are arrested everyday, from serious to minor offences and almost everyone is placed in a lockup – prior to being remanded, charged or released. Lockups are located within the police station and a particular police district has, separate lockups for men and women.

A. Arrest

1. Role of the Police – In their duty to prevent crime, keep the peace and protect the public, the police need to be aware and discerning, about the nature of offences and the level of offenders before deciding on their response to the situation. For example there is a need to distinguish between civil rights protectors and ordinary criminals.
2. Use of Reasonable force – When a person is neither armed nor resisting arrest, there is no need to use excessive force or any force at all to carry out the arrest. The people arrested during the reformasi protest, included women and parents carrying children. Most of them are not armed, nor resisting arrest and yet unnecessary and unreasonable force was used on them. (There are reports verifying the number of persons who had to seek medical aid in hospitals.)

Reforms

- a. *Training for the police – on their role and especially to be discerning between different type of offences and offenders.*
- b. *That it is not necessary to use force on unarmed persons or persons not resisting arrest.*

B. Detention

1. Right to Information – Throughout the whole process of arrest, detention and charge, an accused person is not given any information. At the most you are told you are under arrest. During the whole period of confinement you are kept in anxiety and in suspense. If ever you are given any information – it most probably is not true – maybe some facts to make you talk or keep you scared or quiet.
2. Right to contact some – one phone call. There is no right, legally or in practice to have your family, lawyer or employer informed of the fact of your arrest. Once you are arrested you are completely cut off. Under the circumstances, you are unable to let your family know where you are, or to ask for medicines to be brought to you. You do not have the benefit of legal counsel to advise you and innocent statements you make, ends up being used to convict you. You do not have the opportunity to make arrangements for bail or to settle other matters – like for instance the fact that you have a small child in the house that needs to be collected or to tendered to. If you live alone and you have pets – they will probably go without food for days or just die, under present system.

3. Cautioned Statement (Sec113) – Most people arrested do not understand the purpose or the explanation given (in some cases, no caution is administered) of the cautioned statement. It is difficult to prove what was said, or not said. Many are charged based solely on their cautioned statement and some are even convicted. Some are apparently given the impression, if they made a statement they could go home or that it is just a routine statement.
4. Access to Doctors – it is extremely difficult or almost impossible to send doctors into the lockup, to attend to injuries or to carry out routine checks. Many of the injured have to wait 24 hours, for the Magistrate to arrive before being granted permission to get medical aid.
5. Interrogation by other branches of Police – for matters not related to the reason of the arrest. Special Branch officers for instance, use the remand period to question on all sorts of matters, threaten and harass. Very often, officers questioning you, do not identify themselves, or reveal from which police unit they are from. Often you are severely reprimanded, if you ask for such information. Once you are arrested, it seems a free for all, when it comes to interrogation.
6. No information at the end of the remand period – On the last day of the remand, you are let out of the lockup, given your things, put into a car/van and rushed to some place that you are not told about. You find yourself in court and when you keep asking what is going on, then you are told you are going to be charged. You ask if your lawyer/family is going to be there – they do not say anything. You tell them you need to get bail ready – they laugh and tell you, if it is too late, you can spend one night in Kajang/Sungei Buloh prison and get bailed the next day.
7. Calculation of Remand Period – If you are arrested on a Saturday – the remand does not take place on a Sunday, but on Monday a working day (some 48 hours later). Worse yet if Monday is a public holiday, then your remand hearing is on Tuesday.
8. Difficulties of lawyers – Lawyers seem to have difficulty to represent clients at remand hearings – sometimes they insist on lawyers knowing name of the client or vice versa. Other times lawyers and families of the accused have to wait from 8am to 4pm, at the police station and at the court, not knowing when the person is going to be brought to be charged. It is a game of hide and seek. If you miss them, then they will be charged without the lawyer or his family being there.

Reforms

- a. *Person detained needs to be informed of the grounds and procedure, following arrest – duty of custody officer perhaps – also or in the alternative to have literature available at the station informing the arrested person of the procedure to be followed.*
- b. *Need legislation on the right to have someone informed of your arrest.*
- c. *Need legislation on the right to seek advice from lawyer.*
- d. *Cautioned Statement needs the explanation to be given by a neutral third party.*

- e. *Citizens need to be educated on the significance of cautioned statement and right to remain silent.*
- f. *Perhaps rules should be introduced to have regular visits to persons detained, by medical doctors.*
- g. *Police interrogation should be restricted to offence you were arrested for.*
- h. *Calculation of time, for the accused to be brought for remand, should follow the latter of the law – and hence be done within the 24-hour periods, irrespective of Sundays and public holidays.*

C. Lockup Conditions

- 1. Crowded cells – All cannot sleep at one time – some sit up while others sleep.
- 2. Spectacles – In certain cases they take the spectacles of the arrested person – the person feels disoriented most of the time.
- 3. Mixing of all kinds of detainees together – hardened criminals, juveniles, drug addicts, prostitutes, and civil rights detainees.
- 4. In the case of men detainees, they are asked to strip down to their underpants – they remain thus for the period of their remand.
- 5. Lack of privacy in using toilet facilities – used to embarrass and degrade the person.
- 6. Blanket given is dirty, too few and normally used to cover the cement floor to sleep on.
- 7. Harassment – jeering and laughing at the arrested person.

Reforms

- a. *A commission or a proper study needs to be carried out, on all police stations and also prison and rehabilitation facilities After 45 years of independence – it is only logical to carry out such a study and bring about the necessary changes.*

D. Magistrate Powers

- 1. 14 day remain period under Sec 117 of the CPC is excessive – (UK only has 96 hours maximum lock up time) For certain offences – this length of time already serves as punishment.
- 2. Remand given automatically – at the request of the prosecution. There does not seem to be any criterion that has to be met – in order for the Magistrate to decide how many days to remand or even when extending the remand period. There is no query as to the need for the required period, the type of offence, what needs to be investigated, Etc. Generally if no lawyer is present to represent the accused, the days requested by the prosecution is automatically granted.
- 3. Magistrates hardly makes any inquiries to the accused – The magistrate does not attempt to communicate with the accused on whether he has been beaten or threatened, is sick,

etc. In fact the whole environment and speed of the procedure, is hardly conducive for the detained person to confide any truth to the magistrate.

4. The Magistrate comes to the police station to conduct the remand hearing - sometimes the arrested person hardly leaves his cell.

Reforms

- a. *New conditions / criteria needs to be established and the magistrate must ensure that these are fulfilled before deciding on the remand period.*
- b. *Current length of remand period – need to be shortened.*
- c. *Perhaps some standard inquires relating to the welfare of the accused need to be asked by the Magistrate.*
- d. *No remand hearing should be held at the police station / cell / lockup.*

E. General

1. Police do not identify themselves and some do not use nametags.
2. Treatment of family members – it is very difficult for family and friends of the arrested person to gain any information from the Investigation officer (IO) or the police station – they are generally given the run around and kept waiting at the station for hours.
3. Police and Magistrates should remember that a person is 'innocent until proven guilty' – but the accused is treated as a criminal and often seems to be already receiving punishment:
 - Extensive remand period, Conditions in the lockup.
 - Anxiety – due to the lack of information, Long trial.
 - Financial problems, Loss of employment, Violence.

Conclusion

In recent times, due to the publicity and frequent lobbying, for conditions to improve, several statements and promises have been forthcoming from the authorities, as proposals to improve the system. Legal reform can be in the form of introduction of new legislation, the repeal of old law, or the amendment of existing laws – but in the end legal reform should serve to remedy the situation, cure the defect, improve conditions and not as in some cases, fill up the loop holes and tighten the rules.

SUKAHAM, AG's Chambers and the Police have been putting plans in effect to improve conditions, such as, the proposal to teach human rights in schools, clothes, and mattresses for lockup detainees, advising Magistrates to hear out detainees and not permit remand on demand, a strict compliance of the 24 hours rule, installation of closed circuit TVs in lockups,

Police crisis center for sexual abuse victims and closer cooperation with women's groups.

The people most affected and abused by the arrest and lockup condition are those who are weak, powerless and ignorant about the laws and any rights they may have under them. For instance newspapers frequently report about raids and the arrest of 50/60 or 6 women from foreign countries – there is very little bargaining power on the part of these women, who are vulnerable and dependent on the authorities in the lock up, for any help that they may receive, such as a phone call, a pad, a towel or food.

In considering reforms, three factors are clearly important – the need for education. Education and training needs to start with the judge, the magistrate, the prosecutors, the police and the public. The country also needs to look into improving conditions and services for the police force – perhaps it is time to spend more and focus on other investigative methods of solving crime and not by the use of violence. The third factor stems on the need for check and balances – we need more independent structures to act as an ombudsman between the public and the police force.

Appendix

Rise in deaths, violence, rapes and sexual harassment in police custody

Parliament in the October sitting revealed that 34 persons had died while under police custody since 2000 with six death in 2000, 10 in 2001 and 18 deaths as at September 2002¹ Aliran Monthly Vol 22 (9) in its article by G.Lim "Policing the Police" further chronicles the recent death in police custody, some of which have been successfully challenged in court.

The Rape Acquittal of Razali Pilen

Cpt Razali Pilen was accused of raping two women who had entered the country illegally, while they were being detained in a police lockup. According to newspaper reports the judge claimed tat closed circuit TV cameras showed the man having sex with the women as "married couple" would. The judge further highlighted, that both women did not push him away or scream, there was no medical evidence of any bruises, the women were married and had children, both women took their clothes off, there was 3 days delay in lodging the report, the incident was done in a well-lit place and the door was unlocked, there were TV monitors in the control room and both women had entered the country illegally². This

¹ Yap Mun Ching "F for Malaysia's human rights record" Malaysiakini.com 2002

² Women's Aid Organization (WAO) Joint Press Statement "Rape Acquittal of Razali Pilen" 24th September 2002

completely ignores the power and possibly threats used against the women and the abuse of police powers. Detainees are in a vulnerable position – the power of the police over them is absolute³.

