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Paper on:
Access To Justice For Prisoners
Bangladesh Perspective

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Access to Justice for Prisoners: Bangladesh Perspective

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From the earliest days, when a tribal head, then a feudal lord and finally the Sovereign started to take into detention either those seen as opponents or those supposedly or in fact creating problems for the commonly accepted order of society, or disobeying the sovereign's decree or legislation, misery or misfortune of several kinds started to visit the prisoner.

With the passage of time, the conscious section of the society or the State, either in the background of protests from civil society or being prompted by the values of civil society or sense of justness, from time to time attempted to remove or to ameliorate the problems faced by the man in chains.

At the earliest stages of formation of community bodies, administration of justice vested in the head of the community, thereafter in the chief of the community grouped together and so on so forth and lastly with the sovereign alone. With the passage of time, a sense of fairness led the sovereign to delegate the matter of administration of justice to one independent of him in case of difference or dispute between the subjects and, on fewer occasions, the sovereign and his subject. With the passage of time, ideas and thoughts reflected by the social reformers and philosophers for ensuring fair adjudication of disputes/claims and counter claims among members of the society themselves or between the society/state and its component unit/units as well as individuals led to evolution of the concept of division of powers of state amongst its different organs -- the Executive, Legislative and Judiciary. This is now the tested best concept as regards the structure of a democratic society/state, yet still then it cannot be said with certainty as regards some parts of the globe where a democratic system of Government with division of powers among different organs of the State is either functioning or attempting to be established, that the sovereign/State does not look askance upon the judiciary or to person/persons presiding over the seat of a Judge.

Though more than a century had passed from the enactment of the Prisoners Act to the formulation of the Jail Code, and commissions for reforms of prisons have also been set up since, prisoners can hardly be said to be in a better condition than before.

Now I would like to address myself to the topic of access to justice for prisoners.

A modern State in its Constitution, invariably written, devotes a considerable portion to enumerating policies and principles to guarantee fundamental human rights and freedoms. The Constitution of Bangladesh itself includes respect for the dignity and worth of the human person (Article 11), and the right to

reasonable rest, recreation and leisure (Article 15) which it shall endeavour to ensure or make an effort to attain in its policy matters in the governance of the State. It also describes several kinds of rights as fundamental rights of citizens, and among those it mentions equality before the law and the entitlement to equal protection of law (Article 27), enjoyment of the protection of law and of being treated in accordance with law (Article 31), deprivation of a person's liberty only in accordance with law (Article 32), on being arrested or detained in custody, to have the right to information as to reason of arrest, the right to consult and be defended by a legal practitioner of the arrested person's choice, ensuring production of the arrested person before the Magistrate within 24 hours of arrest exclusive of the time necessary for the journey from the place of arrest to the Court of the Magistrate and that the arrested person shall not be detained in police custody beyond the period of 24 hours without the authority of the Magistrate (Article 33), that the arrested person shall not be subjected to torture or to cruel, inhuman or degrading punishment or treatment, the right to speedy trial of a person accused of criminal offence by an independent and impartial Court or tribunal established by law (Article 35).¹

Prisoners may be 'criminal prisoners', 'convicted criminal prisoners' or persons detained under the preventative detention law.

A 'criminal prisoner' is one who has been duly committed to custody under a writ or warrant or order of the court or authority exercising criminal jurisdiction or by order of a court martial; a 'convicted criminal prisoner' is any criminal prisoner under sentence of a court or court martial. The prisoner detained under a preventative detention law is in a somewhat different position from the other two classes of prisoners, since the said kind of prisoner or detenu is put in prison not in connection with a criminal offence but to prevent him temporarily from disturbing the social order or to prevent from acting in a manner subversive of law and order. The prisoner of this category under the law is required to be placed within the specific time before the Review Board comprising two learned judges of the High Court Division and another nominated by the Government and in this respect he is in a somewhat better position. In case of such detention, when the High Court Division is approached either under Article 102(2)(b)(i) of the Constitution of the People's Republic of Bangladesh or section 491 of the Code of Criminal Procedure, the cases of this category always get priority since the question of guaranteed fundamental rights of personal liberty and freedom of movement are involved, and such cases are disposed of at the earliest. The disposal of this category of case - resulting in the release of the detenu -- is close to full figures.

