

## SENTENCING PRACTICES IN BANGLADESH

Tureen Afroz\*

### 1. INTRODUCTION

The purpose of this article is to present critical discussion on sentencing practices in Bangladesh. The criminal justice system of Bangladesh postulates that determination of the sentence, after conviction, is not a separate process. Both the conviction and the sentence imposed are pronounced together in delivering judgment. Further, in Bangladesh, the penal law gives a wide discretion to the sentencing judges for determination of the sentence that follows the conviction of a defendant. However, the exercise of such sentencing discretion by the sentencing judges is one area that remained largely ignored by Bangladesh criminal justice system. The penal policy of Bangladesh lacks sufficient alternative measures to punishment. Although there are elaborate provisions for compounding of offences (under section 345 of the *Code of Criminal Procedure* 1898) and probation (under the *Probation of Offenders Ordinance* 1960), yet these are hardly ever raised or adequately utilized.

In this context, my paper starts with a discussion on sentencing practice and its purposes from a general and global perspective. It then evaluates various critical aspects of sentencing practices in Bangladesh, such as, constitutional responsibility for sentencing, sentencing structure, types of available sentencing, compounding of offences, and appellate review of sentence. The paper will highlight the findings of surveys conducted on the Bar and the Bench in Bangladesh. In an attempt to critically examine the issue of sentencing discretion and related factors, this paper will present a discussion in the context of sentencing practices based on the survey conducted in Bangladesh. The paper will also examine alternative (and innovative) sentencing provisions available and sanctioned

---

\* Tureen Afroz is an Assistant Professor of Law at BRAC University School of Law, Bangladesh and the Executive Director of LawDev (Bangladesh) – a law and development policy research institute. She has her Ph.D. from Monash University, Australia; LL.M. (International Business Law) from the University of Western Sydney, Australia; LL.B. (Hons.) from the University of London, UK; M.A. (Economics) from Delhi School of Economics, India and B.A.(Hons.) (Economics & Political Science) from the University of Delhi, India. She is an Advocate of the Supreme Court of Bangladesh and has also been admitted as a Barrister & Solicitor in Australia. She can be contacted at: [tureen@bracuniversity.ac.bd](mailto:tureen@bracuniversity.ac.bd).

in other criminal jurisdictions, such as, community service order, economic sanctions, house arrest, referral to an attendance center, shaming, status penalties, and suspended sentencing. Finally, the paper would suggest a viable proposal for reform in sentencing practices that could be enacted and made applicable in Bangladesh.

## 2. SENTENCING PRACTICE

Sentencing is becoming a more complex task day by day. Internationally, over the last fifty years there have been increasing attempts to try to reform sentencing practices in various jurisdictions. However, in reality the successful implementation of reform has been notoriously difficult to achieve.<sup>1</sup>

The act of sentencing is fundamentally a comparative process.<sup>2</sup> It is, of course, an axiom of judicial rhetoric on sentencing that every case is unique and as such each case must be judged in its own facts.<sup>3</sup> Therefore, many argue that since each case is unique it is therefore not possible to compare one case with another.<sup>4</sup>

Two diverse principles help us to analyze the complex process of sentencing: on one side, it is the principle of 'equality of treatment',<sup>5</sup> on the other, the principle of 'individualization of justice'.<sup>6</sup> The principle of 'equality of treatment' would mean that two convicts guilty of similar offenses under similar circumstances should get approximately the same treatment.<sup>7</sup> However, this principle is in direct conflict with the notion of 'individualization of justice',<sup>8</sup> which may justify letting one off with

---

<sup>1</sup> Tata, C, 'Conceptions and Representations of the Sentencing Decision Process' (1997) 24(3) *Journal of Law and Society* 395.

<sup>2</sup> *id.*

<sup>3</sup> Ashworth, A, Genders, E, Mansfield, G, Peay, J and Player, E, *Sentencing in the Crown Court* (Oxford: University of Oxford, Centre for Criminological Research, 1984); Taylor, L, 'Judges and Sentencing' 38(4) *Journal of the Law Society of Scotland* 129.

<sup>4</sup> Tata, *supra no.* 1.

<sup>5</sup> Wyzanski, C E, 'A Trial Judge's Freedom and Responsibility' (1952) 65 *Harvard Law Review* 1281.

<sup>6</sup> Coffee, J C Jr, 'The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice' (1975) 73(8) *Michigan Law Review* 1361.

<sup>7</sup> 'Due Process and Legislative Standards in Sentencing' (1952) 101(2) *University of Pennsylvania Law Review* 257.

<sup>8</sup> 'Individualization of justice' requires differences in treatment.

probation while confining the other for life depending upon the characteristics and needs of each offender.<sup>9</sup>

Criminal courts, thus, are often posed with a valid question: should the sentence, to be pronounced, fit the offence or the offender? Both academic writing and sentencing reforms have tended to assume that sentencing either begins, or, should begin, with consideration of the offence, then orientate a sentence which is then adjusted in the light of the nature of the offender.<sup>10</sup> But to ensure that punishments not only fit the crime, but also the particular criminal, the sentencing judge must labor to fulfill the dual and sometimes conflicting roles of judge and clinician.<sup>11</sup> Entrusted with enormous discretion, he is expected to 'individualize' the sentence he imposes to suit the character, social history, and potential for recidivism of the offender before him.<sup>12</sup>

### 3. PURPOSES OF SENTENCING

Whether a sentencing system can be said to work well depends much on its purposes, what it is supposed to do, and how well it does that. The old idea that the sentence was right if it was proportionate to the offender's culpability is no longer a sole objective of sentencing practice. Modern ideas on the purposes of sentencing frequently required a difficult choice between a sentence reflecting the gravity of the offender's crime (retributive theory), and one, which would serve some other purpose(s), such as, to deter potential offenders from committing same offence (general deterrence theory), to deter particular offender from offending again (specific deterrence theory), to prevent the particular offender from injuring society again by incarcerating him for a long period (preventive theory) and/or to enable the offender to take his place as a responsible and law abiding member of society (rehabilitative/reformative theory).

For long it was believed that the dominant aim in sentencing is retribution, rather than other aims such as deterrence, reformation, incapacitation, reparation, or denunciation.<sup>13</sup> Bentham claims that in the empirical development of criminal law, the principle of retribution was joined and partly overcome by that of general deterrence (and also,

---

<sup>9</sup> *Supra no. 7.*

<sup>10</sup> Tata, *supra no. 1*; Fox, R, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

<sup>11</sup> Coffee, *supra no. 6.*

<sup>12</sup> *id.*

<sup>13</sup> Farrington, D P, 'The Effectiveness of Sentences' (1978) 142 *Justice of the Peace* 68.

prevention).<sup>14</sup> The idea was to deter offenders by increasing the anticipated cost of crime, that is, the risk of detection and punishment, beyond expected benefits.<sup>15</sup> Savelsberg argues that the purpose of sentencing should no longer be simply to do justice, but to reduce crime and to diminish its costs to society (deterrence and preventive theory).<sup>16</sup> The next shift in the substantive rationalization of criminal law began when rehabilitation rather than punishment (due to retribution, deterrence or prevention) became the primary purpose of criminal justice.<sup>17</sup>

Tudor believes that the problem of *justifying imposing punishment* can be looked at from two diverse perspectives – first, from the perspective of the ‘agent’ or the ‘punisher’; and second, from the perspective of the ‘patient’ or the ‘punishee’.<sup>18</sup> According to Tudor, the problem of ‘agent justification of punishment’ centers around the agent i.e. the punisher. It refers mainly to the agent’s or the punisher’s perspective as to how he/she would justify the given punishment in a specific situation. Such focus on the agents is most common and most of the above-mentioned theories of punishment (retributive theory, general deterrence theory, specific deterrence theory and preventive theory) are based on such approach.

On the contrary, the problem of ‘patient justification of punishment’ basically focuses on the patient i.e. the punishee.<sup>19</sup> Tudor explains the patient justification of punishment in the following words:

Let us assume that some punishment has been justly imposed on a criminal offender. How might this person accept or reconcile herself to that punishment,

---

<sup>14</sup> Bentham, J, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner, 1948).

<sup>15</sup> ‘The purpose of the law in criminal jurisprudence is that sentence should ... serve as deterrent to the potential offenders for maintaining law and order situation in society’: *Nurun Nabi (Mohammad) vs. Sahin Alam alias Shahin and others*, 8 (2003) MLR (HC) 218.

<sup>16</sup> Savelsberg, J J, ‘Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law’ (1992) 97(5) *The American Journal of Sociology* 1346.

<sup>17</sup> Friedman, L M, *A History of American Law* (New York: Simon & Schuster, 1985).

<sup>18</sup> Tudor, S, ‘Accepting One’s Punishment as Meaningful Suffering’ (2001) 20(6) *Law and Philosophy* 581.

<sup>19</sup> Duff, R A, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986); Winch, P, *Ethics and Action* (London: Routledge and Kegan Paul, 1972); Adler, J, *The Urgings of Conscience* (Philadelphia: Temple University Press, 1992); Moore, M, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997).

such that she, rightly or properly, feels no resentment at her suffering and, moreover, regards it as right and just to undergo? Indeed, might she even come positively to seek or will it as something that is desirable or that is in her interests to suffer? These questions pose what I shall call the problem of the “patient justification of punishment”<sup>20</sup>

It is argued that Tudor’s concept of ‘patient justification of punishment’ is not an entirely new idea. It has its support in earlier writings of many criminal law scholars. For example, as early as in 1920s, Ferri identifies five classes of offender type: the born or instinctive criminal, the insane criminal, the passional criminal, the occasional criminal, and the habitual criminal.<sup>21</sup> Ferri claims that the primary focus in sentencing should be on the personal and social background of the offender, rather than on the nature of the crime committed.<sup>22</sup>

Like Ferri, Glueck in late 1920s, also feels that the emphasis in sentencing should be on the offender, rather than on the crime. He calls for treatment of the offender’s shortcomings<sup>23</sup> rather than punishment based solely upon the offense committed.<sup>24</sup> Glueck further recommends the establishment of a ‘Socio-Penal Commission’ (or ‘treatment board’), made up of social scientists, that would determine the type of treatment and duration best suited to each individual offender (rehabilitative/reformative theory).<sup>25</sup> Such a board, in Glueck’s view, would provide a more truly indeterminate sentence in which the correctional process would be expressly aimed at the offender rather than the act.<sup>26</sup>

It is equally important that a defendant must accept his punishment as a meaningful suffering for the offence committed.<sup>27</sup> If he does not do so, no rehabilitative or reformatory punishment would work for him. Silving thus rightly finds that a defendant may be more receptive to rehabilitation

---

<sup>20</sup> Tudor, *supra no.* 18.

<sup>21</sup> Ferri, E, ‘The Nomination of A Commission for the Positivist Reform of the Italian Penal Code’ (1920) 11 *Journal of the American Institute of Criminal Law and Criminology* 67.

<sup>22</sup> *id.*

<sup>23</sup> Treating offenders as a ‘patient’ like Tudor does.

<sup>24</sup> Glueck, S, ‘Principles of a Rational Penal Code’ (1928) 41(4) *Harvard Law Review* 453.

<sup>25</sup> *id.*

<sup>26</sup> *id.*

<sup>27</sup> Tudor, *supra no.* 18.

if he feels that he has received fair treatment.<sup>28</sup> A convict who believes that he is the victim of a judge's prejudices is often a hostile inmate, resistant to correctional treatment as well as to discipline.<sup>29</sup>

Therefore, it is argued that in determining the purpose of sentencing, it is essential to make a balance between the justification of both the agent (punisher) and the patient (punishee). In other words, a successful sentencing system must utilize an appropriate combination of all theories of punishment, starting from retributive theory, deterrence theories, preventive theory to rehabilitative/reformative theory.

#### 4. CURRENT SENTENCING PRACTICES IN BANGLADESH

- *Constitutional Responsibility for Sentencing*

Most countries have an explicit or implicit commitment to the 'doctrine of separation of powers', in the sense that certain functions are allocated constitutionally to separate organs of the state (legislature, judiciary, or executive).<sup>30</sup> The Constitution of Bangladesh explicitly recognizes that the State shall ensure the separation of the judiciary from the executive organs of the State.<sup>31</sup> However, the function of sentencing in Bangladesh is essentially a matter for both the legislature<sup>32</sup> and the judiciary. There is widespread acceptance in Bangladesh of the notion that the legislature has the function of setting the limits of state intervention by sentencing,<sup>33</sup> and the role of the judiciary is to use their discretion to select the appropriate sentence in individual cases.

Qadri argues that when we accept that prescribing sentences for various offences is a legislative function, then of course the courts cannot question the wisdom of legislatures even if the sentences appear to them to be

---

<sup>28</sup> Silving, H, 'Rule of Law in Criminal Justice' in Mueller, G (ed.), *Essays in Criminal Law* (N.J./London: South Hackensack, 1961).

<sup>29</sup> 'Application of the Exclusionary Rule at Sentencing' (1971) 57(7) *Virginia Law Review* 1255.

<sup>30</sup> Ashworth, A J, 'Sentencing Reform Structures' in Tonry, M (ed.), *Crime and Justice: A Review of Research*, Vol. 16 (Chicago: University of Chicago Press, 1992).

<sup>31</sup> Articles 22 and 116A, the *Constitution of the People's Republic of Bangladesh*. See further, *Aftabuddin vs. Bangladesh*, 48 (1996) DLR 1; *Secretary, Ministry of Finance, Government of Bangladesh vs. Masdar Hossain*, 52 (2000) DLR (AD) 82.

<sup>32</sup> The Parliament of Bangladesh known as the House of the Nation.

<sup>33</sup> The President of Bangladesh does also enjoy limited law making power by enacting ordinances: see, Article 93, the *Constitution of the People's Republic of Bangladesh*.

‘unreasonable’ or ‘excessive’.<sup>34</sup> However, there is a Constitutional limit on legislature in Bangladesh in prescribing sentences. According to the Constitution of Bangladesh, no person in Bangladesh shall be subjected ‘to torture or to cruel, inhuman or degrading punishment or treatment’.<sup>35</sup> Therefore, the courts in Bangladesh have an actual power to strike down a punishment as ‘unconstitutional’ if it is ‘cruel, inhuman or degrading’.

Now, let us turn to the issue of judicial discretion in sentencing matters. As a matter of Constitutional principle in Bangladesh, discretion in sentencing belongs to the judiciary. It is stated that the arguments in favor of maximum judicial discretion in sentencing actually derives from the principle of judicial independence. Independence of the judiciary is central to the Constitution of Bangladesh.<sup>36</sup> Therefore, if legislature constrains the discretion of the courts in sentencing matters, they encroach on judicial independence. However, the President of Bangladesh enjoys a prerogative of mercy by which he/she has a power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.<sup>37</sup> Nevertheless, it is to be remembered that a favorable response by the President is an act of grace and it cannot, therefore, be claimed as a matter of right.<sup>38</sup>

Further, according to the Constitution of Bangladesh, no person shall be subjected to ‘a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence’.<sup>39</sup> This Constitutional provision requires that when the legislature provides a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of the law.<sup>40</sup>

---

<sup>34</sup> Qadri, S M A, *Ahmad Siddique’s Criminology: Problems and Perspectives* (5<sup>th</sup> ed.) (Lucknow: Eastern Book Company, 2005).

<sup>35</sup> Article 35(5), the *Constitution of the People’s Republic of Bangladesh*.

<sup>36</sup> ‘... the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions’: Article 94(4), the *Constitution of the People’s Republic of Bangladesh*; ‘... all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions’: Article 116A, the *Constitution of the People’s Republic of Bangladesh*. See, further, *Aftabuddin vs. Bangladesh*, *supra* no. 31; *Secretary, Ministry of Finance, Government of Bangladesh vs. Masdar Hossain*, *supra* no. 31.

<sup>37</sup> Article 49, the *Constitution of the People’s Republic of Bangladesh*.

<sup>38</sup> A convict is also not entitled to oral hearing from the President, the matter being entirely within the discretion of the President.

<sup>39</sup> Article 35(1), the *Constitution of the People’s Republic of Bangladesh*.

<sup>40</sup> Rahman, L, *The Constitution of the People’s Republic of Bangladesh with Comments and Case-Laws* (Dhaka: Mullick Brothers, 2004).