Prison overcrowding

The Prisons Department of Malaysia is responsible for about 30,000 offenders in a day. The Prisons department currently operated 33 institutions nationwide. These institutions include 24 prisons, 3 rehabilitation centers, 5 advanced approved schools and 1 detention center. In terms of capacity, the overall comfortable capacity is 23,914 (as at Sept 2002), however the actual total number of inmates is 29,286 – and additional of almost 20%. Of the total inmates, 18,464 were convicted prisoners, 7,913 remanded, 655 juvenile offenders, 2,142 in the rehabilitation center and 112 in the Detention center. (as at 30th Sept 2002)⁴. Generally the overall total number of prisoners has risen by 38% from the year 1992 to 2002. Overcrowding of prison facilities is also beginning a major challenge to adhere to human rights standards⁵. The World International Center for Prison Studies on its Prison brief for Malaysia (mid-2001) puts the percentage of Women prisoners at 4.7% of a prison population of 27,299 in mid 2001 and always shows a growing prison population.

³ Suaram Press Statement "Women's Rights are Human Rights" 2002

⁴ Of the 18,464 inmates, 40.2% were Malays, 9.6% Chinese, 8.2% Indian, 3.4% mixed races and 38.6% were foreigners

⁵ National Report on Contemporary Issues in Malaysia Corrections System, 2002

Zarizana Abdul Aziz

Attorney-at-Law, President of the Women's Centre for Change

Case Studies – Custodial Rape

Case 1

The acquittal of a police officer of custodial rape by the Sessions Court in the state of Selangor on 24th September last year invited angry response from the public. In his decision, the trial judge noted that the 2 women complainants:-

- did not scream or push the police officer away;
- there was no evidence of bruises;
- they took their clothes off;
- they reported the incident 'only' 3 days later after being approached by a policewoman even though the accused was working in the same police station;
- the incident took place in a bright place and not in an isolated place;
- the door was unlocked;
- the women were married and had children;
- there were television monitors in the control room;
- the accused was wearing his police uniform and name tag during the incident;
- that the women entered the country illegally;
- the women's "credibility was zero" because they had delayed in making a report and had cheated the police with forged travel document.

The media¹ reported that the Judge read his grounds for 80 minutes from a 60 page decision. In it, he decided that after viewing the footage from the closed circuit television monitor that "the sexual intercourse here seems to be voluntary, just like between husband and wife". "If I want to elaborate on everything, it will be erotic but I will simplify it by saying that it looked like it was done more on consent."

Prior to concluding the above, the court heard from a clinical specialist in obstetrics that "for the Filipino woman, there was no injury or struggle signs on her body whole for the Indonesian woman there was no injury on her body due to struggle or bruise marks". Besides that, he said, he found old tears on the hymen of both women. Because of this, he concluded that there were no traces to show they were forced to commit sexual intercourse.

¹ Carried in all the major dailies on 24th –26th September 2002. The case is pending appeal.

Not only did the case and decision revolve around all the myths of rape that women and women's groups had fought so hard to dispel, it allowed evidence of past sexual conduct with persons unrelated to the accused into evidence² to be incorporated into some of the reasons why the judge did not find rape.

The fact that a police constable in a police station lock-up wielded absolute power over the women detained and the effect of such power of the women, aged 23 and 24 respectively together with their inability not to "consent" to sex seemed to be realities which were not appreciated by the judge.

Case 2

What was also disheartening was the fact that this decision came hot on the heels of allegations by the Philippines government that a Filipino child was raped in a detention centre in the state of Sabah pending her deportation. The diplomatic tension was finally diffused when the police announced that the 13 year old child was not after all a Filipino but a Malaysian. The child was mistakenly identified as a Filipino and deported to the Philippines.

There was an almost audible sigh of relief. High ranking Malaysian politicians were quick to demand that the Philippines apologise for having mistakenly believed that the child who was allegedly raped was a Filipino.

After the flurry of attention over Malaysia's diplomatic row with its neighbour, there was scant regard shown by politicians and law enforcers over the fact that a child, of whatever nationality, was actually allegedly raped whilst in custody. Suddenly the calls for investigations quietened and the fate of the child was no longer an issue.

Rights of Detainees

It is easy to forget about detainees. They are removed from society as punishment for acts committed. If such acts are proven, they are convicts who deserve punishment. If such acts are yet to be proven, they are suspects who are potentially dangerous and again their removal is justified.

² See Section 146A of the *Evidence Act 1950*, Act 56 – prohibits evidence of past sexual conduct. In this instance although marital status is not necessarily evidence of past sexual activity, such evidence was used to negate rape.

The issue of detainees in Malaysia received public attention due largely in part to the mass arrests of protestors in the past few years. As the detainees were mainly persons arrested for nothing more than unlawful assembly (in Malaysia, the right to assemble must be accompanied with police permit³), they seemed more like ordinary citizens deserving certain basic rights⁴.

In fact, in the first year of the establishment of the Human Rights Commission of Malaysia⁵ (SUHAKAM), it received several complaints relating to alleged abuses and denial of rights of persons detained by the Police. This led SUHAKAM to focus its Law Reform Working Group work on "the Rights of Remand Prisoners" as one of the priority areas for the year 2000. As a result of consultations, interviews, testimonies and visits to detention centres, a series of reports were compiled.

Still, the question remains whether persons in detention have the courage to speak out against the enforcement officers who wield power over their fates, whether whilst in detention or after it. Even if detainees and ex-detainees speak out, how will they prove their complaints and will they be believed⁶.

Amnesty International reported that 19 women who denounced rape of women in police custody were charged in Istanbul for having "insulted the security forces" in a conference in June 2000⁷. The accused included rape survivors, their lawyers and a parent of a survivor.

Closer to home, Irene Fernandez is on trial for maliciously publishing false news⁸. Fernandez is director of a group that published a "Memorandum on Abuse Torture and Deaths of Migrants at Detention Centres".

Regardless of the truth of these allegations, what these cases highlight is that the response of governments against persons denouncing its treatment of detainees is often swift. This in itself creates a culture of fear of the enforcement officers whose duties are to protect those under its custody.

³ Pursuant to the *Police Act 1967, Act 344* and *Public Order (Preservation) Act 1958, Act 296*

⁴ Figures from the Bar Council for the years 1998-2001 indicate that the majority of persons arrested were not charged and a majority of those charged were acquitted or discharged not amounting to acquittal. Reported in Freedom of Assembly Report by SUHAKAM supra 5 and 9

⁵ *Human Rights Commission of Malaysia Act 1999, Act 597* established the Human Right Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia – acronym SUHAKAM). The function of SUHAKAM is set out in Section 4 as promoting awareness of the provide education in relation to human rights, advising and assisting the Government in formulating legislation and administrative directives, recommending to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights and to inquiring into complaints regarding infringements of human rights.

⁶ See custodial rape case above.

⁷ Fact Sheet : Women in Custody at www.amnesty.org.au/women/fact-custody.html

⁸ *Printing Presses and Publications Act 1984*

Custodial Assault

Public perception of police brutality took a nightmarish twist in the trial of the former Deputy Prime Minister, Anwar Ibrahim. Anwar was charged for corruption. The charge pertains to Anwar's alleged abuse of power by interfering with police investigations and requesting the police to "threaten" certain witnesses.

In court, when questioned on what those threats might constitute, police witnesses taking the stand testified to the interrogation strategies employed by the police to "neutralise" and "turn over" detainees. Up until that point, both words, let alone the strategies they implied, were hitherto alien to the general Malaysian public.

This coupled with the fact that the highest ranking police officer in the country was charged with assault for having abused Anwar whilst the latter was handcuffed in police custody shook public confidence in the system that invests what appears to be near limitless powers in its law enforcers⁹.

A string of complaints on police brutality was made public. Within the months of May 2000 to November 2000, Malaysiakini¹⁰ published 4 incidences of alleged police brutality with one leading to death and one leading to blindness.

Following from a complaint by a woman detainee that she was ordered to strip and humiliated, the police, during a visit by SUHAKAM to a police lockup, admitted that detainees are body searched, asked to strip and squat so that any hidden objects would fall out. This search is conducted regardless of the alleged crime for which a person is detained including unlawful assembly.

Remand Prisoners

Right of Information

The Federal Constitution provides that when a person is arrested, he must be informed as soon as may be of the grounds of his arrest. Allegations of persons arrested not being informed of the grounds of his arrest is common. Further detainees also complaint that they

⁹ Anwar was brought to court with a black eye. The then Inspector General of Police admitted to having assaulted Anwar.

¹⁰ Malaysiakini 19th May 2000, 18th August 2000, 16th October 2000, 15th November 2000, 14th December 2000. Malaysiakini is an internet newspaper.

are not allowed to contact their families, friends, employers or even make arrangement to obtain necessary medication.

SUHAKAM¹¹ related a case where one Rosle was arrested for being at the scene of an unlawful assembly. He was remanded for 4 days with no access to anyone. His employer was not informed, although he requested the police to do so, as a result of which Rosle lost his job. His trial lasted 45 days at the end of which he was acquitted. At the time of the report, Rosle was still unemployed.

The Kuala Lumpur Bar Committee was even more damning in its report¹². "The right of access by family members to persons held in remand is virtually non-existent" and "Problems faced by family and friends seeking information on persons detained or under arrest are notorious." "Even if it is to determine that he is in fact in custody."

