CHAPTER SEVEN

CONCLUSION AND SUGGESTIONS

Imprisonment is one of the important and extensively used form of punishment throughout the world in most of the countries including India and Malaysia. A large number of the offences under the Penal Codes and other laws of India and Malaysia are punishable with imprisonment. Its use is supposed to achieve various objectives of punishment such as deterrence, retribution, reformation and rehabilitation of the offender. It is said to be the only punishment, which provides the opportunity to the prison authorities to use corrective and rehabilitative measures. However studies indicate that imprisonment does not seem to have any deterrent, or reformative effect on first offenders and short-termers rather it sends them back to society well trained in the art of crime within a short span of time.

The confinement in the company of recidivists and experienced people of the underworld provide the new inmates an opportunity to learn and acquire ideas and techniques which often lead them to adopt criminal activities. Imprisonment has been found to have a brutalising effect on the personality of the offender and to cause mental anguish and deterioration to their physical health.

Most of the prisons in India and Malaysia are overcrowded. It has been observed that those who are confined in overcrowded prisons have re-conviction rate much higher than those who are detained in less crowded prisons. The majority of the prison population consists of short-termers who are sent to prison for a short duration in the already overcrowded prisons. In this short span of time, they get the opportunity
of mixing with professional and habitual offenders who transmit the criminal traits to these short-termers.

In India imprisonment is of two descriptions: rigorous and simple. However, no such division is made in Malaysia. In rigorous imprisonment, prisoners are engaged in hard labour. They are employed to work in the prison farm and prison industries. In simple imprisonment no work or light work is taken from the prisoners. They remain idle in the prison. It is to be noted that those who are awarded simple imprisonment are short-termers. Such short-term of sentence does not have any deterrent effect on them. Rather they become an unnecessary burden on the prisons. The presence of short-termers sentenced to simple imprisonment hampers the rehabilitative and correctional work in prisons. The ill-effects of short-term imprisonment on the first offenders who have not committed serious offences are clear. They are subjected to humiliation and all types of vices. It also effects the confined persons' productivity and maintenance of his dependants.

The cost of keeping an offender is also exorbitant. It is estimated that the cost of keeping an offender in prison is more than twenty times than releasing him on probation or making a community service order. Short-term imprisonment is therefore not cost effective. The cost of maintaining a prisoner is very high, a major chunk of public funds is used in maintaining prisons. The expenses of their maintenance can be curtailed if the prison population is reduced by avoiding prison sentences particularly for those who have committed minor offences punishable with short-term imprisonment. This would result in restrictions on the number of offenders
incarcerated and would provide an opportunity to the prison authorities to apply rehabilitative and reformative measures to the fullest extent on the prisoners.

Short-term imprisonment is a source of overcrowding in prison. As discussed earlier, overcrowding in prisons makes it difficult to the prison regime to implement effectively corrective measures. It is a thorny problem faced by the correctional administrators globally. However, the solution to the problem is not easy. It needs an integrated approach by the criminal justice administration, the police, the prosecution and the judiciary to reduce pressure on the overcrowded and under facilitated prisons and other penal institutions.

In India the total capacity in prisons is only for 167,326 prisoners, but the number of prisoners confined is much more. For example, Delhi’s Tihar jail has the capacity to confine 3000 prisoners but there are more than 9000 prisoners\(^1\). Similarly in Malaysia, some of the prisons originally built to accommodate 200-600 prisoners now are confining 2000-4000 prisoners\(^2\).

Overcrowding in penal institutions causes various adverse effects. It creates unhealthy atmosphere, hampers penal reformation, results in pressure on prison staff and contributes tension between staff and inmates.

The problem of short-termers in India is a serious one. The statistics of the past fifty years reveal that the Courts have awarded short-term imprisonment to a


large body of offenders. For example, in the year 1941, it was found that 66% offenders were awarded up to six months imprisonment. In the year 1951 this number rose by 81% and in 1961, 87% of offenders were imposed up to six months imprisonment. The situation in India has become worse in the later years. Another study revealed that short-term sentences range between 85% to 95%.

In Malaysia the situation is not much different from that of India. In the year 1993, the number of offenders serving less than six months were 47%. During 1994, the offenders serving less than six months imprisonment rose up to 51.4%. Similarly during 1995, 46% offenders were awarded less than six months imprisonment.

The prison records of India and Malaysia show that quite a large number of offenders serving in prisons constitute short-termers who are undergoing even less than six months imprisonment. Instead of confining such offenders who have committed minor offences punishable with short-term imprisonment they can be dealt with non-custodial methods of treatment.