- *Sentencing Structure*

Ashworth identifies four different categories of sentencing structure:<sup>41</sup>

- (a) *Mandatory or Mandatory Minimum Sentence*. The strongest device by which a legislature can determine sentencing is the mandatory sentence, requiring courts to pass a particular sentence on convicting a person of a certain crime. Mandatory minimum sentences have been roundly rejected in Canada,<sup>42</sup> Victoria (Australia)<sup>43</sup> and the US.<sup>44</sup>
- (b) *Fixed-Point Sentencing*. The essence of this system is that the law lays down a standard sentence for each offense, together with an aggravated sentence and a mitigated sentence.<sup>45</sup>
- (c) *Numerical Guidelines*. Under this heading three different approaches are considered – guidelines that establish ranges of sentences, those that indicate a base sentence and enhancements, and those that provide starting points and no formal structure beyond. What they have in common, as the name suggests, is that they attempt to guide sentencing discretion by numbers.<sup>46</sup>
- (d) *Hierarchy of Principles and Policies*.<sup>47</sup> Here, the court's first task is to assess the 'penal value' of the offense, taking account of its harmfulness, the defendant's culpability, and a number of other specified factors.<sup>48</sup> The second task is then to determine whether the case requires imprisonment or a fine, based on the scale of seriousness; a list of factors is again supplied. If the case is thought so serious as to require imprisonment, the third stage is to consider whether probation or a conditional sentence should be ordered instead of imprisonment; various principles are set out

---

<sup>41</sup> Ashworth, *supra* no. 30.

<sup>42</sup> Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services, 1987).

<sup>43</sup> Victorian Sentencing Committee, *Report* (Melbourne: Victorian Attorney-General's Department, 1988).

<sup>44</sup> Federal Courts Study Committee, *Report* (Washington, DC: Federal Courts Study Committee, 1990); Miller, M and Freed, D, 'Handcuffing the Sentencing Judge', (1990) 2 *Federal Sentencing Reporter* 189.

<sup>45</sup> Ashworth, *supra* no. 30.

<sup>46</sup> *id.*

<sup>47</sup> This is the approach of the two new chapters of the Swedish Criminal Code, which came into force at the beginning of 1989.

<sup>48</sup> The court's aim at this stage is to assess the proportionate seriousness of the offense.



here too.<sup>49</sup> The essence of this approach, then, is that the guidance does not set out sentence ranges or starting points, but furnishes the courts with general instructions on how to develop such ranges and starting points.<sup>50</sup>

It is stated that Bangladesh follows the numerical guidelines sentencing structure. The penal law sets the minimum or maximum sentence for a particular crime, it may set the range, or it may allow different types of sentences (fine, imprisonment, etc.); at the very least, it provides a choice between two alternatives, for instance, a finding of death or life in prison.<sup>51</sup>

- *Sentencing Hearing*

In many jurisdictions, the sentence is imposed after a separate hearing, held within a few days after judgment has been rendered. At such sentencing hearing, both sides have the opportunity to present evidence and testimony to recommend an appropriate sentence. In addition to the information supplied by parties, the judge is typically supplied with a pre-sentence investigation report.<sup>52</sup> Such reports are now a regular feature of the English and American criminal law system.<sup>53</sup> In intent and

---

<sup>49</sup> Special reasons required if an offender under the age of twenty-one is imprisoned; probation is indicated where there is a favorable change of personal circumstances, or need for treatment, etc.

<sup>50</sup> Von Hirsch, A, 'Principles for Choosing Sanctions: Sweden's proposed Sentencing Statute' (1987) 13 *New England Journal of Criminal and Civil Confinement* 171.

<sup>51</sup> This is similar to sentencing practices in many other Anglo-American jurisdictions. See, Zeisel, H, 'Methodological Problems in Studies of Sentencing' (1969) 3(4) *Law & Society Review* 621.

<sup>52</sup> Pre-sentence reports are generally prepared by pre-sentence investigators. The pre-sentence investigator interviews the defendant and often other individuals such as relatives, friends, and employers. With that information, the pre-sentence investigator compiles a social history of the defendant, which covers the defendant's education, employment record, family situation, physical and mental health, and community ties. The pre-sentence investigator will also assemble the defendant's prior criminal record, the defendant's version of the facts surrounding the crime, and the police and other witnesses' version of those facts. The prosecution and defense typically have access to the pre-sentence report prior to the sentencing hearing. Either side may present evidence to rebut or supplement the pre-sentence investigation report. The report is not available to the media or the public. At the conclusion of the pre-sentence hearing, the judge must give the defendant an opportunity to speak on his/her own behalf. Then the judge pronounces the sentence.

<sup>53</sup> Qadri, *supra no.* 34.

methodology, the pre-sentence investigation has been described as an effort to determine ‘the social credit rating of the individual’.<sup>54</sup>

In Bangladeshi criminal proceedings the issue of punishment, as distinct from the issue of guilt, generally presents no question of fact or law. Thus the criminal justice system of Bangladesh postulates that determination of the sentence, after conviction, is not a separate process. Both the conviction and the sentence imposed are pronounced together in delivering judgment.<sup>55</sup>

It is evident that the sentencing authority must have sufficient information regarding the various personal factors of the accused if the sentencing decisions are to proceed on any scientific premises.<sup>56</sup> In the absence of any pre-sentence reports, courts in Bangladesh have to fix the punishments on the basis of whatever inadequate information they receive about the offender in the course of the actual trial. Moreover, when the sentencing bench has too many cases to dispose, it is under a serious pressure to ‘get the facts quickly and decide quickly’.<sup>57</sup> Many fears that such a circumstance alone might lead to arbitrary sentencing simply because of the lack of information necessary to make a reasoned decision.<sup>58</sup>

- *Types of Sentencing*

(*Bangladesh*) *Penal Code*, 1860 explicitly provides for mainly five categories of criminal sentencing:<sup>59</sup>

- (a) *Death*. Death is the highest form of punishment authorized by Bangladeshi law. When a person is sentenced to death the sentence shall direct that ‘he be hanged by the neck till he is dead’.<sup>60</sup> In Bangladesh, neither the Courts of Magistrates,<sup>61</sup> nor the Courts of Assistant Sessions Judge<sup>62</sup> may pass a

<sup>54</sup> Coffee, *supra* no. 6.

<sup>55</sup> Section 367, *Code of Criminal Procedure*, 1898.

<sup>56</sup> At the conclusion of the pre-sentence hearing, the judge must give the defendant an opportunity to speak on his/her own behalf. Then the judge pronounces the sentence.

<sup>57</sup> Everson, G, ‘The Human Element in Justice’ (1919) 10 *Journal of the American Institute of Criminal Law and Criminology* 90.

<sup>58</sup> For details, see, Gaylin, W, *Partial Justice: A Study of Bias in Sentencing* (New York: Vintage Books, 1974); Silberman, C, *Criminal Violence, Criminal Justice* (New York: Vintage Books, 1980).

<sup>59</sup> Section 53, (*Bangladesh*) *Penal Code*, 1860.

<sup>60</sup> Section 368, *Code of Criminal Procedure*, 1898.

<sup>61</sup> *ibid*, sections 29C and 33A.

<sup>62</sup> *ibid*, sections 31(3) and 31(4).

sentence of death. It is only the High Court Division,<sup>63</sup> the Courts of the Sessions Judge<sup>64</sup> or the Additional Sessions Judge<sup>65</sup>, which may pass a sentence of death. However, any sentence of death passed by the Courts of the Sessions Judge or the Additional Sessions Judge shall be subject to confirmation<sup>66</sup> by the High Court Division.<sup>67</sup> Further section 374 of the *Code of Criminal Procedure*, 1898 states that death sentences passed by the Sessions Judges cannot be executed unless the High Court Division confirms the same.<sup>68</sup> If a woman sentenced to death is found to be pregnant, the High Court Division can postpone the execution or may even commute the sentence to imprisonment for life.<sup>69</sup> A death sentence can be suspended,<sup>70</sup> remitted<sup>71</sup> or be commuted<sup>72</sup> for any other sentence by the government as well as the President.<sup>73</sup>

- (b) *Imprisonment for life*. A sentence of imprisonment for life may be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. However, a convict may earn certain remissions.<sup>74</sup> But, such remissions are subject to appropriate Government orders<sup>75</sup> remitting the entire balance of sentence.<sup>76</sup> It may be mentioned that nowhere in the (*Bangladesh*) *Penal Code*, 1860 the definition of 'imprisonment for life' be found. Looking at section 57 of the (*Bangladesh*) *Penal Code*, 1860, which comes closest to defining life imprisonment, the term would mean 30 years. It states: 'In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 30 years.'<sup>77</sup> So,

---

<sup>63</sup> *ibid*, section 31(1).

<sup>64</sup> *ibid*, section 31(2).

<sup>65</sup> *id*.

<sup>66</sup> It may be mentioned that there is a substantial difference between the passing of a sentence and the confirmation thereof: *Muhammad Rafique vs. The State*, 15 (1963) DLR (SC) 219.

<sup>67</sup> Section 31(2), *Code of Criminal Procedure*, 1898.

<sup>68</sup> *ibid*, section 374.

<sup>69</sup> *ibid*, section 382.

<sup>70</sup> *ibid*, section 401.

<sup>71</sup> *id*.

<sup>72</sup> *ibid*, section 402.

<sup>73</sup> *ibid*, section 402A.

<sup>74</sup> *ibid*, section 401.

<sup>75</sup> The appropriate Government has the undoubted discretion to remit or refuse to remit the sentence.

<sup>76</sup> In the absence of such orders, even remissions earned do not entitle the convict to be released automatically before the full life term is served.

<sup>77</sup> Section 57, (*Bangladesh*) *Penal Code*, 1860.

should life imprisonment automatically be treated as one for a definite period of 30 years, excluding remission? It is argued here that the expression ‘imprisonment for life’ must be read in the context of section 45, (*Bangladesh Penal Code*, 1860). Under that provision the word ‘life’ denotes ‘the life of a human being unless the contrary appears from the context’.<sup>78</sup> Therefore, the term ‘imprisonment for life’, read in the light of the section 45, (*Bangladesh Penal Code*, 1860), would ordinarily mean imprisonment for the full or complete span of life. It is further stated that section 57, (*Bangladesh Penal Code*, 1860) has made it abundantly clear that the 30 years’ imprisonment is to be adopted only ‘in calculating fractions of terms of punishment’. Where no such computation of fractions is involved, it is found in other jurisdictions, such as, India, the UK and Singapore, that life imprisonment should be understood as a sentence for imprisonment for the whole of the remaining period of the convicted person’s natural life.<sup>79</sup>

- (c) *Imprisonment*: Imprisonment can be of two types – rigorous imprisonment and simple imprisonment.<sup>80</sup> Rigorous imprisonment would mean imprisonment with ‘hard labor’. On the contrary, simple imprisonment would not involve any kind of ‘hard labor’. In the punishment of imprisonment for life, the imprisonment shall always be rigorous.<sup>81</sup> When nature of imprisonment is not disclosed in judgment, imprisonment is generally taken to be simple. Sentence of imprisonment may be wholly or partly rigorous or simple.<sup>82</sup> It may be mentioned that both short-term and long-term imprisonments have their inherent disadvantages. Short-term imprisonment is considered useless in the sense that no institutional training or reformatory treatment is possible during such short period. It is also considered dangerous because prison might provide ‘ideal surroundings to novices and the minor offender for further training in a criminal career.’<sup>83</sup> On the other side, long-term imprisonment is criticized on the ground that it might ‘brutalize the convict and blunt his finer sensibilities’.<sup>84</sup>

<sup>78</sup> *ibid*, section 45.

<sup>79</sup> In India: *Ashok Kumar vs. Union of India* (1991) AIR 1792 SC; in the UK: *R vs. Foy* [1962] 1 WLR 609, [1962] 2 All ER 246; and in Singapore: Unreported Judgments of the Singapore Court of Appeal decision, *Abdul Nasir bin Amer Hamsah vs. Public Prosecutor* [1997] SGCA 38, Available at, [http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/\[1997\]\\_SGCA\\_38.html](http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/[1997]_SGCA_38.html)

<sup>80</sup> Section 53, (*Bangladesh Penal Code*, 1860).

<sup>81</sup> Huq, Z, *The Penal Code* (3<sup>rd</sup> ed.) (Dhaka: Ayesha Mahal, 1991).

<sup>82</sup> Section 60, (*Bangladesh Penal Code*, 1860).

<sup>83</sup> Qadri, *supra no.* 34.

<sup>84</sup> *Ashok Kumar vs. State (Delhi Administration)* (1980) 2 SCC 282, 1980 SCC (Cri) 426.

- (d) *Forfeiture of property*: Forfeiture is an established form of punishment.<sup>85</sup> The word, 'forfeiture' means 'a loss or deprivation of goods in consequence of a crime, offence or breach of engagement or by way of penalty of transgression or punishment for an offence.'<sup>86</sup> According to *(Bangladesh) Penal Code*, 1860, there are mainly three offences in which the offender is liable for forfeiture of specific property. These offences are: offence of committing depredation on territories of power at peace with Bangladesh,<sup>87</sup> offence of receiving property taken by war or depredation,<sup>88</sup> and offence by public servants for unlawfully buying or bidding for property.<sup>89</sup> It may be mentioned the sentence of forfeiture of property is quite different from confiscation of property. Confiscation is not a part of the sentence for an offence, but only one of the modes by which courts can dispose of property, which comes before it in criminal trials.<sup>90</sup>
- (e) *Fine*: Imposition of fine is a financial punishment independent of physical punishment.<sup>91</sup> Economic penalties, like fine, are among the most effective alternatives in keeping many convicts out of prison. Some believe that setting fixed fines for specified offences avoids difficult questions about what the amount of the fine should be in a particular case.<sup>92</sup> In other cases, the requirements of equality demand that an attempt should be made to ensure that the fine is also related to the income of the offender so that the fine should have an equal 'penal bite'.<sup>93</sup> According to *(Bangladesh) Penal Code*, 1860, where no sum is

---

<sup>85</sup> *Mobarakullah (Md) and another vs. The State*, 9 (2004) MLR (HC) 208.

<sup>86</sup> Chaudhury, T G, *Mitra's Legal and Commercial Dictionary* (6<sup>th</sup> ed.) (Kolkata: Eastern Law House, 2006).

<sup>87</sup> Section 126, *(Bangladesh) Penal Code*, 1860.

<sup>88</sup> *ibid*, section 127.

<sup>89</sup> *ibid*, section 169.

<sup>90</sup> For example, section 9 of the *Criminal Law Amendment Act*, 1958 provides for confiscation of property acquired by corruption. Also, see, *The State of Kerala vs. Mathai* (1961) ILR 1 Ker 374, 1961 Ker LJ 15.

<sup>91</sup> *Rowshan Ali (Md.) vs. The State*, 5 (2000) MLR (HC) 342.

<sup>92</sup> However, a fixed fine hits the poor much more harshly than the rich. Courts should therefore reserve fixed penalties for relatively petty offences for which imprisonment would not normally be considered or where it may be assumed that all offenders have some income from which to pay the fines. For further details, see, United Nations, *Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment* (New York: United Nations, 2007).

<sup>93</sup> Often the court can manage this by inquiring into the income of the offender and then adjusting the fine upwards or downwards as warranted. This method can, however, only provide a rough equivalence between offenders of differing financial means. See, United Nations, *supra no.* 92; Thornstedt, H, 'The Day-Fine

expressed, the amount of fine shall not be 'excessive'.<sup>94</sup> Fine is a charge upon the property of the convict 'as public dues' and is 'recoverable even after his death'.<sup>95</sup> It is argued by many that fine defaulter should not face automatic imprisonment if they fail to pay their fines.<sup>96</sup> Authorities should pay attention to other possible solutions to deal with defaulters.<sup>97</sup> However, in Bangladesh, sentence of imprisonment may be imposed for non-payment of fine<sup>98</sup> and it is not considered as illegal.<sup>99</sup>

In addition to section 53, (*Bangladesh*) *Penal Code*, 1860, there are also some other categories of criminal sentencing available under Bangladeshi laws:

- (f) *Verbal sanctions*: Verbal sanctions, such as admonitions, reprimand, warning or unconditional discharges accompanied by a formal or informal verbal sanction, are some of the 'mildest responses' that a court may impose upon finding a conviction.<sup>100</sup> In Bangladesh, section 4, *The Probation of Offenders Ordinance*, 1960 states that where a first-time offender is convicted of an offence punishable with imprisonment for not more than two years then having regard to the age, character, antecedents or physical or mental condition of the said offender and to the nature and circumstances of the offence, the court, in appropriate cases, may make an order discharging him after admonition.<sup>101</sup> It must be mentioned that although verbal sanctions are formal sanctions, they have the effect in practice of ensuring that the criminal justice system is not further involved in the matter.<sup>102</sup>
- (g) *Conditional discharge*: Conditional discharge of convict is another form of mild sentence. However, the implementing authorities may need to set up some mechanism to ensure that the 'discharge condition(s)' set by a court are strictly met. In Bangladesh, again, *The Probation of Offenders Ordinance*,

---

System in Sweden', 1975 *Criminal Law Review* 307; Friedman, G M, 'The West German Day-Fine System: A Possibility for the United States' (1983), 50 *University of Chicago Law Review* 281.

