Report on the Reference of the Government on Prison Reforms

This is a reference by the Government under section 6 (Ena) of the Law Commission Act, 1996 seeking opinion and recommendations of the Law Commission on 8 specific recommendations made by the Jail Reform Commission, 1978, for prison reforms.

The Jail Reform Commission made 180 recommendations out of which 8 recommendations are the subject- matters of this reference. It appears from the letter of reference received by the Commission under memo. no. 752 আইন মতামত ৮/১৪৭/০২ dated 16-11-2002 of the Ministry of Law, Justice and Parliamentary Affairs that these 8 recommendations are under consideration of the Cabinet Committee relating to prison reforms. It further appears that the Ministry of Law, Justice and Parliamentary Affairs expressed their views on these recommendations and after considering those views, the Cabinet Committee decided to obtain the views of the Law Commission thereon. The decision of the Cabinet Committee in pursuance of which the reference has been made runs as follows: "৩। কারা সংস্কার কমিশনের আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় সংশ্লিষ্ট সুপারিশ সম্□র্কে Law Commission - এর মতামত গ্রহন করতে হবে।"[1]

A copy of the recommendations of the Jail Reform Commission received from the Ministry of Law, Justice and Parliamentary Affairs is with the record. It shows that the Jail Reform Commission made the eight recommendations in question under three separate heads. A copy of the views of the Ministry of Law, Justice and Parliamentary Affairs received from the said Ministry shows that they gave detailed opinions on these recommendations.

The eight recommendations of the Jail Reform Commission with which we are concerned in this reference are as follows:-

"Recommendations of Bangladesh Jails (sic) Reform Commission.

Alternative To Imprisonment

(a) Necessary measures including legislative may be taken to introduce some alternative to Imprisonment such as, bail, conditional discharge, suspension of sentence, probation, binding-over, fines, community service order, compensation, restitution, etc. Clear and detailed schemes outlining the powers and functions of the agencies involved should be drawn.

Aspects of Pre Trial Detention

(b) Arrests may not be made where there is no risk of non-appearance of the offender at his trial. Instead of physical arrest personal recognisance bond may be taken.

(c) Power to grant bail should be used even in cases involving non-bailable offences where there is no risk of non-appearance of the prisoner at his formal trial.

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[1] See item 3 of para 11 of the proceedings of the meeting of the Cabinet Committee on Prison Reforms held on 12-10-2002

(d) No person should be detained without trial for an indefinite period. For offences where there is prescribed maximum punishment is three years trial must commence within 90 days of arrest and for offences where the prescribed maximum punishment is above three years within 180 days of arrest.

(e) The number of judicial staff as well as the number of the prosecution agencies, such as, police and the law officers should be increased.

(f) Practice and procedure relating to prosecution of criminal cases in courts should be streamlined. For this purpose, suggestions for removal of undue delays in holding criminal trials as contained in Chapter II of the Report of Law Committee, 1976 should immediately be implemented.

Probation

(g) The juvenile and youthful offenders should be tried only by Juvenile and Young Persons Courts and treated in separate and exclusive institutions meant for them.

(h) The Children Act of 1974 should be amended to extend coverage to the those between 16-21 years of age. Alternatively, a separate Act should be passed and implemented for dealing with young offenders in the age of 16-21."

The opinion of the Ministry of Law, Justice and Parliamentary Affairs, the relevant resolution of the Cabinet Committee and the reference show that the Law Commission is to examine the constitutional and legal aspects of the opinion of the Ministry of Law, Justice and Parliamentary Affairs.

The Ministry of Law, Justice and Parliamentary Affairs have expressed specific opinions on the recommendations of the Jail Reform Commission on bail, conditional discharge, suspension of sentence, probation, binding-over, fines, community service order, compensation and restitution appearing in paragraph (a) of the recommendations of the Jail Reform Commission.

The opinion of the Ministry on bail as recommended by the Jail Reform Commission is in paragraph (ক) of their opinion. The observation of the Ministry on granting bail as an "alternative to imprisonment" is quite appropriate and justified. The question of imprisonment arises after conviction of an accused and the question of bail is considered during trial. It, however, appears that the Jail Reform Commission used the expression, "imprisonment," in a very broad sense covering incarceration during trial and after conviction. The Code of Criminal Procedure, 1898, lays down detailed principles for guidance of the criminal courts while considering the question of bail.[2] Decisions of superior courts have also spelled out and settled these principles. If the criminal courts properly apply these principles, the objective of the recommendation of the Jail Reform Commission on bail, i.e. confinement of under trials in jail as less as practicable, is likely to be achieved. What is required is sensitization of the judges of the criminal courts on the principles of bail.

[2] See Chapter XXXIX, Code of Criminal Procedure, 1898 (Act V of 1898).