A number of studies to determine the effects of short-term imprisonment reveal that a prison sentence is not likely to be useful unless it provides more than six months for training education and treatment. The German criminologists are also against awarding of short-term imprisonment. In some parts of Germany as an

---

alternative to short-term imprisonment, a person convicted to such punishment is permitted to serve some period of prison sentence in stages on the weekends\footnote{Id. pp.310-311}.

Similar to the German experience in order to avoid confining first offenders of minor offences, the government of Malaysia as far back as 40 years ago enacted the Compulsory Attendance Ordinance 1954. Under this enactment two attendance centres were established in Kuala Lumpur and Penang. Under this system the first offenders involved in minor offences and sentenced to not more than three months imprisonment were committed to the attendance centres for not more than three hours daily after their usual working hours to report daily five days a week from 5 pm to 8 pm\footnote{Supra note 2 at p.237}.

These centres functioned well in Malaysia for some years but for the last two decades they were not in use and they have just disappeared. However, both the Compulsory Attendance Ordinance 1954 and the Compulsory Attendance Rules have not been repealed, and it is submitted that the Compulsory Attendance Ordinance 1954 should be revived to apply to first offenders and minor offenders. It is also submitted that as in India no legislation exists for the establishment of attendance centres, a law on the lines of Malaysian Attendance Centre Ordinance may be enacted to reduce the pressure on prisons and to save the short termers from the ill-effects of prisons.

Absolute and conditional discharge may be employed as a measure to avoid short-term imprisonment. Section 173A and 294 of the Malaysian Criminal Procedure

\footnote{Id. pp.310-311} \footnote{Supra note 2 at p.237.}
Code empowers the Courts to release the offender on absolute and conditional discharge.

The corresponding Indian provision for the absolute or conditional discharge and binding over are contained in Section 360 and 361 of the Indian Code of Criminal Procedure and Section 3 and 4 of the Probation of the Offenders Act, 1958. A comparative analysis of the Indian and Malaysian provisions with regard to absolute and conditional discharge shows that in India, if the court fails to release the offender on absolute and conditional discharge when the conditions mentioned in Section 360 are found, the Court not acting under this provision, has to record special reasons. The special reasons to be recorded must be of such a nature as to compel the Court to decide that it is impossible to reform or rehabilitate the offender. Such a finding has to be arrived at looking at the age, character and antecedents of the offender. Furthermore, the omission to record special reasons is an irregularity and on revision or appeal the sentence passed by the lower court may be set aside if the irregularity has caused any miscarriage of justice. In India, these statutory provisions have helped the courts to restrict the imposition of short term imprisonment so as to protect petty offenders from the contaminated atmosphere of prison life. No such obligation is imposed under the Malaysian provisions dealing with absolute or conditional discharge and binding over. It is submitted that in Malaysia, if such a provision is made mandatory, to give reasons for not applying this provision to release the offenders, this will protect many petty offenders from ill-effects of prison life.

---

The case law on the subject of absolute or conditional and binding over show that Courts in India and Malaysia have used these provisions for certain categories of offenders. It is submitted that there is need to use this provision more liberally in the case of the offenders whose crimes are not so serious so as to pose any danger to the society.

One of the important and the most effective non-custodial measures is probation. Probation is a form of treatment of offender outside the four walls of the prisons. It is the outcome of a feeling that a majority of offenders need sincere advice and help from the fellow human beings for strengthening their moral fibre. A great advantage of probation is that it saves the first and youthful offenders from the stigma of prison life and the contaminated environment of prison. A comparative analysis of the custodial and non-custodial measures of punishment reveal that probation is the most cost effective method of treatment of offenders.

In Malaysia the law relating to probation is contained in the Juvenile Courts Act and Criminal Procedure Code. The provisions of the above statutes in dealing with probation appear to be adequate. However, the cases in which these provisions were invoked reveal that the Courts have used these provisions in granting probation in the case of juvenile and youthful offenders. It is sparingly used in the cases of adults (those who are of the age of 21 or above). The data used in this work reveal that more adults than juveniles who were granted probation successfully completed their probation period. However it is disheartening to note that the courts rarely grant probation to adult offenders. One of the obvious reasons appears to be the lack of probation services for adult offenders. There is a need for a well developed service for
adult offenders in Malaysia. It may not be difficult to introduce probation service for adult offenders as the Department of Social Welfare provides probation services for juveniles and youthful offenders. It has a well-knit scheme for this class of persons with a force of 300 probation officers\textsuperscript{10}.