Further, continued the report, although, by law, criminal proceedings must be conducted in public, remand proceedings are carried out in chambers and in special rooms allocated for that purpose and no right is given to the defence to examine what is put by the police before the magistrate.

Conditions in Detention

Overcrowding is a common complaint. During an unlawful assembly incident in Kesas Highway, 11 women were arrested and held in Kapar Police Lock-up, which was gazetted for only 1 detainee and women detainees for the district of Kelang¹³.

The issue of overcrowding can appear to be so critical that detainees are unable to sleep at the same time. No bedding is provided and sometimes dirty blankets which are used by detainees to lie on rather than cover themselves. Toilet facilities lack privacy. This allegedly is meant to embarrass and humiliate detainees¹⁴.

Kajang Prison for Women

On the day of its visit to the Kajang women facility, SUHAKAM found that there were 787 Women prisoners at the facility. The capacity of the Kajang facility is a mere 450. At its most

¹¹ See Freedom of Assembly Report, SUHAKAM

¹² "The Administration of Justice in Malaysia – A Memorandum from the Kuala Lumpur Bar Committee" 8th January 2001

¹³ SUHAKAM visitation report to Kapar Police Station – November 2001

¹⁴ SUHAKAM visitation Report – Sungai Buloh Prison and Kajang Prison for Women – November 2001

critical, the facility was said to have had about 1,200 detainees.

Out of these, there were 123 young women detainees. Most young women were detained in connection to offences relating to prostitution. Clearly prison is not an appropriate detention centre for these young women.

Further, out of these 123 young women prisoners, 103 were foreigners. It was unclear whether the respective embassies were informed of the detention of their citizens. The presence of such a high number of foreign young women prisoners also created language and communication difficulties¹⁵.

SUHAKAM further found that there was no educational programmes for young prisoners except for religious classes. Recreational facilities if any, are limited. This breaches the Standard Minimum Rules for the Treatment of Prisoners and restricts the detainees ability to re-integrate into society. There are also no rehabilitation and formal counselling services for young offenders¹⁶.

In relation to pregnant and nursing women, SUHAKAM¹⁷ found that the women received medical attention and care from the Kajang Hospital. Despite that, there is no special diet for such detainees. Generally the children are placed in the children's corner whilst their mothers carry out their daily duties and are returned to their mothers in the evenings/nights. Amongst these children, there were some who suffer from skin diseases possibly due to their restricted access outside the buildings or their proximity to the pollutants from the handicraft training centres.

Fathers of such children could only meet their children at specific counters. This might be a disincentive for fathers to visit and unless other male relatives were to visit such children, they would be deprived of male father figure.

Rehabilitative Detention

Prior to its repeal last year, the *Women and Girls Protection Act* were widely used by the police and social welfare as a tool to control the behaviour of young women and girls under the age of 21. As the name implies, it is a legislation that purportedly seeks to protect young unmarried women and girls from moral danger, ironically by detaining them for rehabilitation

¹⁵ ibid

¹⁶ ibid

¹⁷ ibid

purposes. As the name also implies, only young unmarried women and girls are subject to such protection.

Every so often, the social welfare officers accompanied by the police would raid nightspots and detain any under-aged girls found on such premises. These girls are then detained in special moral rehabilitation centres.

Several years ago, the social welfare officers, raided a karaoke lounge in Penang and detained several girls. It transpired that the girls were aged about 16-17 years old and were at the lounge to celebrate the birthday of one of their friends. Their parents were aware of their whereabouts and they were not drinking alcohol yet the officers still deemed the girls to be exposed to moral danger. Neither the boys in the group nor the operator of the lounge were detained. If karaoke lounges posed a danger to the morals of girls, then it should be a condition of licence that no underaged girls be allowed to patronise the lounge.

The *Women and Girls Protection Act* was repealed by the Child Act 2000. This legislation sought to consolidate all laws pertaining to juvenile offenders and protection of children.

Unfortunately, again the legislators have sought to differentiate between children who are abused or neglected and children who are sexually abused or engaged in pornography or prostitution. The former is deemed to be in need of care and protection and the latter in need of rehabilitation.

SUHAKAM made a similar visit to the Moral Rehabilitation Centre for Girls at Batu Gajah, Perak. The conditions of the centre was found to be generally satisfactory save that there was an acute shortage of professional teachers particularly for those occupants who were scheduled to sit for their national exams¹⁸.

The centre with a capacity of 100 occupants only had 38 occupants. Because of this there was a possibility that some of the young women prisoners who were charged for prostitution at the Kajang facility could be transferred to the centre.

The centre is staffed solely by women officers and male officers are prohibited from entering unless accompanied by female officers and even so, up to the administration block only and not into the living quarters.

¹⁸ SUHAKAM visitation report to Batu Gajah Moral Rehabilitation Centre – 8th November 2001

Morality Under the Syariah Laws

The need to control women under the guise of morality is more and more justified under the name of religion. The broadening impact of syariah on civil laws have largely not drawn little protest.

To the Muslims, who form 60% of the population of Malaysia, the syariah is sacred and immutable. Attempts by women's groups and other progressive Muslims to create opportunities for debate the syariah have received angry protests from conservative Muslims. To the non-Muslims, syariah is wrongly perceived as not affecting the non-Muslims. Further, non-Muslims do not feel capable of arguing the tenets of a religion they do not profess.

Whilst the Federal Constitution grants jurisdiction to the states (provinces) for the purposes of administration of the practice of the Islamic religion, the states have gradually expanded this jurisdiction to include more and more criminal aspects whilst the Federal kept its silence over these incursions.

The Muftis were granted power to issue "fatwas", namely edicts which are gazetted and becomes law, thus bypassing both legislative houses (i.e. the parliament and state assemblies). No opportunity for public debate on such edicts nor further public notification apart from the government gazette are given.

The consequences of this style of law making brought about public outcry when Muslim contestants in a beauty pageant were arrested a few years ago. Reports in the mass media indicated that several police as well as syariah court officials attended the beauty pageant, watched the contest, and at the conclusion or near conclusion of the contest, publicly arrested the Muslim contestants. Neither the organisers nor the contestants were warned of their liability in transgressing the fatwa prior to the pageant.

The press was also quick to point out that simultaneously with the beauty pageant, another contest was being judged, namely the men's body building contest with Muslim male participants. Yet the male Muslim participants were not humiliated with public arrest just prior to conclusion or for that matter, at any time during before or after the contest.

The incidences pointed to a deep inequality in the administration of syariah laws. However because the syariah is equated with religious laws and draws some of its bases from the Qur'an and the Prophet's traditions, the syariah is adept at commanding reverence and obedience.

Unless the syariah is accepted for what it is, interpretation by man of religious precepts, the opportunity to correct gender biases within the syariah would not arise.

Promoting Better Standards

Broad-based social and legislative initiatives can only occur as a result of pressure. The amendments to rape laws, the passing of the *Domestic Violence Act* and other legislative reform were brought about by constant and undying demands by women's groups. Similarly reform on the treatment of detainees must also be brought about by legislative change.

The Selangor custodial rape case is reason to expand this battle into the court arena by making available to the arbiters of justice academic papers, research and current philosophical thoughts on the issues such as custodial rape.

Enough attention has been drawn to the treatment of detainees in recently. It is time to start the process of reconstruction of the social perceptions, policies and law affecting persons in detention.



Lalaina Rakotoarisoa

Judge, Member of the UN Sub-Commission

INTRODUCTION

Covering an area of about 592,000 square kilometers, Madagascar is the fourth biggest island all over the world after Groënland, New Guinea and Borneo. Madagascar has approximately 16 millions inhabitants among which the number of women is slightly higher than that of men (98 men out of 100 women) ; yet, fame and notoriousness have almost been constantly men's attribute.

Its economy is mainly based on both agriculture and tourism. More than 60% of its population live under the threshold of poverty.

As an independent state since 1960 Madagascar has been at its Third Republic and its Third Constitution.

The Constitution of 1992 as well as the 1998 revised version of it both stipulate in the preamble that Madagascar considers the International Charter of Human Rights and the African Charter of Human and People's Rights as its own and puts the stress on liberties and on fundamental rights and guarantees the right to life, the ban of torture, the cruel, inhuman and degrading treatments, the arbitrary arrest, the presumption of guiltlessness, and the right to an upright trial for every individual.

It must be underlined at once that the principle of equality between men and women is laid down by the constitution and the different laws. Thus, men and women legally enjoy and exercise the same rights and duties. Yet, the problem lies not in the insufficiency of the texts in force but in their effective application. It is obligatory to ascertain that, unfortunately, there is a gross distortion between the law in force and the common rules and the usual practices which are contrary to it and which are, more often, to the detriment of woman. Therefore, sequels of discrimination still remain within certain tribes and regions.

The main discriminatory factor derives from the instructional and educational level for the reason to be a woman is above all to be a mother in the family.

Attributes relating to women are associated with sex that is qualified to be « weak » which invest all places : e.g sentiment, frailty, weakness.....

Nevertheless, once a woman comes into the incarcerating milieu there is no particular rule taken to protect women except the separating of quarters between female and male detainees.

The prison chaplain general like father Angelo Buccarelo published an article in the « *NEW MAGAZINE* » n° 56 and while congratulating the Ministry for Justice for the measures and initiatives taken in the sense of transparency and the humanizing of the detention conditions, he did not omit to denounce that : « *in the Malagasy incarcerating milieu, a detainee is often considered as a wicked person even a dangerous criminal* ».

Henceforward, it is equally indispensable to sensitize the Malagasy population for this nation never eats its fill and will hardly accept that a prisoner has rights in some ways, including the female detainees. It is unhappily true, that the public opinion is based on how to get rid of the wrongdoing individual in the society because it is already suffering and it is still the wrongdoers' target.

