

# Alternative Sanctions to Convicted Offenders in Criminal Justice System in Bangladesh focusing on Probation and Parole: A lesson from India

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## Abstract

*The societies of Bangladesh and India are alarmingly victims of rampant criminal activities that result huge number of criminal litigations in the courts of law. Although the cardinal purpose of establishment of criminal justice system is to maintain peace and tranquillity in the society by inflicting punishment to offenders there is no apparent sign of gradual decrease of crimes in the society in spite of sentencing remarkable number of offenders with different punishments by the courts in every year. Even it is commonly alleged that after release from prison it is quite tough for the prisoners to reintegrate themselves in the society and resultantly the released prisoners become a harder criminals. Different types of harsh punishments in jails make the prisoners cruel and vindictive and they learn the tactics of dreadful crimes coming in association with other habitual prisoners. Per contra, different kinds of alternative sanctions such as probation, community service, compensation and compromise with victim's family and alternatives to imprisonment such as parole, conditional release and remission will be conducive in rehabilitation and reintegration the offenders in the society with an expectation of reduction of recidivism and maintenance of peace and tranquility. By introducing alternative sanctions to convicted offenders both the countries may find probable solutions of getting rid from the problem of acute overcrowding in jails and as such save a huge expenditure from government exchequer.*

**Keyword :** *Punishment, Prison, Recidivism, Probation and Parole.*

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## I. Introduction

Bangladesh and India are fighting against overspreading organized or unorganized crimes through judicial and extra-judicial forms and manners. Being poverty ridden countries with dire uneven social structure sometimes planned attempts to curb crimes do not work hopefully which makes the criminologists invent new formula. Formal corporeal punishments through the administration of criminal justice have been being used as the means of controlling recidivism in the society. It is primarily used as a method of protecting the society by reducing the occurrence of criminal behavior. There has been a long debate on the effectiveness of different types existing punishments falling under some categorized theories of penal actions. The criminologists differ each other fundamentally on the issue of actual efficacy of corporeal punishments inflicted on the offenders by the state in its corporate capacity. In course of time, human attitude become more rational and humane towards crime and criminals and rehabilitation and correction of offenders, not their punishment, has become the prime concern avoiding all types of corporeal punishments. Considering rehabilitation and reintegration of offenders in the society and reformation in criminal tendency, imposition of alternative sanctions to convicted offenders by criminal justice system is the possible way to modernize the punishment theories. Bangladesh and India have already passed several laws through their respective legislative organs to adopt alternatives to traditional punishment mechanisms. In terms of correctional and rehabilitation measure Indian

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<sup>4</sup>Monjur Kader & M D. Muajjem Hussain, *Criminology* 233 (2nd ed. Books 4 U, Dhaka, 2010).

penal policies are much ahead than those of Bangladesh.

## **II. Punishment**

### **Philosophy:**

Broadly speaking there are two basic philosophies of inflicting punishment upon the convicted offenders namely utilitarian and retributive views. The proponents of the former advocate that the purpose of punishment should be imposition of punitive measure on the offenders to discourage or deter future wrongdoers. The utilitarian theory is “consequentialist” in nature. It recognizes that punishment has consequences for both the offenders and society and holds that the total good produced by the punishment should exceed the total evil. Under this theory, the end of punishment is not to persecute the offender solely but it has got a long term utility in the society. The proponents of the latter urge that punishment is justified as a form of vengeance and hence wrongdoers should be forced to suffer because they have forced others to suffer. The essence of this principle is that the punishment should fit the crime. A criminal should be punished according to what he deserves, neither more nor less, and what is useful to society is irrelevant. Under the umbrella of these two broad philosophies the jurists of criminal jurisprudence opine for four ‘theories of punishment’ Though opinions have always differed as regards punishment of offenders varying from age-old traditionalism to recent modernism, broadly speaking these four types of views can be distinctly found to prevail.

### **Deterrent Theory:**

According to this theory the evil-doer is punished not only for occurring crime but also to deter others in the society by setting examples. The punishment should be so severe that it will act as a warning to all likeminded persons so that they will deter from committing such crimes by fear of consequence. The eminent jurist Salmond, a strong supporter of this theory, is of the opinion that punishment is before all things deterrent and the chief end of law of crimes is to make the evil doer an example and a warning to all that are likeminded with him. In some cases the offender might be given more rigorous punishment than what s/he deserves with a view to making example. Punishment also deters the convicted criminals of committing offence in future.

### **Retributive Theory:**

The origin of this theory can be traced back at the very ancient period of human civilization and jurists used to consider it as an appropriate approach of punishments. The principle of ‘eye for eye’, ‘tooth for tooth’, ‘limb for limb’ and ‘life for life’ is followed and recognized by this theory. The idea behind this theory is that the person who caused suffering to one should also realize the same. In the very primitive ages the victim was allowed to cause the same harm to the offender to mitigate vengeance and later on authority of imposition of punishment was shifted to the state to be exercised by its corporate capacity. Plato was supporter of this theory professing that every culpa demands expiation; the culpa is ugly, it is contrary to justice and order; the expiation is beautiful because all that just is beautiful and to suffer for justice is also beautiful.