In Malaysia no comprehensive legislation exists for probation system while in India such services are made available through the central legislation and by the respective states. It is to be noted that in Singapore, the Probation of Offenders Act 1957 has been in use for the grant of probation to juvenile as well as adult offenders. In Singapore the probation system has worked well. It is submitted that a comprehensive legislation introducing probation system for adult offenders in Malaysia is needed so as to reduce the pressure on prisons and to avoid short-termers lurking unnecessarily in jails.

In India the law relating to probation is contained in the Code of Criminal Procedure and in various state enactments and the Central legislation the Probation of Offenders Act, 1958. These enactments offer an alternative to the Courts to release first offenders or minor offenders on probation. The Probation of Offenders Act 1958 is a comprehensive central legislation which has been adopted by most of the states in India. To ensure that the offender released on probation conducts himself properly and does not reengage in criminal activities, the Act enables the court to pass a supervision order directing the offender to remain under the supervision of probation officer named in the order during the period of not less than one year and not more than three years. No such provision exists under the Malaysian Criminal Procedure

\textsuperscript{10} Information obtained in the interview with Chief Probation Officer, Department of Social Welfare, Kuala Lumpur, Malaysia.
Code for the supervision of the offender by probation officers. In India, the court passing the probation order may impose certain conditions to be observed by the probationer. In case of violation of conditions, the Court may revoke probation. The probation officer is always available to the probationer to guide him. In Malaysia in the absence of supervision by probation officer, the courts appear to be reluctant to make probation orders.

With a view to making the probation service more effective and also reducing the risk of release of undeserving offenders, it is suggested that the courts should insist upon receiving full information in the nature of a pre-sentence report, provided under the Indian laws dealing with probation. This report is prepared by a probation officer and contains the social background and other relevant information to help the court in arriving at the appropriate decision. The Indian law provides for such reports but the Malaysian law is lacking in this respect.

Another procedure adopted to secure antecedent social background and other information in the system of sentence hearing in India is provided in Section 235(2) of the Indian Code of Criminal Procedure which requires the court to hear the accused on question of sentence before passing sentence. The object of this provision is for the court to acquaint itself with the personal information of the offender and thereby enable the court to decide as to the proper sentence or any other method of disposing the case of the offender after his conviction. In Malaysia, this can be achieved with the help of the social welfare department. The probation officers working under the department may help the court to provide such pre-sentence reports. In India, it is done by the probation officers working under the probation department. It is therefore
submitted that in Malaysia provision should be made in the law to make pre-sentence reports essential for granting probation.

As we have seen earlier both Malaysia and India are facing the problem of overcrowding in jails due to the alarmingly large number of short-term prisoners thus making it difficult the use of modern correctional techniques. This problem can be overcome by fully implementing the probation services in Malaysia and India. In India, it has been observed that the courts very often release an offender on probation without supervision by probation officer. This practice is against the philosophy of the probation system. A probationer requires guidance during his probation period. In the absence of appropriate supervision there is a possibility of his relapsing into criminal career. It is desirable that the courts before releasing an offender should insist that there is a provision of a probation officer to look after the probationer. It is further submitted that there should be a provision to release the probationer earlier if he behaves well and to increase the probation period if the circumstances of the case so require.

Fine is one of the important alternatives to short-term imprisonment. Unfortunately a large number of offenders who are unable to pay fine, are sent to prison to serve short-term sentences. The importance of fine as an alternative to short-term imprisonment was felt as far back as in 1951 at the Hague conference of the United Nations on Crime Prevention and Treatment of Offenders. After considering the social and economic drawbacks of imprisonment it was suggested by the conference that as a substitute of short term imprisonment, a fine should be
imposed\textsuperscript{11}. The Indian Jails committee of 1919-20 also recommended the use of fine as an alternative to short-term imprisonment\textsuperscript{12}.

Fine can be a good substitute for short-term sentences if some additional steps are taken. To improve its effectiveness it is suggested that fine should be imposed in accordance with the ability of the offender to pay fine. The amount of fine should be within the accused’s means to pay though he should be made to feel the pinch of it.

Another area that needs attention is imprisonment in default of fine. Many offenders are committed to prison on their failure to pay fine. The failure to pay may be due to inability to pay or unwillingness of the offender. Default in payment may result in commitment to prison. Though circumstances of the case may not require imprisonment, nevertheless it is imposed on him. Section 64 of the Indian Penal Code and Section 283(1)(b)(4) of the Malaysian Criminal Procedure Code empowers the court to impose sentence of imprisonment in default of payment of fine in the cases wherein the sentence of fine is prescribed as a penalty. The use of these provisions creates problems for those who are unable to pay fine due to genuine reasons.