<sup>94</sup> Section 63, (*Bangladesh*) *Penal Code*, 1860.

<sup>95</sup> *Rowshan Ali (Md.) vs. The State*, *supra* no. 91.

<sup>96</sup> United Nations, *supra* no. 92.

<sup>97</sup> For example, they may work in the community, or the state may provide them with work, so that they can pay their fines with the proceeds of their labor.

<sup>98</sup> Sections 64 and 67, (*Bangladesh*) *Penal Code*, 1860.

<sup>99</sup> *Nizamuddin Mia vs. The State*, 26 (1974) DLR 350; *The State vs. Abul Kashem*, 37 (1985) DLR (AD) 91.

<sup>100</sup> United Nations, *supra* no. 92.

<sup>101</sup> Section 4, *The Probation of Offenders Ordinance*, 1960.

<sup>102</sup> United Nations, *supra* no. 92.

1960 makes provision for imposing ‘an order for conditional discharge’ by the court.<sup>103</sup> It is applicable to the first-time offenders who are convicted of an offence punishable with imprisonment for not more than two years. The conditions imposed by the court might include that the convict enters into a bond, with or without sureties, for committing no offence and being of good behavior during such period not exceeding one year from the date of the order.<sup>104</sup>

- (h) *Probation order*: The sole intention of the legislature in passing probation laws is to give persons of a particular type a chance of reformation, which they would not get if sent to prison.<sup>105</sup> By placing the offender on probation the court saves him from the ‘stigma of jail life’ and also from the ‘contaminating influence of hardened prison inmates’.<sup>106</sup> Probation also serves another purpose: it helps in eliminating overcrowding in jails.<sup>107</sup> In Bangladesh, the first legislative piece on probation was sections 562 – 564 of the *Code of Criminal Procedure*, 1898.<sup>108</sup> The Probation of Offenders Ordinance, 1960, later repealed sections 562 – 564 of the *Code of Criminal Procedure*, 1898.<sup>109</sup> Under the said Ordinance, a court, in appropriate cases,<sup>110</sup> can make a probation order i.e. ‘an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years’.<sup>111</sup> Such probation order at times might contain specific conditions.<sup>112</sup> For a successful probation order, the convict must (a) enter into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behavior during the period of the bond and to appear and

---

<sup>103</sup> Section 4(2), *The Probation of Offenders Ordinance*, 1960.

<sup>104</sup> *ibid*, section 4(1).

<sup>105</sup> Qadri, *supra no.* 34.

<sup>106</sup> *id.*

<sup>107</sup> For example, in Italy, there is no probation for adults and as such, it explains the frequency of short prison terms and over-crowding of prisons. See, Mannheim, H, ‘Comparative Sentencing Practice’ (1958) 23(3) *Law and Contemporary Problems* 557.

<sup>108</sup> It provided for release on probation of the first-time offenders in the discretion of the court for minor offences punishable up to two years of imprisonment. In case of young male offenders, the benefit extended to all the offences except those punishable with death or life imprisonment.

<sup>109</sup> Section 16, *Probation of Offenders Ordinance*, 1960.

<sup>110</sup> Having regard to the circumstances including the nature of the offence and the character of the offender.

<sup>111</sup> Section 5, *Probation of Offenders Ordinance*, 1960.

<sup>112</sup> For example, conditions of supervision, conditions with respect to residence, environment, abstention from intoxicants etc.

receive sentence if called upon to do so during that period; and (b) satisfy the court that the he (or his sureties) has a fixed place of abode or a regular occupation within the local limits of its jurisdiction.<sup>113</sup>

- (i) *Victims' compensation order*: Crime victims suffer not only physically and mentally but also financially and materially.<sup>114</sup> In this regard different western countries have already established their crime victims compensation programs.<sup>115</sup> Also, research in Nigeria and other African countries show that there is a long tradition of paying compensation to victims in lieu of other punishment(s) for even the most serious crimes.<sup>116</sup> In Bangladesh, a criminal court while passing any sentence of fine, may order the whole or any part of the fine recovered to be applied in the payment of compensation to any person for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a civil court.<sup>117</sup> Very recently the Bangladesh Law Commission has realized that there is a great need for making mandatory provisions for payment of compensation and other relieves to the victims of grave offences and as such, in early 2007, the Commission prepared a Draft Bill to meet this end.<sup>118</sup> As per section 6 of the Draft Bill, 'crime victims compensation fund; will be established in each district of Bangladesh.'<sup>119</sup>

It may be mentioned that the appropriate use of the later categories of sentencing (such as, verbal sanctions, conditional discharge, probation order and the victims' compensation order) remain significantly underutilized in Bangladesh. For example, in September 2007, I conducted a survey on 558 legal practitioners randomly selected from 6 Bar Associations<sup>120</sup> in Bangladesh.<sup>121</sup> The main purpose of my survey was to find out the level of awareness and

<sup>113</sup> Section 5, *Probation of Offenders Ordinance*, 1960.

<sup>114</sup> Bangladesh Law Commission, 'Final Report on a Proposed Law Relating to Payment of Compensation and Other Reliefs to the Crime Victims' dated 15.02.2007.

<sup>115</sup> For example, in USA the first crime victim compensation program was established in California in 1965. In 1984, the Federal Government of USA enacted its *Victims of Crime Act* establishing its crime victims fund made up of federal criminal fines, penalties and forfeited amount of bond money.

<sup>116</sup> Adeyemi, A A, 'Personal Reparation in Africa: Nigeria and Gambia' in Zvekic, U. (ed.), *Alternatives to Imprisonment in Comparative Perspective* (Chicago: Nelson-Hall Publishers, 1994).

<sup>117</sup> Section 545(1), *Code of Criminal Procedure*, 1898.

<sup>118</sup> Bangladesh Law Commission, *supra no.* 114.

<sup>119</sup> *id.*

<sup>120</sup> Dhaka District Court Bar Association, Chittagong District Court Bar Association, Gazipur District Court Bar Association, Munshiganj District Court Bar Association, Narayanganj District Court Bar Association and Bangladesh Supreme Court Bar Association.

<sup>121</sup> Survey questionnaire and the findings are attached as 'Annexure C' and 'Annexure D'.



frequency of use of probation orders among Bangladeshi legal practitioners in criminal practice. In my survey, I found that approximately 71% of criminal law practitioners in Bangladesh are completely unaware of the *Probation of Offenders Ordinance*, 1960; about 88.5% of criminal law practitioners, during their practice years, never heard of any case where a probation order was granted by the court.<sup>122</sup> Even those who are aware of such cases (only 11.4%), mostly answered that the number of judgments with probation order cannot be more than 5 per year in their respective jurisdictions.<sup>123</sup>

In September 2007, I conducted another survey on 17 magistrates of Dhaka Chief Metropolitan Magistrate Court and Gazipur Magistrate Court.<sup>124</sup> All of the magistrates are of the opinion that the applications for probation order, in appropriate cases, are not frequently made by the legal practitioners in their courts.<sup>125</sup> Among 17 magistrates only one has passed a single probation order in his court in the last one year.<sup>126</sup>

Similarly, victims' compensation order, even though provided for by section 545(1), *Code of Criminal Procedure*, 1898, is neither mandatory nor being made effective. Moreover, the victims of criminal offences, are required to go to civil court for realizing substantial compensation, which of course requires a separate and new proceeding, payment of court fee and other expenses. Therefore, provision of section 545 (1), *Code of Criminal Procedure*, 1898 is of no real help to the victims of crime. If compensation claims can be considered at the time of the criminal trial, this will bring victims a great relief i.e. they would be saved from the cost and trouble of bringing a subsequent civil action for realizing compensation.

Finally, there are legal provisions for some other sentencing mechanism, which are no more in practice in Bangladesh. For example, though the punishment of 'transportation' was deleted from the list of section 52, (*Bangladesb*) *Penal Code*, 1860 in 1985,<sup>127</sup> mention of the same can still be found in section 383 of the *Code of Criminal Procedure*, 1898,<sup>128</sup> section 5 of the *Probation of*

---

<sup>122</sup> See, Annexure D.

<sup>123</sup> *id.*

<sup>124</sup> Survey questionnaire and the findings are attached as 'Annexure A' and 'Annexure B'.

<sup>125</sup> See, Annexure B.

<sup>126</sup> *id.*

<sup>127</sup> By Ordinance No. XLI of 1985.

<sup>128</sup> Section 383, *Code of Criminal Procedure*, 1898 states that 'Where the accused is sentenced to transportation or imprisonment ... the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined,

*Offenders Ordinance*, 1960<sup>129</sup> and section 51 of the *Children Act*, 1974.<sup>130</sup> Moreover, a number of provisions, such as, sections 390,<sup>131</sup> 391,<sup>132</sup> 392,<sup>133</sup> 393<sup>134</sup> and 394<sup>135</sup> of the *Code of Criminal Procedure* provide for the sentence of ‘whipping’.<sup>136</sup>

---

and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.’

<sup>129</sup> Section 5, *Probation of Offenders Ordinance*, 1960 states the ‘Power of court to make a probation order in certain cases (1) Where a court by which – any male person is convicted of an offence not being an offence ... punishable with death or transportation for life...’

<sup>130</sup> Section 51, *Children Act*, 1974 states that ‘(1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment ...’

<sup>131</sup> Section 390, *Code of Criminal Procedure*, 1898 states that ‘When the accused is sentenced to whipping only, the sentence shall ... be executed at such place and time as the Court may direct.’

<sup>132</sup> Section 391, *Code of Criminal Procedure*, 1898 states that ‘(1) When the accused ... is sentenced to whipping ... the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made with that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence. (2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence. (3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.’

<sup>133</sup> Section 392, *Code of Criminal Procedure*, 1898: ‘(1) In the case of a person of or over sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the [Government] directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode and on such part of the person, and with such instruments, as the [Government] directs. (2) In no case shall such punishment exceed thirty stripes [and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes].’

<sup>134</sup> Section 393, *Code of Criminal Procedure*, 1898: ‘No sentence of whipping shall be executed by installments: and none of the following persons shall be punishable with whipping, namely:- (a) females; (b) males sentenced to death or to transportation or to imprisonment for more than five years; (c) males whom the Court considers to be more than forty five years of age.’

<sup>135</sup> Section 394, *Code of Criminal Procedure*, 1898: ‘(1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment. (2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.’

- *Compounding of Offences*

The word 'compound' means to withdraw for a consideration or making a compromise.<sup>137</sup> In Bangladesh, the law makes a difference between various classes of offences and allows compromise in some and no compromise in other. The *Code of Criminal Procedure*, 1898 brings out a long list of offences for which compromise can be made between appropriate parties either in the court or out of the court.<sup>138</sup> A criminal case may so be compounded at any time before the sentence for the same is pronounced.<sup>139</sup> However, it is argued that although there are elaborate provisions for compounding of offences in such a manner, the provisions are hardly ever raised or adequately utilized. In my survey on legal practitioners, I found that almost 67.3% criminal lawyers never utilized section 345(1), *Code of Criminal Procedure*, 1898 in their entire practice years so far.<sup>140</sup> Also in my survey on magistrates, almost 70.5% of the magistrates are of the opinion that in our criminal courts the use of section 345(1), *Code of Criminal Procedure*, 1898 is strikingly less frequent.<sup>141</sup>

- *Appellate Review of Sentence*

It is claimed by many that the most important factor, which contribute to the apparent inefficiency and unfairness of the judicial discretion inherent in the sentencing function, is the absence of an established tribunal to review sentences either automatically or on appeal.<sup>142</sup> In Bangladesh, appeals against sentences (or against inadequacy of sentences) are possible to the superior courts, under the power given to them in the *Criminal Procedure Code*, 1898. Appeals from sentence imposed by the Magistrates of second or third class lie to the District Magistrates<sup>143</sup> or to the first class magistrates upon direction by the district magistrates.<sup>144</sup> Appeals from sentence of Assistant Sessions Judges or Magistrates of the

---

<sup>136</sup> Also, see, *Whipping Act*, 1909.

<sup>137</sup> Huq, Z, *Law and Practice of Criminal Procedure* (6<sup>th</sup> ed.) (Dhaka: Ayesha Mahal, 1996).

<sup>138</sup> Section 345(1), *Code of Criminal Procedure*, 1898.

<sup>139</sup> *Abdus Sattar vs. The State*, 38 (1986) DLR (AD) 38.

<sup>140</sup> See, Annexure D.

<sup>141</sup> See, Annexure B.

<sup>142</sup> Lane, H E, 'Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison' (1941) 32(2) *Journal of Criminal Law and Criminology* 171.

<sup>143</sup> Section 407(1), *Code of Criminal Procedure*, 1898.

<sup>144</sup> *ibid*, section 407(2).

first class would lie to the Court of Session.<sup>145</sup> Appeals from the sentence of the Sessions Judge or the Additional Sessions Judges can be preferred at the High Court Division.<sup>146</sup> In an appeal against sentence (or against inadequacy of sentence), the appellate court must discuss the evidence on record while deciding the said appeal.<sup>147</sup> However, it is argued that the scope of revision of sentencing in appeals is limited as made clear in the various pronouncements of the High Court Division.<sup>148</sup> It is a common belief that the question of sentence is normally a matter of 'judicial discretion' of the trial court and as such, the appellate courts are reluctant to interfere much with the exercise of such discretion.

## 5. SENTENCING DISCRETION AND RELATED FACTORS

Sentencing is frequently seen as one of the clearest examples of an area where judges enjoy very wide discretion.<sup>149</sup> Cross believes that to ask judges why they gave a certain sentence in a particular case is strangely enough 'an unnatural enterprise'.<sup>150</sup> This is more so in Anglo-American jurisdictions, where the law itself allows the judge, when he pronounces sentence, to be completely silent on why he fixed the sentence on a particular level.<sup>151</sup> Wide sentencing discretion practiced by the judges very often leads to inconsistent sentencing system. One of the most obvious consequences of such inconsistent sentencing is a loss of public faith in, and support for, the criminal justice system.<sup>152</sup>

In Bangladesh also, the penal law gives a wide discretion to the sentencing judges for determination of the sentence that follows the conviction of a defendant.<sup>153</sup> However, the exercise of such sentencing discretion by the sentencing judges is one area that remained largely ignored by Bangladesh criminal justice system. The High Court Division observed:

---

<sup>145</sup> *ibid*, section 408.

<sup>146</sup> *ibid*, section 410.

<sup>147</sup> *Altaf Hossain vs. The State*, 5 (2000) MLR (AD) 205.

<sup>148</sup> Huq, *supra no.* 137.

<sup>149</sup> Davis, K C, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969); Taylor, *supra no.* 3.

<sup>150</sup> This practice has been severely criticized by many legal scholars: see, Cross, R, 'Paradoxes in Prison Sentences' (1965) 81 *Law Quarterly Review* 205.

<sup>151</sup> *id.*

<sup>152</sup> Insofar as the judges are left with wide and unstructured discretion, this allows greater scope for the prejudices of the individual judge to operate, knowingly or unknowingly: Ashworth, *supra no.* 30.

<sup>153</sup> *State vs. Anjuara Khatun*, 57 (2005) DLR 277.

‘Sentencing discretion on the part of justice is the most difficult part to perform. There is no system or procedure in (our) Criminal Justice Administration, nor any rule to exercise such discretion. It is also, not possible to lay down any cut and dried formula in imposing proper sentence. But the object of sentencing should be to see that the crime does not go unpunished and the society have the satisfaction that justice has been done.’<sup>154</sup>

There is a huge literature about factors, which affect sentencing discretion of the judges and magistrates. Criminal law and sentencing texts list what they have distilled as being ‘factors’ which aggravate and mitigate sentence.<sup>155</sup> Conforming with the image of justice weighing each ‘factor’, there seems to be an assumption that sentencing is derived from a consideration of the legal conviction followed by a duelist process of aggravation and mitigation.<sup>156</sup> However, there does not seem to be agreement about information which ‘aggravates’ and which ‘mitigates’ sentence.<sup>157</sup> For example, Shapland finds as many as 229 ‘mitigating factors’ in sentencing but some of these can be seen as aggravating in other cases.<sup>158</sup> In Bangladesh, the High Court Division thus correctly observed:

---

<sup>154</sup> *State vs. Mir Hossain alias Mira and others*, 56 (2004) DLR 124.