On conditional discharge, suspension of sentence, probation, binding-over, fines and compensation as recommended by the Jail Reform Commission, the Ministry of Law, Justice and Parliamentary Affairs have opined that enforcement of the Probation of Offenders Ordinance, 1960 in general and sections 4,5,10,11, 7 and 9 thereof in particular will fully achieve the purposes of the recommendations.

We have very carefully examined the provisions of the Probation of Offenders Ordinance, 1960 (Ordinance No. XLV of 1960). This Ordinance was promulgated by the President of Pakistan on 1st November, 1960. It came into force in the then East Pakistan, now Bangladesh, on 14th February, 1962 vide issuance of a notification by the Government of Pakistan in exercise of its power under section 3 (3) of the Ordinance.[3] Thereafter, this Ordinance was adapted to the then East Pakistan and certain amendments were made therein by the Probation of Offenders (East Pakistan Amendment) Act, 1964 (East Pakistan Act No. X of 1964).

This Ordinance as amended by the Probation of Offenders (East Pakistan Amendment) Act, 1964, was "existing law" immediately before the date of coming into force of the Constitution of Bangladesh on 16th December, 1972 and as such, the Ordinance is law in force in Bangladesh.[4]

The Ordinance empowers the High Court Division, a Court of Sessions, a District Magistrate, a Sub-divisional Magistrate, a Magistrate of the 1st class and any other magistrate specially empowered to act and pass orders under it.[5]

Section 4 of the Ordinance lays down in detail the provisions for conditional discharge of a first offender. Section 5 of the Ordinance contains provisions for making a probation order in respect of certain convicts who are convicted of all offences under the Penal Code, 1868, except certain grave offences. Special provisions have been made for female convicts in as much as they have been made eligible for a probation order instead of imprisonment if they are convicted of any offence other than an offence punishable with death. There is no specific provision in the Ordinance or in any other law regarding suspension of sentence but a conditional discharge or a probation order automatically involves, the Ministry of Law, Justice and Parliamentary Affairs rightly observed, suspension of the sentence. There is no separate provision regarding "binding-over" in the Ordinance but this provision is by implication included in the second part of section 4 of the Ordinance which empowers the court to direct the convict to give bond for committing no offence and being of good behaviour.

Section 6 of the Ordinance contains provisions empowering the court to direct an offender against whom a conditional discharge order under section 4 of the Ordinance or a probation order under section 5 of the Ordinance is made to pay compensation or damage to the person or persons injured by the offence committed by the offender.

There is no provision in the Ordinance or any other law to order a convict to render community service in lieu of imprisonment. It is a progressive measure

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[3] See Gazette of Pakistan, Extra-ordinary, dated 14-02-1962 p. 99
[4] See articles 152 and 149 of the Constitution of the People's Republic of Bangladesh.
[5] See section 3(1) of the Probation of Offenders Ordinance, 1960.

adopted by many countries of the world. If the Government takes a policy decision to introduce community service in lieu of imprisonment a legal framework will be required. The legal framework may be provided either by enacting a separate law or by amending the Ordinance by inserting additional provisions therein to this effect.

After considering every aspects we agree with the observations made by the Ministry of Law, Justice & Parliamentary Affairs on the recommendations in paragraph (a) of the recommendations of the Jail Reform Commission. We also agree with the view of the Ministry that implementation of the Probation of Offenders Ordinance, 1960 will largely achieve the objectives of the recommendations of the Jail Reform Commission on conditional discharge, suspension of sentence, probation, binding-over and compensation.

Bails and fines are required to be dealt with by the courts according to the existing substantive and procedural penal laws.[6]

For introducing community service in lieu of imprisonment, a legal framework will be required.

Certain minor amendments are required to be made in the Probation of Offenders Ordinance, 1960. From section 3 of the Ordinance, the expression, "a Sub-Divisional Magistrate", shall be omitted and the expression, "a Metropolitan Magistrate", should be inserted.

Sections 380, 562, 563 and 564 of the Code of Criminal Procedure, 1898 stood repealed by the Ordinance but these sections still find place in our Code of Criminal Procedure. This aspect may be attended to.

So far as the recommendations contained in paragraphs (b) and (c) of the recommendations of the Jail Reform Commission are concerned, we have perused the comments of the Ministry of Law, Justice and Parliamentary Affairs. There is nothing much to add. The existing provisions for bail contained in Chapter XXXIX of the Code of Criminal Procedure, 1898, if properly applied by the criminal courts, are sufficient for implementation of these two recommendations.

Regarding the recommendation in paragraph (d) of the recommendations and the comments thereon by the Ministry of Law, Justice and Parliamentary Affairs, it can be said that time-limit for conclusion of trial is already fixed in the Code of Criminal Procedure, 1898, and no new law is required to be enacted in this respect.[7] What is required is monitoring whether the criminal courts have been complying with the provisions relating to conclusion of trial within the statutory time-limit.

No comment is required on the observation of the Ministry of Law, Justice and Parliamentary Affairs relating to the recommendation in paragraph (e) as no legal question is involved therein. It is for the Government to take an administrative decision in the matter.