It should be noted that the Section 424(10(a) of the Indian Code of Criminal Procedure and Section 283(10(b) of the Malaysian Criminal Procedure Code confer powers on the courts to allow payment of fine by instalment where default is made by the offender in payment of fine. It is submitted that if in deserving cases the courts of both countries liberally used these provisions, a large number of short-termers may be protected from the ill-effects of prison life where they are unable to pay fine.

\textsuperscript{11} Chabra K.S., \textit{Quantum of Punishment in Criminal Law in India}, Chandigarh, Publications Bureau Punjab University p. 75.
\textsuperscript{12} Id at p. 203.
In recent years the emphasis has been laid on community based sanctions as an alternative to short-term imprisonment. The main reason advanced for such non-custodial measure is that it is less costly and more effective and humane than imprisonment. It keeps away the offender from the polluted atmosphere of prison life. In Malaysia\textsuperscript{13} and India\textsuperscript{14} there is no law governing the rules of community services, however the governments of both countries are contemplating to introduce community services. In India the Indian Penal Code (Amendment) Bill, 1972, which contained provisions for the introduction of community service order, was presented before the Rajya Sabha (the Upper House of Indian Parliament) which passed the Bill in 1978. Nevertheless, it could not be taken up by the Lok Sabha and with the prorogation of the Parliament, the Bill lapsed. Since then successive governments in India did not care to put the Bill on legislative lists. Section 74A of the Amendment Bill 1972, empowers the court to make community service orders in the cases of persons above 18 years of age who are convicted of an offence punishable with imprisonment not exceeding three years or with fine or both requiring him to perform without remuneration some kind of work for such number of hours as may be specified in the order. It is submitted that it is timely to consider the implementation of the community service order in view of the problem of short-term imprisonment. The community service orders have worked well in the United Kingdom. It is submitted that looking at the success of the United Kingdom Community Service orders these can work well in India and Malaysia as an alternative to short-term imprisonment.

\textsuperscript{13} Datuk Syed Hamid Albar, the Malaysian Law Minister, decalred that the cabinet agreed in principle to accept his ministry’s recommendation to implement alternatives to sentencing such as suspended sentence, plea bargaining and community services, etc. See New Straits Times, 9 October 1992.

\textsuperscript{14} Mr Ramakanth Khalap, Indian Minister of Law and Justice, while visiting Malaysia on 3 September 1997 at Renaissance Hotel, Kuala Lumpur announced in the gathering of Indian Professors of Law that the Government of India is considering to introduce community service as a penalty.
Attendance centres can also be an effective tool to overcome the problem of short-termers. Unfortunately these centres are no more working in Malaysia. These centres are working successfully in the United Kingdom. It is submitted that in Malaysia these centres be revived so that the courts may have the option of using them in the cases of those offenders who have committed offences punishable with short-term imprisonment. In India no legislation exists as to the use of attendance centres. It is submitted that in India provisions be made on the lines of Criminal Justice Act 1982 to give judicial sanction to this mode of punishment.

Mitigating factors also play an important role in the sentencing process. Some of the mitigating factors which the courts consider in sentencing process are age of the offender, his record, good character, circumstances resulting in the commission of the offence, plea of guilty, health of the offender, effect of sentence on family and behaviour subsequent to the commission of the offence. These mitigating factors help the court to impose appropriate sentence in cases punishable with short term imprisonment.

Mitigation may influence the court in many ways. It may reduce the punishment as when the offender is sentenced to short-term sentence or it may persuade the court to award non-custodial measure of punishment such as conditional discharge, probation and other community based sanctions.