In another class is the prisoner who has been apprehended by the police either under the provisions of section 54 or section 55 of the Code of Criminal Procedure and who remains, sometimes for a considerable period, in prison and on occasions the existence of such prisoners are altogether forgotten by the jail authority.

¹ All articles cited refer to articles of the Constitution of the People's Republic of Bangladesh 1972 ('Constitution').

Access of the prisoner to justice, as I understand it, concerns the administration of the law as regards him i.e. due compliance with the provision of law. In other words, a prisoner ought to be dealt with in a manner as provided for by the law or the prisoner ought to be treated according to what is due to him under the law or as provided by the law. The question is how to ensure that the prisoner is being dealt with in accordance with law or that justice is being done to him. A prisoner may have access to justice either at his level i.e. through a legal practitioner of his choice or by drawing the attention of the court through a petition filed from prison, through a friend (who may be either an individual or organization) or at the court's own instance. The first category postulates a situation where a prisoner is aware of the law applicable to him and at the same time can afford to approach the court to seek justice through a legal practitioner of his choice. In the prevailing social conditions, the number of prisoners of this kind are only a few, and the majority of prisoners are neither aware of the law under and by which they are required to be dealt with, nor do they have sufficient or adequate opportunity or capacity to approach the court through a lawyer of their choice to seek justice and even where they do, it is at the cost of their hearth and home or of extreme indebtedness. As regard this class of prisoners who are far away from free society or in other words have been deprived of liberty, an effort should be made on the part of the "justice" authorities, to approach them to facilitate their availing of existing legal remedies. Justice may be made available to these prisoners by frequent visits to the jail by the District Judge and the organizations engaged in investigations as to observance of human rights and also of violations and to ensure, even though it may not be possible in its entirety, observance of law relating to prisoners and the provisions in the Jail Code as far as possible. In this regard, mention may be made that the Ministry of Law, Justice and Parliamentary Affairs and the Ministry of Home Affairs have already issued instructions to the District Judges to visit the jails in their respective district every month, and the District Judges send their reports to the said Ministries. The effectiveness of such frequent visits to jail by the District Judges is seen from instances of unauthorised confinement being brought to the notice of High Court Division for release. As the High Court Division of the Supreme Court of Bangladesh under Article 109 of the Constitution has the power of 'superintendence and control over all the Courts and Tribunals subordinate to it', so to ensure justice to prisoners it could give directions to the District Judges to send reports of their monthly jail inspections to the said Division. The High Court Division, in case it notices any matters in the said reports regarding prisoners being deprived of access to justice, should go for ensuring justice to the prisoners. The High Court also in exercise of its powers of superintendence over the courts subordinate to it can ensure justice to prisoners by monitoring jail visits by the District Judges.

On one occasion, when a District Judge visited the jail, it came to his notice that a person had been put into jail about 23 years back, although he was not a prisoner of any category. As it appears, at one time this poor prisoner was committed to the prison by the order of the court but later on he went out of the memory not only of the jail authority but also of the Court that committed the said prisoner to the prison. The said matter also somehow came to the notice of a human rights organization and the said organization brought the matter to the

notice of the High Court Division. A Bench of the High Court Division taking up criminal matters issued a suo moto Rule upon the officials concerned at the district level to bring the prisoner before the court and ultimately released him. So it appears that frequent visits to jails by the District Judge and monitoring of the orders of the Court committing under-trial prisoners or sentenced prisoners to prison would save a number of prisoners from being detained in prison without any authorisation or in other words even where they are not a convict or a under trial prisoner.

In the background of the existing social conditions, any prisoner who is a destitute and approaches the court for due compliance with the law relating to him, can either be looked after by the State (the Government of Bangladesh has taken steps to provide legal aid to prisoners through the district legal aid committee, with the District Judge being the head)² or by the organizations active either in securing observance of human rights or preventing of violation thereof, who may approach the Court to do justice to a prisoner who is not being dealt with in accordance with law or who is being deprived of early disposal of the case against him or who continues being detained through abuse of the process of the court. In certain cases the High Court Division of the Supreme Court of Bangladesh has taken steps to do justice to prisoners who either have gone behind the memory of the jail authority or the Court or have been lost amongst the prisons or are being harassed upon resort to abuse of the process of the Court. It may be mentioned that suo moto steps to make available justice to a prisoner are frequently being taken by the High Court Division in the light of the provisions of section 561A of the Code of Criminal Procedure. The High Court Division in many cases in exercise of the powers as provided by the aforesaid provisions of law quashed the proceeding of the case while releasing the prisoner.