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<sup>5</sup>Sheikh Hafizur Rahman Karzon, *Theoretical and Applied Criminology* 240-241(1st ed. Palal Prokashoni, Dhaka 2008).

<sup>6</sup>N. V. Paranjape, *Criminology and Penology* 217 (13th ed. Central Publication 2009).

<sup>7</sup>Kader, *Supra* note 1 at 240.

<sup>8</sup>Kent Greenawalt, *Punishment* 74 *J of Crim. L. & Criminology* 343 (1983).

## **Preventive Theory:**

Simple wisdom expects that prevention is better than cure. The proposition that 'not to avenge crime but to prevent it' is the philosophy behind the preventive theory. Different kinds of punishments are given to offenders with an object to disable or prevent him from further wrongdoings. By imposing punishments like imprisonment, death, forfeiture of office, the convicted is debarred from doing further offences. Paton writes that the preventive theory not only concentrates on the prisoner but also seeks to prevent him from reengaging criminal activities in future. Death penalty and exile meet the purpose of disabling the offenders. Adherents of preventive philosophy hold that prisonisation is the best mode of crime prevention as it removes criminals from society and incarceration disables them from further commission of criminal activity.

## **Reformative Theory:**

In course of time, human attitude has become more rational and humane towards crime and criminals. Rehabilitation of offenders, not their punishment, has gained the prime concern. As against retributive, deterrent and preventive viewpoints reformative approach to punishment brought a change in the outlook how to deal with the offenders. In developed human societies there was a shift from retributive and deterrent attitudes to reformative attitude, where penal policy started to formulate for bringing about a positive change in wrong doer through ethical and religious teaching. They advocate for narrowing down the gap between incarcerated life and free life. This theory favors indeterminate sentence and provided a ground for development of the philosophy of rehabilitation-a modern philosophy of incarceration. As the causes of criminality lie in biological, psychological or social conditions, the offenders should be treated, rather than punished. Social scientists, therefore, begun to develop treatment programs for institutionalized inmates.

## **III. Forms of Punishments:**

Punishments prevalent in different human societies were torturous, cruel, barbaric and inhumane. The criminals were treated rudely making deprived of all kinds of human rights and the forms of punishments by and large included flogging, mutilation, stoning, pillory, banishment, transportation, imprisonment and death penalty. Punishments were justified on the result of experiments conducted on lower animals that criminal behavior can be controlled by imposing harsh forms of punishments. In course of time the forms became civilized and humane. Humanitarianism started its influence on penology towards the end of eighteenth century. It started appealing to the conscience of human being and public opinion shaped in line with liberal ethos and demanded that severity should be kept to minimum in any penal program. Penal policies of Bangladesh and India are almost the same as the legal systems of both the countries are inherited from British legacy. The Penal Code-1860, which was passed during British regime in accordance with report of the first Law Commission, is the main substantive penal law covering almost all spheres of criminal offences with their definitions and punishments. Under this very comprehensive law punishments are categorized into five headings i) death, ii) life imprisonment, iii) imprisonment which will be either simple or rigorous, iv) forfeiture of property and v) fine.

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<sup>9</sup>V.D. Mohajan, *Jurisprudence & Legal Theory* 145 (5thedn, Eastern Book Company, Allahabad, 2003).

<sup>10</sup>Id at138.

<sup>11</sup>Sui Titus Reid, *Crime and Criminology* 85-86 (8thedn, McGraw-Hill, Boston 1997).

#### IV. Efficacy of Traditional Punishments:

Modern penologists show their skepticism on the proper role of traditional punishments in curbing criminality. There are a lot of criticisms of deterrent theories of punishment in modern times because the life of a particular person should never be made example to attain ultimate purpose of the state; that is to deter others. It is contented that the deterrent theory has been proved ineffective in checking crime. Excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy to the public towards those who are given cruel punishments. Deterrent punishment is likely to harden the criminal instead of creating in him fear of law. Hardened criminals are not afraid of punishment. Punishment loses its horror once the criminal is punished. Beccaria writes “ The more cruel punishment become the more human minds hardened, adjusting themselves, like fluids to the level of object around them; and the ever living force of the passion brings it about that, after a hundred years of cruel punishment, the wheel frightens men only just as much as it first did the punishment of prison”.

As regards retributive theory critics point out that punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Revenge is wild justice expressing animal cruelty. The retributive philosophy is said to underline in the crude animal instinct of human being. It believes that such amount of punishment should be inflicted on the criminal which is commensurate to outweigh the pleasure which he derive from the crime. Retributive theory treated it as an end in itself, which has no concern for attaining social security through the institution of punishment.