I- The preliminary inquiry : (Before the police or the Constabulary.)

The beginning of the loss of liberty starts with the arrest.

It is above all during the preliminary inquiry that the risk of transgressing human rights is the the most dreadful. This is done with regard for efficiency to lead to acknowledgement. Pressures of either physical or mental nature are denounced. In case of violence allegation the Public Prosecutor may ask for the doctor's ascertainment.

The law limits the custody at sight up to 48hours but it is possible to extend it with the Public Prosecutor's prior permission.

The woman who is kept in custody at sight has the right to get informed about the causes of her arrest as well as about the allegations brought against herself.

Insofar as the right to defence is concerned, an innovation has just been introduced since the promulgation of the law 97.036 of October, 30, 1997, according to which any person kept in custody at sight can be attended by a lawyer just from the preliminary inquiry.

Free Communication with the counsel is absolute. Any interdiction of communicating does not apply to the counsel.

The judicial police must conform itself to the regulations in force so as to take decisions on perquisitions, wiretaps, interceptions, correspondencies and communication listenings. Corporal searches are done by policewomen. Women are not handcuffed during their arrest.

The law 97.039 dated on November, 4, 1997 allows the abrogation of the bank secret and the stopping of telephone listenings for taking action against drug traders namely in the matter of money washing.

All persons who are kept in custody at sight receive neither food nor family visit. Yet, their family may bring food for them. If a medical treatment proves itself necessary, the sick person is transferred to a public hospital.

Cells are in the police stations themselves and they are not equipped with any beds. But it is proper to ascertain that women are scarcely kept in custody at sight.

II- Women in jail

A- The Pre-Trial detention

The Pre-detention is criticized for the very principle of itself essentially for the excessive use of it, as well in its number as in its duration. The remand is qualified as a necessary harm, as unavoidable injustice and even as disguised penalty for a person who is merely suspected for having committed an infringement is shut in a penitentiary establishment for an illimited time even before the judgement itself.

From this fact, it makes a butt of the principle of the presumption of guiltlessness written in the Declaration of Human Rights.

The judge's position is between mankind who intercedes for a man who only falls under suspicion and the interest of the society which does not enable him to jeopardize the whole inquiry out of weakness and thus to let the culprit flee from the punishment which she deserved.

The problem is to find out the balance between the Society, the interest of which lies in the efficient suing and the repressing of the breaches of the criminal law and the individual whose one of his fundamental rights is liberty.

In Madagascar, the provisional confinement is limited to a maximum of 20 months (8 months that can be extended twice six months = 8 + 6 + 6)

In criminal matter, the order of arrest substitutes itself for the warrant of commitment (ordonnance de prise de corps) and the detainee may stay in prison till her judgement, if she does not apply for a provisional release.

Detainees certainly have the right to be judged within a reasonable time of allowance, but one must find a balance between the duration of the preliminary inquiry, the complexity and the unintelligibility of the case. The partial failure in criminal proceedings is ascribable to the frequent use of pre-detention not as a safety measure but as a disguised penalty.

Some figures can supply interesting elements as for the feminine incarcerating population in the everyday reality of the functioning of the court. It is composed of convicts who are the object of a definite penalty and do time in prison and the accused persons who are in pre-detention. The importance of this rate depends more on the long duration of the pre-detention than the importance of admissions knowing that the rate of womanliness, in slight increase reaches now 5.1% of the total population in prison in Madagascar which is close to 21,000 persons.

RECAPITULATION ON THE 31st October 2001 in MADAGASCAR

CATEGORIES	FEMALE CONDEMNED PERSONS	FEMALE ACCUSED	TOTAL
Women	110	463	563
Infants (Girls below 18 Years)	06	44	60
TOTAL	116	507	623
Percentage	18.61	81.38	99.99

The Gaol of Antananarivo, the capital city, which has been the object of our visit recently includes the following elements .

GAOL OF ANTANIMORA - ANTANANARIVO DECEMBER 2002

CATEGORIES	FEMALE CONDEMNED PERSONS	FEMALE ACCUSED	TOTAL
------------	--------------------------	----------------	-------

Infants (Girls under 18 Years)	-	05	05
Women	49	100	149

- One woman of whom is condemned to penal servitude for life for kidnapping.

Over the last three months (i.e October, November, December) admissions spring up to 167 for 126 outgoings.

17 female penitentiary agents are responsible for this quarter.

The duration of the pre-detention is highly variable from one document to another, namely dependent on the gravity and the complexity of facts and on the prisoner's personality and attitude. It is burdened with consequences and has a serious effect on the prisoner's life. It runs the risk of bringing about family crisis, psychological traumatisin or a loss of job.

The reasonable feature of the duration of keeping in detention on remand is therefore to be appreciated in comparison with circumstances calculated to make admit or reject the existence of an actual requirement of public interest, justifying the derogation of the rule related to the respect of individual liberty.

An unreasonable extension of a detention on remand is inconsistent with the presumption of guiltlessness which any detainee enjoys. Indeed, it appears as an execution of penalty rather than as a necessity dictated by the concern for the sound unfolding of investigation.

*Out of the 100 female accused in the jail of Antananarivo :

- 2 of them have been detained for more than 5 years without being judged.
- 9 have been detained between 3 or 5 years without being judged.

At the end of the investigation, when the Grand Jury finds its indictment before the Ordinary or the Special Criminal Court, if the accused person is detained, the Grand Jury may issue an order for arrest which is to substitute itself for the issued warrant of commitment (ordonnance de prise de corps) a which is effective to keep in detention the party interested till her appearance before the judgement jurisdiction. Such a period is not limited and may last several months, taking into account the fact that the Criminal Court only meets for two or three sessions a year in certain provinces. Yet, as for the High Court of Appeal of Antananarivo and on the recommendation of the Ministry of Justice which makes for its very priority the settlement of the documents related to long detention, the Ordinary Criminal Court has been permanently on the bench since this year.

The Malagasy Code of Criminal Proceedings does not determine the case where provisional detention can be ordained, yet it excludes, from its field of application individuals sued for facts punished by mere police¹ or by correctional² penalty apart from imprisonment that is to say fine, interdiction of certain civil, civic or family rights with time-limit. Moreover, the placing under *mittimus* derives from the magistrate's sovereign appreciating and the code does not impose upon her to motivate her placing decision that is to say fines, interdiction with time-limit.

Practice reveals a systematizing of pre-trial detention. It is unhappy to ascertain that detention on remand, which is an exceptional measure, tends to become the principle.

The extended duration of the pre-detention and the detainees'incertitude on their fate aggravate the severity of their confinement.

Measures were taken by the Ministry of Justice to quicken the judicial proceedings, for example transforming department-courts into courts of first instance so as to avoid communicating documents to other jurisdictions, the reform of texts of proceedings obliging magistrates and registrars to respect legal postponements under penalty of committing their responsibility, the suppressing of the rights to condemnation which delayed the transfer of documents to the High Court, the instituting of performance premium to instigate the liquidation of instances, the creation of a directorship for supervising jurisdictions, the operation « humanizing of detention » which consists to take the census of long detentions in prison and to take action with the Public Prosecutor so that these documents may be enrolled in priority in order that the detainees may be judged within a reasonable delay.

Despite the efforts made by the Ministry of Justice, as well as the manifestations of good will of NGO, it is obligatory to ascertain the sad reality of jails on the whole. The Malagasy prisons reflect the economic difficulties of the country and endangers Human Rights.

Penalty is often aggravated by the feeling of shame, above all during the transfer on foot in public during the appearance in front of the Court even without any handcuff and sometimes the family and the neighbourhood rejecting. All this brings about a psychological destruction of the individual.

The idea that detainees pay for committed faults brings about an attitude of indifference on their detention conditions.

The Malagasy Criminal code classifies the infringements in crimes and delicts.

³ The crimes are facts which are liable to an afflictive and informative penalty (death, penal servitude for life, deportation, hard labour with time-limit, a more than 5 years's imprisonment, civic degradation.

² The delict is liable to a correctional punishment i.e (that is to say) a more than 29 days' imprisonment and a fine beyond 25,000GMF.

¹ Simple police : facts punished by a less than 29 days imprisonment and a fine that can go up to 25,000GMF

B- The Conditions of executing detention

The UN Standard Minimum rules for the Treatment of the Prisoners which defines the guarantees concerning the physical conditions of all persons placed in detention as well as the fundamental provisions to protect the detainees' rights, the Universal Declaration of Human Rights and the International Pact relating to civil and political rights, to which Madagascar has adhered, devotes her will to favour the respect of all human beings' dignity including the detainees.

1- Overpopulation in the prison

There is a jail with each law court. Within which one observes a separation between men and women.

The reception capacity is limited and one attends in most cases, overpopulation in the prison. Such overpopulation constitutes a risk for health, hygiene and security.

To take an example, the jail of Antanimora is foreseen to receive 800 detainees but nowadays 3,000 detainees are accommodated there.

As far as the women's quarter is concerned, its capacity is 80, but its population is 154 detainees at present, Women complain about being too numerous in a cell and invoke that overpopulation contributes to deteriorate their physical conditions. Both over population and insalubrity are in favour of the transmitting of infections illnesses among detainees.

When acts of violence appear between detainees, which is rare, the penitentiary staff finds it difficult to stop them.

The Malagasy Penitentiary establishments have a total capacity of 13,000 seats of detention for a penal population evaluation at 20,000 approximately.

2- Insalubrity of lodging

Penitentiary establishments in Madagascar are old and worn out. They all date up from the colonial period. Two establishments have just been built recently. There is neither particular fitting up nor any guarantee enough security.

As far as bedding is concerned, detainees only have rights to swinging-balls, a kind of plank without any mattress. There are even some who are sleeping on the floor.