The High Court Division on one occasion of its own motion,³ on the basis of a letter drawing attention of the Hon'ble Chief Justice by an Advocate of the Supreme Court and Co-ordinator of a non-government organization (ASK), engaged in providing legal aid to the destitute, as to the matter of detention of 29 persons of different countries held in jail inspite of serving out of their sentence, issued notice on the concerned Ministry of the Government of Bangladesh, and the jail authority, and upon hearing the learned advocate of the petitioners, i.e. the learned Advocate who drew the attention of the Hon'ble Chief Justice and the law officer of the Government, made the Rule absolute and made direction to the Government to release 28 prisoners whose names were mentioned in the letter addressed to the Hon'ble Chief Justice and to take steps for their repatriation. One of the prisoners died during this time.

The aforesaid cases have been mentioned as instances of access of justice to prisoners provided by the High Court Division taking steps suo motu. There are also a good many instances of access of justices to prisoners at the instance of human rights organizations as well as by the organizations active in providing legal aid to the distressed or the disadvantaged. The High Court Division

² See Legal Aid Act 2000.

³ *Dr. Faustina Pereira v Bangladesh* 53 DLR (2001) 414.

frequently in its own anxiety to ensure justice to the destitute, sets the law in motion as regard prisoners who are in detention without any justification. The High Court Division noticed a news item in a widely circulated Bengali newspaper about a boy who had already been discharged from cases initiated against him but was still languishing in jail and thereupon issued a suo moto Rule upon the Ministry of Home Affairs of the Government of Bangladesh, the Deputy Commissioner of the District, the Sub-inspector of Police of the concerned Police Station and the Jailor. In compliance with the direction in the show cause notice, the respondents submitted their respective reply and it was revealed that the boy had been made accused in 12 cases, of which 11 were registered under Sections 395 and 397 of the Penal Code and one under the Arms Act. In some of the cases, a final report was submitted by the investigating agency. In two cases, the boy was acquitted. In two cases, he was discharged and in one case he was sentenced for 7 years and to a fine of Tk. 1000/-, in default, to suffer rigorous imprisonment for 6 months more. The boy served out the period of sentence. As seen from the record of the High Court Division, the boy was made an accused for the offence of dacoity while he was about 8 years old, and further the boy was brought before the High Court Division in 'danda beri' (bar fetters) and it was disclosed to the court that for the last 11 years the boy was held in 'danda beri'. The High Court Division not only released the boy but also quashed the proceeding of the two cases, one wherein the boy had been convicted for 7 years, and the other wherein he was made an accused for allegedly being in possession of arms illegally.⁴

The Hon'ble Chief Justice in his anxiety as regards the disposal of jail appeals, has constituted Benches of the High Court Division, fixing one working day of the week for disposal of jail appeals alone and the High Court Division since May 23, 2001 till August 28, 2002 has disposed of 1644 jail appeals.

I would like to mention that the Supreme Court of Bangladesh is very active whenever an occasion comes to look into the case of a prisoner, who is either not treated in accordance with law or because of being placed in a disadvantaged situation, which may be because of poverty, illiteracy, lack of knowledge of law and information about the proper forum to approach for redress of his grievance, is not being able to come out of the prison where he is being detained without sanction of law or by resort to abuse of the process of the Court or otherwise. The only factor as to such cases are that they should be brought to the notice of the Court in some way so that the Court can go into action.

It may be mentioned here that in the case of undertrial prisoners, if the Trial Judge observes that an accused charged of an offence for which capital sentence is prescribed is going undefended, then the Court at the expense of the State, may take steps for engaging a lawyer of sufficient standing conversant with criminal law to provide a defence to such an under-trial prisoner. In the case of disposal by the High Court Division of references made by the Court of Sessions under Section 374 of the Code of Criminal Procedure for confirmation of

⁴ *State v Satkhira ex parte Nazrul Islam* 45 DLR 643.

sentence of death, if it is noticed that the condemned prisoner has gone unrepresented, then the High Court Division at the expense of the State takes steps for engaging an Advocate of sufficient standing and conversant with criminal law to represent the condemned prisoner. The same occurs in the case of a condemned prisoner who files a petition from jail to the Appellate Division against a sentence of death given or confirmed by the High Court Division.