Prevention of crimes in the society is the principal object of almost all types of punishments. Though generally accepted worldwide, the preventive theory has got some intrinsic drawbacks in terms of sociological and economic aspects. There is no evidence that harsher confinement conditions reduce recidivism. It is suggested that minimum harshness tends to increase his likelihood of rearrests following release. Whilst there is a general belief that harsher punishments deter crime, research has shown that severe punishments are not guaranteed to deter future crime. Whilst incarceration is the most severe form of punishment in most criminal justice systems, second only to the death penalty, it is an environment into which the majority of inmates can adapt to, thus lessening its severity. Harsher prison conditions rather induce recidivism among released convicts with great implication on penal policy. It is observed that when an individual enters prison, he enters a ‘society of captives’. Because of this association with other criminals, many inmates become more criminally inclined, rather than less. Their identity shifts from a member of society, to a prison inmate, and therefore their criminal behavior is reinforced and encouraged. Upon release, their self-identity as a prisoner has an adverse effect on their ability to successfully reintegrate, thus increasing their chances of recidivism. Besides keeping a person in jail casts stigma not only on the convicted but also on his family members who are living in a dominant society. Because of their association – consanguineous, marital or emotional – with prisoners, family members are often a target of ostracism by the dominant society and, sometimes, accused of collaboration in criminal activities. These types of allegations tend to be particularly vivid in dealings with institutions of the criminal justice system, such as courts and prisons, resulting in

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<sup>12</sup>Barry F. Singer, Psychological Studies of Punishment, 58 Calf. L. Rev. 405 (1970).

<sup>13</sup>Penal Code, 1860.No 45 Act of Parliament 1860.

<sup>14</sup>Mohajan, Supra note 3 at 138.

<sup>15</sup>Paranjape, Supra note 3 at 145.

<sup>16</sup>M. Keith Chen & Jesse M. Shapiro, Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach, 9 Am. Law. Eco. Rev, 3 (2007).

situations in which family members report feeling diminished and/or intimidated because they are treated as if they shared some of the guilt of the criminal act.

## V. Transformation:

With the passage of time human notion to crimes and criminals has been changed to a great extent and modern criminologists are of the view that crime rate can be resisted in given society even without inflicting corporeal punishment and penologists try to invent new methods of punishments from time to time. Although in earlier societies punishments whatever might be the forms were regarded as the tools of making reformations in the delinquent tendency of a criminal the concept 'reformation' in contemporary penology indicates a little bit different punishment theory predominating on the correctional measures of the criminals. At present, however, when the punitive reaction decreases, a treatment reaction usually increases. While in some cases there still is no positive alternative to the punitive reaction, the trend during the last century has been toward a societal reaction in which the criminal is treated rather than punished. If a person is prepared to accept the utilitarian account of punishment at all, he will quite naturally give the reform function an important moral place. Indeed, that punishment should be primarily reformative is thought to be the very essence of any approach which can lay claim to being humane, liberal and civilized. It is argued that behind the criminal behavior of a person society may also have contribution in various ways and mere uniform corporeal punishment set up is not expected to be successful to reduce crime rates in such society. Reformative theory has also been criticized on the ground of its limitations in the scales of criminology and penology. It cannot be applied in cases of habitual offenders as it is not easy to change habits. Another limitation of this theory is that society may not accept showing good behavior towards criminal who did not show such from his part. Furthermore, reformative approach may make a feeling in the mind of the offender that prison is not a place of suffering for the wrong done by him. But at the present context utilities of reformative theory override the criticisms and penologists propose some effective measures to mitigate the side effects of application of this theory. Taking into account the reformative purpose of punishment, the modern prisons are providing all necessary articles that are needed for the reformation of a criminal. If we snatch away everything from a criminal by putting him in prison and supply only one piece of cloth and two pieces of bread that shall never make him a normal person. Experience shows that by taking deterrent or preventive theory of punishment we just increase the number of criminals and helping the normal criminal to be a notorious one. On the other hand by reforming and amending their behavior, criminals are becoming normal citizens of the society and ultimately the number of criminals decreases. This modern philosophy of punishments gave rise of some new avenues of management and treatment offenders and encourages the criminal justice system to impose non-custodial measures as alternative to incarceration and capital punishment.

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<sup>17</sup>Id at 10.

<sup>18</sup>Eilidh MacDonald, Does Imprisonment as a Punishment Deter Crime? <http://justspeak.org.nz/wp-content/uploads/2012/11/Does-imprisonment-deter-crime.pdf> (accessed on 12.11.2016)

<sup>19</sup>Rafaela Granja, Beyond prison walls: The experiences of prisoners' relatives and meanings associated with imprisonment,9 *Probation Journal* 6 (2016)

<sup>20</sup>Edwin H. Sutherland & Donald R. Cressy, *Principles of Criminology* 310 (6th edn., J. B. Lippincott Company, New York, 1960).

<sup>21</sup>Arnold S. Kaufman, *The Reform Theory of Punishment* 71 *Ethics*, 49 (1960).

## VI. Alternative Sanctions Prospect:

Given that imprisonment inevitably infringes upon at least some human rights and that it is expensive, is not it justified to find out some alternatives? The reality is that most of the objectives of imprisonment can be met more effectively in other ways. Alternatives may both infringe less on the human rights of persons who would otherwise be detained and may be less expensive. Measured against the standards of human rights protection and expense, the argument against imprisonment, except as a last resort, is very powerful. Although community-based treatment and other wraparound social services do carry a price tag, their cost is much less than that of incarceration, especially when one considers the effectiveness of diversion and reentry programs at reducing recidivism. Till date the penologists have found a number of forms of alternative sanctions with single or combined applications. The UN passed an instrument, the Tokyo Rules, to keep sheer emphasis on the adoption of non-custodial sanctions on the convicted offenders.