<sup>155</sup> Kort, F, ‘Content Analysis of Judicial Opinions and Rules of Law’ in Schubert, G (ed.), *Judicial Decision-Making* (New York: Free Press, 1963); Walker, N D, *Crime and Punishment in Britain* (2<sup>nd</sup> ed.) (Edinburgh: Edinburgh University Press, 1968); Walker, N D, *Sentencing in a Rational Society* (London: Allen Lane the penguin Press, 1969); Thomas, D A, *Principles of Sentencing* (London: Heinemann, 1970); Hogarth, J, *Sentencing as a Human Process* (London: Oxford University Press, 1971); Thomas, D A, *Principles of Sentencing* (2<sup>nd</sup> ed.) (London: Heinemann, 1979); Moxon, D, *Sentencing Practice in the Crown Court* (London: Her Majesty's Stationery Office, 1988); Lovegrove, A, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (New York: Springer, 1989); Boyle, C K and Allen, M J, *Sentencing in Northern Ireland* (NI: SLS Publications, 1990); Hood, R, *Race and Sentencing: A Study in the Crown Court* (Oxford: Oxford University Press, 1992); Nicholson, G, *Sentencing: Law and Practice in Scotland* (2<sup>nd</sup> ed.) (Edinburgh: Sweet and Maxwell, 1992); Findlay, M, Odgers, S and Yeo, S, *Australian Criminal Justice* (Melbourne: Oxford University Press, 1994); Hutton, N and Tata, C, *Patterns of Custodial Sentencing in the Sheriff Court* (Edinburgh: The Scottish Office Central Research Unit, 1995); Walker, N and Padfield, N, *Sentencing: Theory, Law and Practice* (2<sup>nd</sup> ed.) (London: Butterworths and Co., 1996).

<sup>156</sup> Tata, *supra* no. 1.

<sup>157</sup> *id.*

<sup>158</sup> Shapland, J, *Between Conviction and Sentence: The Process of Mitigation* (London: Routledge & Kegan Paul, 1981).

‘... imposition of proper and appropriate sentence is amalgam of many factors, such as nature of offence, circumstances, mitigating and aggravating. A balance sheet of aggravating and mitigating circumstances ... (should be) ... drawn up before subjecting a person to a sentence.’<sup>159</sup>

To find out the actual factors that might influence the discretion of the sentencing judges, in September 2007, I conducted another survey on 58 Court of Sessions Judges of various sessions divisions of Bangladesh.<sup>160</sup> The basic purpose of my survey was to learn about the range of sentencing factors influencing judicial discretion in sentencing matters by going and asking the judges who actually impose the sentence. The research method, I followed, goes under the technical name of ‘Reason Analysis’.<sup>161</sup> It reports on the factors judges in Bangladesh say tend to produce lenient and/or severe sentences. Similar research studies have already been conducted in many other jurisdictions, such as, in the United States<sup>162</sup> and the United Kingdom.<sup>163</sup>

A summary of my findings on sentencing factors influencing judicial discretion in sentencing in Bangladesh is presented and discussed in the following sections:

- *Legal Factors*

- (a) *nature, facts and circumstances of the offence*: The nature, facts and circumstances of the offence are said to always influence sentencing discretion.<sup>164</sup> Empirical studies have shown that sentences were more severe when offenses were of more serious or exceptional nature.<sup>165</sup> My survey finds that about 80% of judges in Bangladesh think that nature,

---

<sup>159</sup> *State vs. Anjuara Khatun*, supra no. 153.

<sup>160</sup> This survey was conducted at Judicial Administration Training Institute (JATI), Dhaka, Bangladesh. Survey questionnaire and the findings are attached as ‘Annexure E’ and ‘Annexure F’.

<sup>161</sup> Zeisel, H, *Say It With Figures* (6<sup>th</sup> ed.) (New York: Harper & Row, 1985).

<sup>162</sup> Morse, W, *The Attorney General’s Survey of Release Procedures* (Washington DC: United States Government Printing Press, 1939).

<sup>163</sup> Report, *Royal Commission on Capital Punishment 1949–1953* (London: Her Majesty’s Stationary Office, 1965); Note, ‘Executive Clemency in Capital Cases’ (1964) 39 *New York University Law Review* 136; Kalven, H and Zeisel, H, *The American Jury* (Boston: Little, Brown & Co, 1966), ch. 36.

<sup>164</sup> Green, E, *Judicial Attitudes in Sentencing* (London: Mcmillan & Co., 1961).

<sup>165</sup> Radzinowich, L and Hood, R, ‘An English Attempt to Reshape the Sentencing Structure’ (1978) 78(5) *Columbia Law Review* 1145; Kapardis, A and Farrington, D P, ‘An Experimental Study of Sentencing by Magistrates’ (1981) 5 (2/3) *Law and Human Behavior* 107.

facts and circumstances of the offence do influence the discretion of the sentencing bench.<sup>166</sup>

- (b) *intention/motive of the offence*: Absence of intention or motive in committing an offence might result in reduced sentencing.<sup>167</sup> However, there are many cases, where the higher judiciary has observed that intention or motive of offence is not always required to be proved for finding a conviction and imposing a valid sentence.<sup>168</sup> My survey finds that about 79% of judges in Bangladesh think that intention/motive of the offence does influence the discretion of the sentencing bench and about 17% of judges think that it does not.<sup>169</sup>
- (c) *weapon used to commit the offence*: The type of weapon used to commit the offence might at times influence the sentencing discretion. In the absence of the convict using any 'heavy or sharp cutting or lethal weapon', the court might reduce the sentence.<sup>170</sup> However, at times, the court might even consider a piece of stone as a dangerous weapon and go on sentencing accordingly.<sup>171</sup> My survey shows that about 69% of judges think that weapon used to commit the offence should influence sentencing discretion.<sup>172</sup>
- (d) *extent of injury/ damages caused*: The sentence may reflect the extent of injury or the damages caused by the convict.<sup>173</sup> Sentence should be proportionate to the gravity of the offence.<sup>174</sup> It should not be too harsh or too lenient. The High Court Division observes that too light a sentence in relation to gravity of offence makes the administration of criminal justice ridiculous.<sup>175</sup> Sentencing is said to follow a tariff system where great weight is given to the harm caused by the offense, as indexed by factors such as the

---

<sup>166</sup> See, Annexure F.

<sup>167</sup> 'There is also nothing on record that the murder was preplanned and cold blooded. In such view of the matter we hold that it will be the ends of justice if the sentence of death ... is reduced to imprisonment for life': *Rafiqul Islam Mollah vs. State*, 57 (2005) DLR 581.

<sup>168</sup> 'The prosecution is not required to prove motive in all cases': *Farid Ali vs. The State*, 4 (1999) MLR (HC) 23; *State vs. Khondker Zillul Bari and others*, 10 (2005) MLR (AD) 175.

<sup>169</sup> See, Annexure F.

<sup>170</sup> *Rafiqul Islam Mollah vs. State*, *supra* no. 167.

<sup>171</sup> *Mashuq Mia alias Iqbal vs. The State*, 9 (2004) MLR (AD) 372.

<sup>172</sup> See, Annexure F.

<sup>173</sup> Green, E, *supra* no. 164.

<sup>174</sup> *Md. Yahia and others vs. State*, 1 (1996) MLR (HC) 59.

<sup>175</sup> *Nurun Nabi (Mohammad) vs. Sahin Alam alias Shahin and others*, *supra* no. 15.

degree of personal injury or monetary value of the stolen property.<sup>176</sup> The mere fact that the victim luckily survived for weeks on account of treatment in the hospital is no ground to award lesser sentence.<sup>177</sup> About 75.8% of judges in Bangladesh believe that extent of injury or damages caused should have a bearing upon the sentence.<sup>178</sup>

- (e) *extent/degree of perversion in committing the crime*: Degree of perversion might be reflected in criminal activities such as, cutting dead body into several pieces, gang rape, killing several persons etc. The court has always seriously condemned criminal activities committed in a brutal manner and it gets reflected in the sentencing parameters of the bench.<sup>179</sup> My survey finding does also support this proposition.<sup>180</sup>

● *Factors Related To The Offender*

- (a) *race/religion/caste of the offender*: Green argues that the sentencing judges do not get bias by the race, religion or the caste of the convict.<sup>181</sup> Even empirical studies have shown that the race, religion or caste of the convict does not have significant effects on sentence severity.<sup>182</sup> In my survey it is found that about 88% of judges in Bangladesh also think alike.<sup>183</sup> However, there are a number of studies, which show that social characteristics of defendants, such as race, are important in determining sentencing in the criminal courts.<sup>184</sup> Also, the prison statistics in many

<sup>176</sup> Walker (1968), *supra no.* 155.

<sup>177</sup> *Md. Abdul Majid Sarker vs. State*, 40 (1988) DLR (AD) 83, *Ershad Ali Sikder (Md.) vs. State*, 57 (2005) DLR (AD) 75.

<sup>178</sup> See, Annexure F.

<sup>179</sup> *Fateh Khan & others vs. State*, 15 (1963) DLR (SC) 51; *Kalu Mia vs. The State*, 10 (2005) MLR (HC) 397.

<sup>180</sup> See, Annexure F.

<sup>181</sup> Green, *supra no.* 164.

<sup>182</sup> Kapardis and Farrington, *supra no.* 165.

<sup>183</sup> See, Annexure F.

<sup>184</sup> Chambliss, W J, *Crime and the Legal Process* (New York: McGraw-Hill, 1969); Thornberry, T P, 'Race, Socioeconomic Status and Sentencing in the Juvenile Justice System' (1973) 64 *The Journal of Criminal Law and Criminology* 90; Hagan, J, 'Extra-legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint' (1974) 8 *Law and Society Review* 357; Quinney, R, *Criminal Justice in America: A Critical Understanding* (Boston: Little Brown, 1974); Chiricos, T G and Waldo, G P, 'Socio-economic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition' (1975) 40 *American Sociological Review* 753; Lizotte, A J, 'Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice' (1978) 25(5) *Social Problems* 564.



US state jurisdictions show members of some racial groups imprisoned at a comparatively higher rate than others.<sup>185</sup>

- (b) *age of the offender*: It is claimed by many that the sentencing judge do not get prejudiced by the age of the convict.<sup>186</sup> However, some empirical studies show that the age of the offender does not have significant impact on sentencing,<sup>187</sup> while some others indicate a contrary view.<sup>188</sup> My survey finds that about 72% of judges believe that age of the convict does play a crucial role in sentencing decisions.<sup>189</sup> Also, in Bangladesh, there are judicial decisions where sentences are reduced by the appellate authorities on the ground of very old age<sup>190</sup> or very tender age of the convict.<sup>191</sup>
- (c) *sex of the offender*: Green claims that sentencing bench is generally indifferent towards the sex of the convict.<sup>192</sup> My survey finding also supports Green's contention as about 69% of judges responded that sex of the offender does not affect the sentencing decision of the bench.<sup>193</sup> However, in a number of empirical studies on sentencing practices show that sentences get more severe when offenders are male.<sup>194</sup>
- (d) *employment and/or economic status of the offender*: It is a common belief that economic status of the convict are important in determining sentencing in the criminal courts.<sup>195</sup> People of lower occupational

---

<sup>185</sup> Blumstein, A, 'Prison Populations: A System Out of Control?' in Tonry, M and Morris, N (ed.), *Crime and Justice: A Review of Research* (Vol. 10), (Chicago: University of Chicago Press, 1988).

<sup>186</sup> Green, *supra no.* 164.

<sup>187</sup> Kapardis and Farrington, *supra no.* 165.

<sup>188</sup> Softley, P, 'Sentencing Practice in Magistrates' Courts' (1980) *Criminal Law Review* 161.

<sup>189</sup> See, Annexure F.

<sup>190</sup> *Abdul Hye (Moulana) vs. The State*, 3 (1998) MLR (AD) 262.

<sup>191</sup> *State vs. Rafiqul Islam*, 55 (2003) DLR 61; *Shamim (Md.) alias Shamim Shikder vs. The State*, 8 (2003) MLR (AD) 214; *State vs. Adam Khan*, 9 (2004) MLR (HC) 405.

<sup>192</sup> Green, *supra no.* 164.

<sup>193</sup> See, Annexure F.

<sup>194</sup> Home Office, *Criminal Statistics, England and Wales, 1979* (London: Her Majesty's Stationery Office, 1980); Kapardis and Farrington, *supra no.* 165.

<sup>195</sup> Zeisel, *supra no.* 51; Chambliss, *supra no.* 184; Thornberry, *supra no.* 184; Hagan, *supra no.* 184; Quinney, *supra no.* 184; Chiricos and Waldo, *supra no.* 184; Lizotte, *supra no.* 184.

strata experience differential sentencing due to economic inequality.<sup>196</sup> Empirical studies show that unemployed convicts are more likely to receive, discharges or imprisonment, rather than fines.<sup>197</sup> Quite contrary to the common view, my survey discovers that about 79% of judges do not consider the economic status of the convict as an influencing factor in sentencing.<sup>198</sup>

- (e) *marital status of the offender*: The issue of family integration of the convict does play a crucial role in sentencing.<sup>199</sup> Empirical studies also show that imprisonment is more likely if the offender is found to have not living with a spouse or parents.<sup>200</sup> However, in Bangladesh, about 90% of judges do not consider this to be an important factor in sentencing.<sup>201</sup>
- (f) *whether first time offender*: In most of the criminal jurisdictions, the first time offenders do get a favorable treatment in sentencing. The bench is more likely to treat them as an accidental criminal. However, my survey result reflects that about 62% of judges in Bangladesh do not consider that first time offenders should get lenient sentences.<sup>202</sup> Such finding is not surprising as we have already found in other surveys on criminal law practitioners and the magistrates that there is less sensitivity about the lenient sentencing provisions regarding verbal sanctions, conditional discharges or probation orders.<sup>203</sup>
- (g) *whether pleaded guilty*: Green finds that the sentencing judges do not favor defendants who pleads guilty over those who do not.<sup>204</sup> In Bangladesh about 74% judges believe that pleading guilty might affect the sentencing discretion.<sup>205</sup> Also, in the higher judiciary of Bangladesh, sentence is reduced if the convict makes an immediate voluntary confession after committing the crime.<sup>206</sup>

---

<sup>196</sup> Skolnick, J H, 'Social Control and the Adversary System' (1967) 11 *Journal of Conflict Resolution* 53.

<sup>197</sup> Softley, *supra no.* 188.

<sup>198</sup> See, Annexure F.

<sup>199</sup> Zeisel, *supra no.* 51.

<sup>200</sup> Softley, *supra no.* 188.

<sup>201</sup> See, Annexure F.

<sup>202</sup> *id.*

<sup>203</sup> Annexure B and Annexure D.

<sup>204</sup> Green, *supra no.* 164.

<sup>205</sup> See, Annexure F.

<sup>206</sup> *Abdur Rahman Syed vs. State*, 44 (1992) DLR 556.

- (h) *whether habitual offender*: The prior criminal record of the convict might influence a sentencing decision.<sup>207</sup> Empirical studies have shown that sentences get more severe when offenders have similar previous criminal record.<sup>208</sup> Similarly, in the higher judiciary of Bangladesh, the court has explicitly expressed the view that habitual offenders should get serious terms.<sup>209</sup> My survey finds that about 65.5% of judges responds in favor of the same view.
- (i) *social status of the offender*: The social status of the convict can get reflected in his extent of education, leadership in social group/trade/profession etc. Crime is no longer perceived as the act of freely and rationally acting individuals but as the act of persons restricted by social and psychological conditions.<sup>210</sup> Social characteristics of defendants, such as race and socio-economic status, are important in determining sentencing in the criminal courts.<sup>211</sup> Empirical studies have shown that sentences were more severe when offenders were of higher social status.<sup>212</sup> Contrary to this widely accepted view, my survey finds that about 67% of judges think that social status of the convict is not a deciding factor in sentencing.
- *Factors Related To The Victims*

(a) *race/religion/caste/age/sex of the victim*: Empirical studies have shown that many of this factors related to the victim do not have significant effects on sentence severity.<sup>213</sup> In the survey it is found that about 91% of judges do not think that race, religion or caste of the victim carry any weight in sentencing.<sup>214</sup> However, about 67% of judges believe that age of the victim might become an important factor in sentencing discretion.<sup>215</sup>
  - *Factors Related To The Bench*

(a) *mindset (attitudes) of the bench*: The survey shows that about 67% of judges in Bangladesh believe that mindset or attitudes of the sentencing bench

---

<sup>207</sup> Green, E, *supra no.* 164.