Whenever the High Court Division has information about a prisoner who is in jail despite the absence of proceedings, or who has already served out his sentence and is languishing in jail, or who is in prison because of initiation of proceedings which constitute an abuse of process of court or otherwise, or where the proceeding against the prisoner apparently appears absurd, it has taken prompt steps for making available justice to him.

I feel that ensuring access to justice to destitute prisoners at the suo moto initiative of the Court is not possible in each and every case. It is also a difficult task for the Court to try to reach justice to every prisoner just by noticing news items or having an intimation from some other source about the distressed situation of a prisoner. In my view, organizations which are working for the less fortunate or the human rights organizations or the organizations working for establishing the rule of law should also take up the cases of prisoners who are unable to approach the appropriate forum provided by law for dispensation of justice or who have no access to justice. Such organizations should take steps at their level to make available justice to distressed prisoner(s) or to bring the distressed condition of the prisoner(s) to the notice of the Court, so that the Court can act of its own motion to dispense justice. Some human rights organizations and organizations providing legal aid are already active in initiating proceedings before the High Court Division for the release of prisoners detained without basis of law. These organizations could be required to monitor the position of 'criminal prisoners' and 'convicted criminal prisoners', detainees under the preventative detention law and persons who have been put into jail without specific charges of committing any offence. I am of the mind to involve organizations of the abovementioned kind, since they are already engaged in different ways to help destitute prisoners to have access to justice, and since activities which were once considered functions of the Government are now being allowed to be shared with or participated in by the said bodies with the Government.

The Ministry of Law, Justice and Parliamentary Affairs and the Ministry of Home Affairs of the Government of Bangladesh have already directed the District Judges to visit the jail in their respective District at least once in a month and the High Court in the exercise of its powers of superintendence should also direct the District Judges to inform the Supreme Court about the position of the prisoners who are in the prison in the background of resorts of abuse of the process of the court or law or of persons being detained without sanction of law. The effective step for sending reports by District Judges to the High Court Division in the light of the provisions of Article 109 of the Constitution (superintendence and control over all the Courts and tribunals subordinate to it) is to be ensured for the performance of purposeful dispensation of justice to all

the categories of prisoners. They should make such visits as the part of their duty of dispensation of justice to persons in distress because of the action of the Court and send reports to the High Court Division of the Supreme Court of Bangladesh as regards irregularities noticed by them in the jail.

Access to justice to a prisoner is denied by either denying his right to be treated in accordance with law or by the inaction of the bodies, including courts, engaged in the dispensation of justice to prisoners. This latter kind of denial of access to the justice to the prisoner happens when a case in connection with which a prisoner has been detained in prison is unnecessarily delayed inspite of the constitutional mandate for speedy trial of an accused of a criminal offence.

In recent times the Courts, including the Court of Magistrate, in Bangladesh have made available to prisoners certain facilities which have not specifically been banned by or under the law to prisoners, such as fans, a two-band radio, newspapers and other reading materials.

In my view the utmost necessity or requirement on the part of the agency responsible for disposal of criminal case is to ensure that the trial of an accused of a criminal offence is concluded without inordinate delay, or in other words within a reasonable time.

The Court, as I see it, at the minimum is to take steps to ensure that the modesty of women prisoners is preserved; the welfare of the children of women prisoners is ensured; that minor girls, who are victims of criminal offences, are not put in jail in the name of judicial custody, and where release is not desirable, at least put in a place other than prison; and that for each prisoner, minimum space, a reasonable quantity of food ordinarily fit for consumption and medical care is ensured. Ensuring these bare necessities is essential since at one time the prisoner, except if his sentence of capital punishment has been found legal by the superior court(s), would come out from prison. These can be ensured by arranging routine visits of jails by the District Judge or his nominated officer and by ensuring that human rights organizations and other organizations providing legal aid to prisoners are able to report whatever is noticed inside the jail to the Supreme Court and to other functionaries responsible in order to put the matter on the correct track.