### Forms:

Although it is not possible to make an exhaustive list of the modes of alternative sanctions especially applicable in a particular legal system the Tokyo Rules provides a comprehensive list of non-custodial measures dividing them into two phases namely 'sentencing disposition' and 'post sentencing disposition'. While inflicting sanctions upon the convicted the judicial authority should take into account the rehabilitative needs of the offenders, the future wellbeing of the society and the necessities of the victim, who may be consulted in necessary cases. The judicial authority may deal with the cases in the following manners:

- (i) Admonition or warning;
- (ii) Conditional discharge;
- (iii) Demotion of status;
- (iv) Fines;
- (v) Forfeiture of property;
- (vi) compensation to victim;
- (vii) Deferred sentence;
- (viii) Probation;
- (ix) Community service;
- (x) House custody;

In case of post sentence disposition the jail authority shall have a wide range of alternatives to imprisonment in order to avoid the effect of long term prisonisation and to assist offenders to reintegrate into society. Post-sentencing dispositions are but not limited to:

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<sup>22</sup>Kader Supra note1 at 245.

<sup>23</sup>Id at 244.

<sup>24</sup>United Nations Office of Drug and Crimes, Handbook of basic principles and promising practices on Alternatives to Imprisonment, (March 3, 2017) [http:// www.unodc.org/pdf/criminal\\_justice/Handbook\\_of\\_](http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf)

[Basic\\_Principles\\_and\\_Promising\\_Practices\\_on\\_Alternatives\\_to\\_Imprisonment.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf).

<sup>25</sup>Charles J. Hynes, A Prosecutor's Collaborative Models for Reducing Criminal Recidivism, 36 Human Rights, 25 (2009).

<sup>26</sup>United Nations Standard Minimum Rules for Non-custodial Measures -1990(The Tokyo Rules).

- (i) Furlough;
- (ii) Work or education release;
- (iii) Parole;
- (iv) Remission;
- (v) Pardon.

Amongst them probation and parole may be the best suitable alternatives in the context of both Bangladesh and India because these two modes have some mixed characteristics of traditional punishment and modern correction. There are a lot of prospects of proper utilization of probation and parole to decrease crimes rate and recidivism with an ultimate effect on acute overcrowding in prisons of Bangladesh and India. In Bangladesh whole jail administration is about to collapse with more than double number of inmates than its actual capacity and the jails have become the breeding houses of crimes due to massive corruption inside jails. Indian jails are also overburdened with huge number of inmates with low quality of service and inhumane conditions. Against such backdrop frequent use of probation and parole options may rescue the country from such awkward situation.

### **Probation:**

Having its origin in the United States, probation, a common legal term in the criminal justice system, has acquired significant domination in correctional penal policy all over the world. It has earned popularity for its intrinsic benefits for both offender and the state. In common parlance, probation means and includes the suspension of sentence of convicted offenders subject to supervision on certain conditions imposed by the court. It allows the convicted offenders to stay in the community with a little different status from that of other free citizens and involves a supervisory mechanism regulated by probationers and courts.

### **The advantages of probation system are:**

- a. The offenders feel that the authority is sympathetic to them that the crime they had committed was a mere accident. Now they need congenial approach from authority to make positive changes in their personality, behaviour, attitude, and outlook towards life.
- b. The offenders are permitted to remain within the community and family letting them to perform their family duties and obligations which help them get rid of criminal behavior.
- c. It saves a convicted offender, who is victim of circumstance while committing crime, from criminal stigma.
- d. It saves huge government expenditure on maintaining a certain section of population in the prison.

Probation is often misconceived by some people as an easy let-off or a form of leniency and not a punishment. But this notion is rather misleading. Probation, whether it is for juveniles or adults, permits a more normal social experience than institutionalization and makes possible varying degrees of institution if he violates probation conditions. In other words, probation enables the delinquent to maintain contact with his family and other social agencies. It means a little routinized and self-directed existence. Unlike imprisonment it makes the offender independent

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<sup>27</sup>Id Art 8.

<sup>28</sup>Human Rights Watch, India 2015 Human Rights Reports (March 3, 2017) <https://www.state.gov/documents/organization/253175.pdf>

and leaves him responsible for self-support. It enables the probationer to keep himself away from criminogenic atmosphere of prison and earn his living rather than leading an idle and wasteful life. In short, probation offers an opportunity for probationer to adjust himself to normal society thus avoiding an isolated and dull life in prison.

## **Parole:**

Parole in popular sense means a mechanism of release from a penal or reformatory institution of an offender in an attempt to examine the prisoner's suitability to stay in the society without formal control. The parole is a reward to the prisoner awarded as a result for good record in prison. The importance of this special treatment lays on the fact that it provides the prisoner a free social life within necessary control. The authority concerned keeps a close examination on the prisoners and one who responds positively to the disciplines of the prison and shows probability of reformation in the nature after release is permitted for a special treatment and finally released to remain in society with some conditions for a certain periods. So parole is an important individualized formula of prison treatment and leads the prisoners to the easy adjustment to the community.

