

APPLICATION OF REFORMATIVE THEORY OF PUNISHMENT TO THE FEMALE OFFENDERS: ROLE OF THE JUDICIARY AND THE GOVERNMENT OF BANGLADESH

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ABSTRACT

Reformatory theory of punishment is reflected in several alternatives to imprisonment such as conditional discharge, probation, parole, furlough, etc. The Judiciary and the Government are the two authorities who have the power to grant, apply and execute these alternatives. These alternatives can be applied at any stage of a criminal trial. In this article, the authors will put emphasis more on those alternatives that can be applied at the final stage or at the conviction stage. The aim of this write-up is to explore different ways that can be used as an alternative to imprisonment with special reference to women prisoners. The study focuses on the resume of application of the Probation of Offenders Ordinance, 1960 in Bangladesh with a grant of probation imposing new and innovative conditions. To what extent the gradual application of probation and its progressive conditions are fruitful and to what extent it can satisfy the victims' interest is the key point to observe. The research demonstrates a study on order of probation to female offenders in the Rajshahi district. Grant of probation to child offenders and related provisions of the Children Act 2013 is beyond the scope of discussion of this write-up. The article critically explores the procedure and the policies the Government follows in granting parole with special reference to women prisoners. Lastly, it makes an attempt to explore the relevancy of the enactment of the Special Facilities for Women Prisoners Act, 2006 in Bangladesh.

I. INTRODUCTION

Exemplary punishment and correctional methods are the two main forms of punishment commonly practiced in criminal justice system. The idea of exemplary punishment is based on a popular notion where it is believed that the fear of punishment can deter people from committing any offence. These exemplary punishments instill fear of the consequence of criminal acts or

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omissions among general people, which eventually compel a person to think twice before he or she commits an offence.

Apart from this philosophy of exemplary punishment, there are correctional methods known as the reformatory theory of punishment. The aim of that theory of punishment is not to punish the wrongdoers; rather, this theory puts more emphasis on reforming the offender as a person. Generally, these reformatory measures are applied to first-time offenders or to persons who are convicted for petty offences. The concept of alternatives to prison is originated on the basis of this reformatory theory of punishment.¹ These alternatives allow an offender to correct his or her mistakes and help him or her to become a law-abiding member of the community. There are several options available as alternatives to imprisonment, such as conditional discharge, probation, parole, furlough etc. In this article, the authors put emphasis on the present application of those alternatives to imprisonment in Bangladesh along with limitations thereof, if any. The article limits its scope to adult women offenders. The prerogative mercy of the President is beyond the scope of the write-up. The Draft Probation Act, 2017, the Rule of the Special Facilities for Women Prisoners Act, 2020 are not discussed here in detail.

This research is qualitative, doctrinal and based on both primary and secondary sources. The prime focuses of the study are the procedures of granting alternatives to imprisonment and the role of both the Judiciary and the Government in this connection. Most of the information for this research was obtained from materials of case laws available in various law reports. Vital information is obtained from the database of the Ministry of Social Welfare of Bangladesh. To explore the probation scenario in Rajshahi District, the researchers had oral conversation with the Senior Assistant Judge working in the District Judge Court, Rajshahi. The researchers also had a conversation with two probation officers, one from Rajshahi District and one from Rajshahi Metropolitan. With a view to gathering some idea about the scenario of the grant of parole to women prisoners in Bangladesh, the authors also interviewed Deputy Jailor of Kashimpur Women Jail over phone.

The study refers to the Indian legislations regarding the operation of the furlough system and guilty plea and in this regard, data was collected from various internet resources e.g., reliable and authoritative databases and websites.

II. POSITION OF THE JUDICIARY TO GRANT ALTERNATIVE SENTENCE

The Court can give an order of conditional discharge or probation as an alternative to prison.

¹ Prof. Paranjape, N.V., *Criminology Penology*, Central Law Publications, 2005, at p. 207.

2.1. Conditional Discharge in the Laws of Bangladesh

In general terms, conditional discharge means an order discharging a person subject to some conditions. It is applicable only for the individuals who are found guilty for the first time. If he or she commits any further offence or fails to maintain good behavior during the period of conditional discharge, he or she will be liable to be sentenced for the original offence. The court may order conditional discharge only when it is inappropriate to impose punishment or the situation cons for to application of the correctional method of punishment. The Court can order the conditional discharge of the offender with warning or admonition to him or her. If the Court thinks fit, it can order to execute a bond for keeping peace and good behaviour.

Section 4 of The Probation of Offenders Ordinance, 1960 (hereinafter referred to as the Ordinance) ² laid down the provisions regarding conditional discharge. As per the provisions in case of a first-time offender who is convicted for an offence punishable with imprisonment for a term not exceeding two years, the Court, after considering his age, character, antecedents or physical or mental condition and also the nature of the offence along with the circumstances under which the offence was committed may make an order to discharge him. The option of conditional discharge is available to both the male and female offenders, provided that he or she is a first-time offender.

The relevant questions that arise here are - whether an offender can claim conditional discharge as of right or not; or whether it's a right or complete discretion of the concerned Court. The answer is – it's not a right of the offenders and they cannot claim it as of right. Therefore, the application of this alternative to prison depends completely upon the judicial mind of the concerned judge and his knowledge and understanding about the provisions of the aforesaid Ordinance.

From the plain reading of the Ordinance, it seems that if the nature of the offence allows the Court to grant conditional discharge, then the granting of such discharge completely relies upon the discretionary power of the Court. But if it was allowed as of right then there is a chance that victim satisfaction may be denied to a extend.

Therefore, the bottom line is, conditional discharge should remain as a judicial discretion and the judicious mind must be guided by the factors written in the Ordinance. The Court should equally emphasize on victim satisfaction which is not patent in the Ordinance.

² In the Indian sub-continent, India introduced the Act in 1958. Two years later Pakistan followed it as Ordinance no. XLV of 1960. The Ordinance was amended in 1964. After independence, the Rule of the Probation of Offenders Ordinance was promulgated in 1971. The law was updated in 1973. The Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973).