<sup>208</sup> Radzinowich and Hood, *supra no.* 165; Softley, *supra no.* 188; Kapardis and Farrington, *supra no.* 165.

<sup>209</sup> *State vs. Rafiqul Islam*, *supra no.* 191.

<sup>210</sup> Savelsberg, *supra no.* 16.

<sup>211</sup> Chambliss, *supra no.* 184; Thornberry, *supra no.* 184; Hagan, *supra no.* 184; Quinney, *supra no.* 184; Chiricos and Waldo, *supra no.* 184; Lizotte, *supra no.* 184.

<sup>212</sup> Kapardis and Farrington, *supra no.* 165.

<sup>213</sup> *id.*

<sup>214</sup> See, Annexure F.

<sup>215</sup> *id.*

do not at all influence the sentencing decision.<sup>216</sup> However, it is a widely accepted notion that personal biases and prejudices of individual sentencing judge do matter in sentencing.<sup>217</sup> Also, empirical studies show that at least sexual difference in value judgment does make a difference in sentencing practice.<sup>218</sup> If sex does make a difference in value judgment, it could mean a lot to the presently male-dominated judicial system of Bangladesh. Many senior judges of the higher judiciary fears that a different sentencing practice might develop if more women are given the chance to sit on the bench.<sup>219</sup>

- (b) *skill and efficiency of the bench*: Bond and Lemon studied the effects of magistrates' training on their attitudes and sentencing and found that the training led magistrates to have a different attitude (more sympathetic) towards convicts.<sup>220</sup> Insufficient training of judges in the interpretation of materials involving medical, psychiatric, psychometric, and sociologic data might affect the sentencing quality.<sup>221</sup> Even the kind of law school a judge attends, or the nature of his practice before his judicial career, are elements in judicial decision-making.<sup>222</sup> It is observed that most judges come to sentencing without any special preparation, and neither law school nor the private practice from which they are frequently drawn is likely to have given them insight into the motivations and treatment of criminal behavior.<sup>223</sup> About 65.5% judges in Bangladesh are of the opinion that skill and efficiency of the bench clearly shapes the sentencing decisions.<sup>224</sup>

---

<sup>216</sup> *id.*

<sup>217</sup> Lane, *supra* no. 142.

<sup>218</sup> A study conducted on Chinese community indicates that sex plays an important role in forming an individual's value judgment: see, Hsu, M, 'Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency' (1973) 64(3) *The Journal of Criminal Law and Criminology* 348.

<sup>219</sup> Haque, H, 'Trial of Offences against Women and the Mind-set of the Trial Judges', JATI Publications, Dhaka.

<sup>220</sup> Bond, R A and Lemon, N F, 'Changes in Magistrates' Attitudes during the First Year on the Bench' in Farrington, D P, Hawkins, K, and Lloyd-Bostock, S M (eds.), *Psychology, Law and Legal Processes* (London: Macmillan, 1979); Bond, R A and Lemon, N F, 'Training, Experience and Magistrates' Sentencing Philosophies: A Longitudinal Study' (1981) 5 *Law and Human Behavior* 123.

<sup>221</sup> Lane, *supra* no. 142.

<sup>222</sup> Smith, A B and Blumberg, A S, 'The Problem of Objectivity in Judicial Decision-Making' (1967) 46(1) *Social Forces* 96.

<sup>223</sup> *Supra* no. 7.

<sup>224</sup> See, Annexure F.

- (c) *social and political attitude of the bench*: Individual aspects of a judge's social biography is relevant to his decision-making. Similarly, due to political pressures, the judge at times may not wish to offend those who have contributed to his past, or may control his future.<sup>225</sup> However, in my survey, I found that about 65% of judges deny the fact that social and political attitude of the bench in any way influence sentencing practices.<sup>226</sup>
- (d) *experience of the bench*: The most conscientious judge lacks guidance, since there are almost no legislative standards, appellate decisions on sentencing or explanatory opinions by trial court judges. Judges, then, are left to their own 'understanding of human nature'.<sup>227</sup> Magistrates and judges frequently turn to precedent for their ruling and place particular value on their experience in sentencing.<sup>228</sup>
- (e) *demographic factors of the bench*: The demographic factors of the bench would refer to the age, sex and social class of the bench. It is well known that socioeconomic and class variables may differentially impinge upon judges in terms of attitudinal biases.<sup>229</sup> Also, in empirical studies it is found that the frequency of suspended sentences tended to reflect the magistrate's ethnic background.<sup>230</sup> However, in Bangladesh, about 69% of judges do not think that such demographic factors can influence the sentencing decision of the criminal bench.<sup>231</sup>
- *Factors Related To The Bar*

(a) *quality of counsel*: There are two conflicting views as to whether quality of counsel can play any influential role on sentencing bench. Zeisel in his research finds that quality of the bar does matter in sentencing.<sup>232</sup> However, Green finds that differences among prosecuting attorneys have no significant effect upon the severity of the sentences.<sup>233</sup> In Bangladesh, the bench and the bar have a mixed feeling about this issue.

---

<sup>225</sup> Smith and Blumberg, *supra no.* 222.

<sup>226</sup> See, Annexure F.

<sup>227</sup> *Supra no.* 7.

<sup>228</sup> Hood, R, *Sentencing in Magistrates' Court: A Study in Variation of Policy* (London: Stevens and Sons, 1962).

<sup>229</sup> Smith and Blumberg, *supra no.* 222.

<sup>230</sup> Everson, G, 'The Human Element in Justice' (1919) *Journal of Criminal Law and Criminology* 90.

<sup>231</sup> See, Annexure F.

<sup>232</sup> Zeisel, *supra no.* 51.

<sup>233</sup> Green, *supra no.* 164.

- *Other Factors*

- (a) *prevalence of the offence in the area*: Prevalence of any specific offence in any particular area might influence the sentencing decisions of the criminal bench. For example, if it is found that dowry deaths are committed in a particular area in an increasing rate, then the sentencing bench would be quite strict on imposing severe sentence for such offence. However, the survey reflects that the judges do not think in that way. About 67% of judges believe that prevalence of any particular offence in any area has no impact on the sentencing decisions of the bench.<sup>234</sup>
- (b) *media reporting*: Media reporting would include report about the crime and reporting on the case by media. Smith and Blumberg argue that in any given society, the role of a sentencing judge is exercised in accordance with the ethos of that particular society or social order at that particular time.<sup>235</sup> Therefore, the sentencing bench is bound to get influenced by media reporting on the case or about the convict. However, the survey shows that about 65.5% of judges deny the fact that media report in any way affects the sentencing discretion.<sup>236</sup>

## 6. ALTERNATIVE SENTENCING PROVISIONS

It is argued that the penal policy of Bangladesh lacks sufficient alternative measures to punishment. In Bangladesh, the sentence of imprisonment is by far the most frequent form of criminal punishment among all others.<sup>237</sup> However, the sentence of imprisonment is criticized on the grounds that it has largely failed to reduce the crime rate and in particular, the rate of recidivism.<sup>238</sup> Some also argue that imprisonment is harsh and degrading for offenders and extraordinarily expensive for society.<sup>239</sup> Hence, theorists of widely divergent orientations are united in their support for alternative sanctions.<sup>240</sup> Alternative

---

<sup>234</sup> See, Annexure F.

<sup>235</sup> Smith and Blumberg, *supra no.* 222.

<sup>236</sup> See, Annexure F.

<sup>237</sup> In Bangladesh death sentences are pronounced in very serious crimes; fines and forfeiture of property are imposed only in a few limited offences; verbal sanctions, conditional discharges, probation order or victims' compensation order are hardly in use.

<sup>238</sup> Mannheim, *supra no.* 107.

<sup>239</sup> Kahan, D M, 'What Do Alternative Sanctions Mean?' (1996) 63(2) *The University of Chicago Law Review* 591.

<sup>240</sup> Posner, R A, 'Optimal sentences for White-collar Criminals' (1980) 17 *American Criminal Law Review* 409; Morris, N and Tonry, M, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990).

sanctions to imprisonment might achieve a better result for the society. For example, in 2002, Kazakhstan penal law opted for increased use of alternative sentencing to imprisonment. Such measure has not only reduced the prison population but also has significantly decreased the existing crime rate within three years.<sup>241</sup>

The following section examines some popular alternative (and innovative) sentencing provisions available and sanctioned in other criminal jurisdictions:

- *Community Service Order*

Community service is just as effective as imprisonment for many offenses, and much cheaper.<sup>242</sup> A community service order requires an offender to do unpaid work<sup>243</sup> for a specified number of hours or to perform a specific task.<sup>244</sup> Before imposing such an order, the court needs reliable information that such work is available under appropriate supervision.<sup>245</sup> For example, in Thailand, drunk drivers, who would normally have received three-month imprisonment terms, are instead given suspended sentences and put on probation with the requirement that they perform 24 hours of community service. The authorities selected community service activities designed to sensitize drunk driver to the kinds of injuries they might cause themselves or others. They included assisting the victims of car accidents, working in hospitals, and volunteering for road accident emergency rescue units.<sup>246</sup>

---

<sup>241</sup> United Nations, *supra no. 92*.

<sup>242</sup> McDonald, D C, *Punishment Without Walls: Community Service Sentences in New York* (New Brunswick, New Jersey: Rutgers University Press, 1986); Feeley, M M, Berk, R and Campbell, A, 'Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications on the U.S. Sentencing Guidelines' (1992) 66 *South California Law Review* 155.

<sup>243</sup> The work should provide a service to the community.

<sup>244</sup> United Nations, *supra no. 92*.

<sup>245</sup> Community service requires close supervision to verify that the offender does the work required and that he or she is neither exploited nor forced to work beyond what is required or under unacceptable conditions. Members of the community can provide work opportunities for offenders; they should not, however, perform enforcement or disciplinary functions.

<sup>246</sup> 'Hospital Duty for Drink Drivers' in *The Nation (Thailand)*, March 11, 2005 (<http://www.nationmultimedia.com>); 'Drunk Driving: Bars Ought to Lay on Cars' in *The Nation (Thailand)*, April 10, 2005 (<http://www.nationmultimedia.com>); 'Tough Campaign Launched against Drink Driving' in the *Bangkok Post (Thailand)*, December 17, 2004 (<http://www.bangkokpost.com>).

- *Economic Sanctions*

Economic sanctions are another type of popular alternative sentencing provision in some criminal justice system. Fine and forfeiture of property are of course examples of economic sanctions available in Bangladesh. However, it may not be always possible to realize the fine or to successfully impose a sanction of forfeiture of property if the convict's economic status remains very poor. Mueller argues that if the poor constitute the bulk of the offender population it is not wise to rely on fines.<sup>247</sup> Rather, he suggests the use of sanctions, which attempt 'to tie offenders in or back in ... with the economic mainstream of society...'<sup>248</sup> In this way, the convict can learn to earn a living and at the same time achieve the ability to pay back fines imposed upon him. For example, Mueller suggests for a meaningful economic sanction, more emphasis should be given on developing crafts skills in prisoners.<sup>249</sup>

- *House Arrest*

House arrest is an alternative sentence to imprisonment.<sup>250</sup> Though it is considered as a relatively harsh sentence, but it is still less invasive than imprisonment.<sup>251</sup> It may be mentioned that in Bangladesh, like any other developing country, homes of offenders vary enormously – many live on the streets, others in grossly overcrowded conditions. In such a situation, if house arrest were imposed for the full 24 hours of the day, it would place an intolerable burden on the offender's many housemates.<sup>252</sup> However, as a possible alternative, the court can restrict the hours of house arrest in a way that might allow an offender to remain gainfully employed during the day but leave him confined to his house at night.

- *Referral to an Attendance Center*

Referral to an attendance centre would mean that the convict is required to spend the day at some specific 'day reporting centre' and would return home in the evenings. Recognizing the considerable need for therapy or treatment (personal, social, psychological or spiritual) of many convicts, these

---

<sup>247</sup> Mueller, G O W, *Sentencing: Process and Purpose*, (Springfield, III: Charles C Thomas Publishers, 1977).

<sup>248</sup> *id.*

<sup>249</sup> *id.*

<sup>250</sup> It would mean that an offender's home would become his prison, except that, unlike prison, he would be responsible for meeting his own basic needs.

<sup>251</sup> United Nations, *supra no.* 92.

<sup>252</sup> *id.*



centers may provide a centralized location for a host of therapeutic interventions.<sup>253</sup> It is believed that convicts are more likely to respond positively to such programs when they are conducted under the relative freedom of attendance centres in communities as compared to a prison setting.<sup>254</sup> However, it may be mentioned that in a country like Bangladesh, use of attendance center would mean increased establishment and maintenance cost for the economy.<sup>255</sup>

- *Shaming*

Since mid-1980s the American criminal justice system has witnessed the growing advent of a wide variety of shaming sanctions. However, many other criminal jurisdictions of the world can be evidenced with shaming sanctions from time immemorial, such as, ancient Rome, socialist China and Cuba, Crow Indian tribes etc.<sup>256</sup> Kahan grouped these sanctions into four classes:<sup>257</sup>

- (a) *stigmatizing publicity*: Stigmatizing publicity is the most straightforward. Penalties in this class attempt to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience.<sup>258</sup>
- (b) *literal stigmatization*: Literal stigmatization is just that – the stamping of an offender with a mark or symbol that invites ridicule.<sup>259</sup>

---

<sup>253</sup> *id.*

<sup>254</sup> *id.*

<sup>255</sup> Use of attendance centres by the courts assumes foremost that a jurisdiction has invested in an infrastructure of attendance centres that offer the range of programs determined to be necessary. Judges need to be regularly informed and updated as to what such centres offer, whether programs have vacancies, are at capacity, or have waiting lists, as well as what may be available in a particular community. Finally, in order to require a particular convict to attend a centre, judges need particular information about the convict and his or her needs, which may require a medical an/or psychological assessment in addition to an investigation of the convict's social history.

<sup>256</sup> Braithwaite, J, *Crime, Shame, and Reintegration* (New York: Cambridge University Press, 1989).

<sup>257</sup> Kahan, *supra no.* 239.

<sup>258</sup> For example, some municipalities in the US publish offenders' names in newspapers or even on billboards, a disposition that is especially common for men convicted of soliciting prostitutes. Other jurisdictions in the US broadcast the name of various types of offenders on community-access television channels.

<sup>259</sup> For example, some judges in the US order offenders to wear t-shirts announcing their crimes, to wear a sign declaring, 'I am a convicted child molester' or to wear brightly colored bracelets that read 'I Write Bad Checks' etc. Some other US jurisdictions now require persons guilty of drunk driving to display special license plates or bumper

- (c) *self-debasement*: Self-debasement penalties involve ceremonies or rituals that publicly disgrace the offender.<sup>260</sup>
- (d) *contrition*: Contrition penalties come in two forms. The first requires offenders to publicize their own convictions, describing their crimes in first-person terms and apologizing for them.<sup>261</sup> Another form of contrition is the apology ritual.<sup>262</sup>

The consequences of shaming penalties are extremely unpleasant. It is claimed that people when lose respect in the society, suffer ‘a crippling diminishment of self-esteem’.<sup>263</sup> Kahan further argues that public disgrace suffered due to shaming penalty might lead to serious financial hardship for the convicts as they are likely to be shunned in the marketplace.<sup>264</sup> Under the Constitution of Bangladesh shaming penalties might even be considered as ‘cruel, inhuman or degrading’. Nevertheless, some research studies strongly advocates shaming penalties as an effective criminal sanction. They suggest that the prospect of public disgrace exerts greater pressure on people to comply with the law than does the threat of imprisonment and other formal sanctions.<sup>265</sup>

- *Status Penalties*

---

stickers. US Courts have also ordered those convicted of sexual assaults and other crimes to post signs at their residences warning others to steer clear.