Two important matters are considered in dealing with parole issue—selection and supervision. A prisoner detached from the family and the society is prone to be turned a dangerous criminal and that such temporary release from jail may reduce his criminal tendency.

The relevant statutory provisions relating to the release of a prisoner on parole or furlough, as the case may be, recognize that the man behind the bars is still the member of his family and society. Yet the same human wants, urges, duties and obligations and that the rehabilitative purposes of sentencing would be promoted by permitting him to fulfill those basic human needs and filial and social duties by occasionally permitting him to live for short periods in his home as well as in the community where he has his roots. Parole is, therefore, permissible to any prisoner, with a record of good conduct in Jail subject to certain limitations and conditions, if it is established to the satisfaction of the releasing authority that a member of the prisoner's family has died or is seriously ill, or that the marriage of his son or daughter is to be celebrated, or that his temporary release is necessary for carrying on agricultural operations on his land since no friend or member of his family is prepared to render him any assistance in that behalf in his absence. The residuary ground for release on parole, namely, that it is desirable so to do for any other sufficient cause, entrusts the releasing authority with a wide discretion which has to be exercised with circumspection and in a just manner, according to common sense and sound judgment, so as to advance the remedy and to effectuate the object. Parole to a prisoner should be granted in the exercise of such discretion on any occasion or in any situation in which his being in the midst of his family, community or society could be regarded as essential or even desirable on any good and valid ground. These various grounds indicate that the law on the subject of parole recognizes that incarceration should not lead to the prisoner's total obfuscation from the family or community and ensures his continuing participation, tailored to considerations of public order and security and subject to reasonable restrictions, in the affairs of his family and society. Parole or furlough must not be considered as an act of kindness to the prisoner but as an act in the discharge of an official duty required to be performed by the authority upon the fulfillment of the conditions.

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<sup>29</sup>Madhusudhan P. S. & Dr. B. Nagarajamurthy, *Concept of Probation* 4 Int. J. of Innovative Res. & Dev. 3 (2015).

<sup>30</sup>Paranjape *Supra* 3 at 469.

<sup>31</sup>Charles L. Newman *Source book on probation, parole and pardons* 73 (3rd ed. Springfield, IL 1970)

## VII. Probation in Bangladesh and India:

### Bangladesh:

#### Probation in Theory:

The Penal Code-1860 provides different types of punishments without any reference of probation. The Code of Criminal Procedure -1898 incorporated provision of probation under sections 562, 563 and 564 with a view to embracing correctional philosophy in penal policy in Indian sub-continent. In Pakistan period Probation of Offenders Ordinance-1960 was issued which repealed probation sections in the Code of Criminal Procedure and provided a full-fledged law to regulate probation. In 1962 two projects were initiated to implement probation effectively i) Probation of Offenders project ii) After Care Service project. Primarily these programs were started separately in ten places in the country. From 1965 these two projects were merged into an integrated one and since then 21 units have been in operation in district headquarters under the supervision and management of Social Service Department of the Government of Bangladesh. It is mentionable here that Probation of Offenders Ordinance-1960 provides for central Probation Department to manage and administer probation countrywide. After an amendment by the former East Pakistan Assembly in 1964 the Ordinance turned into Act. By this amendment probation service was entrusted to the Directorate of Social Welfare though it is to be established yet. Now Social Service Department has been administering the program of probation along with its manifold general services. To fulfil the purposes of this Act Bangladesh Probation of Offender Rules-1971 was passed inserting detailed applications of probation. The Children Act-2013 stipulates the provision of probation for juvenile delinquents and the Special Privileges for Convicted Women Act-2006 provides for appointment of probation officer.

General analysis of the above three laws relating to probation reveal some important issues:

Following courts are entitled to grant probation to the offenders instead of sending them to jails;

- i) High Court Division
- ii) Court of Sessions
- iii) District Magistrate
- iv) Magistrate of First Class
- v) Any other magistrate especially empowered in this behalf.

Court may exercise powers under this ordinance whether the case come before it for original hearing or on appeal or on revision. When court finds any person guilty for an offence punishable with imprisonment for not more than two years who has not previously been convicted it after considering the age, character, antecedents, or physical or mental condition of the convicted person and the nature of the offence or any extenuating circumstances may make an order discharging him after due admonition or if the court thinks fit it may likewise make an order discharging him subject to condition that he (convicted) enters into a bond with or without sureties. Before passing such order court shall inform him that if he fails to show good behavior or commit any offence for the time specified he has to undergo the sentence which was exempted. The probation period for good behavior shall not exceed one year.

The offences for which court can order for probation are:

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<sup>32</sup>Kesar Singh Guleria v. The State of H Pand Ors. MANU/HP/0034/1984.