In the jail of Antanimora, nearly all of them have got mattresses, coming from their family or as donations from NGOs.

This same establishment has at its disposal 7 toilets and 6 showers and the cleaning of them is ensured by the detainees themselves.

Yet, certain detention centres are not endowed with sanitary equipments or symbolic sanitarities. The installations of bathrooms are not enough to enable every detainee to make use of them as often as required by general hygiene. The situation is aggravated when detainees are pregnant or give suck to their babies or have their babies with them.

3- The non-separation of detainees with condemned

The condemned and the detainees on remand share the same quarter. The minor girls are equally placed with adult detainees and culprits, taking into account their very limited number. Due to their criminal past or their bad dispositions the condemned exert bad influence over the detainees and above all over the minor girls who are the most vulnerable.

One of the reasons of detention on remand is to avoid the renewing of infringement. But, this becomes unfounded as the accused, once outside the prison, are going to commit more serious infractions with the experiences that the condemned make them acquire.

4- Health

A certain number of prisons are endowed with a nursery and doctors who are unsparing of cares to detainees and come at regular or irregular intervals according to the case.

It is above all the case of the chief town prisons in the province where medical cares are free in that establishment : there are NGOs which supply essential medicines with medical materials and equipments.

Hospitalizing can be done if necessary and with the Judge's permission, upon the doctor's proposal in public hospitals, under the supervision of police services and the detainee must reintegrate the prison when recovered from illness (this is the case of those who deliver in the prison).

The detainees keep their clothes without taking into account order and cleanliness.

In the jail of Antanimora 4 pregnant women and 18 women accompanied by their children are gathered in a room.

Children may stay with their mother up to the age of 2 years old and they are sent back to a reception Centre later on.

These women complain about the fact that, as soon as a child catches any disease, such a disease is transmitted to the other children within a very little time. They have equally made us note that their children are afraid of men (case of the chaplain who comes for the religions offers) and flee away when they hear the noise made by the car. Certainly the prison doesn't provide appropriate environment for children, but keeping children apart from their mother is highly undesirable too.

5- Visits

The accused have right to 2 visits of 15 minutes per week and the condemned have one visit of 15 minutes per week. A supervisor stays in the parlour during the visit with some possibility to hear all conversations, so intimacy is to be excluded.

The permit to visit may be cancelled or suspended. But the cutting of the detainee from her family constitutes an element of psychological destruction for the individual.

6- Correspondance

The Detainees and the Condemned may send or receive mails subject to a supervision of penitentiary administrative agent as well at its departure as its arrival. Letters written in foreign language may be translated to this end.

7- Food

Every detainee has right to 2 rations of cassava every day. The rate of malnutrition in these penitentiary establishments is very high. Yet, the detainees's family may bring food. NGO's also supply 2 or 3 times per week.

8- Religion

Every detainee may satisfy the requirements of her religious life. There are worship Services.

9- Outgoings

At any time of the proceedings and even in criminal matter, a permit of going out may be granted to the accused. Such a going out is to be motivated by an important family or professional event and it cannot be realized except under escort.

Yet, the escort members can be exempted of putting on of uniform.

In certain prisons like the jail of Antananarivo, detainees may borrow books from the library. They can neither supply themselves with newspapers nor have access to a radio set.

Intervener from outside are admitted to enliven courses of English and French.

10- On the right to defense

The lawyer regularly chosen or appointed in virtue of her office freely communicates with her client in the absence of the supervisor. The interdiction to communicate can't under circumstances apply itself to the culprit's counsel. The personal appearance of the culprit in a sitting is a right.

11- About the means of redress

The extension of detention, the refusal to give provisional release, the indictments before the judgement jurisdictions can be the object of Appeal. In every case, a copy of the decisions is handed back to the party interested, and the detainee's lawyer is to be simultaneously informed of these decisions. It is obligatory to ascertain that taking into account the circumstances of facts (remoteness of the place of incarcerating, absence of means of transport...), certain detainees have been judged by default. This constitutes a serious outrage to the rights to defense.

12- Preparing the reinserting

The lack of equipments due to financial constraints has impeded the creation of a workshop within each establishment.

The use of penal hands may prepare them to reinsert but it is henceforth interdicted for female detainee following a rape attempt perpetrated by a detainee in service outside the prison and has brought about a penitentiary agent's dismissal.

Another problem is idleness, though due to the insufficiency of framing, female detainees have to participate in the functioning of prison life : upkeep, cooking, small administrative tasks.

Any contact between detainees can equally constitute a support in front of detention and contribute to the preparing to reinserting.

There is a quite rare practice in prisons at the jail of Antanimora when a detainee's family member dies, the other detainees come to express their condolence and bring their support.

III- The ending of detention

For a female condemned, detention ends up when the penalty is purged.

For the accused, the end of detention may be decided in virtue of her office by the judge (withdrawal of opposition) or at the request for a provisional release. It can also result in an expiration of delay foreseen by the Code of Criminal Proceedings in the absence of an extension.

A relaxation judgement, an acquittal order or a nonsuit from the examining magistrate can put an end to the detention.

IV- The minor girls in re-educational centres

Out of the 6 provinces of Madagascar, the 4 chief-towns in the province have got reeducational centres, one of which only belongs to the Penitentiary Administration.

For minor girls, educational measures must be the rule and incarcerating, or prison solution is the exception.

Minor girls' training and treatment placed in centres have an object which is to ensure assistance for them, protection, professional education and competences, in order to give them a hand to play a constructive and productive role in the Society. Parents'adhesion in minor girls'education is fully required.

The placement in the centre aims at avoiding adult delinquents negative influences over minor girls and guarantees their welfare for not having known any normal social milieu, they are predisposed to profit by the teaching on criminality in prison.

The laws in force ensure an upright treatment to minor girls at every step of criminal proceedings and pay a particular attention to the particular needs, connected with their age, their sex, during their placement.

CONCLUSION

One must recognize some weaknesses of the judicial power namely the administrative slowness, the lack of personnel despite the recruitments already done.

- The first thought lies in the fact that emprisonement is not the only solution to any infraction. A group of work on the Reforms of Penal System in Madagascar is thinking over alternate sanctions such as tasks of general interest, which would be more educative and promote the ransoming of fault and give back value to the person who accomplishes them.
- Insofar as circumstances allow it preference is to be directed to conditional liberation subject to the satisfactory accomplishment of specified trials by judicial and penitentiary authorities : good behaviour and fine prospects for inserting.

To give appropriate training on the detainees' rights to the penitentiary agents proves itself indispensable. To this end, Madagascar has inaugurated the National School of Penitentiary Administration recently. All agents should be conscious of the fact that any detained person is uniquely deprived of his liberty but not of his dignity. Any Prison is considered as a place for re-education and for preparing reinsertion. The experience proves that any too absolute regime renders detained people like more aggressive and more anti-social beings.

- Sensibilizing magistrates to proceed to organise systematic visits in order to test salubrity, security, dict, observing regulations, visits accompanied by periodical reports, would cost their comments and suggestions. It is above all noteworthy that out of 513 magistrates in Madagascar, 230 are women and are well aware of women's problems and that, at present, The First President as well as the Public Prosecutor in the High Court along with them is the President of the Law Court and the Public Prosecutor of Antananarivo which is the Capital City of Madagascar, all of these high-ranked judicial personalities are women

- The presidential grace and amnesty as well as the remissions of penalty have decreased in a significant way the number of detainees.

In his address on the last 8th of November, the new President of the Republic has called for the respect of the detainees and the sued persons' human rights following the political crisis recently crossing the whole country and our wishes are that concrete measures will be taken in view to make respect these rights to all detainees.



Dina Joy Canencia Tenala
State Counsel, Department of Justice

I Philippine Setting

The **Correctional Institution for Women** is the only penal residence for women offenders who were sentenced to suffer imprisonment for more than three (3) years. It occupies an area of six and a half (6½) hectares situated in the City of Mandaluyong and is approximately fifteen (15) kilometers away from the Bureau of Corrections (National Penitentiary) in Muntinlupa City.

Pursuant to Legislative Act No. 3579, the Institution was established on February 14, 1931. On February 14, 1983 women inmates were then transferred to the Institution from the Old Bilibid Compound in Manila. On April 30, 1982, the pre-war structure was razed to the ground by fire. A new rectangular building was constructed occupying an area of approximately one and a half (1.5) hectares and was inaugurated on September 26, 1983. The building houses the Administrative Office, Office of the Superintendent, conference Hall, Chapel, Dormitories, Kitchen, Laundry and Quarantine (individual rooms) and Infirmary. At the back of the dormitories is the Industrial shop.

The Institution's main mission is correction or the treatment of offenders. Its primary objectives are two-fold, thus:

1. To keep women convicts in custody for their safety and for the protection and security of society; and
2. To prepare and rehabilitate these women convicts for a better life upon release from confinement.

Women offenders who are under trial and those sentenced to less than three (3) years are not committed to the Institution, however they remain in local jails where the sentencing court is situated.

II Rehabilitation Programs

A. Commitment of Prisoners

The rehabilitation process commences at the time a prisoner is committed for confinement by virtue of a duly authenticated commitment order. Upon arrival, a prisoner goes through a thorough routine inspection by the Gate Officer. Money, jewelries and medicines are turned over to the appropriate officers for proper safekeeping or disposition. Other articles found in possession are stored in a stockroom to be returned upon release or upon request for early disposal.

B. Quarantine Period

The prisoner is placed at the Quarantine (single room) for a period of one (1) week before she is assigned to the appropriate dormitory in accordance with the classification procedures. While in quarantine, the inmate goes through identification procedures, immunization and undergoes thorough medical, dental, physical, psychological, sociological and psychiatric examinations to determine her capacity for work assignment.