<sup>260</sup> For example, some US communities require offenders simply to stand in public spaces, such as the local courthouse, with signs describing their offenses. A judge in Tennessee orders convicted burglars to permit their victims to enter their homes and remove items of their choice. In New York, a slumlord was sentenced to house arrest in one of his rat-infested tenements (where tenants greeted him with the banner, ‘Welcome, You Reptile!’ Hoboken, New Jersey, requires Wall Street brokers and others who urinate in public to clean the city’s streets. In some other jurisdictions purse snatchers are ordered to wear tap shoes or man convicted of harassing former wife are ordered ‘let the ex-wife spit in his face’.

<sup>261</sup> For example, companies are ordered to publish apologies for dumping carcinogenic chemicals.

<sup>262</sup> For example, car thieves are ordered to apologize to church congregation. In Maryland, for example, juvenile offenders must apologize on their hands and knees and are released from confinement only if they persuade their victims that their remorse is sincere.

<sup>263</sup> Hultberg, P, ‘Shame-A Hidden Emotion’ (1988) 33 *Journal of Analytical Psychology* 109.

<sup>264</sup> Kahan, *supra no.* 239.

<sup>265</sup> Tittle, C R, *Sanctions and Social Deviance: The Question of Deterrence* (New York: Preager, 1980); Braithwaite, *supra no.* 239; Gibbs, J P, ‘Preventive Effects of Capital Punishment Other than Deterrence’ (1978) 14 *Criminal Law Bulletin* 41.

Status penalties deny the offender specified rights in the community. Such a penalty might, for example, prevent someone convicted of fraud from holding a position of trust as a lawyer or accountant; prevent a loan defaulter to hold the position of a director in a public company; or it might prevent a doctor convicted of medical malpractice from continuing his practice. However, it is suggested that status penalties should relate the 'loss of status' to the offence and not impose restrictions on convicts that are unconnected to the offence committed.<sup>266</sup> It is further stated that status penalties are comparatively less expensive alternatives to imprisonment. The court can impose them easily if it has the relevant information about the status of the convict. Status penalties, however, can have hidden costs. They may prevent the offender from earning a livelihood, and, if the offender's skills are scarce, the whole community may suffer from his/her professional ban.<sup>267</sup>

- *Suspended Sentencing*

Suspended sentencing is an attractive alternative to imprisonment. This would mean that a sentence of imprisonment is pronounced, but its implementation or execution would remain suspended for a particular period on condition(s) set by the court. The sentence might never be in need to be imposed if the convict complies with the conditions set by the court. It is argued that the threat of imprisonment, rather than the actual imprisonment, has more deterrent effect on the convicts.<sup>268</sup> Suspended sentencing is successfully practiced in many jurisdictions of the world, such as, Austria,<sup>269</sup> Denmark,<sup>270</sup> France,<sup>271</sup> West Germany,<sup>272</sup> The Netherlands,<sup>273</sup> Sweden,<sup>274</sup> etc.<sup>275</sup>

---

<sup>266</sup> United Nations, *supra no.* 92.

<sup>267</sup> *id.*

<sup>268</sup> *id.*

<sup>269</sup> In Austria, about 40% of the sentences imposed on adults for more serious offences are suspended.

<sup>270</sup> In Denmark, the case of simple detention up to two years, imprisonment up to one year and fines, the execution of the penalty may be suspended for a period of two to five years. About a third of all cases of violation of the criminal code result in a suspended sentence.

<sup>271</sup> In France, suspension is granted in nearly 40% of all prison sentences imposed by courts of petty sessions and in 18 per cent of all fines.

<sup>272</sup> In West Germany, sentences of up to nine months' imprisonment are usually conditionally suspended.

<sup>273</sup> In the Netherlands, prison sentences of up to one year, sentences of arrest, and fines can be conditionally suspended altogether or in part, but partial suspension is more frequent.

## 7. PROPOSAL FOR REFORM IN SENTENCING PRACTICES

Having discussed the broad purposes of sentencing, explored the current status of sentencing practices in Bangladesh, analyzed the sentencing factors influencing judicial discretion in Bangladesh and discussed some alternative sentencing provisions, this section would now make some necessary recommendations for reform in sentencing practices in Bangladesh. The recommendations are discussed as follows:

### ✓ *Separate Sentencing Hearing*

After convictions, the criminal courts in Bangladesh must introduce a separate hearing process to decide on the sentencing matter. If necessary, the *Code of Criminal Procedure*, 1898 be amended to accommodate such provision. For example, in India, under the new *Criminal Procedure Code* of 1973, Sessions Courts and the Magistrates trying warrant cases have to give separate hearing to the accused on the question of sentencing after finding him guilty of the offence.<sup>276</sup> Such hearing implies opportunity to place full and adequate material before the court and, if necessary, to lead evidence.<sup>277</sup> Glueck suggests that the sentencing function is to be separated from the guilt-finding function in the criminal proceedings in order to permit a tribunal composed of a psychiatrist or psychologist, a sociologist or educator and the trial judge to determine the appropriate treatment for an offender, based upon adequate investigation by case-workers.<sup>278</sup>

### ✓ *Popularizing Alternative Sentencing Provisions to Imprisonment*

As an alternative to imprisonment, the criminal justice system of Bangladesh must make use of less expensive but effective alternative sentences, such as, verbal sanctions, conditional discharges, probation orders, victims' compensations orders, economic sanctions, status penalty or suspended sentencing. To meet this end, the use of the *Probation of Offenders Ordinance*, 1960 should be made more popular among both the bar and the bench. Similarly, the concept of victims' compensation order should be successfully advocated and if necessary, the draft law prepared by Bangladesh Law Commission should be enacted. In addition, proper

<sup>274</sup> In Sweden, in cases of probation, the suspension of the execution of sentences is used from 3.5 to 4.2 times as frequently as the suspension of the imposition of sentence.

<sup>275</sup> Mannheim, *supra* no. 107.

<sup>276</sup> Sections 235 and 248(2), *Criminal Procedure Code* of 1973.

<sup>277</sup> Qadri, *supra* no. 34.

<sup>278</sup> Glueck, S, *Crime and Justice* (Boston: Little, Brown, & Co., 1936).

legal mechanisms should be adopted to introduce effective economic sanctions, status penalty and/or suspended sentencing.

✓ *Issuance of Sentencing Guidelines*

Sentencing guidelines are a neoclassical strategy, which are often employed to solve the problem of sentencing disparities by centrally guided sentencing policy direction.<sup>279</sup> However, a few questions might arise. First, what should be the source of *guidance* on sentencing – should it be a parliamentary committee, or the courts, or a specially appointed committee such as sentencing commission?<sup>280</sup> My answer would be a sentencing commission represented by relevant experts. Second, what *authority* should lay down the sentencing guidance – should it be embodied in a primary legislation, or issued through some other medium?<sup>281</sup> My answer would be a primary legislation, for example, a Sentencing Reform Act. Third, what should be the *style* of sentencing guidance – should it consist of ‘numerical sentencing grids’, or ‘narrative guidelines’, or a ‘set of general principles’, or some other style?<sup>282</sup> My answer would be a combination of all necessary styles. In my survey on judges, I found that 77.5% of judges recognizes that there is a need to have some sort of sentencing guidelines in Bangladesh.<sup>283</sup>

✓ *Judicial Training on Sentencing*

Some form of training of sentencing judges is essential if sentencing reforms are to have their full effect. Improving sentencing skills through training should be an important part of any scheme, which aims to make sentencing practices more consistent.<sup>284</sup> Unless the details and the guiding philosophy of sentencing reform are explained to those who must operate the system, its impact is likely to be impaired. Several jurisdictions now have

<sup>279</sup> Savelsberg, *supra no.* 16; Von Hirsch, A, Knapp, K A and Tonry, M, ‘The Sentencing Commission’s Function’ in *The Sentencing Commission and Its Guidelines* (Boston: Northeastern University Press, 1987); Champion, D J (ed.), *The U.S. Sentencing Guidelines: Implications for Criminal Justice* (New York: Praeger; 1989); Nagel, I H, ‘Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines’ (1990) 80 *Journal of Criminal Law and Criminology* 883.

<sup>280</sup> Ashworth, *supra no.* 30.

<sup>281</sup> *id.*

<sup>282</sup> *id.*

<sup>283</sup> See, Annexure F.

<sup>284</sup> Qadri, *supra no.* 34.

a more or less systematic program for training judges. For example, judicial training programs are common in the USA,<sup>285</sup> UK<sup>286</sup> and many other European countries, such as, Denmark, France, Portugal, Spain, with occasional judicial conferences in other countries such as Austria and Cyprus.<sup>287</sup> My survey on judges also reflects the thought of current bench with regard to the increasing need of organizing regular training programs on sentencing for judges in Bangladesh.<sup>288</sup>

✓ *Establishing Sentencing Council/Board*

Lane believes that establishment of a Sentencing Board or Council is very effective.<sup>289</sup> Such Board or Council would determine the actual period of imprisonment with the minimum and maximum set by the court and would serve to make penalties more uniform.<sup>290</sup> Alternatively, the Board or Council might enable the sentencing judge, before imposing sentence, to meet with his colleagues in order to learn what sentences they would impose if they were the sentencing judge.<sup>291</sup> This procedure is conducive to uniformity in the sentencing pattern.<sup>292</sup> In Bangladesh, there is currently no provision for Sentencing Board or Council. However, in my survey on judges, I found that about 69% of judges of criminal bench do actually discuss and share their thoughts about sentences with other judges before sentencing.<sup>293</sup> Therefore, establishment of a Sentencing Board or Council might facilitate such informal practices of the criminal bench in Bangladesh.

---

<sup>285</sup> Nagel, *supra no.* 279.

<sup>286</sup> Judicial Studies Board, *Triennial Report, 1984-87* (London: Her Majesty's Stationery Office, 1988).

<sup>287</sup> Council of Europe, *Disparities in Sentencing: Causes and Solutions*, Collected Studies in Criminological Research, vol. 26, (Strasbourg: Council of Europe, 1989).

<sup>288</sup> See, Annexure F.

<sup>289</sup> Lane, *supra no.* 142.

<sup>290</sup> Holtzoff, A, 'The Indeterminate Sentence: Its Social and Legal Implications' (1941) 5 *Federal Probation* 3.

<sup>291</sup> Diamond, S S and Zeisel, H, 'Sentencing Councils: A Study of Sentence Disparity and Its Reduction' (1975) 43(1) *The University of Chicago Law Review* 109.

<sup>292</sup> The only snag is that the council meets before the judge gets an opportunity of hearing the defence on sentencing and, therefore, the judge may not be able to pass the sentence with an open mind because of the inhibitions created by the earlier discussions with his colleagues: Qadri, *supra no.* 34.

<sup>293</sup> See, Annexure F.

✓ *Developing Sentencing Information System (SIS)*

One obvious barrier to the achievement of consistent sentencing practices is that individual judges may not know what the practices of other judges are.<sup>294</sup> A collection of appellate judgments is only an adequate guide to sentencing practice if those judgments cover all the major areas of sentencing in sufficient detail. Textbooks can go further than this and sometimes do: they can, for example, draw on regular statistics or on particular research findings in order to reveal the practices that courts actually follow.<sup>295</sup> A Sentencing Data Base or a Sentencing Information System (SIS) can be very useful in this regard.<sup>296</sup> However, the 'success' of information system will depend much on their reception by the courts<sup>297</sup> and on the quality of the information collected.<sup>298</sup> Bangladesh must consider developing such an information system either as a supplement to the Sentencing Board or council or as a substitute for it. This approach is claimed to be particularly helpful in non-metropolitan districts, where judges, because of the geographic isolation, may find it difficult to attend Board or Council meetings.<sup>299</sup>

## 8. CONCLUSION

Sentencing practices form a crucial part of any criminal justice system. Choice of an appropriate sentence in a particular situation bears enormous consequence not only on the individual convict but also on the society at

---

<sup>294</sup> They may simply be unable to find out or, if they are told, the account they are given may be inaccurate, incomplete, or imperfectly understood: Ashworth et al, *supra no. 3*.

<sup>295</sup> Ashworth, *supra no. 30*.

<sup>296</sup> For examples of sentencing data base in Canada, see, Hogarth, J, 'Computers and the Law: Sentencing Data Base Study', *unpublished manuscript*, (Vancouver: University of British Columbia, Faculty of Law, 1987) and Doob, A and Park, N, 'Computerized Sentencing Information for Judges: An Aid to Sentencing Process (1987) 30 *Criminal Law Quarterly* 54. For example of sentencing data base in New South Wales (Australia), see, Chan, J, 'Developing a Sentencing Information System in New South Wales' (1989) 22 *Australia and New Zealand Journal of Criminology* 12; Potas, I, *The Sentencing Information System of New South Wales*, paper presented to the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 1990.

<sup>297</sup> If the judges use the system relatively infrequently, its contribution to consistency is likely to be minimal.

<sup>298</sup> The quality of the information depends on two elements – the extent to which it is classified and the frequency of cases within the various sub-classifications.

<sup>299</sup> Diamond and Zeisel, *supra no. 290*.

large. A few essential characters of sentencing practices in Bangladesh include: (a) it disapproves 'cruel, inhuman or degrading' punishments; (b) wide discretion is granted to the sentencing judges; (c) there does not exist a system of separate sentencing hearing; (d) sentence of imprisonment is the most frequent form of punishment; and (e) the system is yet to either fully utilize or incorporate alternative sentences to imprisonment.

It may be mentioned that both the (*Bangladesh*) *Penal Code*, 1860 and the *Code of Criminal Procedure*, 1898 are very old and in some context, outdated. They were framed when sentencing was not an issue, whether nationally or internationally. It is only over the last fifty years that there have been increasing attempts to try to reform sentencing practices in various jurisdictions. However, criminal justice system of Bangladesh has failed to even trigger yet a discussion on such sentencing reform. In this background a number of policy proposals are recommended here for sentencing reform in Bangladesh. These include separate sentencing hearing, popularizing alternative sentencing provisions to imprisonment, issuance of sentencing guidelines, judicial training on sentencing, establishing Sentencing Council/Board and developing an effective Sentencing Information System (SIS).

## BIBLIOGRAPHY

### Books/Book Chapters

1. Adeyemi, A A, 'Personal Reparation in Africa: Nigeria and Gambia' in Zvekic, U. (ed.), *Alternatives to Imprisonment in Comparative Perspective* (Chicago: Nelson-Hall Publishers, 1994).
2. Adler, J, *The Urgings of Conscience* (Philadelphia: Temple University Press, 1992).
3. Ashworth, A J, 'Sentencing Reform Structures' in Tonry, M (ed.), *Crime and Justice: A Review of Research*, Vol. 16 (Chicago: University of Chicago Press, 1992).
4. Ashworth, A, Genders, E, Mansfield, G, Peay, J and Player, E, *Sentencing in the Crown Court* (Oxford: University of Oxford, Centre for Criminological Research, 1984).
5. Bentham, J, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner, 1948).
6. Blumstein, A, 'Prison Populations: A System out of Control?' in Tonry, M and Morris, N (ed.), *Crime and Justice: A Review of Research* (Vol. 10), (Chicago: University of Chicago Press, 1988).



7. Bond, R A and Lemon, N F, 'Changes in Magistrates' Attitudes during the First Year on the Bench' in Farrington, D P, Hawkins, K, and Lloyd-Bostock, S M (eds.), *Psychology, Law and Legal Processes* (London: Macmillan, 1979).
8. Boyle, C K and Allen, M J, *Sentencing in Northern Ireland* (NI: SLS Publications, 1990).
9. Braithwaite, J, *Crime, Shame, and Reintegration* (New York: Cambridge University Press, 1989).
10. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services, 1987).
11. Chambliss, W J, *Crime and the Legal Process* (New York: McGraw-Hill, 1969).
12. Champion, D J (ed.), *The U.S. Sentencing Guidelines: Implications for Criminal Justice* (New York: Praeger; 1989).
13. Chaudhury, T G, *Mitra's Legal and Commercial Dictionary* (6<sup>th</sup> ed.) (Kolkata: Eastern Law House, 2006).
14. Council of Europe, *Disparities in Sentencing: Causes and Solutions*, Collected Studies in Criminological Research, vol. 26, (Strasbourg: Council of Europe, 1989).
15. Davis, K C, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).
16. Duff, R A, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).
17. Federal Courts Study Committee, *Report* (Washington, DC: Federal Courts Study Committee, 1990).
18. Findlay, M, Odgers, S and Yeo, S, *Australian Criminal Justice* (Melbourne: Oxford University Press, 1994).
19. Friedman, L M, *A History of American Law* (New York: Simon & Schuster, 1985).
20. Gaylin, W, *Partial Justice: A Study of Bias in Sentencing* (New York: Vintage Books, 1974).
21. Glueck, S, *Crime and Justice* (Boston: Little, Brown, & Co., 1936).
22. Green, E, *Judicial attitudes in Sentencing* (London: Mcmillan & Co., 1961).
23. Hogarth, J, *Sentencing as a Human Process* (London: Oxford University Press, 1971).