- i) Any female convicted of any offence other than the offences punishable with death.
- ii) Any male person convicted of an offence not being
  - a) Crimes punishable with death penalty or life imprisonment,
  - b) Crimes against the State,
  - c) Crimes related to the Army, Navy and Air Force,
  - d) Crimes of sheltering robbers or dacoits,
  - e) Causing hurt by means of poison, etc, with intent to commit an offence,
  - f) Theft after preparation made for causing death, hurt or restraint, in order to commit theft,
  - g) Extortion by putting a person in fear of death or grievous hurt,
  - h) Putting person in fear of death or of grievous hurt, in order to commit extortion,
  - i) Extortion by threat of accusation of an offence punishable with death or imprisonment,
  - j) Offence relating to Robbery and Dacoity,
  - k) Punishment for being the member to gang of thieves,
  - l) Offences relating to lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

Additionally, Bangladesh parliament has passed recently the Children Act-2013 repealing the former The Children Act-1974 with great emphasis on the correction of juvenile delinquents. Compulsory probation system of juvenile offenders is the unique feature of this Act. Unlike the old one the new law deals with the appointment, and responsibilities and duties of Probation Officers more elaborately. The Act provides that the government shall appoint one or more Probation Officers in every district, upazila or metropolitan area and that, until such appointments, Probation Officers appointed under any other law shall continue to work as Probation Officers under the Act of 2013. Until the appointment of a Probation Officer in any area the government may entrust any Social Welfare Officer or any other officer of similar rank working in the Department, i.e. the Department of Social Welfare or in a different district or upazila under the Department, with the responsibilities of the Probation Officer. The new Act gives details of the duties and responsibilities of a Probation Officer including what they must do when any child, either in contact or in conflict with the law is brought or otherwise comes to the police station. In the case of children in contact or in conflict with the law, the Probation Officer is to observe the conditions relating to diversion or alternative care and to carry out any other responsibilities that may be prescribed by Rules.

### **Probation in Practice:**

In terms of actualizing the probation process, the Probation Officer plays a vital role throughout the process. The probation process is different for adult offenders (both men and women) and for children in conflict with the law. In case of adult offenders, if the Court considers it suitable it may issue a requisition for a Pre-Sentence Report (PSR) directed to a particular Probation Officer before declaring judgment. Assessing the PSR, a Court can issue a probation order for adult offenders under certain conditions. On the other hand, the probation process

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<sup>33</sup>The Probation of Offenders Ordinance -1960, sec 3, 45 no Act 1960 (Bangladesh)

<sup>34</sup>Id sec 4

<sup>35</sup>Id sec 5

<sup>36</sup>Shishu Ain-2013, No. 24, Act of Parliament, 2013 (Bangladesh)

for children begins as soon as a child comes into conflict with the law. Probation Officer must be present in trial in a Children's Court. At the beginning, Court requires a Probation Officer to produce a Social Inquiry Report (SIR). Finally, the Children Court may send the child under supervision of probation officer. It is to be noted that no female child may be placed in the supervision of any male Probation Officer.

The Probation Service in Bangladesh is a small division of the Department of Social Services (DSS) under the Ministry of Social Welfare. Probation Officers are officially accountable to the Director of the DSS. They are legally incumbent to monitor, supervise and report duties as directed by the Court. At present, there are 44 positions for Probation Officers nationwide at the district level. As there are 64 districts in Bangladesh this situation indicates that there are many districts of Bangladesh where there are no Probation Officers. Social welfare officers are performing the duties of Probation Officers in addition to their regular duties. The probation is a very insignificant section of social welfare scheme of the Government of Bangladesh.

In Bangladesh, probation is not familiar phenomenon to the stakeholders and actors especially the lawyers are not well conversant about this privilege which can be made available to a convicted offender. The DSS probation officers are not sincere enough to make this provision available to convicted offender. In the fiscal year of 2014-2015 only 436 convicted offenders were released on probation including both female and children.

## **India:**

### **Probation in Theory:**

In India, probation is used as an institutional method of treatment which is a necessary appendage of the concept of crime. The criminal judiciary is the kea actor in the probation scheme in India. The Probation of Offenders Act-1958 is the cardinal law governing probation system along with other statues such as section 360 of the Code of Criminal Procedure-1973 and the Juvenile Justice Act-2000.

When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour.

Any magistrate may pass an order under this section. Magistrate of the third class or of the second class not specifically empowered by the state government has to submit the proceeding to Magistrates of the first class or Sub-Divisional magistrates.

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<sup>37</sup>Justice M Imman Ali Justice for Children in Bangladesh. (November 15, 2016)

[http://www.supremecourt.gov.bd/resources/contents/Children\\_Act\\_2013-Brief\\_Commentary\\_v4.pdf](http://www.supremecourt.gov.bd/resources/contents/Children_Act_2013-Brief_Commentary_v4.pdf)

<sup>38</sup>Bangladesh Legal Aid and Services Trust (BLAST) and Penal Reform International (PRI), Development and Use of the Probation System in Bangladesh ( October 30, 2016) <[www.blast.org.bd/publications/opb](http://www.blast.org.bd/publications/opb)

<sup>39</sup>Annual Report (Draft) ( November 12, 2016) [http://www.dss.gov.bd/site/view/annual\\_reports/Annual-Reports](http://www.dss.gov.bd/site/view/annual_reports/Annual-Reports)

When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to release the offender under probation, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so. It implies that it is imperative for court to release under aged offenders on probation.