C. Orientation

Upon assignment to a dormitory, the new resident is gradually introduced into reformatory life by means of a well-planned orientation program. The Rehabilitation and Treatment Section through the Adult-Literacy Class which is duly recognized by the Department of Education is made available to the new inmates. Group lectures on prison rules as well as personal hygiene and care are given to the new inmates. Educational, recreational, vocational and religious facilities are provided by the Institution. Inmates are interviewed and examined from time to time to determine their weaknesses, capabilities, interests and aptitudes as bases for work assignment.

D. Work Assignment

New inmates who are certified by the Institution's Medical Officer to be physically fit undergo all phases of work assignment which is considered as the foundation of the Institution's rehabilitation program. General Services (gardening and cleaning chores) is the first phase. Inmates learn how to raise productively vegetables and other crops. After a reasonable period of practical agriculture and horticulture, depending upon the progress of the inmates receptive faculties, they are sent to the Laundry Section where they are taught how to wash and iron clothes with the least time, money and effort. Some inmates may be assigned to the Kitchen Section where they acquire the techniques of practical and

economic food preparation. Others are sent to the Piggery Section where they acquire techniques on productive hog-raising.

The final phase is when an inmate goes to the Industrial Shop Section, where inmates earn while they learn. They acquire various skills such as, beauty culture, sewing, embroidery, crocheting, stuffed toy making, mat braiding, fan making and other industrial crafts. As an incentive, the Institution pays each worker for every item finished an amount depending upon the quantity and quality of workmanship.

Recently, qualified inmates undergo computer skills training as well as reflexology classes. Certificates of Completion are awarded to those who have successfully acquired and develop skills taught in the various vocational training programs. The vocational training program is under the auspices of the Non-Formal Education Division of the Department of Education and the Technical Education and Skills Development Authority.

Some talented inmates are discovered, thus under proper supervision, they are accorded all the chances and facilities for development and full utilization. Several inmates help in the clerical work of the Administrative Section, others tend the Employees and Inmates store. Still, others act as tutors to less fortunate co-inmates imparting to them whatever knowledge along moral lines the former possesses. Those with leadership qualities are given corresponding responsibilities. They assist the Institution personnel in maintaining peace and order specially in the dormitories where they are specifically assigned.

The institution believes that the above-described productive activities will hopefully prepare the inmates to face the realities in life in a society with its attendant mounting demands.

E. Promotion

Rehabilitation is a harmonious interaction between the Institution and the inmates. The Institution provides the right atmosphere with the necessary manpower and facilities. The inmate, on the other hand, contributes two (2) basic inputs, these are: 1) her conduct and 2) her performance. Without the inmate's cooperation, the rehabilitation process of an inmate will not be attained. There is a symbiotic relationship between the Institution and the inmates.

Conduct and performance are significant as these are the important criteria for promotion in class and/or rotation as determined by the Reclassification Board as approved by the Institution's Superintendent.

Observance of prison rules and regulations constitutes the inmate's conduct, while on the other hand, her efficiency and effectiveness in her work assignment establishes her performance.

Good conduct and efficient performance would mean a high rating for promotion. All things being considered, this will eventually earn for an inmate an early submission of her case to the Board of Pardons and Parole for evaluation.

F. Privileges

Maintenance of physical and mental health of an inmate is a priority of the Institution. A senior clinic Physician and a Dentist assisted by a staff of nurses work on a 24-hour basis. Inmates needing special and emergency medical treatment are brought to hospitals for referrals, treatment and confinement.

A nursery is also available to mother inmates, either to those who gave birth while in confinement or those who have children below one (1) year old. The mother inmate can take care of her child until the child reaches the age of one (1) year. Upon reaching the age of one (1) year, the child is given to the relatives of the inmate for custody and rearing or in cases where the inmate has no relative willing and able to take care of her child, the child is then committed to the Department of Social Welfare and Development for custody.

An open-house visit is allowed on Sundays affording the inmates to freely reunite with their respective families and friends. Visits are also allowed from Sundays to Thursdays from 9:00 a.m. to 3:30 p.m.

Religion has undoubtedly been a primordial factor in the rehabilitation and reformation of the inmates. The Institution is non-sectarian, the inmates are allowed to profess/exercise their own faith.

III Crisis

The current problem besetting the Institution as well as the local jails in the Philippines is the congestion and over-crowding of the prison facilities. The Institution that was built in 1983 can only accommodate 250 inmates. Today, the Institution has a total of 954 inmates. The Conference room, as well as the halls in the Institution is now being used as sleeping quarters.

IV Statistical Data/Profile of Inmates

As to AGE

Unknown	2
16-25	126
26-35	275
36-45	321
46-55	178
56-65	34
66 above	18

As to CIVIL STATUS

Single	213
Married	410
Widow	92
Common Law	74
Separated	165

As to SENTENCE

Reclusion Perpetua	278
R.P. on Appeal	98
Indeterminate/Definite	474
I.D. on Appeal	79
Death	25

As to EDUCATION ATTAINMENT

Illiterate	28
Grade School	191
High School	280
College Level	201
Professionals	254

As to CRIMES COMMITTED

Crimes against Property	459
Crimes against Persons	144
Drug Related Crimes	276
Crimes against Personal Liberty	43
Crimes against Public Officers	9
Crimes against Chastity	7
Crimes against National Security	4
Quasi Crimes	5
Crimes against Public Interest	2
Crimes against Public Order	1
Violation of Parole Conditions	3
Anti-Dummy Law	1

Barbara A. Frey
Director, Human Rights Program
University of Minnesota

As the population of women prisoners grows in the United States, so does concern about human rights violations faced by that population. This paper reflects on some of the human rights issues facing women in U.S. prisons, including lack of access to health care, sexual violence, complications related to pregnancy and motherhood, and inadequate treatment for HIV/AIDS.

In 1999, Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence against Women, issued a report detailing violence against women in state and federal prisons in the United States.¹ The report noted that, according to Justice Department statistics, the U.S. has the largest number of women prisoners of any nation in the world, with more than 84,000 in custody.² According to the report of the Special Rapporteur, these women are disproportionately from poor and minority sectors of the U.S. population. In addition, many women find themselves in U.S. prison because of their unwitting involvement in drug trafficking as "mules" on behalf of boyfriends, partners, or husbands.³

While women only constitute just under 6% of the U.S. prison population, there has been an almost four-fold increase in the number of women incarcerated in jail or prison in the United States between 1985 and 1998.⁴ Statistics from the Bureau of Justice reveal that women's crimes are more often drug and property offenses than violent crimes.⁵

Women in U.S. prisons suffer severe gender-specific neglect of health needs, abuse, and physical and/or sexual violence while imprisoned. The gender-specific harm suffered by women prisoners ranges from lack of medical treatment available for pregnant women in prison to sexual violence against female inmates by prison guards.

¹ *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44, Addendum, *Report of the Mission to the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, E/CN.4/1999/68/Add.2, January 4, 1999. [hereinafter "Special Report"]

² Lawrence A. Greenfeld and Tracy L. Snell, Bureau of Justice Statistics Special Report, *Special Report: Women Offenders*, December 1999. [hereinafter "Women Offenders"]

³ A "mule" is a drug courier. According to a recent study of drug mules in New York, the overwhelming majority of women interviewed charged with drug crimes and sentenced to life imprisonment under New York's Rockefeller Drug Laws, had no prior criminal record. In addition, many claimed that they were unaware they were carrying drugs, or that they had been coerced by male intimates. See Special Report at 18, citing Tracy Huling, "Women Drug Couriers," *Criminal Justice*, vol. 9, #4 1995, p. 14.

⁴ The majority of the violent crimes were assaults against other females. *Women Offenders*.

⁵ See *Women Offenders*, 1.

Health Care Services for Women Prisoners

The trend in U.S. sentencing is toward punitive justice rather than the rehabilitative model. That trend has resulted in strict sentencing policies and the lack of health care and rehabilitative services for women. The philosophy of the rehabilitative model is that inmates should be extended services in prison, such as educational programs, in order to make them functional and useful members of society upon their release. The punitive model asserts that the seriousness of a crime should be the chief determinant of how serious the degree of punishment should be. The seriousness of the crime corresponds to moral culpability, which in turn gives society not only the right, but the *duty* to punish. In accordance with this theory, many health care services were withdrawn from correctional facilities beginning in the late 1970's and early 1980's.⁶

In the United States, there are two kinds of prisons: state and federal. A convicted felon is sent to one or the other depending on whether the offense they committed was a federal or state crime. While the federal government regulates federal prisons, each U.S. state has the authority to create and administer rules and regulations of its state prisons. Within both the federal and state systems, female inmates are consistently given less access to health care service than their male counterparts in state prison. Male inmates tend to receive most of the programs and services available in jails and prisons, including medical and dental, recreational, educational, and vocational.

Moreover, the facilities and the services offered to female inmates are based primarily on models for male inmates. As a result, these facilities and services do not include gender considerations. For instance, a survey was conducted in 1997 of 52 departments of corrections across the U.S. The results reported the following: 27 departments reported that they provided substance abuse programs developed specifically for women; 19 departments provided domestic violence programs developed specifically for women; and that only 9 departments offered programs developed for victims of sexual assault.⁷

In addition, providers of these programs and services currently do not take into account the differences among women – including race, ethnicity, language and sexual identity --- that may affect the quality of health services provided. These factors can have great significance. For example, because of the high population of women from minority groups in U.S. prisons, there is a disproportionate prevalence of certain types of illnesses that afflict minority populations more, such as diabetes, high blood pressure, sickle cell anemia, and a higher instance of undetected breast cancer. The proportion of women in prison who are of

⁶ Chapter 4, Principled Sentencing: Readings on Theory and Policy. Andrew von Hirsch and Andrew Ashworth. Hart Publishing, 1998.