24. Home Office, *Criminal Statistics, England and Wales, 1979* (London: Her Majesty's Stationery Office, 1980).
25. Hood, R, *Race and Sentencing: A Study in the Crown Court* (Oxford: Oxford University Press, 1992).
26. Hood, R, *Sentencing in Magistrates' Court: A Study in Variation of Policy* (London: Stevens and Sons, 1962).
27. Huq, Z, *Law and Practice of Criminal Procedure* (6<sup>th</sup> ed.) (Dhaka: Ayesha Mahal, 1996).
28. Huq, Z, *The Penal Code* (3<sup>rd</sup> ed.) (Dhaka: Ayesha Mahal, 1991).
29. Hutton, N and Tata, C, *Patterns of Custodial Sentencing in the Sheriff Court* (Edinburgh: The Scottish Office Central Research Unit, 1995).
30. Islam, M, *Constitutional Law of Bangladesh* (2<sup>nd</sup> ed.) (Dhaka: Mullick Brothers, 2002).
31. Judicial Studies Board, *Triennial Report, 1984-87* (London: Her Majesty's Stationery Office, 1988).
32. Kalven, H and Zeisel, H, *The American Jury* (Boston: Little, Brown & Co, 1966), ch. 36.
33. Kort, F, 'Content Analysis of Judicial Opinions and Rules of Law' in Schubert, G (ed.), *Judicial Decision-Making* (New York: Free Press, 1963).
34. Lovegrove, A, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (New York: Springer, 1989).
35. Malik, S, *The Children Act 1974: A Critical Commentary* (Dhaka: Save the Children, UK, 2004).
36. McDonald, D C, *Punishment Without Walls: Community Service Sentences in New York* (New Brunswick, New Jersey: Rutgers University Press, 1986).
37. Moore, M, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997).
38. Morris, N and Tonry, M, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990).
39. Morse, W, *The Attorney General's Survey of Release Procedures* (Washington DC: United States Government Printing Press, 1939).
40. Moxon, D, *Sentencing Practice in the Crown Court* (London: Her Majesty's Stationery Office, 1988).
41. Mueller, G O W, *Sentencing: Process and Purpose*, (Springfield, III: Charles C Thomas Publishers, 1977).

42. Nicholson, G, *Sentencing: Law and Practice in Scotland* (2<sup>nd</sup> ed.) (Edinburgh: Sweet and Maxwell, 1992).
43. Qadri, S M A, *Abmad Siddique's Criminology: Problems and Perspectives* (5<sup>th</sup> ed.) (Lucknow: Eastern Book Company, 2005).
44. Quinney, R, *Criminal Justice in America: A Critical Understanding* (Boston: Little Brown, 1974).
45. Rahman, L, *The Constitution of the People's Republic of Bangladesh with Comments and Case-Laws* (Dhaka: Mullick Brothers, 2004).
46. Report, *Royal Commission on Capital Punishment 1949–1953* (London: Her Majesty's Stationary Office, 1965).
47. Shapland, J, *Between Conviction and Sentence: The Process of Mitigation* (London: Routledge & Kegan Paul, 1981).
48. Silberman, C, *Criminal Violence, Criminal Justice* (New York: Vintage Books, 1980).
49. Silving, H, 'Rule of Law in Criminal Justice' in Mueller, G (ed.), *Essays in Criminal Law* (N.J./London: South Hackensack, 1961).
50. Thomas, D A, *Principles of Sentencing* (2<sup>nd</sup> ed.) (London: Heinemann, 1979).
51. Thomas, D A, *Principles of Sentencing* (London: Heinemann, 1970).
52. Tittle, C R, *Sanctions and Social Deviance: The Question of Deterrence* (New York: Praeger, 1980).
53. United Nations, 'Handbook on Restorative Justice Programmes' (New York: United Nations, 2006).
54. United Nations, *Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment* (New York: United Nations, 2007).
55. Victorian Sentencing Committee, *Report* (Melbourne: Victorian Attorney-General's Department, 1988).
56. Ville, R, Zvecik, U and Klaus, J F (eds.), 'Promoting Probation Internationally' *Proceedings of the International Training Workshop on Probation, 2-5 July 1997, Valetta, Malta* (Rome/London: United Nations Interregional Crime and Justice Research Institute, 1997).
57. Von Hirsch, A, *Doing Justice: The Choice of Punishments* (New York: Hill & Wang, 1976).
58. Von Hirsch, A, Knapp, K A and Tonry, M, 'The Sentencing Commission's Function' in *The Sentencing Commission and Its Guidelines* (Boston: Northeastern University Press, 1987).
59. Walker, N and Padfield, N, *Sentencing: Theory, Law and Practice* (2<sup>nd</sup> ed.) (London: Butterworths and Co., 1996).

60. Walker, N D, *Crime and Punishment in Britain* (2<sup>nd</sup> ed.) (Edinburgh: Edinburgh University Press, 1968).
61. Walker, N D, *Sentencing in a Rational Society* (London: Allen Lane the penguin Press, 1969).
62. Winch, P, *Ethics and Action* (London: Routledge and Kegan Paul, 1972).
63. Zeisel, H, *Say It With Figures* (6<sup>th</sup> ed.) (New York: Harper & Row, 1985).

### Refereed Journals

1. 'Application of the Exclusionary Rule at Sentencing' (1971) 57(7) *Virginia Law Review* 1255.
2. 'Due Process and Legislative Standards in Sentencing' (1952) 101(2) *University of Pennsylvania Law Review* 257.
3. Albanese, J S, 'Concern about Variation in Criminal Sentences: A Cyclical History of Reform' (1984) 75(1) *The Journal of Criminal Law and Criminology* 260.
4. Bond, R A and Lemon, N F, 'Training, Experience and Magistrates' Sentencing Philosophies: A Longitudinal Study' (1981) 5 *Law and Human Behavior* 123.
5. Caldwell, R G, 'Review: Judicial Attitudes in Sentencing by Edward Green' (1962) 53 (3) *The Journal of Criminal Law, Criminology, and Police Science* 360.
6. Chan, J, 'Developing a Sentencing Information System in New South Wales' (1989) 22 *Australia and New Zealand Journal of Criminology* 12.
7. Chiricos, T G and Waldo, G P, 'Socio-economic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition' (1975) 40 *American Sociological Review* 753.
8. Coffee, J C Jr, 'The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice' (1975) 73(8) *Michigan Law Review* 1361.
9. Comment, *Reform in Federal Penal Procedure: The Federal Corrections and Parole Improvement Bills* (1944) 53 *Yale Law Journal* 773.
10. Cross, R, 'Paradoxes in Prison Sentences' (1965) 81 *Law Quarterly Review* 205.
11. Diamond, S S and Zeisel, H, 'Sentencing Councils: A Study of Sentence Disparity and Its Reduction' (1975) 43(1) *The University of Chicago Law Review* 109.
12. Doob, A and Park, N, 'Computerized Sentencing Information for Judges: An Aid to Sentencing Process' (1987) 30 *Criminal Law Quarterly* 54.

13. Everson, G, 'The Human Element in Justice' (1919) 10 *Journal of the American Institute of Criminal Law and Criminology* 90.
14. Everson, G, 'The Human Element in Justice' (1919) *Journal of Criminal Law and Criminology* 90.
15. Farrington, D P, 'The Effectiveness of Sentences' (1978) 142 *Justice of the Peace* 68.
16. Feeley, M M, Berk, R and Campbell, A, 'Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications on the U.S. Sentencing Guidelines' (1992) 66 *South California Law Review* 155.
17. Ferri, E, 'The Nomination of A Commission for the Positivist Reform of the Italian Penal Code' (1920) 11 *Journal of the American Institute of Criminal Law and Criminology* 67.
18. Fox, R, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.
19. Frase, R S, 'Sentencing Principles in Theory and Practice' (1997) 22 *Crime and Justice* 363.
20. Friedman, G M, 'The West German Day-Fine System: A Possibility for the United States' (1983), 50 *University of Chicago Law Review* 281.
21. Gibbs, J P, 'Preventive Effects of Capital Punishment Other than Deterrence' (1978) 14 *Criminal Law Bulletin* 41.
22. Glueck, S, 'Principles of a Rational Penal Code' (1928) 41(4) *Harvard Law Review* 453.
23. Hagan, J, 'Extra-legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint' (1974) 8 *Law and Society Review* 357.
24. Haque, H, 'Trial of Offences against Women and the Mind-set of the Trial Judges', JATI Publications, Dhaka.
25. Holtzoff, A, 'The Indeterminate Sentence: Its Social and Legal Implications' (1941) 5 *Federal Probation* 3.
26. Hsu, M, 'Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency' (1973) 64(3) *The Journal of Criminal Law and Criminology* 348.
27. Hultberg, P, 'Shame-A Hidden Emotion' (1988) 33 *Journal of Analytical Psychology* 109.
28. Kahan, D M, 'What Do Alternative Sanctions Mean?' (1996) 63(2) *The University of Chicago Law Review* 591.

29. Kapardis, A and Farrington, D P, 'An Experimental Study of Sentencing by Magistrates' (1981) 5 (2/3) *Law and Human Behavior* 107.
30. Lane, H E, 'Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison' (1941) 32(2) *Journal of Criminal Law and Criminology* 171.
31. Lizotte, A J, 'Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice' (1978) 25(5) *Social Problems* 564.
32. Mannheim, H, 'Comparative Sentencing Practice' (1958) 23(3) *Law and Contemporary Problems* 557.
33. Miller, M and Freed, D, 'Handcuffing the Sentencing Judge', (1990) 2 *Federal Sentencing Reporter* 189.
34. Nagel, I H, 'Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines' (1990) 80(4) *The Journal of Criminal Law and Criminology* 883.
35. Note, 'Executive Clemency in Capital Cases' (1964) 39 *New York University Law Review* 136.
36. Posner, R A, 'Optimal sentences for White-collar Criminals' (1980) 17 *American Criminal Law Review* 409.
37. Radzinowich, L and Hood, R, 'An English Attempt to Reshape the Sentencing Structure' (1978) 78(5) *Columbia Law Review* 1145.
38. Radzinowicz, L and Hood, R, 'Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem' (1979) 127(5) *University of Pennsylvania Law Review* 1288.
39. Roy, A K, 'Bias of a Judge: What and Why', (1999) 51 *Dhaka Law Reports Journal* 62.
40. Royal Commission on Capital Punishment (1949) *Minutes of Evidence* 1.
41. Savelsberg, J J, 'Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law' (1992) 97(5) *The American Journal of Sociology* 1346.
42. Shain, I J, 'Review: Sentencing: Process and Purpose by Gerhard O. W. Mueller' (1979) 70(4) *The Journal of Criminal Law and Criminology* 593.
43. Shute, S, 'Prosecution Appeals against Sentence: The First Five Years' (1994) 57(5) *The Modern Law Review* 745.
44. Skolnick, J H, 'Social Control and the Adversary System' (1967) 11 *Journal of Conflict Resolution* 53.

45. Smith, A B and Blumberg, A S, 'The Problem of Objectivity in Judicial Decision-Making' (1967) 46(1) *Social Forces* 96.
46. Softley, P, 'Sentencing Practice in Magistrates' Courts' (1980) *Criminal Law Review* 161.
47. Tata, C, 'Conceptions and Representations of the Sentencing Decision Process' (1997) 24(3) *Journal of Law and Society* 395.
48. Taylor, L, 'Judges and Sentencing' 38(4) *Journal of the Law Society of Scotland* 129.
49. Thomas, D A, 'Sentences of Imprisonment: A Review of Maximum Penalties' (1979) 42(3) *The Modern Law Review* 309.
50. Thomas, D A, 'Theories in Punishment in the Court of Criminal Appeal' (1964) 27(5) *The Modern Law Review* 546.
51. Thomberry, T P, 'Race, Socioeconomic Status and Sentencing in the Juvenile Justice System' (1973) 64 *The Journal of Criminal Law and Criminology* 90.
52. Thornstedt, H, 'The Day-Fine System in Sweden', 1975 *Criminal Law Review* 307.
53. Tonry, M, 'Structuring Sentencing' (1988) 10 *Crime and Justice* 267.
54. Tudor, S, 'Accepting One's Punishment as Meaningful Suffering' (2001) 20(6) *Law and Philosophy* 581.
55. Von Hirsch, A, 'Principles for Choosing Sanctions: Sweden's proposed Sentencing Statute' (1987) 13 *New England Journal of Criminal and Civil Confinement* 171.
56. Wyzanski, C E, 'A Trial Judge's Freedom and Responsibility' (1952) 65 *Harvard Law Review* 1281.
57. Zeisel, H and Diamond, S S, 'Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut' (1977) 2(4) *American Bar Foundation Research Journal* 881.
58. Zeisel, H, 'Methodological Problems in Studies of Sentencing' (1969) 3(4) *Law & Society Review* 621.

### Others

1. 'Drunk Driving: Bars Ought to Lay on Cars' in *The Nation (Thailand)*, April 10, 2005 (<http://www.nationmultimedia.com>).
2. 'Hospital Duty for Drink Drivers' in *The Nation (Thailand)*, March 11, 2005 (<http://www.nationmultimedia.com>).
3. 'Tough Campaign Launched against Drink Driving' in the *Bangkok Post (Thailand)*, December 17, 2004 (<http://www.bangkokpost.com>).

4. Bangladesh Law Commission, 'Final Report on a Proposed Law Relating to Payment of Compensation and Other Reliefs to the Crime Victims' dated 15.02.2007.
5. Hogarth, J, 'Computers and the Law: Sentencing Data Base Study', *unpublished manuscript*, (Vancouver: University of British Columbia, Faculty of Law, 1987).
6. Potas, I, *The Sentencing Information System of New South Wales*, paper presented to the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 1990.

### Legislation

1. *(Bangladesh) Penal Code*, 1860.
2. *The Code of Criminal Procedure*, 1898.
3. *The Constitution of the Peoples' Republic of Bangladesh*.
4. *The Probation of Offenders Ordinance*, 1960.
5. *The Probation of Offenders Ordinance*, 1960.
6. *The Probation of Offenders Rules*, 1971.
7. *The Whipping Act*, 1909.

### Judicial Decisions

#### Bangladesh

1. *Abdul Hye (Moulana) vs. The State*, 3 (1998) MLR (AD) 262.
2. *Abdur Rahman Syed vs. State*, 44 (1992) DLR 556.
3. *Abdus Sattar vs. The State*, 38 (1986) DLR (AD) 38.
4. *Aftabuddin vs. Bangladesh*, 48 (1996) DLR 1.
5. *Altaf Hossain vs. The State*, 5 (2000) MLR (AD) 205.
6. *Ersbad Ali Sikder (Md.) vs. State*, 57 (2005) DLR (AD) 75.
7. *Farid Ali vs. The State*, 4 (1999) MLR (HC) 23.
8. *Fateh Khan & others vs. State*, 15 (1963) DLR (SC) 51.
9. *Kalu Mia vs. The State*, 10 (2005) MLR (HC) 397.
10. *Mashuq Mia alias Iqbal vs. The State*, 9 (2004) MLR (AD) 372.
11. *Md. Abdul Majid Sarker vs. State*, 40 (1988) DLR (AD) 83.
12. *Md. Yabia and others vs. State*, 1 (1996) MLR (HC) 59.
13. *Mobarakullah (Md) and another vs. The State*, 9 (2004) MLR (HC) 208.