In India although no specific law exists requiring the courts to consider mitigating factor Section 360 of the Indian Code of Criminal Procedure and Section 3
and 4 of the Probation of Offenders Act 1958 mention some mitigating factors such as age, character and antecedents of the offenders. The Court may take these factors into consideration when releasing an offender after admonition and/or probation of good conduct. In Malaysia statutory recognition has been accorded to mitigating factors. The plea in mitigation may be considered by the trial court where it is shown that there is a good case for such a plea. Section 176(2)(8) of the Criminal Procedure Code provides that particulars to be incorporated in the record shall include the court's note on previous convictions, evidence of character and plea in mitigation. Section 173A and 294 of the Criminal Procedure Code and Section 12 and 13 of the Juvenile Court Act 1947, state the mitigating factors. A comparative analysis of the Indian law and Malaysian law dealing with mitigating factors reveal that the Malaysian law is more explicit and comprehensive than the Indian law. The study of the cases in which plea in mitigation is made also show that in Malaysia it is a normal practice after the accused is found guilty before sentence to place before the sentencing court mitigating factors. These mitigating factors if effectively pursued may influence the court to avoid short-term sentences and apply other non-custodial measures. The system of sentence hearing that exists in India provides an opportunity to put before the court, mitigating factors for the court's consideration. But this procedure is absent in summons trials in which most of the minor offences are dealt with and in which short-term sentences are mostly imposed. It is submitted that in India statutory provisions should be made for the consideration of mitigating factors by the courts particularly for those punishable with short-term sentence.

The Islamic penal system provides a wide range of alternatives to combat the problem of short-term imprisonment. The alternatives are contained in ta'zir or penal
punishment. The offences for which ta'zir or penal punishment are prescribed are not specifically mentioned in the Holy Quran or Sunnah of the Prophet (SAW). The legislator or Ruler has been given a discretion to prescribe punishment in accordance with the need to reform the criminal. Imprisonment is one of the penalties prescribed by Islamic criminal law. Nevertheless, the evils of imprisonment were felt by the jurists of Islamic Criminal law. They did not favour the use of imprisonment rather they discouraged its use by providing various non-custodial measures. The experience of the countries where the Islamic penal system is in force is that the prison population is comparatively low whereas in India and Malaysia, the number of prisoners is very high.

The reason for such a low number of the offenders is that the Islamic penal law prescribes a variety of non-custodial measures of punishment. The courts are free to select any of these in accordance with the nature of crime and the need of the offender. The courts are encouraged to use these methods instead of imprisonment. Unlike modern penal system, Islamic penal system, requires the courts to consider imprisonment as a secondary punishment and to impose it only when non-custodial measures cannot be applied.

Besides imprisonment, fine is also one of the penal punishments prescribed under the Islamic penal system. The amount of fine is fixed according to the gravity of the offence and the capability of the offender to pay. Under the Islamic penal system it is wrong to imprison an offender due to his failure to pay when he is unable to pay the fine. He can be imprisoned only when he has the means to pay but fails to
do so. Islamic law also allows the offender to work and to pay the amount of fine out of wages earned by him.

The Islamic penal system prescribes public disclosure or tashhir as a penal punishment. Under this punishment, the offence committed by the accused is made public by announcement. It may be done through the media in newspapers, radio, television or by distributing leaflets. This can also be a good substitute for offences punishable with short-term imprisonment.

Threat or al-Tahdid is another form of penal punishment which can be a substitute for short-term sentences. This is similar to the modern form of suspended sentence. However, the Islamic concept of suspended sentence is different from modern form of suspended sentence. Under the Islamic penal system the period of suspended sentence is not fixed. It is left to the discretion of Qadi or Judge to fix the period of suspended sentence. However, under the modern penal system, the courts cannot suspend sentence other than sentence of imprisonment, but under the Islamic law judge is empowered to suspend any sentence including sentence of imprisonment.

Warning or admonition is another penal punishment provided by Islamic penal system. This punishment is akin to the modern form of probation. This has been regarded as one of the most successful and viable alternatives to short-term imprisonment. It is to be noted that probation was used as an alternative to imprisonment as late as the end of 19th century while Islam advocated it thirteen centuries ago.
Boycott or al-Hajr is one of the punishments used under Islamic penal law. This punishment is the same as ex-communication practised in certain communities. An order of ex-communication may be a good substitute for short-term imprisonment.

The Islamic penal law prescribes a variety of punishments to deal with the offenders which are not found under modern penal system. It is believed that even a bad criminal can be rehabilitated and reclaimed. Punishment is imposed in accordance to the nature of the offence and in proportion to the harm done by the offender. The harsh punishment may be substituted with a lighter one with the avowed object of reforming the offender. Islamic law allows all those measures to be taken that can protect the society and reform the offender.

The Islamic objective of punishment is both deterrent and reformative in nature. It gives a discretion to the judge to select the most appropriate punishment that is suitable to the needs of the offender and provides a wide range of alternatives to short-term imprisonment. It is submitted that some of the penal or ta'zir punishments may be seriously considered to combat the problems of short-termers in our countries.

Last but not the least, it may be said that short-term sentence of imprisonment neither serves the interest of the society nor that of the offender. The sooner it is replaced, the better it will be.