⁷ See Coll, Miller, Fields, and Mathews, *The Experiences of Women in Prison: Implications for Services and Prevention*, Women and Therapy, v.21 (1997), 12.

racial and ethnic minority background far exceeds their representation in the general population. Nearly two-thirds of women in local jails, and state and federal prisons are from ethnic or racial minority groups. Almost 50% of women in state prisons are black, and 32% of women in federal prisons are Hispanic.⁸

Violence against Women in Detention

Violence against women in detention in the United States is a serious problem. In 1998 three women brought a case against the U.S. Federal Bureau of Prisons. The plaintiffs were inmates at the Federal Detention Center in Pleasanton, California. They reported that male prison guards had taken money from male inmates in exchange for allowing the male inmates to enter female inmates' cells and rape them. The Federal Bureau of Prisons agreed to pay the three women a total of \$500,000 to settle the lawsuit.⁹

Cases of sexual abuse similar to this are common in U.S. prisons. Sexual abuse against women inmates ranges from sexually offensive language; random "pat downs" accompanied by touching of breasts, buttocks and genitals; watching female inmates undressing and in various states of undress; and rape.

In her report, Ms. Coomaraswamy took testimony from 44 female inmates and 10 corrections officers while visiting prisons in California, Connecticut, Georgia, Minnesota, New Jersey, and New York.¹⁰ The Governor of Michigan denied her access to visit Michigan prisons, despite very serious allegations of sexual misconduct reported to have occurred in that state. In some prisons, she was told that "at least two-thirds of the female inmates had been sexually or physically abused."¹¹

There have been several court cases alleging sexual violence brought against the U.S. government by female inmates. In one such case, the 9th Circuit Court of Appeals decided that subjecting women with a history of sexual abuse to pat searches by men could constitute cruel and unusual punishment. Jordon v. Gardner, 986 F.2d 1521 (9th Cir. 1993). In a case decided by the Supreme Court, Farmer v. Brennan, the Court decided that when an officer exposes an inmate to a substantial risk of sexual assault, there is an 8th Amendment violation. 114 S. Ct. 1970 (1994).¹²

⁸ Women Offenders, 7.

⁹ Special Report, para. 12.

¹⁰ Special Report, para. 8.

¹¹ Special Report, para. 29.

¹² Special Report, 10-11.

While these cases have been helpful in establishing certain rights for female inmates, the fact remains that there is a lack of state administrative initiative in dealing with the flagrant sexual abuses that occur in U.S. prisons. There are few grievance procedures for female inmates, and those who do make formal complaints are often victims of retaliation.¹³ As of 1999, in fifteen states there were no laws criminalizing sexual contact between staff and inmates.¹⁴ In states where such contact is illegal, the cases which come to the attention of authorities often go unprosecuted. Often, the guard is transferred, and/or the female inmate is transferred, without any criminal consequences for the guard.¹⁵

The fact that many female inmates have been sexually and physically abused creates special mental health care needs for these women in order to assist in psychological, emotional, and social rehabilitation. Few such services are available.

Motherhood and Pregnancy in Custody

Women under supervision by justice system agencies are the mothers of more than an estimated 1.3 million children in the United States.¹⁶ In addition, about 5% of incarcerated women are pregnant when they enter prison.¹⁷ The needs of pregnant women are not sufficiently accounted for in the U.S. prison system. Prenatal care is available for inmates; however, the care available is sparse and unreliable.

Cases have been reported of women in U.S. prisons undergoing labor strapped to gurneys and are handcuffed and or shackled to beds, often for hours. Restraints are commonly used across the United States as a matter of course, even when a woman has no previous history of violence. For example, Amnesty International delegates visiting a prison hospital in California describe their visit as such:

Prison officials took [us] through a ward where women are held when they are seriously ill or in labour and for a short period after giving birth. The ward is locked. Inside the ward are four armed guards. Yet every woman is chained by a leg to her bed. A woman showed [us] her shackle. She could lie on her side but could not roll over. Prison officials explained to the delegates that the shackle is removed only if a doctor informs them that it is interfering with medical treatment or injurious to a woman's health. Shortly before [our] visit, [Amnesty International] received a report from a lawyer that at the same hospital...she had seen a woman who was shackled

¹³ Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, (1996), 5-6. [hereinafter "HRW Report"]

¹⁴ Amnesty International, *United States of America: Breaking the Chain*, 4, Jan. 3, 1999.

¹⁵ Id.

¹⁶ Women Offenders, 1.

¹⁷ Women Offenders, 1.

having a seizure and that guards refused the request of nursing staff to remove the constraint.¹⁸

Shackling female inmates is a humiliating violation of their basic dignity, as well as being dangerous for the health of pregnant inmates and their children. Labor in childbirth requires a high degree of mobility in order to assume various birthing positions, and this is impossible when a woman's arms and legs are shackled to a bed.¹⁹

Pregnant women are at risk of harm from inadequate access to health care. There are often no doctors on duty at women's prisons on weekends and during evenings. In 1997, a female inmate in the California Institution for Women, one of the largest women's penitentiaries in the United States, went into labor during the weekend. The only staff member available was a nurse. The inmate was strapped to a gurney, and unable to move her arms. The nurse refused to assist with the birth, and the mother delivered her baby alone and unassisted. When the baby was born, it was not breathing, and the nurse called for the paramedics. By the time the paramedics arrived, the baby was brain dead. The mother was not allowed to see her baby again.²⁰

In another example, Harris v. McCarthy, a woman who was five months pregnant began to have vaginal bleeding, and after repeated requests for medical help, was shown to the staff physician, an orthopedist. He prescribed a drug to her that was prohibited from use during pregnancy, and she went into premature labor two weeks later. The baby died shortly after.²¹

While the Harris case was settled in 1989, and the California Department of Corrections agreed to make changes and closely monitor medical care, health care facilities in women's prisons are still far under any acceptable international standard. Many women's prisons still do not have an obstetrician-gynecologist on its staff.²²

California, which has the largest number of incarcerated women of any state, is a prime example of the mismanaged and under-resourced women's health care that is symptomatic of women's prisons in the United States. Along with five other states, California assigns medical duties and responsibilities to guards, many of them male. The merger of these two

¹⁸ Amnesty International, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody, Section 6, *Restraints*, <http://www.amnestyusa.org/rightsforall/women/report/women-27.html> (accessed Dec. 4, 2002) [hereinafter, "Not Part of My Sentence"].

¹⁹ Id. at footnote 144

²⁰ See Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16-SPG Crim. Just. 39, 40 (2001).

²¹ "Women in Prison," Nina Siegal, Ms. Magazine, v. 9, no. 2 Sept./Oct. 1998, 69.

²² Id.

roles causes many professional conflicts between security needs and medical needs of inmates.

U.S. prisons generally deny female inmates access to reproductive health rights, which endangers the lives of women, as well as to unborn children. The Bureau of Prisons is allowed to pay only for inmates' abortions only in two situations: (1) in cases of rape, or (2) if giving birth would endanger the life of a woman. Congress has banned the use of federal funds for abortions in prison for other reasons.²³

After giving birth, female inmates are often denied their basic rights as mothers. Many female inmates who give birth are only allowed to keep their newborns for only short periods of time, ranging from a few hours to a year, depending upon the state. While some correctional systems offer mother-infant care programs which provide community-based residential treatment in lieu of incarceration for new mothers, there are very few slots available. For example, California only has 100 slots available for the 8,000 women who qualify to participate. While the Family Unity Demonstration Project Act of 1994 authorized states to seek federal funding to create new mother-infant care programs, the funds were never appropriated by Congress.²⁴ In addition, many women are incarcerated far from their families, making the maintenance of contact nearly impossible. In all states, there are laws permitting the termination of parental rights of incarcerated persons, and this lack of contact may trigger such a termination.²⁵

The Effect of HIV and AIDS on Women in U.S. Correctional Facilities

AIDS occurs in U.S. state and federal prisons at a rate fourteen times higher than in the general population. A recent study conducted by the National Institute of Justice indicates that correctional facilities reported a cumulative total of 11,565 AIDS cases among inmates in correctional facilities, and that approximately 2.3% of the prison population was HIV-positive. This ranges from 17-20% in New York, to 0-1% in Oregon.²⁶

Of these infected inmates, Female inmates also have among the highest rates of HIV infection in the United States. In 1994, the rates of AIDS in state and federal prison systems for women were double the rates for men. In studies conducted in New York, results

²³ Id.

²⁴ See *supra* Ms. 70-71; See also "Not Part of My Sentence."

²⁵ Ms. At 70-71.

²⁶ Connie M. Mayer, *Unique Mental Health Needs of HIV-Infected Women Inmates: What Services are Required Under the Constitution and the Americans with Disabilities Act?* 6 Wm. & Mary J. Women & L. 215, 218-219 (1999).

indicated that 20.3% of the female inmates, compared to 11.5% of the male inmates tested HIV-positive.²⁷

Women who are HIV-positive have special mental health needs which encompass a wide range of psychological problems induced by the virus, including depression, AIDS dementia, delirium, and anxiety disorders. These disorders require rapid and accurate diagnosis, psychotherapy, and medication. Additionally, women of color are dramatically affected by HIV/AIDS. The disproportion of HIV-positive women of color in correctional facilities corresponds to the prevalence of HIV in women of color nation wide.