Although the Probation of Offenders Act-1958 has got an overriding effect section 360 of Cr. P. C. is equally applicable in granting probation providing that when any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behavior.

### **Probation in Practice:**

The Act of 1958 applies to all offenders irrespective of ages and genders. It permits the release on probation for a maximum period of three years and also has a provision for revoking the term. Some states (like Rajasthan, Uttar Pradesh, Assam and Himachal Pradesh) have linked probation with social welfare and others (like Bihar, West Bengal, Punjab, Andhra Pradesh, Tamil Nadu and Kerala) with the Prison Department. Madhya Pradesh has linked it with the Law Department, while Karnataka has its separate Directorate.

The probation officer has been assigned two functions: social investigation and super-vision of probationers. There are about 500 probation officers in the country. On an average, one probation officer investigates 20 cases and supervises ten cases a year.

## **VIII. Parole in Bangladesh and India**

### **Parole in Bangladesh:**

#### **Parole in theory:**

There is no statutory mother law dealing with parole provision in Bangladesh. Jail Code of Bangladesh (which is not a statute) envisages provisions of granting parole to the prisoners as follows:

- Certain classes of prisoners who have fulfilled the following conditions may be released on parole:

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<sup>40</sup>The Probation of Offenders Act-1958, sec 4, 20 no Act 1958 (India)

<sup>41</sup>Id sec 6

<sup>42</sup>Smritisikha Law regarding probation in India Your Article Library (November 15, 2016) <http://www.yourarticlelibrary.com/law/law-regarding-probation-in-india/43992/>

- (1) That he has served half of his sentence including remission;
  - (2) That he has maintained good conduct in the prison throughout his imprisonment ;
  - (3) That he must have completed thorough training on a particular trade allotted to him in the prison industries. The certificate for completion of his training on a particular trade will be issued by the Senior Superintendent/ Superintendent on the recommendation of the Deputy Superintendent (in central jails);
  - (4) That he will not revert to crime after release and shall in no case be a problem to the society.
- No prisoner of the following categories will be eligible for parole:
- (1) Prisoner under sentence of death.
  - (2) Prisoner sentenced to rigorous imprisonment for life.
  - (3) Prisoner sentenced for sedition and treachery against the state.
  - (4) Prisoner convicted under the Arms Act, 1878, the Explosive Substances Act, 1908 and the Narcotics Control Act, 1990 or any other Act relating to Drugs.
- Supervision:
- Upon release of a prisoner on parole he shall remain under parole supervision for the remaining period of his sentence under social welfare department or any other voluntary organisations as determined by the Government.

➤ Parole Board:

The Senior Superintendent/Superintendent of the jail to which such prisoner belongs shall make initial recommendation for release of a prisoner on parole to the Parole Board.

Parole Board shall consist of the following members:-

- (1) Secretary, Ministry of Home Affairs, who shall also be the Chairman of the Board.
- (2) Secretary, Ministry of Social Welfare.
- (3) Secretary, Ministry of Law, Justice & Parliamentary Affairs.
- (4) Inspector General of Prisons, Bangladesh.
- (5) Deputy Inspector General of Prisons of the Division to which such prisoner belongs.
- (6) Senior Superintendent/Superintendent of Jail who made the initial recommendation for release on parole, who shall also be the Member- Secretary of the Board.

Violation of parole conditions: If a prisoner, released on parole, violates any conditions of parole he shall be re-arrested and committed to the prison to serve out the remaining portion of his sentence.

### **Parole in Practice:**

It is clear from the above provisions that apart from emergency parole there are regular and permanent parole systems in Bangladesh with some restrictions as to offences under particular laws. A prisoner is entitled to this special privilege after serving half portion of sentence subject to good conduct in jail and having training on trade. But in practice there is not a single example of releasing a prisoner on permanent parole in Bangladesh rather this noble instrument is often misused for political purpose. After independence of Bangladesh there were many instances of

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<sup>43</sup>The Bangladesh Jail Code revised upto 2006, Rule 781,(Bangladesh).

emergency parole favored to the veteran politicians who were in jail in criminal cases. Political leaders such as H. M. Ershad, Khaleda Zia, Sheikh Hasina, were released on parole for a long period and other leaders such as Luttfuzzaman Babor-ex home minister, Delower Hossain Sayedee-leader of Jamat-e-Islam, Tarek Rahman and Arafat Rahman-sons and leaders of BNP were given emergency parole on different times. In Bangladesh there is no specific law, except broad umbrella rules of Jail Code, for regulation and management of parole of convicted prisoners especially for permanent parole-conditional release after serving a considerable portion of imprisonment. Even the judiciary remains silent about proper utilization of this golden method by which overcrowding in jail and recidivism in the society may be reduced to a level. Lately The Special Privileges for Convicted Women Act, 2006 has introduced formal permanent parole for women prisoners being released early on condition of good conduct under supervision of Probation Officer.