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[6] See also the reports of the Law Commission on the Problems Relating to Bail dated 22 July, 2002 and the Various Aspects of Sections 54 and 167 of the Code of Criminal Procedure, 1898 and the Provisions Relating to Bail dated 14 July, 2002, in this connection.

[7] See section 339C, the Code of Criminal Procedure, 1898.

In paragraph (f) of its recommendations the Jail Reform Commission has made an omnibus recommendation to implement the recommendations of the Law Committee of 1976 contained in Chapter II of its report. In Chapter II of the said report there are 21 recommendations for eliminating delay in disposal of cases in criminal courts. Some of these recommendations lack direct relevancy to the issue of prison reforms although these may have very remote connection with prison administration. To cite only a few examples, recommendation (8) in Chapter II of report of the Law Committee of 1976 suggests sitting facilities for witnesses in court while deposing, recommendation (9) thereof suggests increase of travelling allowances and daily allowances of witnesses, recommendations 13 to 19(a) thereof suggest adoption of certain measures for assessing the efficiency of magistrates and for increasing their efficiency, recommendation 19(b) suggests establishment of a "judicial ombudsman", recommendation 20 suggests adoption of measures for improving the working condition of the courts and recommendation 21 requires the Government to provide residential accommodation to all judicial officers. After the report of the Law Committee of 1976 (and the report of the Jail Reform Commission) various committees and bodies were formed by the Supreme Court and also the Government for investigating into the administration of the courts, the causes of delay, court management, etc. and these committees and bodies made various recommendations and suggested remedies from time to time. The Government also took steps to implement these recommendations and the process is going on.[8] A few of the recommendations made by the Law Committee of 1976 in Chapter II of its report are, however, still relevant in the context of prison reforms and the Government may, if it feels necessary, look into them.

Regarding recommendation (g) of the recommendations of the Jail Reform Commission, we have nothing more to add to what has been commented by the Ministry of Law, Justice and Parliamentary Affairs. The "child" offenders as defined in the Children Act, 1974, are tried by the courts empowered to exercise the powers of Juvenile Courts under the Children Act, 1974, according to the provisions of the said Act.[9] The Government may, however, seriously consider the question of establishing "Juvenile Courts" with exclusive jurisdiction to try only child offenders.[10] They are also supposed to be treated in separate institutions under the said Act.[11]

Regarding the recommendation in paragraph (h) of the recommendations of the Jail Reform Commission for bringing children upto the age of 21 years within the ambit of the Children Act, 1974, and the comments of the Ministry of Law, Justice and Parliamentary Affairs thereon, it may be stated that at the present moment children below the age 16 years are covered by the Children Act, 1974.[12] According to the U.N. Convention on the Rights of the Child, "a child means every human being below the age of eighteen years".[13] Bangladesh is a party to this Convention having ratified it on 3rd August, 1990. So, Bangladesh is under an obligation to raise the age

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[8] See amendment of the Code of Criminal Procedure, 1898, by the Law Reforms Ordinance, 1978 (Ordinance No. XLIX of 1978), Ordinance No. XXIV of 1982, Ordinance No. LX of 1982, Ordinance No. XXXVII of 1983, Act 41 of 2000, etc.
[9] See section 4, the Children Act, 1974.
[10] See section 3, the Children Act, 1974.
[11] See Chapters III to IX, the Children Act, 1974.
[12] See section 2(f), the Children Act, 1974.
[13] See Article 1, the Convention on the Rights of the Child.

of "child" in the Children Act, 1974, to 18 years. It may be done by amending clause (f) of section 2 of the Children Act, 1974.

Before concluding, we make the following recommendations:-

Recommendations

1. The proposal of the Ministry of Law, Justice and Parliamentary Affairs for enforcing the Probation of Offenders Ordinance, 1960 (Ordinance No. XLV of 1960) may be accepted and implemented.

2. If the Government takes a policy decision to introduce community service as an alternative to imprisonment, a legal framework for the purpose may be evolved by suitable legislation.

3. The judges trying criminal cases and the magistrates may be sensitized to apply the existing law of bail conscientiously and on judicial consideration and judicial consideration alone and not on any consideration other than judicial.

4. The police officers may be sensitized to exercise their powers to grant bail to an arrested person properly and conscientiously.

5. The Children Act, 1974, may be suitably amended in order to raise the age of a "child" to 18 years, vest the powers of a Juvenile Court to Metropolitan Magistrates and delete the expression, "Sub-divisional Magistrate", from section 3 thereof.

6. The Children Act, 1974, may be enforced in letter and in spirit.

7. Sections 380, 562, 563 and 564 may be deleted from the Code of Criminal Procedure, 1898.

(On leave)
(Justice A.K.M. Sadeque)
Member

(Justice Naimuddin Ahmed)
Member

(Justice A.T.M. Afzal)
Chairman