Mental Illnesses

Mental illness is also a key factor regarding women's involvement in the criminal justice system in the U.S. More than half of women in prisons nationwide suffer from some form of psychiatric disorder. A survey of inmates in Dublin Penitentiary in California found that 65% of female inmates suffered from some form of mental illness.²⁸ The study conducted at the Research Triangle Institute in North Carolina found that many women were imprisoned because they were "acting out" a mental disorder, usually linked to sexual or physical abuse inflicted upon them in their youth.²⁹

Several class action lawsuits were brought on behalf of inmates in state prisons nationwide; one of the longest-running cases began in 1974, in Texas. The case, Ruiz v. Scott, alleged cruel and unusual punishment of mentally ill inmates, and in 1980 the U.S. District Court for the Eastern District of Texas ruled in the plaintiffs' favor and ordered the state to develop a plan for treating mentally ill inmates. But in 1996, the state corrections department requested a "relief from judgment", which is currently being considered.³⁰

Domestic Remedies for Violations of the Rights of Women Prisoners

The U.S. Constitution does protect the rights of female inmates, but opportunities for legal remedy have been severely diminished over the past decade. The applicable Constitutional provisions used by prisoners to protect their rights are the 4th and 8th Amendments. The 8th Amendment to the U.S. Constitution prohibits "cruel and unusual punishment," and the 4th Amendment protects the privacy rights of individuals from unwarranted "search and

²⁷ Id.

²⁸ Special Report at para. 23

²⁹ Ms. at 68.

³⁰ Ms. at 70.

seizure.” These provisions have been used to bring cases alleging sexual violation, and invasion of cell privacy, respectively.

In the 1960's and 1970's, much of the impetus for the reform of U.S. prison conditions was the result of civil litigation. Such litigation allowed for judicial oversight of the prison reform process, which made great progress during these decades. With the rise of the punitive model of sentencing in the 1990s, came political efforts to restrict the rights of prisoners and to limit their ability to sue state and federal governments over prison conditions.

The Prison Litigation Reform Act in 1995³¹ makes it quite difficult for prisoners to conduct litigation on their own behalf. Some of the new obstacles that have been set up include the following: (1) Before a prisoner can file a lawsuit, she must exhaust all administrative remedies. Complaints that cannot clearly demonstrate the use of every possible prisoner grievance procedure are summarily dismissed, except in certain cases where the complainant is allowed to appeal the warden's response; (2) All prisoners must pay a court filing fee in installments; (3) Each lawsuit a prisoner files that is dismissed as frivolous, malicious, or improper counts as a strike; (4) After three strikes, the prisoner must pay the entire court filing fee up front, unless she faces a threat of immediate physical harm; (5) A prisoner cannot file a lawsuit for mental or emotional injury unless she can also show physical injury; (6) If a prisoner is in federal prison, there is a risk of losing goodtime credits if the judge rules that she is lying or trying to harass the people she is suing.³² The limitations imposed by this Act have reduced the access to legal remedies of women in U.S. prisons.

Violations of International Human Rights Law

The current prison conditions for women existing in the United States today are in serious violation of various international standards, treaties, and conventions. Among the international bodies of law violated are: the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules); the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the Convention Against Torture

³¹ *Prison Litigation Reform Act of 1995*, Pub. L. No. 104-134 9 (1995).

³² HRW Report, 7-9. See also Amy Petre Hill, *Death through Administrative Indifference: The Prison Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 *Hastings Women's L.J.* 223 (2002) and Meredith McCollum, *The Prison Litigation Reform Act: Should Prisoners Be Required to Exhaust Administrative Remedies When They Seek a Form of Relief Not Available Under Prison Procedures?*, 31 *Cumb. L. Rev.* 369 (2001).

and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).

The U.S. government is in violation of internationally-recognized standards with regard to treatment of prisoners. Under the provisions of the Standard Minimum Rules, which are not binding, but represent a statement of internationally-recognized standards regarding the treatment of prisoners, men and women are to be housed in separate institutions of detention, and women prisoners are to be attended and supervised only by other females.³³ In addition, the Standard Minimum Rules provide that there should be at least one qualified medical officer who has some knowledge of psychiatry, and special accommodation must be made for necessary prenatal and post-natal care and treatment.³⁴ Furthermore, the Rules specifically prohibit the use of chains or irons as restraints, except in certain limited circumstances.³⁵ By allowing male guards to supervise women inmates, lack of access to qualified medical and mental health professionals, and inadequate medical care for pregnant inmates, the U.S. is in violation of the Standard Minimum Rules.

In addition, the Body of Principles states that "All persons...shall be treated in a humane manner and with respect for the inherent dignity of the human person" (Principle 1) and that no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Principle 6)³⁶ Sexual violence perpetrated by prison officials or other agents of the U.S. government and shackling women in labor can be interpreted as torture, in violation of those Principles, as well as Article 1 of the Convention against Torture, to which the U.S. is a party.³⁷

The International Covenant on Civil and Political Rights provides for basic rights of all individuals, regardless of incarcerated or non-incarcerated status. The U.S., through its denial of adequate health care, its complicity in acts of sexual violence by prison guards, its drastic physical restraints of women in labor, and its denial of an adequate remedy for the above violations is in violation of several key provisions of the Civil and Political Covenant including: (1) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (article 7); (2) the right of any detained person to be treated with

³³ Rule 8(a) and Rule 53, paragraph 2 and 3.

³⁴ Rule 22 and 23.

³⁵ Rule 33: "Chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

- (a) as a precaution against escape during a transfer...
- (b) on medical grounds by direction of the medical officer;
- (c) by order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property...

[instruments of restraint] must not be applied for any longer time than is strictly necessary."

³⁶ *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

³⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc A/39/51 (1984), Art. 1.

humanity and with respect for the inherent dignity of the human person (article 10); the right to recognition before the law (Article 16); and the right to privacy without arbitrary interference (Article 17).³⁸

Conclusion

Women incarcerated in U.S. prisons and correction centers are subjected to a range of emotional, physical, and sexual abuse for which there is little legal redress or psychological or medical treatment. Few Americans are aware of what takes place inside prison walls, and there is almost no constituency demanding remedies to the above problems. The United States takes away many things from women who are convicted of crimes: their freedom, their access to many services and sometimes their children. The government must not take away women's dignity by violating their fundamental human rights. The human rights community should call upon the United States government to align itself with its international and domestic obligations by carrying out policies and procedures that respect the human rights of women in detention.



³⁸ *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S.

3rd Meeting on Women and Justice Participants' List

Algeria	Leila Zerrougui, UN Sub-Commission Member
Australia	Elizabeth Biok, Solicitor
Hong Kong	Hing Chun Wong, Judge
India	Nirmala Pandit, NGO activist Soli J. Sorabjee, Attorney General
Indonesia	Pasti Sinaga, Judge
Japan	Yozo Yokota, Professor, Chuo University, UN SCM Yoko Hayashi, Attorney-at-Law Emi Omura, Attorney-at-Law
Malaysia	Zarizana Abdul Aziz, Attorney-at-Law, WCC Penang Maznah Mohamed, Journalist, WCC Penang Stephanie Bastian, Attorney-at-Law, NGO activist Honey Tan Lay Ean, Attorney-at-Law, WCC Penang Loh Cheng Kooi, WCC Executive Director
Madagascar	Lalaina Rakotoarisoa, UN Sub-Commission Member
Philippines	Dina Joy Canencia Tenala, State Counsel, Dept. of Justice
Romania	Iulia Antonella Motoc, Professor, International Relations, Bucharest University, UN SCM
USA	Barbara A. Frey, Director, Human Rights Program, University of Minnesota
AWF Staff	Mizuho Matsuda, Programme Director Tomoko Manaka, Staff, General Affairs Section

Atonement Projects for Former “Comfort Women” of the Asian Women’s Fund

*Implemented for 285 Women in the Philippines, the Republic of Korea
and Taiwan and 79 Women in the Netherlands*

In 1995, the Japanese Government decided to implement projects aimed at providing atonement to former World War II “comfort women.” The projects involved sending each of them a signed letter of apology from the Prime Minister of Japan, making atonement payments financed by donations from the Japanese people, and providing medical and welfare services financed by the Japanese Government. The Asian Women’s Fund (AWF) was established to manage the projects. A donation campaign collected over ¥565 million (US\$4,700,000) for dispersal among former comfort women in the Philippines, the Republic of Korea and Taiwan. In light of the need to implement the projects as quickly as possible due to the women’s advanced age, an application period of five years was accepted. The application dead-lines, which varied depending on the starting date, were set at August 2001 for the Philippines and May 2002 for the Republic of Korea and Taiwan. These atonement projects were concluded in September 2002, following conclusion of a medical and welfare services project in the Netherlands in July 2001. Many appreciative recipients expressed such sentiments as, “I never expected to receive an apology from the Prime Minister or atonement money,” and, “I feel sure these represent the goodwill of the Japanese people.”

Why is the Cooperative Project Promoted Jointly by Japanese Government and People of Japan ?

The term “comfort women” refers to women who were forced to provide sexual services at “comfort stations” for officers of the former Japanese military during World War II. The honor and dignity of these women were violated, and many suffered irreversible physical and psychological trauma. In August 1993, Japan’s Chief Cabinet Secretary expressed the sincere apologies and deep remorse of the Japanese Government for these wrongs. The AWF was founded in July 1995 to implement atonement projects on behalf of the Japanese through cooperative efforts by the government and people of Japan. The AWF seeks atonement on behalf of the Japanese Government and people for the distress suffered by the former comfort women and solutions to problems threatening the honor and dignity of women today. It is working to heighten awareness in Japan and other countries of the importance of protecting the honor and dignity of women and of preventing conduct that threatens their honor and dignity with the aim of constructing an international society in which such conduct can never be repeated.

Asian Women’s Fund

2-7-6, Kudan-Minami, Chiyoda-ku, Tokyo 102-0074, Japan
Phone: 81-3-3514-4071 Fax: 81-3-3514-4072
URL <http://www.awf.or.jp>