## **Parole in India:**

### **Parole in theory:**

The overall criminal administration in India is positively prone to the reformatory and rehabilitative modes of punitive measures to be imposed on the offenders. Different types of non-custodial measures which include probation, parole, open jail, community service, and correction center are developed in a great scale as alternatives to incarceration. The Government and judiciary show positive attitude to the prisoners with a view to bringing reformation in criminal tendency and readjusting the offenders in the mainstream of society. As a result some of the barbaric punishments were abolished from punishment categories and system of awards for good work and conduct in the form of remission, review of sentences, wages for prison labour, treatment in open jails, probation, parole, furlough, canteen facilities have been introduced in penal policy. The jail authority in India regularly permits the prisoners to stay out of heavy walls of jail in form of parole in different manners.

In India, there are no statutory provisions dealing with the question of grant of parole. The CrPC does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking an administrative action.

In India, the grant of Parole is largely governed by the rules made under the Prison Act, 1894 and Prisoner Act, 1900. Each of the States has its own parole rules, which have minor variations with each other. There are two types of parole- custody and regular. The custody parole is granted in emergency circumstances like death in the family, serious illness or marriage in the family. Regular parole is allowed for a maximum period of one month, except in special circumstances, to convicts who have served at least one year in prison. It is granted on certain grounds such as: serious illness, accident, death and marriage of a family member or delivery of child by wife of the convict or maintain family and social ties or serious damage to property of convict by natural calamities or performing agricultural function etc. Certain categories of convicts are not eligible for being released on parole like prisoners involved in offences against the State, or threats to national security, non-citizens of India etc. People convicted of murder and rape of children or multiple murders etc. are also exempted except at the discretion of the granting authority. In Rajasthan a prisoner may be released on permanent parole after successful completion of three short term paroles.

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<sup>44</sup>Sunil Fulchand Shah v. Union of India & Ors. MANU/SC/0109/2000

Parole Board: Generally State Government, Divisional Commissioner, Superintendent of jail, District Magistrate, State Committee and District Committee approve regular parole normally on the reports of Superintendent of police of concerned district and/or of judges by whom the prisoner was convicted.

### Parole in Practice:

Given consideration to the reformatory trends and overcrowding in jails the Indian jail authority is increasingly allowing the prisoners conditional release in form of parole. But there are some practical problematic issues in parole regime which frustrate the ultimate objectives of this noble initiative. It is alleged that parole procedure is being misused by both the authority and parolee. Political affiliation and social status of the prisoners are mainly considered while granting parole but poor and destitute prisoners are deprived of this opportunity. On the other hand the parolees violate the parole conditions such as getting involved in criminal activities and not returning to jail after expiration of parole period. Following data indicates the ascending rate of grant of parole along with misuse by parolee in India:

Year	Released on parole	Parole Absconders	Parole absconders arrested
2011	28581	683	333
2012	36459	563	201
2013	33031	613	245
2014	32890	374	225
2015	39199	501	209

The above table implies that parole is an emerging issue in Indian criminal justice system with some sorts of challenges in proper implementation. The parole cases of Sanjay Dutt, who is a famous actor convicted in Mumbai blast case, and Manu Sharma, who is a son of a political leader and convicted in Jessica Lal murder case, triggered criticism against misuse of grant of parole by the concerned authority. In spite of risk it is a praiseworthy approach of Indian criminal administration towards reformatory penal policy.

### IX. Conclusion

Most of the penal laws in Bangladesh and India were enacted during British regime and ulterior objects of the then government were to control the colonial subjects at anyhow mostly by penal instruments. But the present Constitutions of both countries envisage welfare safeguards to the citizens including personal liberty and safeguards against torture, cruel, inhuman, degrading punishment or treatment . In tune of the Constitutional vision Bangladesh and India are heading towards correctional approach in criminology and penology schemes and have already passed some laws which allow the concerned authorities to impose alternative sanctions to the convicted offenders including probation and parole. There is no doubt that delinquent behaviors are result of psychic disorder pressing desire for love and recognition. Although the penal system of Bangladesh is essentially reformatory in character as opposed to retributive there are deficiencies

<sup>45</sup>NSSR Murthy &Dr. MSV Srinivas, Indian Parole System- A Review of Judicial Stand and Critical Issues, 4 Int. J. of Innovative Research and Development (Nov. 10, 2015) <http://www.ijird.com/index.php/ijird/article/viewFile/77696/60297>

<sup>46</sup>RAJASTHAN PRISONERS RELEASE ON PAROLE RULES, 1958 Rule 9.

<sup>47</sup>Prison Statistics-An Annual Publication. (December 20, 2016) <http://ncrb.gov.in/StatPublications/PSI/psimainpage.htm>

in proper implementation of correctional measures in sentencing process and jail administration. Parole and probation are rarely used in criminal administration of Bangladesh. However, the concerned authorities namely judiciary and jail administration in India are a little bit ahead in this regard and have been succeeded in many exemplary instances. Probation, parole and open jail systems in India are playing considerable role towards the journey of correctional philosophy of punishment.

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<sup>48</sup>Art 35, the Constitution of Bangladesh Art 21, the Constitution of India.

<sup>49</sup>Joan McCord & William McCord, Two Approaches to the Cure of Delinquents 44 J. of Crim. Law, Crimino. & Pol. Sci. 463 (1953).

<sup>50</sup>LEX/BDHC/0075/2006