14. *Muhammad Rafique vs. The State*, 15 (1963) DLR (SC) 219.
15. *Nizamuddin Mia vs. The State*, 26 (1974) DLR 350.
16. *Nurun Nabi (Mobammad) vs. Sabin Alam alias Shabin and others*, 8 (2003) MLR (HC) 218.
17. *Rafiqul Islam Mollab vs. State*, 57 (2005) DLR 581.
18. *Rovshan Ali (Md.) vs. The State*, 5 (2000) MLR (HC) 342.
19. *Secretary, Ministry of Finance, Government of Bangladesh vs. Masdar Hossain*, 52 (2000) DLR (AD) 82.
20. *Shamim (Md.) alias Shamim Shikder vs. The State*, 8 (2003) MLR (AD) 214.
21. *State vs. Adam Khan*, 9 (2004) MLR (HC) 405.
22. *State vs. Anjuara Khatun*, 57 (2005) DLR 277.
23. *State vs. Khondker Zillul Bari and others*, 10 (2005) MLR (AD) 175.
24. *State vs. Mir Hossain alias Mira and others*, 56 (2004) DLR 124.
25. *State vs. Rafiqul Islam*, 55 (2003) DLR 61.
26. *The State vs. Abul Kashem*, 37 (1985) DLR (AD) 91.

### **United Kingdom**

1. *R v Foy* [1962] 1 WLR 609, [1962] 2 All ER 246.

### **India**

1. *Asbok Kumar v Union of India* (1991) AIR 1792 SC.
2. *Asbok Kumar vs. State (Delhi Administration)* (1980) 2 SCC 282, 1980 SCC (Cri) 426.
3. *The State of Kerala vs. Mathai* (1961) ILR 1 Ker 374, 1961 Ker LJ 15.

### **Singapore**

1. *Abdul Nasir bin Amer Hamsab vs. Public Prosecutor* [1997] SGCA 38 [Unreported], Available at, [http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/\[1997\]\\_SGCA\\_38.html](http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/[1997]_SGCA_38.html)

**ACKNOWLEDGEMENTS**

I acknowledge the financial support provided by the CIDA Legal Reform Project to undertake this research work.

I am grateful to Dr Shahdeen Malik, Director, School of Law, BRAC University for his research guidance and critical comments on the earlier drafts of this paper.

I am thankful to a number of people who helped me in collecting data necessary for this research work: particular thanks to Justice Hamidul Haque, Director, Judicial Administration Training Institute (JATI); Ms Rostoma Begum (JATI); Chief Metropolitan Magistrate, CMM Court, Dhaka; ADM, Gazipur Magistrate Court; Secretary, Bangladesh Bar Council; Dr Kazi Aktar Hamid, Advocate, Supreme Court of Bangladesh; Dr Kazi Rezaul Huq, Advocate, Supreme Court of Bangladesh; Presidents and Secretaries of the following Bar Associations: Dhaka District Court, Chittagong District Court, Gazipur District Court, Munshiganj District Court, Narayangaj District Court and Dhaka Supreme Court. I would also like to thank all the judges, magistrates and advocates who gave up their invaluable time to speak on the topic and to fill up the survey questionnaire.

Many colleagues in the BRAC University School of Law and the LawDev (Bangladesh) provided advice and encouragement: particular thanks to Dr Saira Rahman Khan and Advocate Dilruba Aftabi. In the Supreme Court, the Sessions Courts and the Magistrate's Courts, the survey data was collected by Md. Abdullah Al Mamun, Ms Delara Hossain, Mohd. Shahidul Islam and Md. Nour Alam Patoary.

However, the usual disclaimer applies.

**ANNEXURE A**

## সমীক্ষা

বয়স ..... পুরুষ ..... মহিলা .....

বর্তমান পদ .....

চাকুরীর ময়াদকাল.....

*Code of Criminal Procedure*, 1898 এর section 345-এ যে Compounding of offences' এর কথা বলা আছে তার ব্যবহার কি আপনার আদালতে:

প্রায়শঃই হয়

মাঝে মাঝে হয়

একেবারেই হয় না

আপনি কি *Probation of Offenders Ordinance*, 1960 সম্পর্কে অবগত আছেন?

হ্যাঁ

না

যথাযথ ফৌজদারী মামলায় আপনার জানা মতে *Probation of Offenders Ordinance*, 1960 এর অধীনে Probation Order এর জন্য আদালতে প্রায়শঃই আবেদন করা হয় কি?

হ্যাঁ

না

আপনার আদালতে গত এক বছরে Probation Order দেয়া হয়েছে এমন মামলার সংখ্যা কয়টি হতে পারে?

০

১-৫ টি

৬-১০ টি

১১-১৫টি

১৬-২০টি

২০ এর অধিক

মন্তব্য.....

.....

.....

.....

**ANNEXURE B****Survey on Compounding of Offences and Probation****Sample Details**

SAMPLE SIZE	17 Magistrates of Dhaka Chief Metropolitan Magistrate Court and Gazipur Magistrate Court (randomly selected)
AGE DISTRIBUTION	3 Magistrates between the age of 25-30 years 9 Magistrates between the age of 31-40 years 5 Magistrates between the age of 41-50 years
LENGTH OF SERVICE	1-18 years

**Survey Findings**

<i>Questions</i>	<i>Response Options</i>	<i>Responses in Dhaka CMM Court</i>	<i>Responses in Gazipur Magistrate Court</i>	<i>Total</i>	<i>(%)</i>
The frequency of the use of section 345, <i>Code of Criminal Procedure, 1898</i> in your Court:	Most frequently	2	2	4	<b>23.53</b>
	less frequently	3	9	12	<b>70.59</b>
	not at all	0	1	1	<b>5.88</b>
Are you aware of the <i>Probation of Offenders Ordinance, 1960</i>	Yes	4	11	15	<b>88.24</b>
	No	1	1	2	<b>11.76</b>
Do you think that the applications for probation order, in appropriate cases, are frequently made in the Court?	Yes	0	0	0	<b>0</b>
	No	5	12	17	<b>100</b>
In the last one year, how many Probation Order(s) has been passed in your court?	0	5	11	16	-
	1-5	0	1	1	-
	6-10	0	0	0	-
	11-15	0	0	0	-
	16-20	0	0	0	-
	more than 20	0	0	0	-

ANNEXURE C

## সমীক্ষা

বয়স ..... পুরুষ ..... মহিলা .....

কত বছর ধরে আইন পেশায় নিয়োজিত?.....

ফৌজদারী মামলা পরিচালনা করেন কি?

হ্যা

না

**Code of Criminal Procedure, 1898** এর ২৬৩-এর ৩৪৫-এ **‘compounding of offences’** এর কথা বলা আছে তা কখনও কি কোন মামলায় প্রয়োগ করেছেন?

হ্যা

না

আপনি কি **Compounding of Offenders Ordinance, 1960** সম্পর্কে অবগত আছেন?

হ্যা

না

যথাযথ ফৌজদারী মামলায় আপনার জানা মতে **Probation of Offenders Ordinance, 1960** এর অধীনে **Probation Order** এর জন্য আদালতে প্রায়শঃই আবেদন করা হয় কি?

হ্যা

না

**Probation Order** দেয়া হয়েছে এমন মামলার কথা জানেন কি?

হ্যা

না

যদি জানা থাকে তবে তার সংখ্যা বছরে কয়টি হতে পারে?

০

১-৫ টি

৬-১০ টি

১১-১৫টি

১৬-২০টি

২০ এর অধিক

মন্তব্য:.....

.....

.....

**ANNEXURE D****Survey on Compounding of Offences and Probation****Sample Details**

SAMPLE SIZE	558 Lawyers
SAMPLE DISTRIBUTION	114 lawyers from Bangladesh Supreme Court Bar 228 lawyers from Dhaka District Court Bar 32 lawyers from Chittagong District Court Bar 61 lawyers from Narayanganj District Court Bar 106 lawyers from Gazipur District Court Bar 17 lawyers from Munshigonj District Court Bar

**Survey Findings**

Questions	Response Options	Supreme Court BAR	Dhaka BAR	Chittagong BAR	Narayanganj BAR	Gazipur BAR	Munshigonj BAR	Total	Percentage
Have you ever utilized section 345, <i>Code of Criminal Procedure</i> , 1898 in any of your conducted case?	Yes	25	83	19	23	24	8	182	32.62
	No	89	145	13	38	82	9	376	67.38
Are you aware of the <i>Probation of Offenders Ordinance</i> , 1960	Yes	31	77	10	13	27	2	160	28.67
	No	83	151	22	48	79	15	398	71.33
Do you think that the application for Probation Order in appropriate cases are frequently made in the Court?	Yes	02	22	02	05	9	0	40	7.17
	No	112	206	30	56	107	17	528	94.62
Are you aware of cases where Probation Order has been granted?	Yes	0	36	02	07	19	0	64	11.47
	No	114	192	30	54	87	17	494	88.53
If yes, what will be the appropriate number of such cases per year?	1-5		17	02	5	16		40	62.5
	6-10		7		1	3		11	17.18
	11-15		6					6	9.37
	16-20		4					4	6.25
	>20		2		1			3	4.68

**ANNEXURE E**

**Survey on Sentencing Practice**

**Age.....Sex:.....**

**Length of service:.....**

HOW DO YOU THINK THE FOLLOWING FACTORS INFLUENCE THE SENTENCING PRACTICE IN OUR CRIMINAL JUSTICE SYSTEM?

**How to response**

The responses to the questions no. 1 to 25 below should be based on your assessment of whether these factors influence the sentencing decisions of other judges, (i.e. your colleague judges) or not. In other words, the responses should reflect your assessment of how other judges (NOT YOU) take these factors into consideration in deciding the quantum of punishment imposed.

The responses to the questions no. 26 to 30 below should be based on your OWN opinion and experience.

**Explanations**

- strongly disagree : This factor is not at all relevant in any way.
- disagree : Generally this factor is taken into consideration but in most cases it does not influence the judges’ decision about the sentence.
- indifferent : This factor is irrelevant or external to the process of sentencing and hence, it is not taken into consideration.
- agree : Generally this factor is taken into consideration and may influence the judges’ decision about the sentence but only in a few or limited cases.
- strongly agree : This factor invariably or in most cases influences the judges decision about the sentence.

**LEGAL FACTORS****1. Nature of the offence influences the sentence imposed**

                         
strongly disagree    disagree    indifferent    agree    strongly agree

**2. Intention/motive of the offence influences the sentence imposed**

                         
strongly disagree    disagree    indifferent    agree    strongly agree

**3. Facts and circumstances related to the offence influences the sentence imposed**

                         
strongly disagree    disagree    indifferent    agree    strongly agree

**4. Weapon used to commit the offence influences the sentence imposed**

                         
strongly disagree    disagree    indifferent    agree    strongly agree

**5. Extent of injury/ Damage caused influences the sentence imposed**

                         
strongly disagree    disagree    indifferent    agree    strongly agree

**6. Extent/ Degree of perversion in committing the crime influences the sentence imposed (e.g. Cutting dead body into several pieces, gang rape, killing several persons etc.)**

                         
strongly disagree    disagree    indifferent    agree    strongly agree



**FACTORS RELATED TO THE OFFENDER**

**7. Race/Religion/Caste of the offender influences the sentence imposed**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**8. Age of the offender influences the sentence imposed**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**9. Sex of the offender influences the sentence imposed**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**10. Employment and/or economic status of the offender influences the sentence imposed**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**11. Marital status of the offender influences the sentence imposed**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**12. Whether first time offender**

                      

strongly disagree    disagree    indifferent    agree    strongly agree

**13. Whether pleaded guilty**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**14. Whether habitual offender**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**15. Social status of the offender influences the sentence imposed (e.g. extent of education, leadership in social group/trade/profession etc.)**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**FACTORS RELATED TO THE VICTIMS****16. Race/Religion/Caste of the victim influences the sentence imposed**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**17. Age of the victim influences the sentence imposed**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**18. Sex of the victim influences the sentence imposed**
                        

strongly disagree    disagree    indifferent    agree    strongly agree

**FACTORS RELATED TO THE BENCH**

19. Mindset (attitudes) of the bench influences the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

20. Skill and efficiency of the bench influences the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

21. Social and political attitude of the bench influences the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

22. Experience of the bench influences the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

23. Demographic factors (Age/sex/social class) of the bench influence the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

**OTHER FACTORS**

24. Prevalence of the offence in the area influences the sentence imposed

strongly disagree   disagree   indifferent   agree   strongly agree

25. Media reporting influences the sentence imposed (e.g. report about the crime and reporting on the case by media)

                      

strongly disagree    disagree    indifferent    agree    strongly agree

26. "Judges discuss/share their thoughts about sentences to be imposed in specific cases with other judges (before sentencing)". Do you agree?

.....  
.....  
.....  
.....  
.....  
.....

27. "Judges discuss with other judges the sentence imposed by them (after sentencing)". Do you agree?

.....  
.....  
.....  
.....  
.....  
.....

28. "In your jurisdiction it is possible that there are judges whose sentences can be predicted i.e. judge A always imposes the highest sentences, judge B is generally lenient and imposes the minimum or short sentences." Do you agree?

.....  
.....  
.....

.....  
.....

**29. Reflect your thoughts on whether there should be a guideline on sentencing and why?**

.....  
.....  
.....  
.....  
.....  
.....

**30. Do you have any other thoughts/recommendation/proposal for sentencing reform?**

.....  
.....  
.....  
.....  
.....  
.....

**ANNEXURE F****Survey on Sentencing Factors****Sample Details**

- SAMPLE SIZE : 58 Court of Sessions Judges of various sessions divisions of Bangladesh
- AGE DISTRIBUTION : 8 judges between the age of 31-40 years  
31 judges between the age of 41-50 years  
19 judges between the age of 51-60 years
- LENGTH OF SERVICE : 13 to 25 years

**Survey Findings****PART A**

	<i>Factors influencing sentencing decisions</i>	Strongly Disagree %	<i>Disagree</i> %	<i>Indifferent</i> %	<i>Agree</i> %	<i>Strongly Agree</i> %
1	Nature of the offence	3.4	13.79	0	50	32.76
2	Intention/motive of the offence	3.45	13.79	3.45	60.34	18.97
3	Facts and circumstances related to the offence	0	17.24	5.17	55.17	22.41
4	Weapon used to commit the offence	1.72	17.24	13.79	51.72	17.24
5	Extent of injury/ Damage caused	3.45	13.79	8.62	53.45	22.41
6	Extent/ Degree of perversion in committing the crime	1.72	17.24	1.72	14.38	37.93
7	Race/Religion/Caste of the offender	44.83	25.86	17.24	12.07	0
8	Age of the offender	3.45	13.79	10.34	65.52	6.90
9	Sex of the offender	13.79	48.28	6.90	24.14	5.17
10	Employment and/or economic status of the offender	24.14	39.66	15.52	15.52	3.45
11	Marital status of the	24.14	46.55	18.97	6.90	3.45

	offender					
12	Whether first time offender	12.07	27.59	22.41	37.93	0
13	Whether pleaded guilty	5.17	10.34	10.34	62.07	12.07
14	Whether habitual offender	6.90	18.97	8.62	25.86	39.66
15	Social status of the offender (e.g. extent of education, leadership in social group/trade/profession etc.)	18.97	36.21	12.07	29.31	3.45
16	Race/Religion/Caste of the victim	41.38	32.76	17.24	5.17	3.45
17	Age of the victim	1.72	27.59	1.72	62.07	5.17
18	Sex of the victim	12.07	46.55	13.79	24.14	3.14
19	Mindset (attitudes) of the bench	25.86	27.59	13.79	29.31	3.45
20	Skill and efficiency of the bench	6.90	12.07	5.52	44.83	20.69
21	Social and political attitude of the bench	25.86	24.14	15.52	34.48	0
22	Experience of the bench	8.62	20.69	15.52	27.59	10.34
23	Demographic factors (Age/sex/social class) of the bench	6.90	43.10	18.97	27.59	1.72
24	Prevalence of the offence in the area	12.07	39.66	15.52	25.86	5.17
25	Media reporting (e.g. report about the crime and reporting on the case by media)	17.24	24.14	24.14	32.76%	1.72

## PART B

		YES %	NO %	NO COMMENTS %

26	Do judges discuss/share their thoughts about sentences with other judges (before sentencing)?	68.97	25.86	5.17
27	Do judges discuss with other judges the sentence imposed by them (after sentencing)?	36.21	56.90	6.90
28	In your jurisdiction is it possible that there are judges whose sentences can be predicted?	32.76	56.90	10.34
29	Is there a need to have a sentencing guideline?	46.55	31.03	22.41
30	Is there a comment on sentencing reform?	31.04	41.37	27.58

Some Major Sentencing Reform Provisions Suggested:

1. Effective measures should be undertaken to deal with sentencing backlog problems;
2. More corrective measures should be used to give a reformatory chance to the convicted;
3. Capital punishment must be omitted;
4. Should have a computer database on sentencing decisions;
5. More training programs on sentencing should be organized for judges.